EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104568/2022

Held in Glasgow on 9 January 2023

Employment Judge B Campbell; Members Mr R McPherson and Mr V Alexander

Ms A McKnight	**Claimant** **Represented by:** **Mr B McKinlay -** **Trainee Solicitor**
F47 Limited	**First Respondent** **No appearance and** **No representation**
WBI Limited	**Second Respondent** **No appearance and** **No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. the claimant was an employee of the second respondent at all material times;

2. the claimant was subjected to a detriment by the second respondent under section 47C of the Employment Rights Act 1996, and separately unfavourable treatment because of her pregnancy under section 18 of the Equality Act 2010, in the following ways:

    a. Being offered fewer hours of work than normal because of her pregnancy or pregnancy-related illness despite confirming her ongoing availability for work; and

b. Not engaging with her sufficiently or adequately in relation to her pregnancy and steps to accommodate it, including allocation of shifts, arrangements for maternity leave and confirmation of maternity pay arrangements;

and a declaration is made to that effect;

3. The claimant was dismissed by the second respondent by reason of her pregnancy and as such was automatically unfairly dismissed under sections 99(1) and 99(3)(a) of the Employment Rights Act 1996;

4. She is awarded £9,900.00 in respect of injury to feelings, together with interest at the rate of 8% per annum from 20 May 2022;

5. She is awarded £5,465.12 as compensation for her unfair dismissal, made up of £2,006.13 past loss to the date of the hearing and £3,458.99 in respect of future loss; and

6. The claimant was not issued with a written statement of terms and conditions of employment under section 38 of the Employment Rights Act 1996, and an additional award of four weeks' pay amounting to £591.28 is made, together with interest at the rate of 8% per annum from the date of this judgment.

REASONS

Introduction

1. This claim arises out of the claimant's employment by the second respondent. The claimant worked latterly as an assistant manager in the 'Fenwick'/'F47' restaurant in Greenock. Her period of continuous service as an employee began on 15 November 2021 and she was dismissed on 20 May 2022 for the reasons and in the manner described in more detail below.

2. The claim was raised against two respondent companies as the claimant was unclear about which was her employer. This was a matter the tribunal had to determine. She completed ACAS Early Conciliation against both respondents and named both in her claim form. Neither lodged a response to the claim with the tribunal and nor did they appear at the hearing.

3. The tribunal heard evidence from the claimant alone. Generally she was found to be credible and reliable in the evidence that she gave.

4. The claimant provided a bundle of productions. This was supplemented by a smaller additional bundle, the page numbers of which followed on from the first. References in square brackets below are references to the page numbers of the bundle. She also provided a schedule of losses claimed.

5. It had been agreed at an earlier case management hearing that the claimant's evidence in chief could be given by way of a written statement, and one was provided. The claimant confirmed her statement under oath and in addition the tribunal asked her a number of questions in order to gain as full an understanding of the relevant circumstances as was possible.

6. Mr McKinlay helpfully provided a written notes of his closing submissions which were carefully considered in reaching the outcome in the claim.

Legal issues

7. The following legal issues had to be decided:

    a. Was the claimant an employee of either (or both) respondent(s) up until 20 May 2022 as she alleged;

    b. If so, which entity or entities was/were her employer;

    c. When did her employer become aware of her pregnancy;

    d. Did her employer subject her to any detriment relating to her pregnancy contrary to section 47C of the Employment Rights Act 1996 ('ERA'), and/or unfavourable treatment because of her pregnancy under section 18 of the Equality Act 2010 (EqA), in any of the following ways:

        i. Overlooking her when providing work or shifts;

        ii. Ostracising her; and/or

        iii. Not engaging with her in response to her attempts to contact it.

e. Was the claimant dismissed by reason of pregnancy or maternity.

f. Did her employer fail in its obligation to provide her with a written statement of terms and conditions of her employment compliant with section 1 of ERA;

g. To the extent any of the complaints are successful:

i. What compensatory award should be made;

ii. What compensation should be awarded for injury to feelings; and

iii. What declarations should be made.

Applicable law

1. Employees are entitled to protection against discrimination on the basis of certain protected characteristics, as provided for in the Equality Act 2010 (EqA). One such protected characteristic is pregnancy and/or maternity. A pregnant employee is therefore protected against various types of unfavourable action by her employer both during employment and in relation to dismissal. The key terms are found in section 18 of EqA. An employer will unlawfully discriminate if it treats the employee unfavourable because of her pregnancy or because of illness suffered by her as a result of it.

2. Similar protection is given to pregnant employees by section 47C of the Employment Rights Act 1996 (ERA). That provides that an employee should not be subjected to a detriment by her employer's actions or failure to act where the reason is pregnancy, childbirth or maternity.

3. Where the sole or principal reason for an employee's dismissal is their pregnancy, utilisation of maternity rights or childbirth, that dismissal is deemed automatically unfair under section 99 ERA.

4. Every employee is entitled to be given a written statement of the key particulars of their employment, as set out in section 1 ERA. If the employer does not comply, the employee may make a complaint to an employment

tribunal to that effect, but only in conjunction with certain other types of claim. If the complaint is successful, a tribunal may award up to four weeks' pay as compensation.

Findings in fact

5. The following findings of fact are made as they are relevant to the issues.

6. The claimant was employed by the second respondent for the reasons given below from 15 November 2020. Both respondents have the same registered office, namely Clarence House, 7 Hood Street, Greenock, Scotland, PA15 1YQ. The second respondent recruited the claimant, administered her pay, seconded her to the first respondent, was responsible for observing her rights as a pregnant employee and ultimately dismissed her.

7. The claimant began working for the second respondent at the 'Word Up' bar and nightclub in Greenock on or around 15 November 2020. She cannot be precise about the date other than that it was in that month, and so the mid-point is found to be the correct date. Nothing material turns on the matter of which day in that month was the correct date. When she started her partner already worked there and made her aware that staff were needed. She worked as a barperson. The bar was operated by the second respondent. This was common knowledge among the existing staff. It was reported as such in local newspapers. The claimant worked a trial shift and then was offered the role by the bar manager, Ms Leah Campbell. In that way she became an employee of the second respondent.

8. She was not given any confirmation of her appointment in writing, whether by way of a paper document or anything electronic. She was offered further part time hours to fit in with her college studies.

9. In late November 2021 the claimant was asked by her then manager Mark Bryceland if she would be interested in working in the role of Assistant Manager at the restaurant Fenwick 47, trading sometimes as Fenwick Tapas ('Fenwick'), which is also in Greenock and a short distance from Word Up. This would be a promotion for her and she agreed. Fenwick was also

commonly understood and reported to be owned by the second respondent. It had no apparent management structure of its own.

10. The claimant began working at Fenwick on or around 1 December 2021. Mr Bryceland did not work at Fenwick but Ms Campbell would come in from time to time to oversee how things were being run. The General Manager at Fenwick was a Mr Jonny Carruthers and the claimant reported to him. His shifts and those of the claimant tended to be such that there was not a lot of overlap between them, other than at weekends if the premises were busy. One or other would act as the de facto manager of the premises when they were there. Other members of staff from Word Up would be deployed at Fenwick for shifts from time to time. Ms Campbell would cover for Mr Carruthers when he was unable to work, for example when on holiday.

11. There was a high degree of interchangeability of staff between the two establishments. After moving over to Fenwick the claimant would still occasionally be asked to work shifts at Word Up.

12. On moving to Fenwick the claimant's rate of pay was increased to £9.50 per hour. She asked for a minimum of 16 hours per week which was accommodated to begin with. In January to March 2022 she tended to work between 18 and 23 hours per week. She was satisfied with the arrangement. Mr Carruthers drew up the rota for Fenwick on a weekly basis. He would usually send a text message to each member of staff to ask them how many hours they wished to work in the following week, then draw up the rota based on that.

13. The claimant was paid weekly and received her pay through a combination of bank transfer of a set amount of up to £76, and cash in hand for any pay earned above that. She did not receive any payslips physically and so had no evidence of that sort to show who was paying her. She produced extracts from her online bank account [53-61] but those stated 'W/W CLIENTS SALARIE' and gave no indication of the company making the payments. She was given details to log on to an online portal or app where, she was told, her payslips

were available to view, but she could not gain access to them on the occasions she tried. After her dismissal she was denied access altogether.

14. The claimant's average weekly pay was £147.82. She was not a member of a pension scheme through her employer. She received no other benefits.

The claimant's pregnancy

15. The claimant found that she was pregnant in mid-January 2022. She told Mr Carruthers within days and he congratulated her. On 30 January 2022 he sent her a WhatsApp message to say that he would be abstaining from drinking the following week and that he *'will kiddon I am preggers tae'* [30]. He therefore knew about the pregnancy on or before that date.

16. The claimant's due date was 20 September 2022. She planned to commence maternity leave between 11 and 23 August 2022, wishing to wait until nearer the time to see how she felt.

17. In February 2022 the claimant experienced pain and sickness connected with her pregnancy. She was open with Mr Carruthers about this but was largely able to work her usual number of hours. The symptoms were not constant.

18. From the end of March 2022 Mr Carruthers offered the claimant noticeably fewer shifts than before. She was still experiencing occasional sickness at this point. On 16 April 2022 the claimant offered availability for three shifts the following week, but was not put on the rota at all [35]. Mr Carruthers said it had been a quiet week. On 26 April 2022 he said to her it was still quiet in the restaurant and asked her to *'pop in for a catch up'.* He also said he had some staff issues [36].

19. The claimant was offered one further shift, on either Saturday 7 or Saturday 14 May 2022 – it is not clear from Mr Carruthers' message which day it was and the claimant asked for clarification, which was not given by way of a further message at least.

The claimant's dismissal and matters following

20. The claimant contacted a Ms Lynsey Penman to discuss her plans for taking maternity leave, any formalities required and any entitlement she would have to maternity pay. Ms Penman worked in an office above Word Up and dealt with HR matters and employee wages for both Word Up and Fenwick. She was known by staff at either location to be the person to contact if an HR matter needed to be raised. The claimant tried for four days between 17 and 20 May 2022 to reach Ms Penman by telephone.

21. The claimant managed to speak to Ms Penman by telephone on 20 May 2022. She explained the purpose of her call. Ms Penman replied to say that she had been 'P45'd' in a way which suggested any conversation about maternity rights had been superseded. The claimant took from her words that she was being dismissed. This was the first she had heard if so. Ms Penman told the claimant she should speak to Mr Carruthers.

22. The claimant was surprised at Ms Penman's statement, and it upset her. It took her about two days before she was able to contact Mr Carruthers, which she did by WhatsApp. She told him on Monday 23 May 2022 of her call to Ms Penman and asked why she had been told nothing of this beforehand by him. She also said that if her illness had been an issue, she could have obtained fit notes from her GP.

23. Mr Carruthers did not deny that the claimant had been dismissed as Ms Penman had indicated. He said he would try to speak to her about it. The claimant assumed this meant that he would try to persuade her to change her mind. He sent her a WhatsApp message which said *'no hard feelings'*. He did not follow up on that message. The next time he sent her a message was on 17 September 2022 to congratulate her on the birth of her son.

24. The claimant did not hear further from Mr Carruthers, or Ms Penman, in relation to her employment status and when she tried to contact both she was unsuccessful. She therefore remained out of work. The claimant believed that she was dismissed because of her pregnancy and in particular because the

point when she would be taking maternity leave, and would become entitled to maternity pay, was approaching.

25. There were no other apparent factors in the claimant's relationship with Mr Carruthers, which was friendly and supportive until the end, or any issues with the claimant's performance or conduct which suggested another reason for her being dismissed in the way that she was.

26. The unexpected decision to dismiss the claimant caused her a degree of stress at a time when she was already experiencing illness and other symptoms connected to her pregnancy. She had financial commitments in relation to her flat and car as well as everyday expenses. She called upon her partner and father to help her pay her bills. She felt upset and vulnerable. She felt that the way in which her dismissal was implemented was particularly underhand.

27. The claimant was not at any point provided with a statement of her terms and conditions of employment in writing as required by section 1 of ERA. A document in the bundle purporting to be such a statement was included in the bundle [39-45] but was only provided to the claimant during negotiations over the settlement of her claim, which did not lead to resolution. The claimant had not seen the document before that point, which is to say at any point while she was in employment.

28. The document is not helpful in determining who was the claimant's true employer. For example, it is headed up *'F47 Limited / Contract of Employment'* but then goes on to state the claimant *'should also refer to the Employee Handbook for further information on policies and procedures applicable to your employment with WBI Limited, Clarence House, 7 Hood Street, Greenock PA15 1YH.'* The claimant's commencement date as stated is wrong, as is the description of her job title. The claimant had never seen an 'Employee Handbook' or been made aware of the existence of one.

29. The claimant had intended to go on working her normal hours – that is to say, 16 to 20 per week – up until 23 August 2022 and then take maternity leave of

between six and nine months. She has by now returned to her college course and has good options for securing childcare via members of her family.

The parties' submissions

30. Mr McKinlay provided a written note of submissions which was considered by the tribunal in reaching its decision on the issues.

Discussion and conclusions

Was the claimant an employee until 20 May 2022 as she alleged?

31. On the evidence above it is found that the claimant was employed continuously by the second respondent between 15 November 2020 and 20 May 2022.

Which entity or entities was/were her employer?

32. The tribunal finds that the second respondent, WBI Limited, was the claimant's employer between the above dates.

33. The finding is made on the balance of probability and based on the evidence before the tribunal. There was a notable lack of evidence in the form of a reliable contract document, payslips or evidence from the respondents themselves.

34. However, the tribunal concluded that the claimant was originally employed by the second respondent, as it operated Word Up where she first worked, and that she remained employed by that company when transferred to Fenwick. Her managers appeared to have been employees of the second respondent and there was no evidence of her employer changing at any point. She was not notified that the company employing her would change. It was not unusual for employees of the second respondent to be transferred to Fenwick on a short-term basis. She herself occasionally worked shifts at Word Up after transferring to Fenwick.

When did her employer become aware of her pregnancy?

35. On the evidence it is found that the claimant's employer became aware of her pregnancy in the last week of January 2022. This occurred by way of the claimant telling Mr Carruthers, an employee of her employer and someone who reported to her employer. He knew by 30 January 2022 that she was pregnant as he sent her a WhatsApp message clearly referring to it.

Did her employer subject her to any detriment relating to her pregnancy contrary to section 47C of the Employment Rights Act 1996 ('ERA'), and/or unfavourable treatment because of her pregnancy under section 18 of the Equality Act 2010 (EqA)?

36. The claimant alleged that the (second) respondent acted unlawfully in three ways, namely by:

    36.1 Overlooking her when providing work or shifts;

    36.2 Ostracising her; and/or

    36.3 Not engaging with her in response to her attempts to contact it.

37. Effectively the tribunal upholds the claimant's complaints, but expresses them as follows. The claimant was both subjected to a detriment under section 47C ERA and treated unfavourably because of her pregnancy under section 18 EqA by:

    37.1 Being offered fewer shifts by reason of her pregnancy despite providing her employer with details of her availability and willingness to work as she had done before; and

    37.2 Not engaging with her properly in relation to her pregnancy and the ways in which it should have been accommodated, including in relation to the allocation of shifts, arrangements for her to take maternity leave and provision of maternity pay.

38. On the evidence, and again applying the balance of probability, the claimant was treated in this way and it was because of her being pregnant in itself

and/or being ill as a result of her pregnancy. Her employer had knowledge of both.

Was the claimant dismissed by reason of pregnancy or maternity?

39. On the evidence the claimant was dismissed because of her pregnancy. There was no evidence of any other reason for her dismissal. The claimant was given no indication that she was being dismissed, much less a reason, until she began contacting her employer to discuss her maternity leave and pay arrangements.

40. As such, the claimant was automatically unfairly dismissed under section 99 ERA and the fact that she had not completed two whole years of service does not matter.

Did her employer fail in its obligation to provide her with a written statement of terms and conditions of her employment compliant with section 1 of ERA?

41. The claimant was not provided with a compliant statement of terms and conditions of employment. The tribunal accepted that the document at pages 39 to 45 of the bundle was not provided to her at any point when she was an employee.

To the extent any of the complaints are successful, what remedy should be awarded?

42. The claimant sought declarations that:

    42.1 The second respondent unlawfully discriminated against her in contravention of section 18 EqA as a result of her pregnancy or pregnancy-related illness:

    42.2 The second respondent automatically unfairly dismissed her contrary to section 99 ERA by reason of her pregnancy or pregnancy-related illness; and

    42.3 The claimant was not provided with a written statement of terms and conditions of employment compliant with section 1 ERA.

43. The tribunal makes those declarations in its judgment above.

44. The claimant also sought an award of compensation for injury to feelings in respect of her discriminatory dismissal and discriminatory and detrimental treatment before dismissal.

45. She did not provide any medical or other third-party evidence to support her claim for an award. She sought an amount consistent with the upper end of the lowest of the three bands of compensation introduced by the well known authority of ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102***. This Mr McKinlay argued was consistent with the approach taken by another employment tribunal in the claim of ***Gay v Leeds Warehouse Solutions Limited – 1800043/2018***. In that claim the employee had similarly short service and was dismissed because of her pregnancy. A further consistent first-instance decision was relied upon.

46. Whilst those judgments are not binding on this tribunal, we agree that this is an appropriate level of compensation in this claimant's case. The effect on her by the decision to dismiss her was clearly not minimal or insignificant. However, it was a single act by her employer.

47. The claimant sought a figure of £9,900 consistent with the upper end of the bottom Vento band currently, and the tribunal consider it proportionate to award her this sum.

48. Interest will accrue on this figure from the date of her dismissal, 20 May 2022, at the rate of 8% per annum. The tribunal was conscious that as it could be argued that the detrimental treatment began earlier, possibly as early as March 2022, interest should run from an earlier point. However, the key act was clearly the claimant's dismissal and so her dismissal date is used as a reference point.

49. Were she not dismissed, the claimant planned to work up until 23 August 2022 as normal, then take a period of Ordinary Maternity Leave and possibly also Additional Maternity Leave following that. She indicated she would have taken a period of six to nine months before returning to work. Had she done so (and

not been discriminated against or unfavourably treated because of her pregnancy or any related illness) she would have most likely received an average of £147.82 gross per week between 20 May and 23 August 2022, calculated to be 13.57 weeks or £2,006.13 after rounding as a monetary equivalent.

50. In order to be eligible to receive Statutory Maternity Pay (SMP) the claimant had to be employed for at least 26 weeks by the point 15 weeks before her expected week of childbirth, which was 20 September 2022 at the relevant time. 15 weeks before that was the week commencing 5 June 2022. The claimant had been an employee since 15 November 2020 and therefore qualified.

51. The claimant earned more than the Lower Earnings Limit of £123 per week which applied. There is no reason why she would have been unable to comply with the other formalities associated with taking maternity leave.

52. According to the evidence, the tribunal therefore finds that the claimant would have been eligible to receive maternity pay at the statutory rate of 90% of her average weekly earnings for a period of 26 weeks. This equates to £133.04 per week for 26 weeks, or £3,458.99. But for her unfair dismissal the claimant would most likely have been entitled to these payments and she is awarded the same sum as part of the compensatory award the tribunal makes.

53. The tribunal considered whether to compensate the claimant for a further period but considered that the above approach was proportionate and in keeping with what was just and equitable, including the losses the claimant herself was seeking.

54. Finally, the tribunal considered whether to compensate the claimant under section 38 of ERA as a result of not being given a written statement of terms and conditions of employment. There was no apparent good reason for her employer's failure in this respect, and the lack of a statement caused her uncertainty and difficulty during her employment and when she came to pursue her rights via this claim. The tribunal did not consider this a mere

oversight, and saw fit to award the claimant the sum of four weeks' pay together with interest at the statutory rate of 8% as is competent.

Conclusions

55. As a result of the above findings the tribunal makes the declarations and awards as indicated at the outset of this judgment.

Employment Judge: **B Campbell**
Date of Judgment: **14 February 2023**
Entered in register: **15 February 2023**
and copied to parties