# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Hamilton

**Respondent:** Zoe Loftus t/a Love2Dye

**HELD AT:** Manchester **ON:** 5, 6 and 7 July 2017

**BEFORE:** Employment Judge Franey
Mr G Skilling
Ms B Hillon

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** In person

# WRITTEN REASONS

These are the written reasons for the judgment delivered orally with reasons on 7 July 2017, and sent to the parties in writing on 13 July 2017.

**Introduction**

1. These proceedings began with a claim form presented on 16 November 2016 in which the claimant complained of unfair dismissal and pregnancy discrimination when dismissed from her employment as a stylist with the respondent with effect from 3 August 2016. The claim form said that the claimant had informed the respondent that she was pregnant, had met with a negative response and had then been dismissed a few days later. There were also two complaints of harassment related to sex in the reaction of the respondent when informed of the pregnancy, and complaints in respect of notice pay, payslips and failure to provide a written statement of terms. Finally, the claimant alleged that the respondent had made unlawful deductions from her pay by failing to pay her for all the hours she worked, and that as a consequence her holiday pay had been underpaid upon dismissal.

2. By her response form of 19 December 2016 the respondent resisted the complaints on their merits. The respondent said that the dismissal was a fair

dismissal for gross misconduct unrelated to pregnancy. Any harassment or discriminatory treatment was denied. The claimant had voluntarily chosen to work more hours than agreed for the purposes of training and there had been no unlawful deductions from pay.

3. The claims pursued and the issues which arose were clarified by Employment Judge Sherratt at a preliminary hearing on 30 January 2017. The case was listed for a three day final hearing to determine all matters in dispute.

## Issues

4. At the outset of our hearing we discussed with the parties whether the issues remained as identified by Employment Judge Sherratt. The claimant confirmed that in addition she was still pursuing her complaint in relation to a failure to supply payslips. She did not pursue, however, a complaint that the respondent had failed to give written reasons for her dismissal because she acknowledged that her email requesting written reasons had been sent to the wrong email address.

5. It followed, therefore, that there were eleven liability issues to be determined by the Tribunal, of which the first ten were drawn from the Case Management Order:

**(1) Was the reason or principal reason for dismissal a reason connected with the claimant's pregnancy, rendering the dismissal automatically unfair?**

**(2) If not, could the respondent show a potentially fair reason relating to conduct?**

**(3) If so, was the dismissal for conduct fair or unfair?**

**(4) In dismissing the claimant did the respondent treat her unfavourably because of her pregnancy contrary to section 18 Equality Act 2010?**

**(5) Did the respondent subject the claimant to harassment contrary to section 26 Equality Act 2010 in comments made to her on 29 July 2016 when informed of the pregnancy?**

**(6) Did the respondent subject the claimant to harassment on 29 July 2016 in engaging in an exchange with her husband about the claimant's pregnancy by means of facebook or text messages?**

**(7) Did the respondent breach the claimant's contract by dismissing her without notice?**

**(8) Had there been a series of deductions from pay made in the two years prior to the presentation of the claim form because the respondent only paid the claimant for 16 hours per week when she worked for longer than that each week?**

**(9) Depending on the outcome of the previous issue, did the respondent fail to pay the claimant the amount of holiday pay to which she was entitled on termination of employment?**

**(10) Was the respondent in breach of her duty to provide the claimant with a written statement of the main terms of employment?**

**(11) Was the respondent in breach of her duty to give the claimant an itemised pay statement?**

6. We agreed at the outset of the hearing that any matters relating solely to remedy would be left for consideration once the Tribunal had announced its findings on liability.

**Evidence**

7. The parties had agreed a bundle of documents which ran to over 300 pages. Some documents were added by agreement to the end of that bundle. Any reference in these reasons to a page number is a reference to that bundle unless otherwise indicated.

8. In addition we were provided with a copy of the salon appointments book and any reference to that document will be by reference to the relevant date.

9. During the hearing the respondent offered to show the Tribunal how notifications appeared on her mobile phone, but after consideration we declined this offer because the mobile phone in question was not the same mobile phone as the respondent had been using at the relevant time. In any event the relevant settings are frequently ones which can be altered by the user. We did not consider that this evidence would have had any significant probative value.

10. We heard from five witnesses in person, each of whom gave evidence pursuant to a written witness statement. The claimant gave evidence herself and also called her sister, Wendy Coffey, who accompanied her at the dismissal meeting. The respondent gave evidence herself and also called her husband, Lee Loftus, who was the author of the messages which the claimant claimed to have seen, and her mother-in-law, Beverley Loftus, who had also attended the dismissal hearing.

11. The Tribunal also had a witness statement from Courtney Rowan provided by the respondent. Ms Rowan was not called to give evidence and we attached less weight to her witness statement than if she had done so.

**Relevant Legal Principles**

Unfair Dismissal

12. The right not to be unfairly dismissed arises under Part X of the 1996 Act. It was common ground here that the claimant had that right and had been dismissed.

13. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

14. If the reason or principal reason is pregnancy dismissal is automatically unfair by virtue of section 99 which so far as material reads as follows:

> **"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—**
>
> **(a) the reason or principal reason for the dismissal is of a prescribed kind, or**
>
> **(b) the dismissal takes place in prescribed circumstances.**
>
> **(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State."**

15. Those regulations are the Maternity and Parental Leave etc Regulations 1999 ("MAPLE") of which regulation 20 provides so far as material:

> **"(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if —**
>
> **(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), ……..**
>
> **(2) ……..**
>
> **(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—**
>
> **(a) the pregnancy of the employee…"**

16. If the reason or principal reason is not pregnancy, the fairness of the dismissal is considered under section 98.

17. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code of Practice on Disciplinary and Grievance Procedures is admissible in evidence and the Tribunal must take into account any provision which appears relevant.

Pregnancy Discrimination – section 18 Equality Act 2010

18. Discrimination by way of dismissal of an employee is rendered unlawful by Section 39(2)(c) of the Equality Act 2010.

19. Discrimination in this context is defined by Section 18(2)(a), which is headed "Pregnancy and maternity discrimination: work cases":

> **"(1) This section has effect for the purposes of the application of Part 5 (work) 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 hers, A treats her unfavourably —**
>
> **(a) because of the pregnancy, or**
>
> **(b) because of illness suffered by her as a result of it."**

20. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason

why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see for example the decision of the Employment Appeal Tribunal ("EAT") in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed. Unlike the test for unfair dismissal, the pregnancy need not be the principal reason for the decision as long as it has had a material influence upon it.

Harassment section 26 Equality Act 2010

21. The definition of harassment appears in section 26 which so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are …sex".**

22. In **Grant v HM Land Registry [2011] ICR 1390** the Court of Appeal said of the phrase "intimidating, hostile, degrading, humiliating or offensive environment" in section 26:

> **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**

23. An employer is liable for her own actions and for those of her employees in the course of their employment. If someone else acts on her behalf she may also be liable if that person acted as her agent (section 109).

24. Both Equality Act complaints must be approached in accordance with the burden of proof provision in section 136:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**

> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

25. Section 136 goes on to provide that an Employment Tribunal is treated as a Court for these purposes.

26. Guidance as to the application of the burden of proof was given by the Court of Appeal in **Igen Limited v Wong [2005] IRLR 258**, and in **Madarassy v Nomura International PLC [2007] ICR 867**, the Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. The guidance to be derived from these decisions was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37.** In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question.

Unlawful Deductions

27. The right not to suffer unlawful deductions from pay arises under Part II of the Employment Rights Act 1996. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by her. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

28. It was common ground here that the claimant was entitled to be paid the national minimum wage.

Notice Pay

29. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

30. An employee is entitled to notice of termination in accordance with her contract (or the statutory minimum notice period under section 86 Employment Rights Act 1996 if that is longer) unless the employer establishes that she was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Holiday Pay

31. A failure to pay holiday pay in respect of annual leave accrued but untaken at termination can be pursued as a complaint of unlawful deductions from pay or under the Working Time Regulations 1998. In this case it was agreed that the respondent had paid the claimant holiday pay due to her unless the claimant succeeded in

establishing that she was entitled to be paid for 26.5 hours per week instead of 16 during her final leave year, in which case there would have been an underpayment.

Written Statement of Terms

32. If another complaint succeeds, section 38 of the Employment Act 2002 requires a Tribunal to award either two or four weeks' pay to an employee if at the date of presentation of the claim form the employer was in breach of the obligation under section 1 Employment Rights Act 1996 to give a written statement of the main terms of employment. That duty does not apply if there are exceptional circumstances which would make it inequitable to make such an award.

Itemised Pay Statements

33. Section 8 of the Employment Rights Act 1996 obliges an employer to give an employee an itemised pay statement at or before each payment of wages or salary. A failure to do so can lead to a reference to an Employment Tribunal under section 11. The remedy under section 12(3) is by way of a declaration. The Tribunal may also order the employer to pay to the employee any deductions made in the 13 weeks before the presentation of the claim form if those deductions were not notified to the employee by an itemised pay statement.

**Relevant Findings of Fact**

34. This section of our reason sets out the broad chronology of events over which there was no significant dispute. Any matters of central importance which were the subject of a dispute of fact will be addressed in our discussion and conclusions section.

Background

35. The respondent is a sole trader operating a hairdressing salon in North Manchester. The claimant started to work for the respondent on an unpaid voluntary basis in April 2014, when she was aged 24. After 12 months she was formally taken on as an employee. She was the first person the respondent had employed, and the respondent had never previously been an employee herself.

36. In September 2015 Courtney Rowan started as an apprentice. As well as the claimant and Ms Rowan, there were other stylists working there on a self-employed basis from time to time.

Hours of Work

37. No written statement of the main terms of employment was provided to the claimant by the respondent. The respondent did not know that she was legally obliged to do that. The agreement between them was entirely verbal.

38. It was common ground that from 22 April 2014 onwards the claimant was paid for 16 hours per week, and that she actually worked more hours than that. She worked 34.5 hours per week for the first two years, then in April 2016 her hours reduced to 26.5 per week. Those figures were not challenged by the respondent.

39. Where the parties differed was in the nature of that extra work. The claimant said that it was agreed she would be paid for those extra hours and that she expected to be paid in due course. That formed the basis of her complaint that there had been a historic underpayment of her wages. In contrast the respondent maintained that it was agreed the claimant would only ever be paid for 16 hours per week, and that the additional hours worked by the claimant were voluntary hours for her own benefit for training purposes. We will return to this dispute in our conclusions.

Payslips

40. Payslips were generated by the accountant providing payroll services to the respondent throughout the period and they consistently showed a figure of 16 hours per week at the minimum wage rate from time to time. The claimant maintained that she was never given any payslips until he final payslip. The respondent maintained that the claimant was given payslips for the first year or so, but kept leaving them lying around the salon. After that point the respondent said it was agreed that the payslips would be available to the claimant on demand. We will return to that dispute in our conclusions.

Previous Pregnancy 2015

41. In October 2015 (page 159) the respondent told her accountant that the claimant was about seven weeks' pregnant. The claimant was certified unfit for work on account of pregnancy induced vomiting between 26 October 2015 and 9 November 2015 (page 239). That pregnancy had to be terminated because of health concerns arising from a tumour.

June 2016

42. In June 2016 the salon moved premises. Prior to that date the staff had been in the habit of using the respondent's mobile telephone for the purpose of client bookings. The salon website which allowed bookings was linked to that mobile phone. The staff knew the pass code for the respondent's mobile phone for that purpose.

43. At a staff meeting on 29 June, however, the respondent told staff that there was now an iPad available and they all had an app on their mobile phones which linked to the website. Although staff were not expressly told they should no longer access the respondent's mobile phone, the need for them to do so had passed. However, the respondent did not change the pass code for her mobile phone, and remained in the habit of leaving it by reception in the salon.

29 July 2016

44. In the summer of 2016 the claimant became pregnant again. She experienced some sickness. On 29 July 2016 she went into work at about 9.30am and told the respondent that she was pregnant. It was common ground that the respondent immediately replied, "Why have you done that?".

45. The dispute was over whether the respondent made a further comment to the effect that she was going to have to replace the claimant. This was an important dispute of primary fact and we will return to it in our conclusions.

46. After that discussion the claimant returned to work.

47. Later that morning the claimant was sitting at the reception desk in the salon. The respondent's mobile telephone was on the counter. She saw that a message had come through on it. The claimant's case was that on the notification screen (i.e. without having to touch the phone) she saw that there were two messages from the respondent's husband. They were messages sent via Facebook. According to the claimant, one said that the respondent and her husband would not be able to go on holiday to Florida because the claimant was pregnant, and the other was telling the respondent not to let the claimant sit down just because she was pregnant.

48. This account was hotly disputed by the respondent. Her case was that any messages which came up on her lock screen could not be read without opening the telephone and accessing the messages app. She told us that the messages which were sent and which the claimant saw were produced in the bundle at page 240, which was a screenshot taken by her husband from his Facebook page some weeks later. The first two messages were redacted on the copy produced. The respondent said this was because they were messages before the claimant arrived at work.

49. The next message was from Mr Loftus. It was not timed. It read as follows[1]:

> **"well we fucked bye bye florida not going you ruined everything like ya mates wedding again leave me out of it dont wanna no"**

50. There were then two further messages from him which on the screenshot were untimed but which on page 241 appeared on the respondent's phone with times. The first at 11.34am on 29 July 2016 read as follows:

> **"defo not going florida i will take kids away when i can"**

51. The second at 11.43am read:

> **"DO NOT LET THEM stand around need 2 builds ther clients up or ther hours are cut tell them I said kids gonna be gutted"**

52. The next message was a reply from the respondent at 11.53am simply telling her husband to "fuck off". He responded immediately with a message saying:

> **"u prick wasnt blaming u wont be going Florida u have your hol with Lou."**

53. The respondent's case was that she had not told her husband of the claimant's pregnancy until early afternoon. It was simply the continuation of an argument they had been having the previous night about how a planned holiday to Florida could not happen because the respondent's business was taking up too much of her time. Mr Loftus gave evidence to the same effect.

[1] In all these quotations from messages the original spelling and grammar will be retained.

54. The dispute as to what the claimant actually saw is a matter to which we will return in our conclusions. What was common ground, however, is that the claimant was angry or upset at what she saw and that she went to speak to the respondent about it. There was no-one else present. The claimant said she had seen messages on the respondent's phone. The discussion became heated on both sides. It ended with the claimant saying that she wanted to leave to go to the Job Centre for advice. She alleged that the respondent grabbed her arms to stop her going but this was denied.

30 July – 2 August 2016

55. After the claimant left the premises the respondent spoke to her accountant and the following morning posted a letter to the claimant which appeared at page 244. In its entirety the content of the letter was as follows:

> **"Due to the incident that took place on 29/7/16 you are required to attend a meeting with myself on Wednesday 3/8/16 at 16:30 at Love2Dye."**

56. The claimant certified herself unfit for work that day. Her stepfather took the certificate in. There was a text exchange between the claimant and the respondent at mid morning between pages 247 and 249.

57. On 2 August 2016 the claimant was paid as normal (page 250).

3 August 2016

58. The claimant attended a meeting on 3 August 2016. She got her sister, Mrs Coffey, to accompany her. She had prepared a letter to hand over during the meeting. The letter appeared at pages 252-253. The relevant parts read as follows:

> **"On 29 July I told you in confidence I was pregnant. Your response was 'what have you done that for?'. Shortly after your phone bleeped with a message. I looked at your phone as I always have in case it was a client. This has always been done. [I looked at it] to see a very nasty message off Lee. This not only annoyed me it upset me. I spoke to you about it and an argument erupted. I didn't think you should have told anyone as this was private and confidential. You Zoe then grabbed me. I then said I'm going to the Job Centre for advice. You told me to go…"**

59. When the respondent saw that the claimant had come with her sister she got her mother-in-law, Mrs Beverley Loftus, to attend the meeting as well. Beverley Loftus had been at the salon for a hair appointment.

60. No notes were kept of the meeting and no letter was issued following it. It was common ground that there was discussion of the claimant's letter summarised above, and that the respondent began the meeting by talking about her concern that the claimant had viewed messages on her phone. Mrs Coffey told us in her oral evidence that during the meeting the claimant said that when she had told the respondent of the pregnancy, the respondent had said that she was going to have to replace the claimant. The respondent had a form (which was not produced to our hearing) for the claimant to sign to enable her to resign and be paid notice pay, but the claimant refused to sign it. She wanted more time to consider it which the respondent would not allow. The claimant was told that if she did not sign the form she would be dismissed for gross misconduct. As she did not sign the form that is

what happened. This was never confirmed in writing, but a P45 was issued on 5 August 2016 at pages 257-260.

61. There was an exchange of texts immediately after the meeting. It appeared at page 250. The claimant's text at just after 5.00pm said:

> **"The offer you gave me to resign I should have been allowed 14 days to respond to not to be put on the spot and given an answer there and then."**

62. The response seven minutes later from the respondent said she could only go off what she had been advised.

63. The claimant was provided with a final payslip dated 5 August 2016 (page 261) which paid her for two weeks of holiday pay (32 hours).

## Submissions

64. At the conclusion of the evidence each party made a brief summary of their case, assisted by the Employment Judge.

Respondent's Submission

65. The respondent emphasised that the reason for dismissal was not pregnancy but the conduct of the claimant on 29 July. That included telling family members of what she had seen on the texts, walking out when there were clients in the salon in the middle of their appointments, and deliberately accessing private messages on the respondent's mobile phone. This was said to be gross misconduct which meant that no notice pay was due.

66. In relation to the allegation of harassment, the respondent denied that she had used the words alleged on 29 July, or that there had been any text exchange with her husband about the claimant's pregnancy. The texts about not going to Florida were a continuation of an ongoing row with her husband.

67. The respondent accepted that she had not provided a written statement of terms to the claimant, simply because she did not know it was required, but said that payslips had been given to the claimant for the first year of employment until it was agreed they would be available on demand.

68. In relation to hours of work, the respondent submitted that the claimant had never complained about working so much unpaid time and it was inconceivable that she would have done so for so long without a complaint. There had been no underpayment and the holiday pay had been correctly calculated.

69. In relation to remedy issues that might arise depending on our findings on liability, the respondent submitted that if the dismissal was found to be for misconduct but procedurally unfair, compensation should be limited because a fair procedure would have made no difference. The respondent accepted she had not been aware of the ACAS Code of Practice.

70. She also submitted that compensation should be reduced or extinguished because the claimant was guilty of contributory fault in leaving the salon without

permission on 29 July and in accessing private messages on the respondent's mobile phone.

Claimant's Submission

71. For her part the claimant submitted that the real reason for dismissal was pregnancy. This was evident from the respondent's initial reaction, and from the fact that the text messages produced by the respondent were not the messages which she had seen on the mobile phone. The concern about accessing messages on the phone was not genuine because staff had been allowed to do that for some time and never been told to stop doing it. It was therefore an automatically unfair dismissal and pregnancy discrimination. In the alternative the claimant said that if the reason was conduct the procedure was unfair.

72. The claimant maintained that she had never been given a payslip until the final payslip containing holiday pay.

73. The claimant said that there had been no gross misconduct on her part which justified dismissal without notice. As for the hours she worked, she would not have worked all those extra hours in return for no payment because the amount of training needed was much less than that. The reason she had not made any complaint was that she enjoyed working in the salon and needed the money and she trusted the respondent as a friend to pay her for the extra hours in due course. This meant that the holiday pay had also been under calculated.

74. She maintained that the respondent had told her that she would have to be replaced and that this and the mobile phone messages amounted to harassment.

75. On remedy issues the claimant submitted that there should be no reduction in compensation to reflect what would have happened after a fair procedure because the real reason for dismissal was pregnancy. There should be no reduction for contributory fault either.

**Discussion and Conclusions on Liability**

Introduction

76. As a general observation, the task of the Tribunal in this case was made more difficult by the lack of documentation. There was no written statement of the terms of employment. There were no notes of the key meeting on 3 August. There was no letter of dismissal. That means that the disputes of fact had to be resolved by the Tribunal looking carefully at the credibility of the witnesses on each side and at any ancillary documents that there might be.

Comment Made 29 July 2016

77. Before addressing the legal issues, however, it was necessary for us to make one finding of fact: what did the respondent say on 29 July 2016 when first told of the claimant's pregnancy?

78. It was common ground that the initial response was to say "Why have you done that?" The respondent explained that she made that comment as a reference to the claimant's personal circumstances in the recent past. She denied going on to say words to the effect of "I'm going to have to replace you" as the claimant alleged. There was no-one else present at that meeting.

79. Mrs Coffey said in her witness statement and in her oral evidence that the claimant told her that evening that the respondent had made a comment about replacing her. She also told us in response to a question from the Tribunal that the claimant said at the meeting on 3 August that that comment had been made.

80. We noted, however, that the claimant did not mention that comment in her letter prepared for the meeting on 3 August that appeared at page 252. That was a surprising omission for such an important matter. We also noted that the written witness statement from Courtney Rowan said that after that discussion the claimant told her that the respondent had been fine about her pregnancy. There was a conflict of evidence.

81. Overall, however, on the balance of probabilities we decided that the respondent did say something to the effect of

> **"Why have you done that? It means I'm going to have to replace you".**

There were a number of factors combining to cause us to take that view.

82. Firstly, we were influenced significantly by Mrs Coffey's evidence about what the claimant said that evening and on 3 August: that was credible evidence which was not challenged.

83. Secondly, the claimant explained that page 252 was intended to be a brief account, and we concluded that by the time she came to write it the Facebook messages were the major concern in her mind, not what had been said in that initial discussion.

84. Thirdly, it would not be a surprise if a small employer reacted in that way to news that the employee was pregnant, especially where on her case the respondent was benefitting from 10½ hours each week unpaid from an employee who would now be going on maternity leave.

85. Fourthly, we declined to attach any weight to Ms Rowan's witness statement because she was not called to give evidence and therefore the claimant had no opportunity to challenge the evidence she gave.

<u>Issue (1) – Reason for Dismissal</u>

86. We turned to the issues for us to determine as set out above. The first issue was the reason for dismissal. Was the principal reason connected to pregnancy, as the claimant maintained, or was it the way the claimant had behaved on 29 July? Identifying the reason for dismissal is a question of identifying the set of facts or beliefs in the respondent's mind which caused her to dismiss the claimant.

87. The Tribunal considered the events leading up to the meeting on 3 August. The respondent said in evidence that she had only intended to have a chat with the claimant but we rejected that. We concluded that the purpose of the meeting was to bring the claimant's employment to an end. We reached that conclusion for the following reasons.

88. Firstly, the wording of the letter of 30 July at page 244 required the claimant to attend. It was not just a casual invitation to come in for a chat which might just as well have been issued by text or email. Sending a letter to the claimant was a big step for the respondent.

89. Secondly, the respondent told us in her evidence that she had taken advice from ACAS and spoken to an employment lawyer before the meeting. In her evidence she said the employment lawyer told her that having issued the letter of 30 July she could no longer maintain that the claimant had resigned on 29 July.

90. Thirdly, and importantly, the respondent had prepared a form for the claimant to sign resigning on notice and wanted the claimant to sign that form at the meeting.

91. So although we accepted the respondent was surprised the claimant attended with Mrs Coffey, which prompted her to get Mrs Beverley Loftus to accompany her during the meeting, we concluded that the respondent intended the meeting with the claimant to be a way to bring the claimant's employment to an end. She wanted to persuade her to resign; it was not just to have a chat.

92. Against that background we turned to the core question: what was the principal reason in the respondent's mind for dismissing the claimant? We found unanimously that the principal reason was the claimant's pregnancy and its impact on the business. Any annoyance at the claimant having seen the messages from her husband was a subsidiary concern. We reached that conclusion for these reasons.

93. Firstly, as explained, we found that the respondent did react to news of the pregnancy by making a comment about having to replace the claimant. Her immediate thought, perhaps understandably, was about the negative impact the pregnancy would have on the business.

94. Secondly, there was no mention of gross misconduct in the invitation letter at page 244. It gave no hint that the respondent thought the claimant might have committed misconduct in relation to viewing messages or leaving the salon.

95. Thirdly, we had other reservations about how candid the respondent was in her evidence to our hearing. As explained, we concluded the meeting was not intended just to be a chat. The resignation form had been prepared and the purpose of the meeting was to bring the claimant's employment to an end. Further, there were serious discrepancies in the Facebook messages disclosed by the respondent at pages 240-241. Page 240 had been redacted and we did not have the full exchange. Page 241 was not consistent with page 240 and on the respondent's own case some individual messages had been deleted, meaning that page 241 was not a full picture either. The text of the first two of Mr Loftus' messages at page 240 was consistent with there being a new development in the ongoing overnight discussion about whether the family holiday to Florida could go ahead and it appeared to us

from the content of those messages that another reason why it could not happen had been identified that morning. On the respondent's case it was the demands of the business which prevented the family holiday, but that very morning she had been informed of a further very significant issue affecting her business, namely the claimant's pregnancy. It is inconceivable in our judgment that she would not have mentioned that when she spoke to her husband in the middle of the morning. We concluded that the respondent did tell Mr Loftus that the claimant was pregnant and that this resulted in further messages from him, including but not limited to those on page 240.

96. We were driven to conclude that the claimant did see two messages which have not been disclosed which referred expressly to her pregnancy and the fact that because of the pregnancy they could not go to Florida and that the respondent should not just let the claimant sit around. Those messages had been removed from the material before us and we rejected the respondent's contention that page 240 was a complete record.

97. For those reasons, therefore, we concluded that the respondent began the meeting on 3 August by referring to the Facebook message issue not because that was her main concern, but as a means to pressure the claimant to get her to resign. The principal reason in the respondent's mind for wanting to terminate employment was the claimant's pregnancy and its effect on the business. As a consequence the dismissal was automatically unfair under section 99 Employment Rights Act 1996.

Issues (2) and (3): Fairness

98. Had we found that the reason for dismissal was the conduct of the claimant on 29 July including accessing messages on the mobile phone, we would have found it unfair anyway. The basic requirements of fairness set out in the ACAS Code had simply not been met. However, that was an academic issue given our finding as to the principal reason. Issues 2 and 3 fell away.

Issue (4): Pregnancy Discrimination

99. The dismissal was clearly unfavourable treatment. The question was the reason for the dismissal. This was a different test from that required under the unfair dismissal provisions. The question was not whether pregnancy was the principal reason but whether it had a material influence on the decision. However, it followed inevitably from our finding as to the reason for the dismissal that the claimant's pregnancy did have a material influence on the decision: it was the predominant influence. The section 18 claim therefore succeeded. The dismissal amounted to unfavourable treatment because of pregnancy.

Issue (5): Harassment (Comments)

100. Harassment arises where the respondent subjects the claimant to unwanted conduct related to sex which violates the claimant's dignity or creates an intimidating, hostile or humiliating environment for her. The Tribunal found as a fact that the respondent did say words amounting to:

> **"Why have you done that? It means I'm going to have to replace you".**

101. This was unwanted conduct and related to sex because it arose out of the claimant's pregnancy. We were satisfied, however, that the respondent did not have the purpose of harassing the claimant; it was simply a genuine, candid initial reaction to the news. The question therefore was whether it had the effect of creating the necessary environment.

102. Looking at the matter overall and taking into account the matters which section 26(4) requires us to take into account, we decided that the comment did not have that effect. It was not serious enough to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment.

103. We took into account the claimant's perception. The real offence to the claimant was caused later on that morning by sight of the Facebook messages. It was not the comment itself that caused any significant offence.

104. We took into account the other circumstances of the case. The respondent is a small employer. She only has two employees so understandably she was very concerned at the impact the news of the pregnancy might have on her business.

105. Finally, we took into account whether it would be reasonable for those words to have that effect, and applying the guidance from the Court of Appeal in **Grant v HM Land Registry** that it is important not to cheapen the import of the words in section 26, we decided that the words used by the respondent did not have the effect required and therefore there was no harassment of the claimant in this respect.

Issue (6) Harassment – Messages 29 July 2016

106. For reasons explained above, we were satisfied that we did not see the full Facebook message exchange that morning.

107. Nevertheless, this allegation could not succeed against the respondent because of anything that Mr Loftus did: he was neither the respondent's employee nor her agent. She is not legally responsible for what he does under section 109.

108. That might explain why the allegation in the claim form was about the respondent's participation in that Facebook message exchange. However, there was no evidence before us of any inappropriate texts or messages by the respondent about the claimant. We were satisfied that all the respondent did was to tell her husband that the claimant was pregnant so that was another reason why the trip to Florida could not happen. Therefore this allegation of harassment against the respondent failed as well.

Issue (7) Notice Pay

109. An employee is entitled to be given notice of dismissal unless the employer can prove that the employee was guilty of gross misconduct which entitles the employer to dismiss her without notice. The allegation of gross misconduct in this case had three elements.

110. The first was that the claimant had committed gross misconduct by telling her family about the Facebook messages. Given our finding about the content of the messages it was not gross misconduct to do that. The claimant was understandably concerned about her position and in so far as she told her immediate family including her sister about that, it could not possibly be regarded as gross misconduct.

111. The second element was that she had left the salon leaving clients in the middle of their appointments. We found as a fact that the respondent did say the claimant would leave to go to the Job Centre. In any event, in view of the Facebook messages from the respondent's husband this would not have been gross misconduct. Those messages were hugely upsetting for the claimant.

112. The third element was the allegation the claimant had accessed private messages on the respondent's mobile phone by unlocking it and having a look at the messages rather than simply seeing what came up on the notification screen. This Tribunal found as a fact the claimant did not do this. We were satisfied that she only saw notifications on the locked screen. The claimant did not access the respondent's phone beyond looking at it to see if a client had left a message.

113. Therefore the respondent failed to establish the claimant had committed gross misconduct and the claimant is entitled to two weeks' notice pay.

Issue (10) Written Statement of Terms

114. It was common ground that no written statement was issued. The respondent explained she was simply unaware of the obligation to do that. It appears the respondent did not make enquiries about her responsibilities once she became an employer of staff. There was no effort to put anything in writing at all, not even confirmation of the start date, the terms of employment and rates of pay. It was not a partial but a wholesale failure to comply. Therefore the Tribunal considered it just and equitable to make the higher award of four weeks' pay in respect of that failure.

Issue (11) Payslips

115. The respondent produced payslips generated by her accountant, but the key question was whether they were given to the claimant or not. The claimant said that she had not received any payslips until the final payslip showing holiday pay. The respondent said that she had been given them in the first 12 months but had left them lying around and therefore it was agreed she would only be given them on request thereafter.

116. In general terms for the reasons explained above we preferred the claimant's evidence to that of the respondent. There were some matters on which the respondent did not give reliable evidence. Although that does not mean that all her evidence should be disbelieved, it weighed in the balance against her account. In the absence of any evidence of the payslips being sent by post or email we found as a fact that they were not given to the claimant until the very last payslip.

Issue (9) Arrears of Pay

117. Section 23(4)(a) of the Employment Rights Act 1996 limits this complaint to the period of two years before the claim form, so the period with which we were concerned ran from 17 November 2014.

118. The parties were agreed that the claimant was paid 16 hours per week at the prevailing minimum wage rate. They were also agreed that the claimant did more work than that. The dispute was whether those extra hours were part of her job and something for which she would eventually be paid, or whether they were voluntary extra unpaid hours benefitting the claimant by giving her more training opportunities.

119. Provision of a written statement of the main terms of employment would have avoided this dispute. In the absence of any written statement we had to resolve the issue on oral evidence alone. There was no clear detailed evidence of the words used in the verbal agreement and nor had any third person given any evidence about this. It was the word of the claimant against the word of the respondent, evaluated against the background circumstances. Those circumstances included documents in two categories: payslips and benefit claim forms.

120. The payslips supported the respondent. They consistently showed payment for 16 hours per week. However, the claimant said that she knew the respondent could not afford to pay more at that stage so waited to be paid. As the respondent pointed out, there was no record of any complaint by the claimant, and it would appear at first sight odd that she was working many more hours each week on her case without complaining about the lack of payment. However, the claimant explained that she needed the job; she needed the 16 hours per week that were guaranteed for payment; she liked working at the salon and she trusted the respondent as a friend. In our judgment that was a credible reason for not pursuing the matter formally. They were clearly close until the end of July 2016.

121. The respondent also relied on the fact that on the benefit claim forms, such as the housing benefit form that we saw, the claimant put her hours down as 16 each week. The claimant said that was all she was getting paid for so there was no point putting any more down. Again we found that to be a credible explanation for someone completing forms for benefits in that way.

122. So overall we concluded that the documents did not tip the balance strongly in either direction and we were left to decide this issue based on the plausibility of each side's case.

123. We unanimously concluded on the balance of probabilities that the claimant had been truthful about the arrangement and it was a term of the unwritten contract that she would be paid for her extra hours in due course. We reached that conclusion for these reasons:

(1) The claimant had already done a year's unpaid work before she started employment.

(2) The claimant accepted there were some model days where customers could come in at a discount rate so she could practice, but she said

these ended shortly after she started her paid employment in April 2014. That was consistent with the only evidence we were taken to in the bundle, which was page 269, of a model day in August 2014. We were satisfied there were none after November 2014.

(3) It was not credible in our judgment that the claimant would need so much training that it took 18.5 unpaid hours a week for two years and then 10.5 unpaid hours a week for a further four months or so.

124. Accordingly in our judgment for each week of the claimant's employment from 16 November 2014 the respondent paid her less than the amount properly payable under her contract, and therefore there was a series of unauthorised deductions from 16 November 2014 to 3 August 2016. That complaint succeeded.

Issue (8) Holiday Pay

125. The holiday pay claim in the Schedule of Loss was put on the basis of a different calculation of hours and of days owing, but the claimant did not provide any evidence about that in her witness statement. The only issue in our hearing was whether she was entitled to be paid for 26.5 hours or 16 hours at the time her employment ended. For the reasons explained we concluded that she was entitled to be paid for 26.5 hours and therefore she should have been paid for 53 hours of untaken holiday (representing two weeks) and not 32 hours. The complaint of unlawful deductions from holiday pay succeeded too.

**Remedy**

126. Having delivered oral judgment on liability with reasons, the Tribunal addressed the question of remedy. We discussed the issues with the parties and identified those matters in dispute and those which were not. We then heard oral evidence from the claimant on the disputed matters and submissions from each party on those matters. The result of that exercise was as follows.

Payslips

127. Section 12(3) of the Employment Rights Act 1996 requires the Tribunal to make a declaration if itemised pay statements have not been provided, but an order for repayment of unnotified deductions can only be made for the period of 13 weeks preceding the presentation of the claim (section 12(4)).

128. We granted a declaration that the respondent failed in her duty to provide itemised pay statements to the claimant. No order for the reimbursement of unnotified deductions was made because none had occurred in the 13 weeks prior to the presentation of the claim form on 16 November 2016.

Written statement of terms

129. The gross weekly pay to which the claimant was entitled at termination was 26.5 hours at £7.20 per hour, making a total of £190.80. We awarded four weeks' pay making a total of £763.20.

Arrears of pay

130. This complaint was brought under Part II of the Employment Rights Act 1996. Although the time limit is three months from the date upon which a deduction is made, where there has been a series of deductions time runs from the last one in the series. We were satisfied that throughout the period with which we were concerned (November 2014 onwards) there had been an unlawful deduction each week and therefore a series of deductions was established.

131. Under section 24 the remedy is to order the employer to pay to the worker the amount of any deduction made in contravention of section 13. Those awards are made in gross terms so that the employer can deduct tax and national insurance. The claimant did not seek any award in relation to financial losses as a consequence of such deductions.

132. The appropriate amount payable here was determined by reference to the National Minimum Wage legislation. Accordingly we had regard to the provisions of the National Minimum Wage Act 1998 and regulations made under it.

133. To calculate the amount due to the claimant by way of arrears of pay we applied the formula set out in section 17 of the National Minimum Wage Act 1998 as amended by section 8 Employment Act 2008. For each period covered by a rate of the National Minimum Wage we identified what the claimant should have been paid in that period, deducted what she had actually been paid, and then divided the difference by the National Minimum Wage rate at the time before multiplying it by the current National Minimum Wage rate. That is the formula which appears in section 17(4). As this produced a higher figure than the unaltered difference we awarded the higher figure.

134. For the period between 17 November 2014 and 30 September 2015 (45.5 weeks) the National Minimum Wage rate was £6.50 per hour. The claimant should have been paid for 34.5 hours each week in that period. Her entitlement was £10,203.38. She was paid for 16 hours each week during that period which is a total of £4,732.00. The difference is £5,471.38. Dividing that figure by 6.50 then multiplying it by 7.50 (the current minimum wage rate) produced a figure for that period of £6,313.13.

135. For the period between 1 October 2015 and 31 March 2016 (26 weeks) the applicable rate was £6.70 per hour. On a 34.5 hour week that would have resulted in a payment of £6,009.90. The claimant was paid for 16 hours each week in that period making a total of £2,787.20. The difference of £3,222.70 when divided by 6.70 but multiplied by 7.50 made a loss of £3,607.50.

136. For the period between 1 April 2016 and the termination of employment on 3 August 2016 (17.86 weeks) the applicable rate was £7.20. The claimant should have been paid for 26.5 hours each week in that period. That would mean she should have been paid £3,407.69. Instead she was paid for only 16 hours for each week in that period, £2,057.47. The difference of £1,350.22 is divided by 7.20 and multiplied by 7.50 to make a total of £1,406.48.

137. The three figures added together made a total of £11,327.11 and we ordered the respondent to reimburse the claimant that figure as a gross payment (i.e. before making deductions for tax and national insurance).

Holiday Pay

138. This was pursued as a complaint of unlawful deductions from pay governed by section 24 of the Employment Rights Act 1996. Holiday pay appears as one of the examples of sums payable as wages under section 27(1)(a).

139. Based on our finding that the claimant was entitled to be paid for 26.5 hours each week at dismissal, she should have been paid the total of £190.80 reflecting the two weeks of accrued but untaken annual leave for which she was paid. Although the claimant's Schedule of Loss argued for a higher figure, the claimant produced no evidence in support of that. The claimant should have been paid £381.60. She was actually paid £230.40 (page 261). We awarded her the difference of £151.20 as a gross figure prior to deductions.

Notice Pay

140. The measure of loss in a breach of contract claim is the amount needed to put the claimant in the same position as if the respondent had not breached the contract. This means identifying the net benefits which the claimant would have received had she been allowed to work her two week notice period, but giving credit for any sums earned from other employment during that period which would not have been received had she remained employed by the respondent. The Tribunal awards a net figure.

141. The claimant was entitled to two weeks' notice. Working 26.5 hours per week at the minimum wage rate of £7.20 per hour would give her a net weekly income of £186.50. That would produce a figure for notice pay of £373. However, in the last few days of the notice period the claimant generated earnings from her mobile hairdressing in the sum of £49 (page 284). We deducted this figure and awarded the claimant damages for breach of contract in the net sum of £324.00.

Unfair Dismissal

142. The claimant did not seek re-employment with the respondent and we did not consider it appropriate to make any such order. Instead we applied the provisions as to financial compensation which appear in sections 118-126 of the Employment Rights Act 1996. Section 126 prevents the Tribunal awarding the same compensation for unfair dismissal and discriminatory dismissal and we decided to make the award of loss of earnings under the discrimination jurisdiction. We applied the formula for the basic award in section 119, and for the compensatory award we applied section 123(1), restricting our award to one for loss of statutory rights.

143. There was no issue with the basic award which was agreed at two weeks' gross pay at £190.80 per week. We awarded £381.60.

144. In relation to the compensatory award the claimant sought £500 for loss of statutory rights but the Tribunal decided to award her £400 to reflect the fact it will

take her two years in a new job to build up the right not to be unfairly dismissed and other employment rights dependent on length of service.

145. For reasons explained in our conclusions on breach of contract (see above) we decided that the claimant had not been guilty of any contributory fault and therefore there was no reduction to the basic or compensatory awards. We rejected the claim made in the Schedule of Loss for an uplift because of an unreasonable failure by the respondent to follow the ACAS Code of Practice because this was not a disciplinary procedure. Had we found that it had been a misconduct dismissal an increase in the compensatory award would have been appropriate.

Pregnancy Discrimination

146. The law we applied can be summarised as follows.

147. The starting point is section 124 of the Equality Act 2010:

> **(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
>
> **(2) The tribunal may—**
>
> **(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;**
>
> **(b) order the respondent to pay compensation to the complainant;**
>
> **(c) make an appropriate recommendation.**
>
> **…….**
>
> **(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court or the sheriff under section 119.**

148. The amount of compensation in cases of discrimination should be calculated in the same way as damages in tort: **Ministry of Defence -v- Cannock & Others [1994] ICR 918**. A Tribunal should determine what loss, financial and non-financial, has been caused by the discrimination in question. The EAT stated "as best as money can do it, the applicant must be put into the position she [or he] would have been in but for the unlawful conduct." The tribunal must ascertain the position that the claimant would have been in had the discrimination not occurred. Tribunals can award full compensation for the loss suffered.

149. In relation to an award of compensation for injury to feelings, the onus is on the claimant to establish the nature and extent of the injury to feelings. The amount of the award under this head should be made taking into account the degree of hurt, distress and humiliation caused to the complainant by the discrimination. In **Armitage Marsden & HM Prison Service -v- Johnson (1997) ICR 275** a number of principles were identified which can be summarised as follows:-

134.1 Awards for injury to feelings are compensatory not punitive.

134.2 Awards should not be too low, as that would diminish respect for the policy of anti-discrimination legislation (see **Alexander -v- The Home**

**Office [1998] IRLR 190 CA)**. Nor should they be so excessive as to be viewed as "untaxed riches".

134.3 Awards should be broadly similar to the whole range of awards in personal injury cases.

134.4 Tribunals should remind themselves of the value in every day life of the sum they have in mind.

134.5 Tribunals should bear in mind the need for public respect for the level of awards made.

150. In **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102** the Court of Appeal gave guidance as follows in paragraphs 65-68:

> **65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **i) The top band should normally be between £15,000 and £25,000. Sums in this range 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. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.**
>
> **67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.**
>
> **68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."**

151. Subsequently in **Da'bell v NSPCC [2010] IRLR** in September 2009 the EAT said that in line with inflation the **Vento** bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000. However, a Tribunal is not bound to consider the effect of inflation solely pursuant to **Da'Bell:** see

**Bullimore v Pothecary Witham Weld Solicitors and another [2011] IRLR 18** paragraph 31.

152. The Court of Appeal confirmed in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879** that the 10% uplift established by the Court of Appeal for personal injury cases in **Simmons v Castle [2012] EWCA Civ 1288** should apply to awards for injury to feelings and injury to health in discrimination complaints.

153. Finally, interest on discrimination awards is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Where an award is made the Tribunal must consider awarding interest but has a discretion whether to make any award. For injury to feelings awards interest is in principle calculated over the period between the discriminatory act and the award (Regulation 6(1)(a)); for financial loss compensation the period is between the mid-point date and the award (Regulation 6(1)(b)). However, a different approach to the relevant periods can be used in order to avoid serious injustice (Regulation 6(3)). The applicable rate for cases where the claim form was presented prior to 29 July 2013 is the Special Investment Account rate as it has varied over time (0.5% per annum since 1 July 2009). For cases where the claim form was presented on or after that date it is the rate prescribed by the Judgments Act 1838 (currently 8% per annum).

154. Dealing first with injury to feelings, we heard evidence on oath from the claimant and she was cross examined by the respondent. We found as a fact that she had been stressed and upset by her dismissal, particularly because she had been friends with the respondent and had worked there for some years. She was also vulnerable at the time because of her pregnancy. This made the injury to feelings worse because she was worried about her future with a baby on the way. The claimant was certified unfit for work by her GP due to “stress” for two weeks the day after her dismissal (page 256), although she was able to start her mobile hairdressing work a few days before the end of that period. The claimant suffered from sleepless nights and symptoms of stress and it was a few months before she was over that.

155. The claimant argued that the appropriate award should be £10,000. The respondent submitted it should be in the lowest band under **Vento**. We decided that an award of £6,000 was appropriate. This was in the lowest band because this was essentially a one-off act of discrimination. However, it was towards the top end of that band because the claimant was vulnerable at the time, she was certified unfit for work due to stress the day after the dismissal, and we accepted her evidence that it was some months before she recovered. In setting that figure we also took into account the effect of inflation on awards for injury to feelings since **Vento** was decided, and we also applied the 10% uplift pursuant to the recent decision in **De Souza**.

156. We calculated interest on the award for injury to feelings at the rate of 8% per annum for the 334 day period between 3 August 2016 and 7 July 2017. The annual figure for interest is £480 and the figure for 334 days is £439.23.

157. We then turned to the question of financial loss flowing from the dismissal. It was necessary to approach this in different periods.

158. We did not make any award for the period up to 18 August 2016 as that period was covered by the award in respect of notice pay.

159. We considered the period between 19 August and 25 December 2016 as that was the period for which the claimant would have carried on working before starting her maternity leave. That was a period of 18.57 weeks during which the claimant would have been entitled to have been paid £186.50 per week net from the respondent had she remained in employment. We were satisfied that there was no basis on which we could conclude her employment would have ended any earlier had she not been the victim of pregnancy discrimination.

160. The issue between the parties was on the extent of mitigation of loss in that period. The claimant started work as a self-employed mobile hairdresser on 15 August. The payments she received were recorded at pages 284-287 in the bundle, being extracts from her diary showing the work she did, the amount paid but what she had to pay out by way of expenses. In the first week she made a loss because she took £63 but had to spend £66.52 on equipment. We ignored that week. Thereafter in the second week she generated £70 in income but had £6.19 in expenses. There was no income in the following week and only income of £18 in the week between 5 and 10 September. The claimant did not produce any records beyond 10 September, but she said that her earnings from the mobile work remained at roughly the same level until she began her maternity leave at Christmas.

161. In cross examination the respondent pointed out that the claimant had a tax credit award for the year 6 April 2016 to 5 April 2017 at page 291 which showed that her income from self employment in that year would be £3,200. We inferred that this represented income of approximately £92 per week in the period from 4 August 2016 to 5 April 2017. The tax credit notice said it was based on an estimate provided by the claimant. The claimant said that she had not worked out those figures and that in any event they had been subsequently corrected because they were based on the assumption she would continue earning at the same rate throughout the rest of that financial year. She said a revised version had been produced recognising that she stopped working at Christmas but that was not produced to us.

162. The respondent also put to the claimant that she had tips on top of what she had recorded in her figures but the claimant said that the mobile clients did not tend to give her tips. There was no evidence that any tips had been received.

163. Putting these matters together we decided to proceed on the basis of the actual figures produced by the claimant and to use the figures from the second week of her self-employment as a mobile hairdresser. That produced a figure of net earnings each week of approximately £60. We accepted what the claimant said about the tax credit notification figure being an estimate which was later corrected. Accordingly we reduced the claimant's net loss of earnings in this period by £60 per week from £186.50 to £126.50. For the period of 18.57 weeks this made a financial loss of £2,349.11.

164. We rejected the respondent’s contention that the claimant had failed to mitigate her loss in this period. The claimant had sought work in other salons but being visibly pregnant she did not find it possible to find that work. We concluded

she acted reasonably in seeking to generate earnings from mobile hairdressing, by advertising via her mother's Facebook page, for the period of approximately four months before her maternity leave would begin. We awarded her £2,349.11.

165. For the period between 25 December 2016 and our hearing on 7 July 2017 the loss was very limited. The claimant was in receipt of maternity allowance throughout the period. She would have been in receipt of statutory maternity pay throughout the period had she remained in employment. The only loss was that for the first six weeks of statutory maternity pay she would have been on 90% of her earnings with the respondent but there was no loss thereafter. In that six week period she would have received £167.85 per week, making a total of £1,007.10, but credit had to be given for the flat rate maternity allowance payment which she did receive of £139.58, making a total of £837.48. For this period we decided to award her the difference of £169.62.

166. This meant that the total award for past financial losses was £2,349.11 plus £169.62 making a total of £2,518.73. Interest on this figure ran from the mid point date, a total of 167 days. The annual rate of interest at 8% per annum is £201.50, and from the mid point date the total interest was £92.19.

167. We did not make any award for losses after our hearing. The claimant said she did not wish to pursue this as it seemed likely from her evidence that she would be able to find employment at or above the same level by the time her maternity allowance ended in September.

168. The Schedule of Loss included mention of a recommendation sought by the claimant but the claimant did not pursue that at our hearing.

169. It followed, therefore, that the award for pregnancy discrimination was £6,000 for injury to feelings, interest on that figure of £439.23, £2,518.73 for financial losses up to the date of our hearing, and interest on that figure of £92.19. There was no award for future loss. The total award was £9,050.15.

Employment Judge Franey

14 July 2017

WRITTEN REASONS SENT TO THE PARTIES ON
19 July 2017

FOR THE TRIBUNAL OFFICE