



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101141/2022

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Held in Glasgow on 14 August 2022

**Employment Judge S MacLean
Tribunal Members L Millar and G McKay**

10 **Miss Sarah Twort**

**Claimant
In Person**

15 **Coasters Wine Bar Oban Ltd**

**Respondent
Not present and
Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that:

1. The Tribunal finds and declares that the respondent unlawfully discriminated against the claimant contrary to section 39 of the Equality Act 2010 and her complaint of discrimination contrary to section 18 of the Equality Act 2010 succeeds. The complaint under section 26 of the Equality Act 2010 is dismissed.

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2. In respect of unlawful pregnancy discrimination, the Tribunal orders that the respondent shall pay to the claimant compensation for loss of earnings amounting to £10,873.69.

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3. In respect of injury to the claimant's feelings, the respondent also orders that the respondent shall pay to the claimant a further amount of £7,000 for her injury to feelings.

4. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, it is further ordered that the respondent shall pay to the claimant the additional sum of £666.65 representing the total of:

- 5 a. interest of £290.76 on the claimant's loss of earnings of £10,873.69 calculated at the appropriate rate of interest of 8 percent each year by reference to the midpoint between 16 December 2021, the date of the discrimination and 18 August 2022 being the date of this Judgment; and
- b. interest of £375.89 on the injury to feeling award of £7,000 calculated at the appropriate rate of interest of 8 percent each year for the period between 16 December 2021, the date of the discrimination and 18 August 2022 being the date of this Judgment.
- 10 5. The respondent automatically unfairly dismissed the claimant contrary to section 99(3) of the Employment Rights Act 1996. The Tribunal orders the respondent to pay to the claimant a compensatory award for unfair dismissal. The Tribunal awards a basic award of £700 and an additional compensation £500 for loss of statutory rights under the provisions of the Employment Rights
- 15 Act 1996 as they have not already been awarded.
6. Under section 270A of the Trade Union and Labour Relations (Consolidation) Act 1992 the Tribunal adjusts the compensatory award by increasing it by £2,843.42 being a 25 percent uplift to the compensatory award for breaches by the respondent to follow the ACAS Code of Practice on Disciplinary or
- 20 Grievance Procedures.
7. Under section 38 of the Employment Act 2002 the Tribunal adjusts the compensatory award by increasing it by £700 for the respondent's breach of its duty to provide full and accurate written particular under section 1 of the Employment Rights Act 1996.

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REASONS

Background

1. In the claim form sent to the Employment Tribunal on 21 February 2022, the claimant, who was employed as a bar manager by the respondent from 30 March 2019 until 16 December 2021, claims that she was automatically
- 30 unfairly dismissed because the reason or principal reason for her dismissal

was pregnancy; alternatively unfair dismissal; harassment because of pregnancy/maternity; and pregnancy discrimination. The claimant seeks compensation.

2. In the response, the respondent denies that the claimant's dismissal was because of pregnancy. The respondent refers to an alleged incident on 12 November 2021 when the claimant did not charge for a number of drinks that were served to her boyfriend in the bar that evening. The respondent said that the staff had been warned about this practice and the following day the claimant was asked if her boyfriend had settled the bill for himself. The respondent says that the claimant lied about this and asserted that she had them on some form of tab known as a table. The amount paid by the boyfriend, the respondent says, was insufficient to pay the bill. The respondent said that it took the manager three weeks to come to her decision. She contacted the claimant around 6 December 2021 and asked her to come to the bar because there were a few things that were to be discussed. The claimant did not accept this offer and later that day said she was going off sick. The respondent received a sick line stating stress at work. The claimant was then absent from work. The respondent denies the dismissal for pregnancy discrimination.
3. At a preliminary hearing for case management on 21 April 2022, Employment Judge O'Dempsey issued orders about exchanging documents and for the respondent to prepare the agreed file of documents for the final hearing. The final hearing was scheduled to take place in person on 15 to 18 August 2022.
4. The claimant complied with the orders. The respondent failed to do so. On 28 July 2022, the Tribunal sent a letter to the respondent advising that Employment Judge Kearns was considering striking out the response on the grounds that there had been non-compliance with an order and that the response was not being actively pursued. The respondent was advised that it should write to the Tribunal by 4 August 2022 to advise whether or not it wished to put forward reasons in person why the response should not be struck out. No response was received by the deadline. Employment Judge Kearns directed that the issue of strike out of the response should be considered at the final hearing.

5. The respondent sent an email sent on 11 August 2022 advising that it would not be attending the final hearing. The email was not copied to the claimant.
6. At the final hearing, there was no appearance by or for the respondent. The claimant was present along with her witness Angus Clarke.
- 5 7. The Tribunal decided that notwithstanding that it had grounds to do so, it would not strike out the response. Instead, the Tribunal heard evidence from the claimant and her witness. The Employment Judge put to the claimant and Mr Clarke the statements set out in the response.
8. The Tribunal has set out the facts as found that are essential to its reasons and to understanding the important parts of the evidence. The claimant was invited to make submissions once the evidence was heard. As she was unrepresented she confirmed that she was content for the Tribunal to make its decision based on the evidence before it.
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9. As the respondent was not present and the claimant wanted written reasons the Tribunal reserved its judgment.
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Issues

10. The issues that the Tribunal had to determine were:
- a. Was the reason or principal reason for the claimant's dismissal related to pregnancy, childbirth or maternity?
- 20 b. What was the reason for dismissal? Was it (a) pregnancy or (b) conduct by the claimant? If (b), did the respondent had a genuine belief in that conduct and if so, was that belief based on reasonable investigation and grounds? Was a fair procedure followed? If conduct was a reason, was that a sufficient reason for dismissal having regard to all the circumstances of the case including the size and administrative resources of the respondent and having regard to equity and the substantial merits of the case.
- 25 c. Can the claimant rely on harassment under section 26 of the Equality Act 2010 (EqA) given that pregnancy and maternity is not listed in it as

a protected characteristic? If she can rely on section 26, was the claimant subjected to unwanted treatment related to a protected characteristic having the purpose or effect of creating a proscribed environment for her under section 26?

- 5 d. Was the claimant subjected to unfavourable treatment (dismissal and/or the other factual matters about which she complains) because of pregnancy within the terms of section 18 of the EqA?
- e. As compensation is being sought, is the claimant entitled to any and if so what compensation for the acts of unfair dismissal and/or
- 10 discrimination cited above?

Relevant law

11. Section 99(3)(a) of the Employment Rights Act 1996 (the ERA) provides that an employee will be regarded as unfairly dismissed if the reason or principal reason for the dismissal was pregnancy, childbirth or maternity.
- 15 12. Section 98 of the ERA set outs how a Tribunal should approach the question of whether a dismissal is fair. Section 98(1) and (2) provides that the employer must show the reason for the dismissal and it is one of the potentially fair reasons. If the employer is successful, the Tribunal must then determine whether the dismissal was fair or unfair under section 98(4).
- 20 13. Section 26 of the EqA provides that a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. The relevant protected characteristics are age, disability, gender
- 25 reassignment, race, religion or belief, sex and sexual orientation.
14. Section 18 of the EqA provides that a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, (A) treats her unfavourably, (a) because of the pregnancy or (b) because of an illness suffered by her as a result of it.

15. Section 39 of the EqA provides that the employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment.

Findings in fact

- 5 16. The respondent is a limited company carrying on business in the hospitality sector. Amanda MacPhail is a director of the respondent.
17. The respondent employed the claimant on 30 March 2019 to undertake bar work. She reported to Claire McIntyre who was then bar manager. The respondent did not issue the claimant with written terms and conditions of
10 employment.
18. After the lockdown in 2020, Ms MacPhail started working in the business on a daily basis and did most of the cooking.
19. The claimant had a very good relationship with Ms MacPhail. Around October 2020, the claimant was appointed as bar manager. The claimant enjoyed
15 working for the respondent and liked the responsibility which she had been given.
20. Between December 2020 and April 2021 there was a second lockdown. The claimant was on furlough.
21. From around June 2021 more employees were recruited to assist with the bar
20 work. The claimant and Ms MacPhail continued to work well.
22. Around September 2021 the claimant noted in the diary that she wished to take time off around 11/12 December 2021 as she was going to Edinburgh. At that point she was unaware of any Christmas bookings that weekend.
23. Around October 2021, the claimant was knew that she was pregnant. When
25 she was around seven/eight weeks pregnant, the claimant had a dating scan. She was informed that the baby was due on 10 June 2022.
24. The claimant knew that she had some scheduled antenatal appointments to attend. Accordingly after informing the family, the claimant wanted to tell Ms

MacPhail her news. Ms MacPhail anticipated what news the claimant was going to share. On being informed Ms MacPhail said that it would make it easier for her to sell the pub.

- 5 25. The claimant advised Ms MacPhail that she intended to work for as long as possible before the baby was born, probably up to 10 May 2022 and it was her intention to return to work.
- 10 26. In addition to the scheduled antenatal appointments the claimant had two or three emergency antenatal appointments due to breakthrough bleeding. The nearest maternity hospital was in Paisley. This involved the claimant having to arrange for a colleague to cover her shifts at short notice. The claimant was able to arrange cover but formed the impression that Ms MacPhail was not happy about it.
- 15 27. Mr Clarke was a regular customer at the bar. He works for a contractor on the Western Isles. He had done work in the past for Ms MacPhail who was also friendly with his father. Mr Clarke is the claimant's partner.
28. On Friday 12 November 2021, the claimant was working in the bar along with another colleague (the 12 November Incident). Ms MacPhail was working in the kitchen until around 8.30pm. There is CCTV camera in the bar area of which the customers and employees are aware.
- 20 29. Mr Clarke, arrived in the bar around 6.30pm. Shortly afterwards he was joined by Caitlin Burns, a friend who had previously worked in the bar. Ms Burns stayed for a couple of drinks and then left. Mr Clarke paid for Ms Burn's drinks while she was there. As it was a Friday evening, Mr Clarke was "a bit flush". He offered to buy drinks for other people and use a card or cash for payment as he went. He was served by the claimant and her colleague.
- 25 30. During the week commencing 15 November 2021, Ms MacPhail asked the claimant if Mr Clarke had paid for all the drinks as she did not see a table open for him.
- 30 31. The claimant contacted Mr Clarke who was working away on Coll. He sent the claimant a screenshot of the electronic payments that he had been made

that evening. The claimant informed Ms MacPhail that Mr Clarke was paying for drinks as he went along. The claimant heard no further about this and continued working as normal.

- 5 32. Around 5 December 2021 the claimant and Ms MacPhail exchanged messages about cover for the weekend of 11 December 2021 which had a Christmas booking for 24 people. The claimant referred to her pre-booked leave and suggested ways of cover. Ms MacPhail responded that that she felt that every time something was booked the claimant was taking time off and it was not fair. The claimant replied that this had been in the diary since
10 September and she had reminded Ms MacPhail of this the month previously. She said that Ms MacPhail was making her feel bad every time she booked time off. Ms MacPhail's position was the claimant was the manager not a part-time worker and she was not discussing this by message as she had "quite a few things to discuss which have bothered me for quite some time". She want
15 to do so in person.
33. Around 7 December 2021 the claimant had an appointment with the midwife who expressed concern about recurrent bleeding which was necessitating hospital visits. The midwife advised that this could be triggered by stress at work. She advised the claimant to take time off work to eliminate stress before
20 investigating other potential causes.
34. The claimant sent a message to Ms MacPhail stating that she had spoken to the midwife and GP and had been issued with a fitness note until 28 December 2021. The claimant said that she would hand in the fitness note and if Ms MacPhail wanted they could have a chat then.
- 25 35. The claimant handed in the fitness note but Ms MacPhail was not at the pub. The fitness note stated that the reason for the absence was "stress at work".
36. Around 10 December 2019 there was an message exchange between the claimant and Ms MacPhail about the claimant absence for "stress at work". The claimant explained that was what the GP wrote as there were various
30 reasons why she was off but not all were listed. Ms MacPhail was frustrated

that the claimant had not delivered the fitness note when she was in the pub. It was a sore point considering the claimant was “hardly ever here”.

5 37. The claimant responded that the only time she was not at work was when she was not well enough to come in. For once the claimant was putting herself before work. She did not know that she would be signed off work for three weeks. She felt terrible about leaving Ms MacPhail and her colleagues short staffed.

10 38. Around 12 December 2021 the claimant messaged Ms MacPhail to ask her to let the claimant know when she would be in the pub and free to discuss matters. Ms MacPhail did not respond. The claimant also messaged Ms MacPhail about the pub alarm going off and enquiring whether Ms MacPhail wanted to the claimant to go into the pub and switch it off. Again there was no response.

15 39. On 16 December 2021 the claimant messaged Ms MacPhail to request if it would be possible to use her remaining holidays rather than sick leave. No response was received.

40. On or around 21 December 2021, the claimant discovered that she had been removed from a work group chat.

20 41. In a message exchange on 21 December 2021, Ms MacPhail wrote that she had sent an email to the claimant on 16 December 2021 with a letter attached. The claimant checked her email account and advised Ms MacPhail that there was no email from her.

42. Ms MacPhail then sent an email attaching the following letter.

“Hi Sarah,

25 *I am afraid I am left no choice but to put this in writing as you are now on day 10 of you being off sick and have not yet come in to see me despite me being at work every day apart from the days we were closed.*

You did say you would come down and see me today, 2.30pm, I did message you to say that I had an appointment, no response from you.

I would have much rather done this face to face as I said in my message to you on 7 December so you had a chance to explain.

On 12 November, I believe you undersold drinks to Gus and Caitlin (not their fault at all) as you were the server.

5 *I did message you to ask if their bar tab was paid and you said it was and that you never let anyone leave without paying and Gus had paid for both his and Caitlin's drinks. On checking the next morning, I found a card payment for £22.35 of which I believe was the payment you took at 10.29pm, this does not cover in any way the drinks that were served to*
10 *them that night.*

If I am wrong and you can show me evidence that I am wrong, then please bring it to me, if not it leaves me no choice but to dismiss you from Coasters Bar effective from today, Thursday 16 December 2021.

15 *If you feel this is something you do not want to discuss with me, I will accept your notice rather than being dismissed. If you would like to discuss it then please come in and see me. I am still waiting on the accountants to stock check on the drinks to me hopefully not too long to wait now.*

20 *This is not the first time I have had suspicions of underselling. I feel I have no trust left in you in this case.*

Please come in and discuss this privately if you want to respond to my email.

Amanda”

43. The claimant was shocked and humiliated at receiving this email. The
25 claimant was unaware of any previous suspicion that Ms MacPhail had had of underselling. It had not been raised with the claimant. The claimant had continued to work in the pub for almost three weeks after the 12 November Incident. During this time there was no investigation of which she was aware. The claimant was not the only person serving Mr Clarke that evening. Ms

MacPhail had CCTV footage and would have been able to check who had been serving drinks to Mr Clarke and when he made payments in cash. The card payment of £22.35 was not the only card payment that Mr Clarke had made that evening. The claimant had endeavoured to meet with Ms MacPhail while she was absent on sick leave but Ms MacPhail had not responded to her messages

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44. The claimant contacted ACAS then sent an email to Ms MacPhail asking her to provide proof that the claimant had undersold drinks during the 12 November Incident. There had been no communication with the claimant about any previous suspicion that Ms MacPhail had and as far as the claimant was aware, no disciplinary investigation had taken place to prove the allegations. The claimant considered that she had doing nothing wrong during the 12 November Incident and it appeared that Ms MacPhail was highlighting concerns about the claimant's work since she had informed her about her pregnancy. The claimant said that she was suspicious that Ms MacPhail no longer wanted to employ her as she was pregnant and would have to pay maternity pay. The claimant asked that a fair and reasonable disciplinary procedure be followed. She did not intend to resign as requested.

45. On 23 December 2021 Ms MacPhail sent the claimant a screenshot of the drinks totalling £22.35. She said that she would email the claimant once she had advice. The claimant responded by referring to Mr Clarke's other bank transactions on 12 November 2021.

46. The claimant received no further response from the respondent. The claimant received a payslip on 7 January 2022. No payment was received into her bank account.

47. At the date of termination of employment the claimant was 21 years of age. She had two years' continuous service with the respondent. Her gross annual salary was £18,200 (£350 gross weekly pay). Her net weekly pay was £300.

48. The claimant was shocked that her dismissal. She struggled with the allegation that she had undersold drinks and that she had not been given any opportunity to clear her name. Her universal credit was affected because she

was treated as having payment from the respondent on 7 January 2022 that she had not received. She felt helpless because she could not get a job, she was unable to make any financial contribution and was relying heavily on Mr Clarke for support.

5 49. Since becoming aware of the termination of her employment the claimant has endeavoured to find alternative employment in hospitality, retail and cleaning services. The claimant has been unable to find alternative employment and she suspects that this is primarily due to the fact that employers were reluctant to employ her when it was apparent from her appearance that she was
10 pregnant.

50. The claimant's baby was born on 22 May 2022. The claimant was not paid statutory maternity pay because of her early dismissal. The claimant said that she intended to take 26 weeks' maternity leave starting from 10 May 2022.

Observations on evidence

15 51. The Tribunal considered that although the evidence of the claimant and Mr Clarke was unchallenged, they were candid. The Tribunal had no hesitation in finding them credible and reliable witnesses. It was apparent particularly in relation to how the dismissal had effected the claimant that they had not discuss their evidence.

20 52. The claimant gave evidence about comments made by Ms MacPhail in relation to pregnancy. Mr Clarke also confirmed the comment made by Ms MacPhail about the claimant's appearance after she became pregnant. While the Tribunal did not doubt that the comments were made the claimant did not take them seriously at the time as she believed that Ms MacPhail was joking.

25 53. While the Tribunal did not hear evidence from the respondent, the Employment Judge put to the claimant and Mr Clarke the points raised in the response. The Tribunal's impression was that the claimant and Mr Clarke had high regard for Ms MacPhail and were dismayed by what had happened. The claimant in particular had enjoyed working for Ms MacPhail and having been

bar manager was acutely aware that her absence had put strain on the remaining staff.

54. The Tribunal appreciated that the fitness note provided in December 2021 referred to “stress at work”. While the fitness note did not specifically refer to pregnancy, it was clear from the discussions and contemporaneous messages that the absence was related to the pregnancy as the claimant was having to attend emergency antenatal appointments due to bleeding and the cause of this was thought by the midwife and GP to be stress.

55. In relation to the 12 November Incident, the Tribunal understood that CCTV cameras operated in the pub. The claimant had been appointed bar manager since October 2020. She was not the only server in the bar that evening and she had been unaware of any concerns of underselling. The Tribunal found it surprising to say at the least that if those concerns were genuine, that Ms MacPhail allowed the claimant to continue to work another three weeks without undertaking an investigation or suspending her.

56. The Tribunal also felt that it was significant that Ms MacPhail did not request the claimant to come to a disciplinary meeting to discuss any allegations and took a decision to terminate the claimant’s employment without her having any opportunity to respond to the allegations and the outcome of any investigation.

Deliberations

57. The claimant brought claims under different statutory provisions relying on the same facts. The different claims involve different tests. The Tribunal decided to start with the claim of automatic unfair dismissal for an inadmissible reason because if that was successful then it would almost certainly amount to pregnancy discrimination and avoided the need to consider the alternative claim of unfair dismissal.

Pregnancy dismissal

58. Under section 99(3)(a) of the ERA an employee is regarded as unfairly dismissed if the reason or principal reason for the dismissal of the claimant related to pregnancy, child birth or maternity.

5 59. The Tribunal noted these material findings:

a. The claimant had a good working relationship with Ms MacPhail. The claimant had been promoted to the position of bar manager in October 2020. There had been no issues raised with the claimant about her conduct or performance. The claimant was unaware of any suspicions that Ms MacPhail had about underselling before the 12 November Incident.

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b. Ms MacPhail knew of the claimant's pregnancy from mid-October 2021.

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c. The claimant required to attend routine and unexpected antenatal appointments. Ms MacPhail commented negatively about the claimant arranging for colleagues covering shifts.

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d. Around mid-November 2021 Ms MacPhail raised with the claimant the alleged failure by Mr Clarke to pay for drinks while the claimant was a server. The claimant provided an explanation. No further action was taken by Ms MacPhail.

e. The claimant continued working until early December 2021 when the claimant was absent for three weeks for a pregnancy related absence.

f. While on sick leave the claimant attempted to contact Ms MacPhail but she did not reply.

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g. On 21 December 2021 the claimant discovered that she had been removed from a work group chat. The claimant then received a copy of a letter which Ms MacPhail claimed to have sent to her on 16 December 2021. The letter referred to the 12 November Incident. It advised that Ms MacPhail had no choice to dismiss the claimant

effective from 16 December 2021. The claimant was offered to resign rather than be dismissed.

5 h. The claimant replied saying that she was unaware of any disciplinary investigation. The claimant said that she thought Ms MacPhail was highlighting concerns about the claimant's work since she had informed her about her pregnancy. The claimant said that she was suspicious that Ms MacPhail no longer wanted to employ her as she was pregnant and would have to pay maternity pay. The claimant asked that a fair and reasonable disciplinary procedure be followed.
10 She did not intend to resign as requested.

i. Ms MacPhail responded that it had nothing to with pregnancy or sick absence. There was no further communication other than a "final" payslip referring to holiday pay which payment the claimant did not receive.

15 60. Given that the claimant had two years' service during which she had received no disciplinary sanctions relating to conduct or cautions about absence; had continued to work for the respondent for a further three weeks during which there was no investigation; and there was no disciplinary process, the Tribunal was unconvinced that the 12 November Incident was the reason or principal
20 reason for the dismissal. The Tribunal considered from its material facts that the reason for the dismissal was that the claimant was pregnant and had absences related to her pregnancy. The Tribunal concluded that the dismissal was automatically unfair.

61. Having reached that conclusion that the dismissal was automatically unfair
25 because it was because of an inadmissible reason the Tribunal did not need to consider whether the dismissal was unfair under section 98 of the ERA.

62. The Tribunal then turned to the claim under section 26 of the EqA. The protected characteristic that the claimant relied upon was pregnancy which is not listed as a protected characteristic under this section. The Tribunal
30 therefore dismissed the harassment claim.

63. Next the Tribunal referred to section 18 of the EqA and first considered if, during the protected period the respondent treated the claimant unfavourably because of her pregnancy.
64. The Tribunal was satisfied that dismissal amounts to unfavourable treatment and that the claimant's dismissal occurred during the protected period (beginning when the pregnancy begins and ends two weeks after the pregnancy ends). The respondent was aware of claimant's pregnancy at the time of her dismissal but denied that she was dismissed because of her pregnancy. The claimant disputed this.
65. In contrast to the automatic unfair dismissal claim the claimant's pregnancy did not need to be the reason or principal reason for the decision, but it must materially influence the respondent in this case.
66. It was for the claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination.
67. In recognition that the respondent did not admit discrimination the Tribunal referred to its primary facts set out in paragraph 59 from which inference could be drawn.
68. The Tribunal was of the view that considered cumulatively these facts from which the claimant has proved from which the conclusion could be drawn that there was discrimination because of pregnancy.
69. Given that the Tribunal turned to consider the explanation provided by the respondent. The respondent provided no evidence. Its position was that the reason was conduct related to the 12 November Incident. The Tribunal was unconvinced of that for the reasons set out in paragraph 60.
70. The Tribunal concluded that the respondent failed to show that the claimant's dismissal was in no sense whatsoever on the grounds of pregnancy. The Tribunal felt that the claimant's pregnancy was a significant influence on Ms MacPhail's decision-making and was indeed the reason or principal reason for the claimant's dismissal.

71. Having concluded that the respondent treated the claimant unfavourably because of her pregnancy the Tribunal moved onto consider the question of remedy.
72. As the Tribunal upheld the complaint of discrimination under section 18 of the EqA the Tribunal considered that it was appropriate in its judgment to make a declaration to that effect. The claimant did not seek a recommendation. She is no longer employed by the respondent. The Tribunal therefore did not consider this further.
73. The claimant did not seek reinstatement or re-engagement. She seeks compensation. Where an award of compensation falls to be awarded in respect of the provisions of the ERA relating to unfair dismissal and the EqA the Tribunal should not award compensation under either of those Acts in respect of any loss or other matter which has been taken into account under the other.
74. The Tribunal asked what financial loss has the claimant suffered as a result of her dismissal?
75. The claimant's last day of employment was 16 December 2021. She planned to work until 10 May 2022 (her expected start date of maternity leave). The claimant earned £300 net per week. Her loss of earning in this period was 20 weeks plus 5 days making a total of £6,214.29.
76. The claimant intended to go on maternity leave from 10 May 2022. She was not paid statutory maternity pay because of her early dismissal. She therefore lost up to 26 weeks made up to £1,620 (6 weeks at £290 – 90% of weekly pay before tax) and £3,039.40 (20 weeks at £151.97) making a total of £4,659.40.
77. Given the availability of jobs in the hospitality section the Tribunal was optimistic that the claimant will be able to find alternative employment at the end of her maternity leave. The claimant did not seek future loss in her schedule of loss.

78. The Tribunal considered whether the claimant had mitigated her loss by considering what a reasonable person would have done if they had no hope of seeking compensation from their previous employer.
79. The Tribunal accepted the claimant's evidence about her attempts to find alternative employment. It was obvious to the Tribunal that the claimant wanted to work and needed to feel that she was making a financial contribution to the household. While the Tribunal acknowledged that the pandemic had a significant impact on employment that was less so in the sector that the claimant worked. The Tribunal however did not underestimate the challenges that the claimant faced when advising prospective employers that she had was expecting a baby in June 2022.
80. The Tribunal next considered whether to make an award be made for injury to feelings and if so, what is the appropriate Vento band?
81. An award for injury to feelings is compensatory. It should be just to both parties. It should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.
82. The Tribunal reminded itself that an award of injury to feelings is to compensate for "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression." (see *Vento v Chief Constable of West Yorkshire Police* (No. 2) [2002] EWCA Civ 1871 [2003] IRLR 102).
83. In *Vento*, the Court of Appeal observed there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the

highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

84. For claims presented on or after 6 April 2021, the Vento bands are now a lower band of £900 to £9,100 (less serious cases); a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and an upper band of £27,400 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.
85. The claimant sought an injury to feeling award of £27,400 which is in the upper Vento band. This is not a case in which the claimant has suffered a course of discriminatory conduct on the ground of her pregnancy. The Tribunal considered that there was one act of discrimination: dismissal. Ms MacPhail knew that the claimant was already experiencing pregnancy related illness. She was not given any notice of the termination of her employment nor was she given an opportunity to respond to the allegations for which the respondent purported to dismiss her. The claimant did not receive final payments due to her and this affected her universal credit which cause financial worry and stress.
86. In the Tribunal's judgment this is a case that appropriately falls into the upper lower band of the Vento guidelines. The subjective feelings described by the claimant in her evidence at the final hearing were entirely plausible and credible. The evidence of Mr Clarke as to the effect the dismissal had on the claimant was compelling. The claimant was a committed employee who was loyal to Ms MacPhail. While the Tribunal appreciated the challenges under which the hospitality industry has been operating it could not understand why Ms MacPhail acted in the way she did. It was astounding that Ms MacPhail did not even offer to meet with the claimant even when being told that the claimant had not received the email attaching the letter. On one hand the respondent had not embarked on a lengthy campaign of discriminatory treatment to merit an award at the top band. On the other hand, the respondent's failings were not insignificant. This placed the case in the Tribunal's judgment in the upper lower band of Vento.

87. The Tribunal considered that it was plausible and credible that the claimant would be shocked to discover that she was dismissed while she was absent from work. She would feel hurt feelings being told by Ms MacPhail that she suspected of previous underselling and was being dismissed without any reasonable investigation or disciplinary process. Knowing that stress was impacting on the claimant's pregnancy Ms MacPhail acted capriciously in terminating the claimant's employment in the manner that she did.
88. Applying a broad brush, the Tribunal assess the amount payable to the claimant for injury to feelings as £7,000 and that is the amount the Tribunal ordered the respondent to pay to the claimant.
89. The Tribunal turned to the question of interest. It is empowered to make an award of interest upon any sums awarded pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The rate of interest prescribed by regulation 3(2) is each year the rate fixed for the time being, currently an amount of eight percent in Scotland.
90. Under regulation 6(1)(a) for an award of injury to feelings the period of the award of interest starts on the date of the act of discrimination complained of and ending on the day on which the Tribunal calculates the amount of interest. In the case of other sums of damages or compensation and arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the calculation. The mid-point date is the date halfway through the period beginning on the date of the act of unlawful of discrimination and ending on the date of calculation. For the purposes of both awards the date of calculation is 18 August 2022 being the date of this Judgement.
91. Where the Tribunal considers that a serious injustice would be caused, if interest were to be awarded for the periods in regulation 6(1) and (2), it may, under regulation 6(3), calculate interest for a different period, as it considers appropriate. The Tribunal received no submission to that effect from either party, and it did not consider it appropriate to do so. The Tribunal cannot alter the interest rate of eight per cent each year, as that is prescribed by law, and

it is a matter in respect of which it has no judicial discretion to vary the interest rate, only the period to which that rate refers.

- 5 92. Accordingly, the appropriate rate of interest is eight percent. The Tribunal orders the respondent to pay the claimant the additional sum of £290.76 representing interest on the claimant's total loss of earnings of £10,873.69, calculated by reference to the mid-point between 16 December 2021 (the claimant's dismissal) and 18 August 2022 a period of 245 days. The mid-point is 122 days. The Tribunal's calculation is $(£6,214.29 + £4,659.40) £10,873.69 \times 0.08 \times 122/365 \text{ days} = £290.76$.
- 10 93. Further the Tribunal orders that the respondent shall pay to the claimant the additional sum of interest upon the injury to feelings award of £7,000 calculated at the appropriate rate of interest of eight percent for the period between 16 December 2021, the date the claimant's dismissal and 18 August 2022 being the date of this Judgment, a period of 245 days. The Tribunal's calculation to is $£7,000 \times 0.08 \times 245/365 \text{ days} = £375.89$.
- 15 94. Adding the two interest amounts together the total interest payable is £666.65.
95. The Tribunal then turned to consider what could be awarded under the provisions of the ERA that has not already been awarded.
96. The claimant was entitled to a basic award for unfair dismissal based on her age, length of service and gross weekly wage. The Tribunal calculated this at 2 weeks' pay at £350 that is £700.
- 20 97. In addition to the compensatory award already calculated the claimant was also entitled to a sum for the loss of her statutory rights. The Tribunal calculated this at £500. The claimant did not receive any payment in lieu of notice. The Tribunal did not consider that it was just and equitable to make any reductions.
- 25 98. The Tribunal considered that there had been a complete failure by the respondent to follow the ACAS Code of Practice on Disciplinary or Grievance Procedures in that it failed to investigate and establish the facts; inform the claimant of the allegations; hold a meeting with her to discuss the problem;
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inform the claimant of the true reason for her dismissal; provide her with the right of appeal and the right to be accompanied. In the circumstances the Tribunal decided under section 270A of the Trade Union and Labour Relations (Consolidation) Act 1992 to uplift the compensatory award by 25 percent: that is £2,843.42 ($£10,873.69 + £500 = £11,373.69 \times 25\%$).

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99. Finally under section 38 of the Employment Act 2002 the Tribunal must award compensation to the claimant where there is a successful claim, including unfair dismissal and it is evident that the respondent is in breach of its duty to provide full and accurate written particular under section 1 of the ERA. The minimum award is two weeks' gross week pay, that is £700. The Tribunal adjusts the compensatory award by this amount.

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100. The Tribunal made no deductions for any contributory fault by the claimant.

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Employment Judge: S MacLean
Date of Judgment: 19 August 2022
Entered in register: 22 August 2022
and copied to parties