

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105236/16

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Held in Glasgow on 9 & 10 May 2017

Employment Judge: Laura Doherty
Members: Mr A D McAllister
Mr J Burnett

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Miss Gillian Anderson

Claimant
In Person

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Spar Duntocher

Respondents
Represented by:
Mr Arshad Sadiq -
Owner

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

- 30 (1) That the respondents discriminated against the claimant, contrary to Section **18(2)** of the Equality Act 2010 (EQA) and the respondents are ordered to pay the claimant compensation of **£11,989.20 (Eleven Thousand, Nine Hundred and Eighty Nine Pounds, Twenty Pence)**.
- 35 (2) The claimant's claim under **Section 13** of the Working Time Regulations 1992 succeeds, and the respondents are ordered to pay the claimant the sum of **£202.30 (Two Hundred and Two Pounds, Thirty Pence)** in respect of annual leave accrued, but not taken at date of termination of employment

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REASONS

E.T. Z4 (WR)

1. The claimant presents a complaint of discrimination contrary to **Section 18(2)** of the Equality Act 2010 (EQA). Her position is that she was subjected to unfavourable treatment, which was dismissal, because of her pregnancy, or because of an illness suffered as a result of it. The claimant lacks the qualifying service to present a complaint of unfair dismissal under **Section 94** of the Employment Rights Act 1996 (ERA).
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2. The respondents admit dismissal. Their position is that the reason for the claimant's dismissal was frequent absence intimated to them shortly prior to the commencement of her shifts, which impacted adversely on their business.
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3. The issue for the Tribunal is one of causation, and to determine the reason for the claimant's dismissal, and whether it was for a prescribed reason.
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4. The claimant also presents a complaint in respect of unpaid holiday pay, in respect of leave which had accrued, but which had not been taken at the termination of her employment. It is accepted by the respondents that it likely some leave was due, but there was no agreement as to the amount which was due.
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5. There was no agreement as to the claimant's pre-dismissal earnings, although it was agreed that her rate of pay was £7.20per hour.
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6. The claimant gave evidence on her own behalf, and the respondents evidence was given Mr Arshad Sadiq who is an owner of the business along with Mr Amjid Sadiq, his brother, who represented by the respondents at the Tribunal Hearing.
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7. Each side lodged a bundle of documents.

Findings in Fact

8. From the information before it the Tribunal made the following findings in fact.

5 9. The respondents business operates a grocery store in Duntocher (Spar Duntocher). The business is owned jointly, by Mr Arshad Sadiq and Mr Amjid Sadiq. The business has approximately 8 employees. Mr Arshad Sadiq works for the business, but performs a back office function. Management of the staff is primarily the function of the store manager, Mr
10 Ambi Johal.

10. Employees work shifts, which are an early, and a late shift. In broad terms, an early shift is from 7am until 3pm and a late shift is from 3pm to 10pm. Shift times are, however, subject to change from time to time, and can be
15 truncated. The shift rota is made up by Mr Ambi Johal and is sent electronically to the staff each week. Mr Johal, and on occasion staff members, complete timesheets, examples of which are produced in the respondents bundle. to record hours they have worked each week. The time sheets are used to calculate wages. Staff are paid one week in arrears
20 and the timesheets are completed on a preceding week's basis (i.e. the time sheet reflects the work done in the week prior to its completion). Staff work a weeks lying time.

11. The claimant, whose date of birth 8 May 1990 commenced working with the
25 respondents on 10 April 2016, as a sales assistant. Prior to joining the respondents, the claimant had been employed for a period of around 8 years, working in a hotel, for 18 hours per week. She was approached by the respondents` Manager, Mr Johal, who enquired if she would be interested working with the respondents. The claimant was interested in
30 working slightly more than 18 hours per week, and she understood from Mr Johal that she would be working approximately 20 hours per week. The claimant filled in an application form, but was offered the job without

interview. She commenced employment on 4 April 2016. Her rate of pay was £7.20 per hour.

- 5 12. The claimant's shifts changed from time to time, but in general terms, the arrangement was that she would work early shift on Saturday, Sunday (from 7am to 3pm), and a late shift on a Tuesday, from 3pm to 10pm. The claimant's shifts did change from time to time. On occasions she worked more than 20 hours, (for example the week of 15 April 2016, the week of 27 May 2016, the week of 8 July 2016). On other occasions, she worked less
10 than 20 hours. The claimant undertook shifts swaps with other members of staff, and the hours which she worked on a shift were from time to time reduced.
- 15 13. At some point in April 2016, the claimant fell pregnant. She did not realise she was pregnant until she was sick on Saturday 14 May to the extent she was unable to attend work. The claimant was due to attend work at 10.30am on that date, and she telephone Mr Johal first thing in the morning to tell him that she would not be in because she was ill.
- 20 14. The claimant texted Mr Johal later on 14 May, to ask if she was still on the rota to work on the Sunday. It was confirmed that she was, and the claimant attended work, but was sent home by Mr Johal because she looked so ill.
- 25 15. The claimant next attended work on the Tuesday 17 May. By this time she had discovered she was pregnant, and she told Mr Johal, and Mr Arshad Sadiq, that she was pregnant.
- 30 16. The claimant had an accident in mid-June, while taking out rubbish from the shop, when she tripped on a pothole. The claimant had to attend hospital where her leg was strapped up in a '*moon boot*'. The fall happened on Sunday 12 June. On the Tuesday of that week, the claimant phoned to let Mr Johal know that she was out of hospital. She offered to come into work

5 on the Thursday of that week as opposed to the Tuesday in order to allow some time for her foot to heal. He told her that that she should not work that Tuesday or the following Saturday/Sunday and she should not come back to the shop, until she got the boot off. The claimant therefore returned to work on Tuesday 21 June. The claimant was not was not roistered for work that week (timesheet of 24 June 2016) page 65.

10 17. The claimant experienced severe pelvic pain on 31 July. She was due to work that day. She contacted the Maternity Support Unit at the hospital and was told not to attend work. She contacted Mr Johal at approximately 12.10pm, to left him know she had severe pelvic and stomach pain, and she was contacting the Maternity Unit, and she would be unable to attend work.

15 18. The claimant subsequently received a copy of the rota for the week to come, which indicated that she was not rotated to work. The claimant telephoned the respondents on 1 August, looking for Mr Johal, but the telephone was answered by Mr Arshad Sadiq. He asked what had happened to her for the previous shift, and she told him that she suffered pelvic pain, and had contacted the Maternity Assessment Unit. Mr Arshad Sadiq asked the claimant if she free to come down to the shop to meet with him.

20 19. On arrival at the shop Mr Arshad Sadiq took the claimant into the back office. He asked her what happened the day before. The claimant explained again that she had pain in her pelvis and stomach. She told him she had called the Maternity Assessment Unit and had been told by them to keep an eye on the baby`s movements and to call back if there were any further issues.

25 30 20. The claimant anticipated when she went into the meeting, that her job might be at risk, and she made a covert tape recording on her telephone, of the conversation which took place. The claimant subsequently transcribed this

conversation, and produced this for the purposes of the Tribunal Hearing, document 1.

21. At the outset of the conversation, Mr Sadiq told the claimant that it was an inconvenience for him, and he was going to let the claimant go because it was probably the best for her and for the shop too. He emphasised it was nothing personal to the claimant, and that she was a nice girl.
22. The claimant told Mr Sadiq, she would have been better to stay where she was (i.e her old job) because of her maternity rights. Mr Sadiq agreed with her and reiterated, that he thought she was a nice girl, and it was nothing personal. He suggested to her that she did not look for another until she had her baby. Mr Sadiq went on to say that he would give the claimant a good reference. He told the claimant he was finding it hard, because the problem came back to him when the shifts are not covered; the manager was annoyed, and complained to him.
23. The claimant acknowledged that she understood that, but she pointed out her missing the shift the day before was an inconvenience to her too, as she could not afford to miss shifts, but she had no control over what happened.
24. Mr Sadiq accepted that he understood that, but *“unfortunately there were a couple of instances obviously you fell outside, again not your fault and I am then left to get cover”*.
25. The claimant said that she had not taken time off her fall. She explained she had phoned the manager after the hospital appointment and asked if she could come into work on the Thursday onwards to allow her foot to heal.
26. Mr Sadiq replied to the effect that he was not going to say that the claimant should have come in, and that she had let them down. Unfortunately it happened, but because it happened Mr Johal was having to cover shifts, and was complaining about it and that was coming back to Mr Sadiq.

27. Mr Sadiq went on to say that it was best for the claimant as well as for him. He said once she had her baby, she could by all means she came back to see him or came back to see Mr Johal. He said he did not have a problem with her work ethic and he didn't have a problem when she was at the shop. He continued: *"it's just the problem is obviously when she couldn't make it, and the worry for me is that as time goes on it's going to become more frequent and I don't have a big pool (of staff), and I really need the small pool of staff to be here and not phone an hour or 2 hours before the shift starts because honestly put herself in my position"*.
28. The claimant acknowledged that she understood. Mr Sadiq carried on in the conversation to suggest to the claimant that once she had the baby that by all means she came back to see him to see what they could do. He also stated that if she was feeling better and she felt she wanted to come back, he would be more than happy to take her back.
29. The conversation carried on, in the course of which Mr Sadiq told the claimant that he did not mean it personally, that she had always been pleasant and a nice girl, but he needed her in the shop. He also said that Mr Johal was of the same opinion, that she was good with customers. He said he wished that Sunday had not happened, and they could have carried on, but he thought going forward the claimant was going to need a bit more time off as well, and he could not afford to give her that time off.
30. The conversation carried on in a reasonably pleasant vein thereafter.
31. After the claimant was dismissed on 1 August 2016, she felt distressed and upset. She was stressed and worried about her position, in that she was no longer in employment, and she had no income and she already had a young son and another child on the way.

32. On 2 August the claimant texted Mr Sadiq asking for a letter confirming her dismissal, for the purpose of the Jobcentre. Mr Sadiq sent a letter on 3 August, document 4, in which he stated:-

5 *“We regret to inform you that your employment with Spar Duntocher is hereby terminated immediately.*

10 *You have been employed with the company since 01/04/2016 and in that time you have shown yourself to be unreliable on several occasions. This puts added pressure on the business leading to increased stress and strain on other staff members which cannot be tolerated. Despite having spoken to you, as recently as 17/06/2016 you yet again cancelled your most recent shift. Reliability plays a key part in the retail industry and with a business that operates mainly on two people per shift it becomes absolutely essential. On that basis we feel that the only option is to terminate your employment.”*

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33. The claimant wrote to Mr Sadiq on 5 August 2016 stating inter alia:-

20 *“Your letter dated 3rd August states that the reason for my dismissal is that I have been unreliable. You state that you spoke to me on 17th June about this. I dispute that. As you know, I fell just outside work on 12th June and tore a ligament. I had to go to hospital and my leg was in plaster for a week. I phoned on 13th to say that the doctor had told me to rest my leg for a few days but I offered to return to work on 16th June. You told me not to and my next shift was on 20th June. There was no meeting on 17th June.*

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30 *I have not been absent on any other occasion until 31st July, when I rang in to report in sick as I had severe pelvic pain, due to the fact that I am 6 months pregnant. I sought advice from my midwife and will be attending physiotherapy for this.*

You called me to a meeting on 1st August, without saying what the meeting was for. When I attended you told me that it was inconvenient for you to have a pregnant employee. You felt that as the pregnancy progressed, I would take more time off and then you told me not to come back.

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I feel that this is an unfair dismissal on the grounds of my pregnancy and also a wrongful dismissal as you did not give me any notice”.

10 34. The claimant sought to appeal against the decision to dismiss her.

35. Mr Sadiq replied on 22 August 2016 (document 6 in the claimant’s bundle) stating that a discussion on 1 August 2016 was to the effect that the claimant’s employment was being terminated with immediate effect because she was unreliable and his was having a negative impact on the operation of the store and on other members of staff where the respondents did not have a large pool of staff and on many shifts there were only 2 personnel at any point. He stated the claimant was frequently absent on very short notice and it was incredibly difficult to cover in her absence. Mr Sadiq considered the request for the appeal, where the decision to terminate the claimant’s employment with immediate effect was put.

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36. The claimant’s earnings while in her employment with the respondents were on average £119 per week.

37. The claimant’s baby was born on 8 December 2016. Had she remained in the respondents employment, it was her intention to work as close to the due date as possible. The claimant has a young son, and she worked up until 4 weeks prior to the birth of her first child.

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38. Since the termination of her employment with the respondents, the claimant has not sought other employment. She is now starting to look for work, in the retail/hospitality sector, and looking for work on a part time basis.

39. During the period the claimant was working with the respondents, she sought to work shifts, which allowed her to balance her entitlement to Working Tax and Child Credits. This meant that on occasions when the claimant worked a higher number of hours in a week, she reduced her hours in others, in order to maintain her entitlement to these benefits.

Note on Evidence

40. There is a fundamental issue of credibility in this case, in relation to the reason why the claimant was dismissed.

41. It was the claimant`s position that the reason for dismissal was because of her pregnancy, or pregnancy related illness. The respondent`s position is that she was dismissed because of persistent absence, which was notified to them on short notice, which rendered it difficult for them to provide cover for staffing the shop, from a small pool of staff.

42. The principal conflict in the evidence of the claimant and that of Mr Sadiq, was around the number of occasions on which the claimant had reported ill for work, contacting the respondents shortly before her shift was due to commence.

43. The respondents produced a document in their bundle (R48) which is a narrative of the claimant`s alleged absences from work and identifies 9 occasions on which it was alleged the claimant was unable to attend work. The claimant`s position was that this grossly exaggerated. She accepted that she had been unable to attend work on some occasions, in particular, on 14 and 15 May (albeit 14 April is not recorded as a days absence) before she discovered she was pregnant, but had been ill. She accepted she was unable to attend work on 31 July 2016, because of severe pelvic pain which was pregnancy related. She also accepted that she had hurt her ankle but denied that she had contacted the respondents on 18 June, as they alleged, to say she would be unable to come in for the duration of that

week. Her position was that she had offered to return to work on 16 June, but was told not to attend, and that her next shift would be 20 June.

5 44. This in fact appeared to be consistent with the timesheet produced at page 65, dated 24/6, which reflected work done the in week ending 17 June, and shows the claimant not working at all that week, including 17 June.

10 45. It was the respondent's position, outlined in document R48 that the claimant had telephoned on 24 & 30 April, 15 May, 1, 4, 16, 18 June, 27 and 31 July 2016, and on each occasion, the narrative suggested the claimant had called in sick on these occasions. The respondent's position is that the time sheets and wage slips produced in their bundle support the conclusion that the claimant was off on these occasions.

15 46. The Tribunal therefore had to determine which version of events it was satisfied on the balance of probabilities, was correct.

20 47. In doing so, it took into account its impression that the claimant was generally a credible and reliable witness. On the particular issue of her absences her credibility was enhanced, in that she volunteered she was absent from 14 May, which was a date which was not included in the respondents list of absences.

25 48. In reaching it's conclusion as to whether the claimant was absent as claimed by the respondents, or whether her absences were confined to those that she identified, the Tribunal also takes into account the timesheets and wage slips which were produced by the respondents. The claimant accepted that the wage slips matched the timesheets, other than on one occasion, (the week ending 29 April 2016 (document 73)) where the claimant was paid for 2 hours. The claimant gave convincing evidence to
30 the effect that she had contacted the respondents as soon as she received her wage slip for that week, as this did not accurately reflect the hours that she had worked that week. She explained there was an error in the

completed timesheet and she had not appreciated that she required to fill it in, and this was rectified by a payment into her bank account.

5 49. In any event, the Tribunal did not attribute too much on the fact that the claimant did not consistently work Saturday, Sunday, and Tuesday shifts, or for the full shift hours (which is some weeks is demonstrated by the timesheets). It was apparent from consideration of the timesheets that the shifts did change, and the claimant on occasion worked longer hours, and on occasions her shifts (and those of other staff) were truncated. From it's
10 consideration of the timesheets, the Tribunal was satisfied the times worked in each shift by members of staff could change on occasion.

15 50. The Tribunal was also satisfied that, as explained by the claimant, she balanced her hours to ensure that she retained her entitlement to tax credits, and her shifts changes were from time to time, explained by this, as opposed to supporting the conclusion that she was absent, as alleged by the respondents.

20 51. In reaching this conclusion on this point, the Tribunal also take into account that Mr Sadiq gave no explanation for the narrative in document 48. On each occasion when it is alleged by the respondents the claimant was absent, document 48 sets out a narrative, stating when the claimant phoned in, and the reason she gave for not attending work. There was no explanation before the Tribunal as to where this narrative came from. Mr
25 Sadiq explained that the information at document 48 came from consideration of the timesheets and the wage slips. These documents however could not provide the narrative on document 48, and there was no convincing evidence before the Tribunal as to the telephone calls which the claimant was alleged to have made, other than those she accepted.

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52. The respondents produced a number of witness statements, including one from Mr Johal, and statements from other members of staff indicating that the claimant was unreliable. They also produced statements from staff

saying they had been treated well during their pregnancy. These witnesses did not attend the Tribunal to give evidence however, and were not subject to cross examination, and the Tribunal could attribute little or no weight to the statements in these circumstances.

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53. Significantly, the Tribunal take into account the terms of the conversation which took place when the claimant was dismissed. Mr. Sadiq accepted that the transcript produced by the claimant was more or less accurate, and he did not point to any elements of the transcript with which he took issue.

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It was clear from the conversation which took place at the point when the claimant was dismissed, that Mr Sadiq made no reference the claimant`s persistent absence from work on short notice, as a reason for dismissing her. He refers to "*a couple of occasions*", which is in fact consistent with the claimant`s position that she had been off twice, at the point when she was dismissed. Furthermore, the fact that Mr Sadiq indicated to the claimant on more than one occasion, that he thought well of her as an employee, and he was prepared to provide her with a reference, and take her back into employment, was inconsistent with the notion that the claimant was dismissed for persistent short term absence, intimated shortly before her shifts were due to begin.

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54. The Tribunal in reaching it`s conclusion, takes into account Mr Sadiq`s explanation for what he said in the course of that meeting. It was his position that he was trying to be 'soft' and effectively be a nice employer .He also pointed out he was unaware that he was being recorded. Even if it was the case however that Mr Sadiq was trying to be nice or '*soft*' the Tribunal would have expected at least some reference to have been made to the claimant`s persistent absence notified at short notice by Mr Sadiq at the meeting on 1 August, and it was not persuaded that Mr Sadiq`s finding it difficult to dismiss the claimant, and approaching matters in a "*soft*" manner adequately explained his failure to refer to the fact that the claimant had been persistently absent, and had already been spoken to about this. The Tribunal was further supported in this conclusion, in that it seemed to the

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Tribunal unlikely, that Mr Sadiq would have suggested to the claimant that he was prepared to take her back after the baby was born, had it been the case that she was an unreliable employee, as he now claimed.

5 55. The Tribunal was not satisfied that the claimant had been spoken to about her absences. Mr Sadiq said he had spoken to her on two occasions, however, for the reasons given above the tribunal was satisfied that the claimant was at work on the 17th and therefore it was not satisfied that Mr Sadiq had spoken to her on 17 June. The Tribunal did not conclude the
10 claimant was persistently absent, and had been spoken to about this.

56. The Tribunal also takes into account the terms of the letter which Mr Sadiq sent to the claimant after she was dismissed, which does state that the claimant had shown herself to be unreliable on several occasions.

15 57. The Tribunal was satisfied that the weight which could be attached to the contents of this letter is reduced in consequence of the fact that there is reference in the letter to the claimant having been spoken to on 17 June 2016, yet, according to the respondents timesheets, the claimant did not
20 appear to be at work on that date. The respondents produced the timesheet for the week ending 24 May 2016 (page 65). It was explained the date on the timesheets is a week in arrears and the claimant was paid on the basis of a week's lying time. The timesheet of 24 June 2016 would therefore reflect hours working in the week ending 17 June 2016 when the
25 claimant is now shown to be working at all. This was consistent with her evidence, that after hurting her ankle, she was told not to return to work until 20 June, and it diminishes the weight the Tribunal considered could appropriately be attached to the contents of Mr Sadiq's letter of 3 August 2016.

30 58. Weighing and balancing these factors together, the Tribunal was satisfied on the balance of probabilities, that the claimant's version of events was to be preferred over that advanced by the respondents, and that she was

absent on the occasions identified in the findings in fact, as opposed to on the nine occasions alleged by the respondents.

Submissions

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59. Both parties made brief submissions. The claimant asked the Tribunal effectively to accept her version of events and to find in her favour.

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60. Mr Sadiq did likewise and pointed to the documentation produced by the respondents in support of the position that he claimant had been unreliable and it was this, and not her pregnancy which was the reason for dismissal. He submitted that he and his brother had been in business for around 30 years and had never had to deal with any issue like this. They regularly employed women who were pregnant or had young children without any difficulty.

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Consideration

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61. This claim is brought under **Section 18(2)** of the Equality Act 2010. Section 18 states:-

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“(1) This section has effect for the purpose of the application of Part 5(1) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of her, A treats her unfavourably –

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(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.”

62. The burden of proof rests with the claimant in the first instance, and it is for the claimant to prove, on the balance of probabilities, facts on which the Tribunal can conclude, that in the absence of an adequate explanation, the respondents had committed an act of discrimination.

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63. In considering whether the claimant has proved the act of discrimination it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination even to themselves.

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64. The outcome at this stage depends on what inferences it is proper to draw from the primary facts found by the Tribunal. The Tribunal does not have to reach a final determination of such facts or conclude that it was discrimination; it merely has to decide what inference can be drawn. When the claimant has proved such facts from which inference could be drawn that the respondents had treated her less favourably because of her pregnancy or pregnancy related illness, the burden of proof moves to the respondents, and it is then for them to prove that they did not commit the act of discrimination.

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65. To discharge that burden it is necessary for the respondents to prove on the balance of probabilities that the treatment of the claimant was in no sense whatsoever on the grounds of a protected characteristic.

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66. The Tribunal was satisfied in this case that the claimant, who had been employed by the respondents for a period of around 16 weeks, was summarily dismissed in circumstances where she had advised her employer that she was pregnant, and where she had been absent from work on one occasion, on 14 and 15 May because of pregnancy related illness. Albeit neither the claimant nor the respondents knew at the time she was pregnant, they discovered very shortly thereafter that she was.

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67. The claimant phoned in absent from work sick on 31 July, because of pregnancy related sickness. She was then called to a meeting and summarily dismissed. The Tribunal was also satisfied as a matter of fact, that at the point when the claimant was dismissed she was told by Mr Sadiq in the course of her meeting with him on 1 August, that the problem for him was when the claimant could not make it to work, and the worry for him was as time went by it was going to become more frequent.

68. The Tribunal was satisfied that it was entitled to conclude that the claimant had proved facts from which inference could be drawn that the respondents dismissed her, because of her pregnancy or pregnancy related illness, and the burden of proof shifted to the respondents.

69. It is then for the respondents to prove that it did not dismiss the claimant because of her pregnancy. For the reasons set out above, the Tribunal was not satisfied that the respondents had proved on the balance of probabilities, that the reason they dismissed the claimant was because of her persistent short absences, intimated to them shortly before her shift were due to begin.

70. The Tribunal was prepared to infer from the facts found that at the point when Mr Sadiq dismissed the claimant, he did so because she had been absent on short notice on two occasions and on the second occasion (even if not the first) he was aware this was because of a pregnancy related illness, and he was concerned that she may have more absences because of her pregnancy and that this impact this would have on staffing the shop.

71. In drawing this inference the Tribunal takes into account the terms of the conversation which Mr Sadiq had with the claimant when he dismissed her. In the course of that conversation Mr Sadiq told the claimant that; *'the worry for me is that as time goes on it's going to become more frequent and I don't have a big pool (of staff), and I really need the small pool of staff to be*

here and not phone an hour or 2 hours before the shift starts because honestly put herself in my position'.

5 72. That statement was made in the course of a conversation in which Mr Sadiq suggested to the claimant that she should not look for work until after her baby was born, and that he would consider re-employing her after her baby was born. He also said he wished that Sunday had not happened, and they could have carried on, but he thought going forward the claimant was going to need a bit more time off, and he could not afford to give her that time off.

10 73. The Tribunal was satisfied that the inference to be drawn from what Mr Sadiq said to the claimant in the conversation at the point of dismissal, was that the reason why the claimant was dismissed was because he was concerned about the impact on staffing the shop as a result of the time off she had had because of her pregnancy, and was concerned that she may have more absences because of her pregnancy, which would cause him difficulty in getting staff to cover for the shop at short notice.

15 74. The Tribunal was not satisfied that the respondents had discharged the burden of proof which had shifted to them.

20 75. The Tribunal therefore concluded that claimant's claim of discrimination under **Section 18** of the EQA is well founded and that the respondents had discriminated against her contrary to the provisions of that section.

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Remedy

30 76. The remedy sought is compensation. The claimant's pre-dismissal earnings were in dispute. The Tribunal considered the claimant's earnings for a period of 12 weeks prior to her dismissal, excluding the week during the week she was not rostered to work and earned nothing. This exercise which brings out an average of £119 per week, based on the claimant earning paid £7.20 per hour, (which was not a matter of dispute).

- 5 77. The Tribunal was satisfied that had the claimant not been dismissed, she would have continued working with the respondents, and she would have continued to do so, up until 4 weeks prior to her due date. The Tribunal reach this conclusion by taking account the claimant's evidence on this point, and her evidence to that effect that she worked until 4 weeks prior to the birth of her first child.
- 10 78. The claimant's child was born on 8 December, and therefore the Tribunal assessed the claimant would have worked until 10 November 2016.
79. The period from 1 August, (the date the claimant was dismissed), to 10 November is **14 weeks**, and therefore her loss during that period would have been 14 x £119 which is **£1,666**.
- 15 80. Thereafter the claimant would have been on maternity leave. The Tribunal was satisfied that the claimant would have taken 26 weeks maternity leave. The claimant said in evidence that she would have sought to return to work as soon as possible. She has, however, has made no effort to obtain alternative employment, and explained that she intends to apply for college, commencing 2018, but in the interim, has now started to look for work, in
20 the retail/hospitality sector, working on a part time basis.
81. On balance, the Tribunal was satisfied that it was likely, that the claimant would have taken 26 weeks off work after the birth of her child, and is
25 fortified in this view, this is the amount claimed in her schedule of loss.
82. The claimant would not have been entitled to receive statutory maternity pay during that period. In order to qualify for that benefit, the claimant would have had to have been working for a period of 26 continuous weeks,
30 prior to the date of her qualifying period, which is 15 weeks prior to her due date. The Tribunal was satisfied, however, that the claimant had lost her entitlement to working tax credits, as a result of her loss of employment. She gave evidence to the effect that her working tax credit and child tax

credit, amounted to around £100 per week, and the Tribunal was satisfied that the figures in the claimant's schedule of loss were to be accepted in relation to working tax credit. The claimant's information in the schedule of loss was that she received £237 every 4 weeks, and therefore working tax credit amounted to £59.25.

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83. The Tribunal was satisfied that she would have lost this for a period of 26 weeks, which brings out a loss of **£1,540.50**.

10 84. The period of 26 weeks brings the claimant to around the date of the Hearing and the Tribunal considered future loss. It was satisfied that the claimant is entitled to future loss for a period of around 3 months. Applying its industrial experience the Tribunal was satisfied that the claimant should readily be able to find part time work in the retail/hospitality sector, and this was a reasonable period in which to assess future loss. Had the claimant been employed with the respondents during that time, she would have earned £119 per week, and therefore her loss is **£1,785** (3 x 5 x £119).

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85. The Tribunal then considered compensation for injury to feelings. In assessing this, the Tribunal takes into account the claimant's evidence that she was distressed, had been upset, and worried about her position, having lost her income, with a young child to support, and another child due. The Tribunal also takes into account that this was a one off act, albeit it was a serious act, in that the claimant was dismissed. It considered that compensation should be assessed towards the higher end of the lower Vento band, and it made an award of **£5,000** in respect of compensation for injury to feelings.

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86. The claimant's total compensatory award is therefore **£9,991**.

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87. The Tribunal then considered whether there should be any uplift to that, on the basis of the respondents failure to follow the ACAS Code. In terms of **Section 2** of the Trade Union & labour Relations (Consolidation) Act 1992

(TULCRA) if, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that (a) the claim to which the proceedings relate contain a matter to which a relevant code of practice applies, (b) the employer has failed to comply with that code in relation to that matter, and (c) that a failure was unreasonable, the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

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88. The ACAS Code sets out the standard of reasonableness and fairness for handling disciplinary issues and grievances. The Code suggests that in disciplinary matters, the employer should establish the facts of the case, inform the employee of the problem, hold a meeting with the employee at which the employee may be accompanied, decide on appropriate action, and give the employee an opportunity to appeal. The Code applies to dismissal in this case.

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89. There was a very significant failure on the part of the respondent in terms of its obligations under the ACAS Code. They did not advise the claimant of the nature of the meeting to which she was called and she was not allowed to be accompanied, they did not carry out any fact finding, they did not inform her of her right to appeal. The only extent, to which there was any procedure applied in this case, was that there was a meeting, and the claimant received a letter subsequent to it confirming she was dismissed.

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90. The Tribunal considered whether there should be any uplift, and were satisfied it was just and equitable there should be, and this should be 20%. The Tribunal were satisfied that this reflected the severity of the failures on the part of the respondents, but also took into account the fact the respondents were a small employer, who did not have any HR input or resource. The compensatory award of £9,991 is therefore uplifted by a factor of **£1,998.20** which brings out a total of **£11,989.20**.

Holiday Pay

91. The Tribunal also considered the claimant's complaint of failure to pay holiday pay.

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92. In terms of the Working Time Regulations the claimant is entitled to the minimum of 5.6 weeks holiday per annum. The claimant commenced work on 4 April. From 4 April to 1 August 2016, the date of dismissal is 16 weeks. The claimant is therefore entitled to pro rata annual leave on that basis (i.e $5.6 \times 16/52 = 1.7$ weeks). On the basis of the claimant's average income was £119 per week. The claimant is entitled to **£202.30** (i.e. $£119 \times 1.7$) in respect of leave accrued but not taken on the termination of employment and the Tribunal shall make that award.

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Employment Judge: Laura Doherty
Date of Judgment: 16 May 2017
Entered in register: 17 May 2017
and copied to parties

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