



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms K Barnes

**Respondents:**

1. Douglas Leisure (North West) Limited t/a The Wiend Bar (in Liquidation)
2. Dean Clayton
3. Mark Douglas

**Heard at:** Manchester

**On:** 28 and 29 March 2018  
11 May 2018  
(in Chambers)

**Before:** Employment Judge Batten  
Mrs P J Byrne  
Mr C S Williams

## REPRESENTATION:

**Claimant:** Mr B Henry of Counsel  
**1<sup>st</sup> Respondent:** No attendance  
**2<sup>nd</sup> Respondent:** In person  
**3<sup>rd</sup> Respondent:** Mr M Mensah of Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant suffered unlawful discrimination because of pregnancy in that the first and third respondents dismissed her because of her pregnancy.
2. The claimant was automatically unfairly dismissed because of her pregnancy.
3. The claimant's claim that she was subjected to a detriment by the respondents because of her pregnancy is not well-founded and is dismissed.
4. The case shall now proceed to a remedy hearing on a date to be fixed.

# REASONS

1. The case was listed for a 2 day hearing on 28 and 29 March 2018. The evidence and submissions were finished in the afternoon on 29 March 2018. Due to the time available and the issues involved, the Tribunal was unable to reach a judgment despite deliberations that afternoon. Accordingly the matter was listed for further deliberations in chambers on 11 May 2018.

## The Evidence

2. The Tribunal was provided with an agreed bundle of documents together with a list of issues and chronology prepared by Counsel for the third respondent. The list of issues was subsequently agreed at the beginning of the hearing with a couple of additions.
3. The claimant gave evidence by reference to a written witness statement and was subject to cross examination.
4. The first respondent is in insolvent Liquidation and did not attend or provide any evidence.
5. The second respondent appeared in person and produced a witness statement consisting of his responses to the claimant's witness statement which he had prepared shortly before the hearing. That document was exchanged and accepted as his evidence in chief. The second respondent was subject to cross-examination.
6. The third respondent tendered a witness statement together with copies of documents appended to his witness statement; many of those documents appeared also in the agreed bundle but were better copies thereof.

## The Issues

7. The List of Issues drawn up by counsel for the third respondent was discussed and agreed between the parties at the beginning of the hearing. The issues to be determined by the Tribunal were agreed to be as follows:

### Discrimination

- (1) Did the second respondent advise the claimant that if she were ever to become pregnant he would push her down the stairs?
- (2) Did the second respondent send a text message to the claimant once he had received a picture of the positive pregnancy test, which stated "ha ha, oh God, gonna push you down the stairs"?
- (3) On 6 July 2017, did the third respondent advise the claimant that "he could not afford to pay her anymore"?
- (4) On 6 July 2017, did the third respondent advise the claimant "I hope you don't go down that route"?

- (5) If the answer to any of questions 1-4 is yes, was that a detriment within the meaning of section 47C(2) (a) Employment Rights Act 1996?
- (6) Was the reason for the treatment that the claimant was pregnant? (Regulation 19(2)(a) Maternity and Parental Leave Etc Regulations 1999).
- (7) In the alternative, did any of the above amount to unfavourable treatment within the meaning of section 18(2)(a) Equality Act 2010?
- (8) Has the claimant been discriminated against in the protected period in relation to her pregnancy?
- (9) Was the claimant's dismissal on 10 July 2017 unfavourable treatment pursuant to section 18 Equality Act 2010?

#### Dismissal

- (10) What was the reason for dismissal?
- (11) Was it dismissal by reason of her pregnancy? (Section 99 Employment Rights Act 1996, regulation 20(1) Maternity and Parental Leave Etc Regulations 1999, section 18 Equality Act 2010)
- (12) Was the claimant automatically unfairly dismissed because of her pregnancy?
- (13) Was it a non discriminatory reason – dismissal by reason of redundancy as averred by the third respondent?

#### **Findings of Fact**

8. The Tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.
9. The findings of fact relevant to the issues which have been determined are as follows.
10. The claimant started working for the first respondent in November 2015 as assistant manager of The Wiend Bar in Wigan. This was a new venture by the first respondent company. The first respondent had four directors. The second and third respondents were two of those directors, with each having a 45% shareholding. The other two directors were the third respondent's wife and the second respondent's partner.
11. The third respondent invested money in The Wiend Bar and assumed liability on a personal basis for the lease. The third respondent also funded the refurbishment costs which turned out to be greater than predicted, resulting in the bar opening slightly later than planned.

12. The claimant was recruited to work at the Wiend Bar because she had previously worked with the second respondent at another bar. The claimant and second respondent had a friendly, informal relationship, and exchanged messages from time to time on social media. On occasions, they had a private joke about the claimant not wanting children.
13. The Wiend Bar business was projected to make a loss in the first year due to the repayment of loans, the cost of refurbishment and start up costs. Business projections were that revenue would be in the region of £9,000-£11,000 per week but it was soon clear that the bar was only achieving around £6,000 per week. As a result, it was not possible for the first respondent to start repaying the loans taken out in order to start up the business.
14. In May 2016, an employee was dismissed as redundant following customer complaints about her.
15. In August 2016, the respondents decided to cancel the Sky subscription and to increase the bar prices in an attempt to improve the turnover.
16. In January 2017, at a meeting between the claimant, the second respondent and one of the bar staff, it was decided that discounted drinks for staff should stop and that they should keep a close eye on the security of stock. By this time the business was struggling to pay suppliers and to meet the quarterly VAT payments.
17. In March 2017, the second and third respondents met to review the business. They realised that anticipated profits were not materialising and they considered cutting costs. The third respondent raised the possibility of making the claimant redundant. However, after a lengthy discussion, the second respondent persuaded the third respondent to retain the claimant. In part, this was because the second respondent's wedding was coming up and a honeymoon holiday and it was clear that the second respondent was not going to be working in the business for a significant period of time. When the second respondent was away, it was the claimant's role to deputise for him.
18. In May 2017, the respondents employed two new staff in the bar on a part-time basis.
19. On 20 June 2017, the claimant messaged the second respondent with a picture of a positive pregnancy test. She accompanied the picture with a joke about what she would do next in light of the news of her pregnancy. The second respondent replied, in a joking manner, "laughing", and then he messaged the claimant with "gonna push you downstairs".
20. On 21 June 2017, the third respondent's mother had a stroke and was rushed to hospital. Unfortunately she did not recover, was subject to palliative care and eventually died on 29 June 2017. As a result the second respondent, who was by then married to the third respondent's son, was not in attendance at work much because he was supporting his partner through his grandmother's ill health.

21. On 25 June 2017, the second and third respondents met for a family Sunday lunch and the second respondent told the third respondent about the claimant's pregnancy.
22. On 29 June 2017, the third respondent's mother sadly died.
23. Shortly after, the third respondent was approached by the proprietor of a restaurant situated across the road from The Wiend Bar. He asked the third respondent if The Wiend Bar was closing down and he reported that he had been in recently and there was very little stock on show.
24. The third respondent resolved to and did, on 30 June 2017, visit the bar and discovered that there was very little stock on the premises. The third respondent spoke to the second respondent who blamed the claimant for oversleeping and missing a delivery.
25. By 4 July 2017, the third respondent had resolved to contact the claimant about her future. He tried to contact her but could not get hold of her because she was at the doctors on 5 July 2017 and then on a booked holiday.
26. On 6 July 2017, the third respondent finally contacted the claimant by telephone, to discuss the lack of stock that he had found in the bar. The third respondent told the claimant that the business was in financial difficulty and that they could not afford to pay her anymore.
27. In response, the claimant pointed out that it was a coincidence and linked the termination of her employment to her pregnancy. The claimant said that she would be taking legal advice. The third respondent expressed his dismay and said that he hoped she would not go down that route.
28. On 10 July 2017, the third respondent sent the claimant a letter terminating her employment. The dismissal letter appears in the bundle at page 93 and points out that the venue had been struggling to pay its suppliers and quarterly VAT payments, with the third respondent and his wife bailing out the company. The letter also mentions the third respondent's visit to the venue to find only a single bottle of stock in the beer cellar and that this was apparently the "final straw". The third respondent commented that this was apparently because nobody had come in for the delivery. The letter then goes on to say:  
  
*"The bar could not carry on supporting both a manager and an assistant manager, so a decision had to be made quickly so we could make a fresh start."*
29. The third respondent's letter gives the claimant one week's notice so that her employment would end on 22 July 2017, following her current annual leave. The claimant was told that she would be under "garden leave" for her notice period to allow her to look for new work.
30. Following the claimant's dismissal the bar opening hours were reduced by 8 hours per week. However, the claimant's working hours were redistributed to other members of staff and the second respondent took on some of her duties. At a later date, the second respondent took a pay cut of £4,000 per annum in an effort to stem the losses.

31. However, on 26 October 2017, the first respondent company went into a creditor's voluntary liquidation.

### The Law

32. 'Pregnancy and maternity' is a protected characteristic under the Equality Act 2010. Section 18 of the Equality Act 2010 provides that a person discriminates against a woman if, in the protected period set out in section 18 (6) – from when the pregnancy begins and until the end of the additional maternity leave period or such earlier time as she returns to work – she is treated unfavourably because of her pregnancy or because of illness suffered by her as a result of it.
33. Section 109 of the Equality Act 2010 makes principals liable for discriminatory acts of an agent acting under the principal's authority and section 110 provides that where an employer or principal is liable for the discriminatory acts of employees and agents, the employees and agents may themselves be personally liable and it is not necessary to show that the employee or agent knew that the act was unlawful.
34. The burden of proof in relation to claims of discrimination brought under the Equality Act 2010 is found in section 136 and provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision.
35. Section 47C of the Employment Rights Act 1996 provides that an employee has the right not to be subjected to any detriment other than dismissal by any act or deliberate failure to act by their employer that is done because of pregnancy. The Maternity and Parental Leave etc Regulations 1999, Regulation 19, provides similarly.
36. Section 99 of the Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal of a prescribed kind. Section 99(3) (a) and (b) set out the prescribed circumstances to include pregnancy, childbirth, maternity and ordinary, compulsory or additional maternity leave. There is no minimum qualifying service.
37. The Tribunal also considered cases to which it was referred by Counsel for the claimant in submissions. The cases were:

Commissioner of Police of the Metropolis –v- Keohane [2014] ICR 1073  
O'Neill v (1) Governors of St Thomas More RCVA Upper School (2)  
Bedfordshire County Council [1996] IRLR 372

The Tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

### Submissions

38. Counsel for the third respondent submitted written closing submissions which he expanded upon orally. The Tribunal does not set out those submissions in full but, in brief, it was submitted that the letter of dismissal contained the third respondent's rationale for dismissal with clear reasoning. It was submitted that the third respondent had shown that the dismissal of the claimant was entirely unconnected to her pregnancy, that the claimant had accepted that it would have been difficult for the respondents to make the second respondent redundant because he was a director of the first respondent and he was able to discharge more duties than the claimant in any event. On the question of whether rotas and hours had been reduced, it was submitted that the second respondent was working more hours for less money and that the dismissal of the claimant had been on the respondents' agenda since March 2017. The Tribunal was reminded that it was not for the Tribunal to determine how the respondents should allocate their resources, whether to save money or to run their business. Finally, it was submitted that because a previous employee had worked shifts while pregnant, that was compelling evidence that the respondents did not have a problem with pregnant employees.
39. Counsel for the claimant produced a written skeleton argument which he spoke to and, in brief, submitted that the second respondent was merely an employee of the first respondent and the third respondent had written and signed the claimant's dismissal letter as agent for all the other respondents and consistent with his role as an active party; that this was a "reason why" case and that the Tribunal needed to look at why the respondents acted as they did, and that it was not necessary to confine that narrowly to whether the dismissal or any detriment was because of pregnancy. It was submitted on behalf of the claimant that the respondents' business ultimately did fail but that such an eventuality was not known at the time of the claimant's dismissal, and therefore the cause of her dismissal could not be said to be redundancy and/or the business failure. Counsel pointed to the coincidence in timing of the announcement of the claimant's pregnancy and, within two weeks, after being distracted by personal issues, the respondents moved swiftly to dismiss her. For the purposes of the burden of proof it was submitted that it was for the respondents to show that the claimant's dismissal was in no way because of her pregnancy, and that the suggestion of redundancy was at best a cover up and suggested the subconscious reason was pregnancy; the fact that redundancy had been talked about in March 2017 was not relevant and that what was different between March and July 2017 was not any significant downturn in the business but simply the fact that the claimant told the respondents that she was pregnant; that there were significantly no hallmarks of a redundancy dismissal: there was no warning, consultation, at risk letter, pooling or scoring and no consideration of suitable alternative employment or alternatives to redundancy. It was further submitted that it was clear from the evidence of hours worked and the rotas that there was not a need to reduce hours to any significant extent and that the arguments about saving money were not made out because the respondent made little or no savings through paying other staff to do those hours. Counsel for the claimant also pointed to haste with which the claimant was dismissed, in that the third respondent was chasing the claimant, when she was on holiday, and was unable to wait to tell her that she was dismissed. On that basis it was submitted on behalf of the claimant that pregnancy was the trigger for her dismissal and no other reason.

40. The second respondent relied upon submission made on behalf of the third respondent.

**Conclusions** (including where appropriate any additional findings of fact)

41. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.
42. In relation to the claimant's detriment claim, this was limited to 2 matters. The first and second allegations concerned the second respondent advising the claimant that if she were ever to become pregnant, he would push her down the stairs and the second respondent sending a text message to that end when she told him she was pregnant. However, the Tribunal did not find that a claim of detriment had been made out in relation to these. The Tribunal concluded that comments between the claimant and the second respondent were very much made in the context of a joke, albeit a joke that the Tribunal found difficult to comprehend. In particular, once the claimant had told the second respondent that she was pregnant, the joke about pregnancy was initiated by the claimant and jokey comments were first made by her. Further, in her evidence the claimant accepted that the comments were made in a jokey manner and were not serious, nor intended to be serious. On that basis the Tribunal could not conclude that the claimant's claim of detriment as a result of pregnancy was well-founded and that claim is dismissed.
43. The Tribunal found that the third respondent advised the claimant, on 6 July 2017, that the business could not afford to pay her anymore. In addition, when the claimant said that she would take legal advice, the Tribunal found that the third respondent commented to the claimant that he hoped she would not go down that route. However, the Tribunal did not find that these were matters of detriment in the sense of section 47C ERA. Rather, the Tribunal considered that Mr Douglas' comment to the claimant that he could not afford to pay her anymore was confirmation of his decision to dismiss her and therefore formed part of the act of dismissal. Further, the third respondent's comment to the claimant about not going down a particular route was in the context of discussions between them once the third respondent had told the claimant that he could not afford to pay her anymore, and therefore was not a detriment to the claimant per se, but was linked to the claimant's dismissal and the discussions around it at the time.
44. The Tribunal concluded that the claimant was dismissed because of her pregnancy. The Tribunal also concluded that the claimant's dismissal amounted to unfavourable treatment for the purposes of section 18 of the Equality Act 2010, and an automatic unfair dismissal pursuant to section 99 of the Employment Rights Act 1996. The Tribunal considered that the claimant would not have been dismissed at the beginning of July 2017, if she was not pregnant and that the timing of her dismissal, coming so soon after her announcement that she was pregnant, was significant. There was not a redundancy situation at that particular time as opposed to any other time. The Tribunal took into account that the business was not doing well and that there were financial pressures. The third respondent submitted that it was those financial pressures which caused him to decide to make the claimant redundant. That argument was rejected by the Tribunal. It did not explain why



he decided upon dismissal and acted in haste to carry it out when he did. In March 2017, there had been discussions between the second and third respondents about the business. The possibility of making the claimant redundant was raised then but they had decided not to proceed. In contrast, in June and July 2017, there was no such discussion between the second and third respondents but there was some haste in moving to dismiss the claimant alone. No procedures were followed: no warning; no consultation, no consideration of pooling or selection procedures; nor consideration of any suitable alternative employment. The third respondent was intent on dismissing the claimant as soon as possible.

45. The Tribunal was particularly concerned with the haste at which the third respondent moved to dismiss the claimant. She was on a pre-booked holiday at the beginning of July 2017 but, nevertheless, the third respondent pursued her by telephone as if desperate to communicate his decision to her. He had clearly by then made his decision and wanted to remove the claimant from the business.
46. In respect of the contention that there was a redundancy situation, the Tribunal was concerned at the numerous questions arising over the extent of the savings that could, in fact, be made if the claimant was dismissed, particularly in the light of the fact that other staff were allocated the claimant's hours and given extra shifts to cover the claimant's departure, even if those other staff might be working for a slightly lower hourly rate of pay.
47. The letter of dismissal, dated 10 July 2017, does not anywhere state that the claimant is being made redundant. It does refer to a member of staff having been made redundant in March 2016 but it does not say in clear terms that the same reason for dismissal is being applied to the claimant. At best, the letter makes much of the third respondent's visit to the bar to find stock deficiencies and the issue of nobody coming in for the delivery order. The letter also says that the bar could not carry on supporting both a manager and an assistant manager but then goes on to say that a decision had to be made quickly so that they could make a fresh start. It does not say specifically that the reason for the claimant is redundancy, but relies on an inference of misconduct in relation to the delivery order. In the respondents' evidence, much was made of the claimant's apparent failure to be available for a delivery on one date. However, the Tribunal rejected the respondents' case on this point, namely that the claimant was dismissed or alternatively caused or contributed to her dismissal because she had failed on one occasion to be available for a stock order. The circumstances of that failure were entirely unclear and did not become any clearer from the respondents' evidence which was confused and unreliable on that aspect.
48. The Tribunal was concerned at the variety of evidence from the third respondent as to the rationale for his decision to dismiss the claimant. The Tribunal rejected the third respondent's explanations and found that the announcement by the claimant that she was pregnant was the operative cause of the third respondent's decision to dismiss her, within a period of 2 weeks. The Tribunal noted that, within that 2 week period, the third respondent had family issues to deal with which caused a delay and that, absent those difficulties, the claimant may well have been dismissed sooner.

49. The Tribunal was shown a significant amount of evidence about the business finances and issues which had clearly been in existence for some time. The Tribunal was told that the business was unable to pay suppliers and/or the VAT, was buying stock on an ad hoc basis and sometimes on a daily basis from a local supermarket and from a discounted supplier, and that the business had been conducted in that manner for some time. The third respondent contended that the state of the business led him to dismiss the claimant. However, those circumstances had existed for some time. The only difference in July 2017, was the fact that the claimant had announced that she was pregnant. The Tribunal considered this to be the trigger for the claimant's dismissal. The Tribunal considered that the respondent had not demonstrated in its evidence that the claimant's dismissal was in no way connected to her pregnancy.
50. In all the circumstances, the Tribunal also concluded that the claimant's dismissal was an act of unfavourable treatment contrary to section 18 of the Equality Act 2010 and also an automatically unfair dismissal.
51. The Tribunal considered that the first respondent and third respondent were responsible for the claimant's dismissal. The second respondent had no part in the decision to dismiss the claimant, nor the carrying out of her dismissal, and therefore the second respondent can have no liability for that discriminatory act of dismissal.
52. In the circumstances, this case will now proceed to a remedy hearing which will be listed for one day, on a date to be fixed, when the claimant, the first respondent and the third respondent, are required to attend to address the issue of remedy.

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Employment Judge Batten

Date: 25 May 2018

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
6 June 2018

FOR THE TRIBUNAL OFFICE

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