Case No: EA-2019-000687-VP(Previously UKEAT/0296/19/VP)
EA-2019-000722-VP (Previously UKEAT/0297/19/VP)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 December 2021

Before :

THE HONOURABLE MR JUSTICE GRIFFITHS

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Between :

(1)SIR BENJAMIN SLADE BARONET **(2)ANDREW HAMILTON**	**Appellant**
- and -	
(1)MELISSA BIGGS **(2)ROXANNE STEWART**	**Respondent**
(3) AETHELBERT LIMITED	**Respondent**

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Jeremy Lewis (instructed by Russell-Cooke LLP) for the **Appellant Sir Benjamin Slade Bt**
H F Cottam (of Resolve Law Group**)** for the **Appellant Andrew Hamilton**
Lucinda Harris (instructed by Astons Solicitors) for the **Respondents Melissa Biggs and Roxanne Stewart**
The Respondent Aethelbert Limited not represented

Hearing date: 8 October 2021

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JUDGMENT

SUMMARY

TRANSFER OF UNDERTAKINGS, UNFAIR DISMISSAL, SEX DISCRIMINATION, MATERNITY RIGHTS AND PARENTAL LEAVE

The ET was entitled to apply the maximum uplift of 25% allowed by section 207A(2) of the **Trade Union and Labour Relations (Consolidation) Act 1992.**

There was no obvious or significant double-counting in the 25% uplift and the awards for aggravated damages and injury to feelings given the reasoning of the ET. In any event, it should not be assumed in every case that aggravated damages and compensation for injury to feelings operate in the same plane as the territory of a 25% (or other) "just and equitable" uplift for non-compliance with the ACAS Code, such that some overlap can be detected in the first place and, having been detected, has to be adjusted for. **Base Childrenswear Ltd v Otshudi** UKEAT/0267/18/JOJ (28 February 2019) considered.

The absolute value in money terms of the 25% uplifts in these cases was not too high to be proportionate or acceptable. **Abbey National v Chaggar** [2010] ICR 397, **Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290, **Acetrip v Dogra** UKEAT/0016/20/VP (18 March 2019), **Banerjee v Royal Bank of Canada** [2021] ICR 359 and **Secretary of State for Justice v Plaistow** UKEAT/0016/20/VP (6 July 2021) considered. There must be cases in which the top of the range 25% is applied, otherwise the range set by Parliament is not being respected. The discretion given to the ET by the statute is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift. While the top of the range should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional.

Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is "just and equitable in all the circumstances", and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is "just and equitable" by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested. The reduction by Parliament in the range from 50% to 25%, after the decision in **Wardle** may be taken to be a reconsideration of what is proportionate in the most serious cases, and, therefore, a strong indication on that aspect.

In future, when considering what should be the effect of an employer's failure to comply with a relevant Code under section 207A of **TULRCA**, tribunals might choose to apply a four-stage test (para 77):-

i) Is the case such as to make it just and equitable to award any ACAS uplift?

ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?

iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

The awards for injury to feelings and for aggravated damages were taxable under section 401 of the **Income Tax (Earnings and Pensions) Act 2003** and not excluded from taxation by section

406. The ET was correct to gross up those awards to take account of the effect of taxation.

THE HONOURABLE MR JUSTICE GRIFFITHS

1. This is my judgment on appeals against aspects of liability and remedy judgments of the Bristol Employment Tribunal sent to the parties on 25 June 2019 ("the Liability Decision") and 19 August 2019 ("the Remedy Decision").

2. The Appellants are two of the three respondents to the ET proceedings, namely, Sir Benjamin Slade, baronet ("Sir Benjamin") and Andrew Hamilton ("Mr Hamilton"). I will refer to them, jointly, as "the Appellants". The other respondent to the ET proceedings, Aethelbert Limited ("the Company") has played no part in the appeal. The respondents to the appeal are Mrs Melissa Biggs ("Mrs Biggs") and Ms Roxanne Stewart ("Ms Stewart"), who were the claimants in the ET. I will refer to them, jointly, as "the claimants".

Matters no longer in issue

3. The issues in the appeals have been narrowed by previous decisions and orders of the EAT and of the Court of Appeal, for the most part rejecting certain arguments as unsustainable, but also including a point resolved between the parties by consent and reflected in an order of the EAT.

4. Of the points still outstanding before me, a number of other issues have now happily also been resolved by agreement between the parties.

    (i) It is accepted that the appellants are not personally liable to the claimants in respect of the claims for unfair dismissal and holiday pay, so far as the unfair

dismissal jurisdiction is concerned, but it is said by the claimants that this makes no difference, because substantially equivalent amounts are payable by way of compensation for their successful discrimination claims. The figures have now been agreed and so the point does not need to be decided and has not been argued.

(ii) The appellants have recently noticed that the ET wrongly used as the basis for its grossing up calculation the total unfair dismissal award, including the basic award, which was therefore counted twice. Again, the parties are in agreement on this, and the figures will be amended accordingly.

Issues remaining for decision

5. The two issues which remain for me to decide are:-

i) The size of the ACAS uplift. The ET awarded an uplift of 25% for failure to comply with the Codes of Practice and the appellants contend that, while that was within the limit allowed by section 207A(2) of the **Trade Union and Labour Relations (Consolidation) Act 1992**, it was at the very top of that limit, and should not have been so high. A further issue is whether Mr Hamilton was jointly and severally liable for the ACAS uplift. This is a point he raises in his own appeal.

ii) Whether the ET was correct to gross up the awards for injury to feelings and aggravated damages. This depends on whether they were taxable under section 401 of the **Income Tax (Earnings and Pensions) Act 2003** ("ITEPA"). The appellants say they were not. The claimants say that they were.

Background facts

6. The primary facts found by the ET are not challenged in this appeal.

7. The claimants were both employed by the Company, which operates Woodlands Castle and Maunsel House in Somerset as venues for weddings and other events. These are properties which belong, as I understand it, to Sir Benjamin or to entities related to him.

8. The first claimant (Mrs Biggs) had been employed as an administration assistant but was constructively dismissed with effect from her resignation on 12 January 2018 after two years' service. The second claimant (Ms Stewart) had been employed for ten years, latterly as a deputy manager, before her dismissal by a letter received on 23 December 2017, purportedly backdated to 4 December 2017.

9. From December 2016, the identity of the claimants' employer was a company called "Offer Limited".

10. On 4 May 2017, Mrs Biggs notified Sir Benjamin that she was pregnant, with a due date of 3 November. On 9 September, she went on maternity leave.

11. On 6 October 2017, Ms Stewart notified Sir Benjamin that she was pregnant, with a due date of 26 January 2018.

12. The ET found that Sir Benjamin "found their becoming pregnant at roughly the same time as highly inconvenient", and "he thereafter decided to dispense with the claimants' services and thus avoid the inconvenience of hiring temporary staff to stand in, in their

absence" (Liability Decision para 13.a.).

13. Sir Benjamin "decided to engineer their departure from their employment". He set about this by pursuing "a course of conduct".

14. In the case of Mrs Biggs, this took the form of a "process" which "took… approximately two months, encompassing several events, including non-payment of SMP (particularly so at Christmas); her being 'abandoned' in Offer Limited; being subjected to a spurious TUPE transfer to [the Company]; having her grievance ignored and finally the insistence as to a formal resignation from [the Company]" (Remedy Decision para 11.c.i.3. on p 8). In the case of Ms Stewart, similar points were made (Remedy Decision para 11.c.ii. on p 9).

15. With effect from 20 November 2017, ten workers were transferred from Offer Ltd into the employment of another linked company, but the claimants were left in Offer Ltd. The ET found that this reflected a desire "to make life difficult for them, at least initially by having an excuse not to pay them SMP" (Liability Decision para 13.b.).

16. On 25 November 2017, both claimants were not paid as they should have been. The ET found that the failure to pay SMP on time, on this and subsequent occasions, was "deliberate". The ET found that Sir Benjamin "hoped that the delays in payment would encourage the Claimants to resign." (Liability Decision para 13.c.).

17. On 29 November, Sir Benjamin met both claimants to discuss what he described as a company re-structure. After Mrs Biggs had left, he gave Ms Stewart a letter accusing her

of misconduct, suspending her from work at Offer Ltd, and instructing her to hand in her laptop and keys.

18. On 5 December, Ms Stewart gave birth prematurely, having been admitted to hospital a few days before.

19. On the same day, Mr Hamilton had a meeting with Mrs Biggs about a transfer of her employment from Offer Ltd to the Company. This was, the ET found, an entity "with no funds to pay them". By not informing either of the claimants of this crucial fact, Mr Hamilton "failed in his duty, as Offer Ltd and [the Company's] agent, to properly inform the Claimants" (Liability Decision para 10.a.). For this failure to consult as required by the **Transfer of Undertakings (Protection of Employment) Regulations 2006**, the ET awarded compensation of 13 weeks' pay against the Company.

20. On 7 December, Mr Hamilton wrote to both claimants, on behalf of Offer Ltd, about a transfer of their employment to the Company the following day. At the same time, Mr Hamilton wrote to them on behalf of the Company, welcoming them as transferred employees.

21. On 8 December, both claimants were belatedly paid overdue salary and statutory maternity pay (SMP), but from a different company associated with Sir Benjamin called Pyman Bell.

22. On 23 December 2017, Ms Stewart (who was still recovering from the premature birth of her child) received a letter of dismissal from Offer Ltd dated 15 December which stated

that the dismissal was for gross misconduct and that the dismissal was backdated to 4 December. The ET found that "The spurious attempt to 'backdate' the dismissal to 4 December, the day before the birth" was "an attempt… to somehow avoid liability for maternity pay" (Liability Decision para 13.iv.). Ms Stewart was subjected "to an entirely spurious and vindictive 'disciplinary' process, designed to drive her from the business, at a point both before she gave birth prematurely and within the weeks following that birth, when her baby was in intensive care" (Remedy Decision para 11.c.ii.3.b. on p 9).

23. She had not been told of the detail of the charges against her, had not been given a hearing, and was offered no right of appeal, all of which made it "blatantly unfair" on procedural grounds alone (Liability Decision para 11). The implied term of mutual trust and confidence was breached by this and by the failure to pay Ms Stewart's wages. In addition, her suspension and dismissal were found by the ET to be "one of the most egregious acts of discrimination possible" (Liability Decision para 13.d.). The timing of the suspension, in the advanced states of her pregnancy, was "designed… with her then-vulnerability in mind, to have maximum effect on her" (para 13.d.i.). The suspension and dismissal were then pursued with the "motivation… of driving her out of employment" (para 13.d.ii.). The charges were "absolutely trumped up" and were "a vindictive act on the Respondents' part" (para 13.d.iii. of the Liability Decision; see also para 11.d.i. of the Remedy Decision).

24. The placing of the apostrophe shows that Sir Benjamin and Mr Hamilton were both personally guilty of this, although Sir Benjamin "was the driving force and controlling influence behind these acts" (Liability Decision para 17.a.). Mr Hamilton was, however, as well as Sir Benjamin, "specifically authorized by Offer Ltd to engage with the

Claimants in relation to their employment and pay", and he did so (Liability Decision para 7.c.). Mr Hamilton "throughout carried out the instructions" of Sir Benjamin (para 17.e.) and was described by Sir Benjamin as "the brains". Mr Hamilton was found liable for Sir Benjamin's discriminatory acts "as agent" and Mr Hamilton personally carried out the TUPE transfer of other employees, "abandoning the Claimants... in a failing company" (para 17.e.).

25. Mr Hamilton was "intimately involved in the discriminatory dismissal of [Ms Stewart]". He "took no action whatsoever to ensure that the Claimants would continue to receive their pay, thus facilitating what we have found to be [Sir Benjamin's] plan all along".

26. Ms Stewart was so concerned about the disciplinary process and about not being paid that she asked for a meeting with Mr Hamilton, "two days after giving birth" (Remedy Decision para 11.c.ii.3.c. on p 9). At the meeting, Mr Hamilton made blatantly discriminatory remarks about women with children returning to work (Liability Decision para 17.e.). He also told her that, if she did return, she would not receive commission as she had before.

27. The ET decided that Mr Hamilton should be "jointly and severally liable", with Sir Benjamin and the Company, for acts of discrimination against the claimants (Liability Decision para 17.e.).

28. Mrs Biggs was not paid her SMP as she should have been in December. She raised this with Mr Hamilton but he said he did not have instructions.

29. Mr Hamilton had some correspondence with HMRC in January 2018 about advanced

funding of SMP which he wrongly stated had already been applied for, which was not in fact the case until 16 January (Liability Decision para 9.t.) and then only in response to approaches by the claimants themselves to HMRC and ACAS (para 13.c.). The ET found that there was "no real desire" on any of the respondents' part (including, therefore, that of Mr Hamilton) to rectify the situation (para 13.c.).

30. On 12 January 2018 Mrs Biggs wrote to Sir Benjamin and Mr Hamilton resigning with immediate effect. She had still not been paid the money due to her in December.

31. When giving evidence to the ET, Sir Benjamin "made wide-ranging and lurid allegations about the claimants and their relatives, without any substantiation whatsoever, in respect of their character, financial position and other matters". The ET found that these allegations were "entirely fanciful and prompted by a desire on his part… to 'throw some dirt' at the Claimants" (Liability Decision para 12.iii.). Sir Benjamin's behaviour when giving evidence to the ET was "arrogant and misogynistic" (Remedy Decision para 11.d.ii). It had a direct effect on the claimants themselves, and "rubbed salt in the wounds" (para 11.d.iii.).

32. Ms Stewart had still not found alternative work by the date of the hearing, having worked for the Company since the age of 17, although the ET was entirely satisfied that she had made all reasonable efforts to do so. She told the ET that "after everything that happened to me, I no longer had the confidence I used to" (Remedy Decision para 9.d.).

The Employment Tribunal decisions

33. The ET concluded that the Company, Sir Benjamin Slade baronet, and Mr Hamilton,

discriminated against both claimants on grounds of their pregnancy or maternity and were jointly and severally liable for remedy in respect of those acts.

34. It also decided that the Company (for which Sir Benjamin and Mr Hamilton were also jointly and severally liable):

i) Constructively unfairly dismissed the First claimant (Mrs Biggs).

ii) Unfairly dismissed the Second claimant (Ms Stewart)

iii) Failed to comply with regulation 13 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006**, as to consultation and information, in respect of both claimants.

iv) Failed to pay four days' holiday pay to Ms Stewart.

35. The remedies awarded were all financial.

i) Both claimants received the unfair dismissal basic award which, in Mrs Biggs' case, was £940.04 and, in Ms Stewart's case, was £3,423.00.

ii) Compensatory awards were assessed for both claimants, representing past and future loss of earnings and loss of statutory rights. In Mrs Biggs' case this came to £23,243.50. In Ms Stewart's case, it came to £41,375.32. Both of these included 25% uplifts for failure to comply with the ACAS Code.

iii) There were awards for injury to feelings. Mrs Biggs received an award for injury to feelings of £20,000. Ms Stewart received an award for injury to feelings of £25,200. These figures were then uplifted by 25%.

iv) Aggravated damages were awarded to the claimants of £5,000 each. These figures were also then uplifted by 25%.

v) The claimants received awards for breaches of duty under TUPE. Mrs Biggs was given a TUPE award of £6,110.26 and Ms Stewart was given a TUPE award of £6,469.71. These awards were not, of course, uplifted.

35. When assessing injury to Mrs Biggs' feelings from the discrimination she had suffered, the ET stated that this injury was "obvious from her evidence"; she was "genuinely distressed during much of her evidence, requiring several pauses for her to gather herself and additional breaks when she became too upset to carry on".

36. When assessing injury to Ms Stewart's feelings, the ET recorded that her visible distress when giving evidence was even more pronounced (Remedy Decision para 11.c.ii.2.). "She said that having been previously an extremely independent person, she now entirely lacked confidence".

Issue (i): The size of the ACAS uplift.

38. Section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992** (TULRCA) provides for adjustments of up to 25% in favour of employees, as follows:

> **"207A Effect of failure to comply with Code: adjustment of awards**
>
> (…)
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant

> Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

39. When deciding its decision to award the maximum 25% uplift to the awards of both claimants in this case, the ET said (at para 11.e. of the Remedy Decision):-

> "ACAS Code – even had the disciplinary proceedings against [Ms Stewart] been genuine, they were conducted entirely without regard to the Code: in particular to identify the details of the charges; provide the evidence in support of them; to hold a disciplinary hearing and to offer an appeal against the decision. In respect of [Mrs Biggs], she had brought an obvious serious grievance about her discriminatory treatment by the Respondents, which was entirely ignored, giving her no option but to resign. Clearly, both failures by the Respondents [i.e. the failures in respect of both Claimants] were entirely unreasonable and an uplift of 25% is appropriate. We consider it just and equitable to apply this uplift to both the awards for unfair dismissal and injury to feelings (as permitted by Schedule A2 of TULRCA), as the two unlawful acts are intimately linked and cannot be distinguished from each other."

40. Both appellants challenge the 25% uplift. On behalf of Sir Benjamin, the following points are made (and they are adopted on behalf of Mr Hamilton, who is separately

represented).

i) There was double-counting in the ET's awards between the awards for injury to feelings and aggravated damages on the one hand and the award of a 25% uplift on the other hand.

ii) The application of a 25% uplift to the figures in this case produced a figure which was too high in absolute terms to be proportionate or acceptable.

41. The appellants do not seek remission of the assessment to the ET but invite me to substitute my own assessment of the appropriate uplift which, they say, should be in the order of 10% or not more than 15%.

(a) Double-counting

42. The appellants point, in support of their case that there should be a reduction of the ACAS uplift to less than 25%, to **Base Childrenswear Ltd v Otshudi** UKEAT/0267/18/JOJ (28 February 2019). HHJ Eady QC, as she then was, allowed an ACAS uplift of 25% to stand, but reduced the aggravated damages from £5,000 to £4,000 to avoid double counting. A failure to respond to the claimant's grievance/appeal had been the sole basis of the uplift, and part of the basis identified for awarding aggravated damages as well.

43. The case went to the Court of Appeal on another point, and this aspect was not considered there: [2019] EWCA Civ 1648; [2020] IRLR 118.

44. At para 40 of the judgment of the EAT, it was noted that the aggravated damages in that

case had been based entirely on matters after dismissal (the injury to feelings award having already reflected the respondents' conduct in relation to the dismissal itself), and these matters were identified as being four in number: (i) lying about the reason for dismissal (ii) continuing the lie in its defence to the ET proceedings (iii) failing to respond to the Claimant's grievance/appeal and (iv) conduct of the litigation (which was criticised in various respects). HHJ Eady QC then said at paras 47-48:

> "47 (…) The difficulty that arises, however, is the ACAS uplift made was in respect of a failure to respond to a grievance and the ET had already separately taken that into account when making its award of aggravated damages. For the Claimant it is said that this does not matter: the awards serve different purposes and the ACAS uplift is not intended to be purely compensatory, such an award is intended to impose a sanction upon an employer. For the Respondent, it is said that this gives rise to a double-counting in terms of compensation.
>
> 48. It seems to me that the point made by the Respondent might be a valid objection to take at the time an ET is considering whether it is just and equitable to award an uplift under section 207A TULRCA and, if so, in what amount. There is a difficulty here, however, because the Respondent is objecting to what it has said is an element of double-counting in this regard, but has not appealed against the ACAS uplift itself but the earlier award for aggravated damages. That said, I do consider that the Respondent is right to say that this is something to which the ET ought properly to have had regard in again considering the overall award made: it was a potentially

> relevant factor that it failed to take into account. On any case, the double-counting in question is not great: it is simply the fact that the ET considered the Respondent's failure to respond to the Claimant's grievance under the head of aggravated damages - it being one of four elements taken into account under that head - and as justifying an ACAS uplift. It was, however, a relevant matter to which the ET apparently failed to have regard when considering the overall award of compensation made for non-pecuniary losses. Therefore, and to that limited extent, I allow the appeal in this regard."

45. She said at para 55:

> "I agree with the Respondent that, given that the ET went on to consider that this failure on the Respondent's part [to respond to the grievance] was a matter that justified a 25% uplift for failure to comply with the ACAS Code, the ET ought properly to have returned to the aggravated damages award and removed that factor from its consideration under that head, and adjusted the award made accordingly. Undertaking that task, it seems to me, however, that this was a relatively small aspect of the ET's aggravated damages award and, in my Judgment, on the ET's findings in this case, I consider that the appropriate reduction would be one of £1,000. That would therefore reduce the aggravated damages award to £4,000 in total."

46. The appellants have embarked, at the hearing before me, on a similar effort to slice up the various awards with a view to detecting any double-counting between them. I would not myself expect this to become common, especially in view of the Court of Appeal's

recent warning against over-analysis of ET decisions in **DPP Law v Greenberg** [2021] EWCA Civ 672 at para 57, but, on the facts of this case, it has proved in my judgment to be an uphill task.

47. The appellants accept that an ACAS uplift may be regarded as punitive as well as compensatory: see **Acetrip v Dogra** UKEAT/0016/20/VP (18 March 2019) per HHJ Auerbach at para 103:

> "There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part."

48. See also **Secretary of State for Justice v Plaistow** UKEAT/0016/20/VP (6 July 2021) per Eady J at para 90:

> "Although there may be a compensatory element to the uplift (by analogy with the statutory regime under consideration in Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604, a failure to use the procedures under the ACAS Code of Practice may deprive the employee of the opportunity to persuade the employer that dismissal would be inappropriate or unfair), inevitably there is a punitive quality to such an award. The statute might not provide that the uplift is to be expressed in a precise

> amount but it does require that the ET considers that it is "just and equitable" to increase any award by that amount."

49. The appellants argue, however, that, given the injury to feelings and aggravated awards in this case, it was double-counting to impose, in addition to those awards, an ACAS uplift of 25%. This is on the basis that "the compensatory element [of the 25% ACAS uplift] must have been fully addressed" in those awards (skeleton argument para 19.3). It seems to be accepted that the punitive element would not have been.

50. The appellants compare the explanation given for giving the maximum ACAS uplift of 25% (which I have quoted in para 39 above) to the explanations given, prior to that, for the amounts awarded for injury to feelings and by way of aggravated damages.

51. The £20,000 award to Mrs Biggs for injury to her feelings was explained in para 11.c.i. of the Remedy Decision, in four numbered sub-paragraphs. The first allocated it to the middle Vento band. The second noted the injury to feelings demonstrated by her evidence. The third described "a course of conduct" following on from Sir Benjamin's decision to engineer the departure of both claimants, which (they found) had in the case of Mrs Biggs been a "process" which took "approximately two months". The fourth said that all of this was occurred when she should, like any new mother, have been at her happiest, and "Such factor will inevitably exacerbate the injury to her feelings". There is nothing, so far, which suggests an impermissible overlap between the compensation for injury to feelings and the explanation for the 25% uplift which does not refer to injury to feelings. The appellants focus, however, on the ET's non-exhaustive account (the word "including" is used) of "several elements" in the process which caused the injury to feelings, which describes it as:

> "…including non-payment of SMP (particularly so at Christmas); her being 'abandoned' in Offer Limited; being subjected to a spurious TUPE transfer to the First Respondent [the Company]; having her grievance ignored and finally the insistence as to a formal resignation from the Frist Respondent. This was clearly a course of conduct…"

52. The appellants suggest that the reference to "having her grievance ignored" as one of the elements means that there must be overlap with the basis of the 25% uplift and, therefore, double counting.

53. I am not persuaded by this, for the following reasons:

i) The ET in this passage as a whole is describing what it describes as a single "process" or single "course of conduct", which had an impact caused by its totality rather than by individually separable elements.

ii) Even the catalogue of elements contains five elements, which are not exhaustive, and it is unconvincing to suggest that "having her grievance ignored" should be separated from the whole, or measured, so as to reduce the injury to feelings award (which was the exercise performed by HHJ Eady QC in **Base Childrenswear**) or so as to demonstrate an overlap with the 25% ACAS uplift so evident or (if evident) so significant as to require it to be reduced. In fact, there is no outstanding appeal against the injury to feelings award, with the result that only the latter course is open to the Appellants.

iii) There is nothing in the reasoning behind the 25% uplift to suggest that there is an overlap.

54. The ET reiterated, in relation to the injury to feelings award to Ms Stewart, its explanation in relation to Mrs Biggs, to the extent that their circumstances were similar (Remedy Decision para 11.c.ii.1). The same reasoning on the suggestion of double-counting therefore applies to that. The ET also relied on Ms Stewart's visible distress and on the substance of her evidence (Remedy Decision para 11.c.ii.2). It then justified an award of £25,000 rather than £20,000 to her by saying that her treatment was "even more egregious" than the treatment of Ms Stewart (para 11.c.ii.3.). This was because:

> "a. She had been a very long-serving and clearly loyal employee (hence the Second Respondent's reaction to her prospective absence).
>
> b. She was subjected to an entirely spurious and vindictive 'disciplinary' process, designed to drive her from the business, at a point both before she gave birth prematurely and within the weeks following the birth, when her baby was in intensive care.
>
> c. She was so concerned about both this process and Offer Ltd's failure to pay her that she felt obliged to request a meeting with [Mr Hamilton], two days after giving birth, at which she was subjected to discriminatory comments and informed, in the event that she

> should return to work, she would lose the commission she had previously earned."

55. Again, I am not persuaded that the reference to the disciplinary process at b. weighs in the balance heavily enough to suggest that the 25% uplift double-counted this aspect. It is the vindictiveness and spuriousness of the disciplinary process which is noted as relevant to the injury to feelings; whereas the non-compliance with the Code is a more objective matter, although the motivation was the same. These three sub-paragraphs are in addition to the points about leaving her in Offer Ltd (which could not pay her), the deliberate failure to pay her in November, and the spurious attempt to backdate the dismissal in order "to somehow avoid liability for maternity pay" (Liability Decision para 13.iv.). This dilutes the element represented by sub-paragraph b. Moreover, even the reference to the disciplinary process in b. was not only to the lack of ACAS Code compliance, but must have included the deliberate timing of the suspension "to have maximum effect on her" because of her pregnancy (Liability Decision para 13.d.i.). This was a relevant element in the assessment of injury to feelings, but was not in itself a breach of any particular provision of a Code of Practice.

56. In the absence of any reference in the explanation for the 25% ACAS uplift which can be said to show an explicit double-counting, the argument for double-counting from the injury to feelings award to Ms Stewart is not in my view made out.

57. Turning, finally, on the double-counting argument, to the awards for aggravated damages, three sub-paragraphs are devoted to giving the ET's reasons for these, at 11.d.i to 11.d.iii of the Remedy Decision. Not one of the reasons includes a reference to breaches of the ACAS Code, and there is no basis at all for claiming double-counting

from the awards of aggravated damages.

58. That is enough to dispose of the double-counting aspect of the appeal. However, I will make, also, two further observations.

59. The failure to comply with either the letter or the essence of the ACAS Codes appears, from the factual findings of the ET which I have summarised, to have been exceptionally cynical and, indeed, malicious, the malice emanating from Sir Benjamin and fulfilled with the assistance of Mr Hamilton. In those circumstances, the 25% uplift could have been justified by the punitive element alone, which could not possibly have overlapped with the purely compensatory character of awards both for injury to feelings and for aggravated damages.

60. Moving from the analytical approach which I have adopted so far, in deference to the nature of the arguments addressed to me in support of the double-counting appeal, I also have a concern about this artificially meticulous approach from a broader perspective. It seems to me that the argument based on overlap wrongly assumes that aggravated damages and compensation for injury to feelings operate in the same plane as the territory of a 25% (or other) "just and equitable" uplift for non-compliance with the ACAS Code, such that some overlap can be detected in the first place and, having been detected, has to be adjusted for. Whilst in some cases, as in **Base Childrenswear**, this may be so, there will be many cases in which it is not so. The evaluative nature of the ET assessment on all three will not be mathematical and cannot, therefore, always lend itself to an argument along these lines. The three awards are assessing different things and may do so in different ways. Although all three end in money sums, they are not necessarily strictly comparable such that credits or debits can always be counted and

applied between them as was possible in **Base Childrenswear**. What is "just and equitable in all the circumstances" by way of percentage ACAS uplift must be consistent with the basis and quantum of other awards, but it is going too far to argue that there has to be some rigorous definition of territory in order to avoid any conceivable overlap. The reality, in this case as in many others, is that the extent of any overlap was unquantifiable and insignificant, even if (which I doubt) it existed at all.

61. The guarantee that the ACAS uplift is no more or less than it should be is the requirement, from section 207A of **TULRCA**, that any increase is what the ET considers "just and equitable in all the circumstances", which will include the fact and quantum of any other awards. I see no reason to doubt that the ET performed the exercise required conscientiously and correctly or that when assessing what was "just and equitable" it failed to take account of the impact of its own previous awards.

(b) The absolute value of the 25% ACAS uplift in money terms

62. The appellants also argue that the application of a 25% uplift to the figures in this case produced a figure which was too high in absolute terms to be proportionate or acceptable.

63. I was referred to a number of cases.

64. In **Abbey National v Chaggar** [2010] ICR 397, the claimant suffered unfair dismissal and race discrimination, for which he was awarded a net sum of over £1.3 million for future loss of earnings. The dismissal was automatically unfair under section 98A(1) of the **Employment Rights Act 1996** which applied when the employer was responsible

for a failure to comply with statutory dismissal and disciplinary procedures. By section 31(4) of the **Employment Act 2002**, as it stood at the relevant time (now repealed), it followed that the ET "must" increase any award which it made to the employee by 10% and might, "if it consider[ed] it just and equitable in all the circumstances to do so", increase it further by up to 50%. By section 31(4), the duty to increase by at least 10% did not apply if there were "exceptional circumstances which would make… that percentage unjust or inequitable", in which case the ET might make no increase at all, or increase by "such lesser percentage as it considers just and equitable in all the circumstances".

65. The ET in **Chaggar** applied a 2% uplift on the ground of the overall size of the award, and this exercise of discretion was upheld by the EAT. On appeal to the Court of Appeal, the award was remitted to the ET for other reasons. The Court of Appeal left the amount of any uplift to be re-determined by the ET when it had settled the other figures, but agreed with the ET that "the level of compensation is of itself capable of being an exceptional circumstance within the meaning of section 31(4) of the **Employment Act 2002** entitling the tribunal to reduce the uplift below what would otherwise be the minimum of 10%" (at para 101; stating a proposition adopted in para 102). It reasoned (at para 102):-

> "As the Court of Appeal noted in Redcar and Cleveland Borough Council v Bainbridge [2009] ICR 133, para 311, the uplift operates as an incentive to encourage parties to make use of the statutory procedures. We do not think Parliament would have intended the sums awarded to be wholly disproportionate to the nature of the breach. In our view, that would have been the effect of awarding

> even a 10% uplift. There is no definition of "exceptional circumstance" and we are satisfied that it was open to the tribunal to conclude that the size of the award was one such circumstance."

66. In **Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290 CA, the statutory regime in **Chaggar** (applying a presumption of at least 10% uplift and allowing an uplift of as much as 50%) was still in force at the relevant times. That could result in figures considerably greater than those under the current regime in which the maximum uplift is 25%. The Claimant was unfairly dismissed as an act of victimisation after he had brought proceedings for discrimination; he was also refused promotions before his dismissal and this was found to be because of unlawful discrimination. The ET awarded £15,000 for injury to feelings (of which £5,000 was aggravated damages) and compensation, increasing the whole award by the maximum 50%. The result was a final award of almost £375,000 after grossing up.

67. The award was found to be incorrect in a number of respects, but in relation to the uplift Elias LJ said this (at paras 27-29):

> "27. Once the tribunal has fixed on the appropriate uplift by focusing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms. As I have said, this must not be disproportionate but there is no simple formula for determining when the amount should be so characterised. However, the law sets its face against sums which would not command the respect of the general public, and very large payments for purely procedural wrongdoings are at risk of

doing just that. The appeal tribunal referred to Prison Service v Johnson [1997] ICR 275 when Smith J observed, at p 282, with respect to the level of compensation for injury to feelings, that it was necessary to have regard to "the view which … members of the public would have of the amount of the award". In my judgment, that is a fortiori the case where the award is either unrelated, or at least only partially related, to any specific injury to, or loss suffered by, the employee.

28. In considering the sort of sum which would be proportionate and acceptable it is, in my view, of some relevance to have regard to the sums which the courts are willing to award for injury to feelings and for aggravated damages. The former cases involve compensation for injury but they could bear some comparison with cases where the employee feels aggrieved at losing the opportunity to try to correct what he or she sees as an injustice. Aggravated damages are exceptionally awarded in discrimination cases where there is malice or spite, or the complaints of the employee have been trivialised. That is often more offensive to the employee than a simple failure properly to follow procedures. The level of awards for injury to feelings was laid down by the Court of Appeal in Vento v Chief Constable of West Yorkshire Police [2003] ICR 318. The court held that the most serious case should attract an award of compensation no greater than £25,000 (now slightly adjusted to take account of inflation…). The sum of £65,000 awarded in that case by the employment tribunal was held to be seriously out of

> line. For aggravated damages the amounts are in fact much lower and rarely exceed £5,000. (That was in fact the sum awarded in the Vento case in addition to the compensation for injured feelings.)
>
> 29. I do not suggest that these are entirely analogous situations, but I think that, save in very exceptional cases, most members of the public would view with some concern additional payments following an uplift for purely procedural failings which exceeded the maximum payable for injured feelings."

68. In the case before me, the failure to follow proper procedure when suspending and dismissing Ms Stewart was part and parcel of the "absolutely trumped up nature of the charges" against her (Liability Decision para 13.d.iii.). The "obviously serious grievance about her discriminatory treatment" brought by Mrs Biggs (Remedy Decision para 11.e.) was part of the process whereby Sir Benjamin tried to "engineer" her departure as an act of discrimination, in which he was successful (Remedy Decision para 11.c.3.). It is a case which qualifies as "very exceptional" (to use the phrase of Elias LJ at para 29 of **Wardle**) and, indeed, the ET found that the suspension and dismissal of Ms Stewart "was one of the most egregious acts of discrimination possible" (Liability Decision para 13.d.). It falls directly within one of the examples given by Elias LJ (at para 26 of **Wardle**) of "the most egregious cases" which might permit the maximum uplift (at that time) of 50%, namely, (at para 26) "a clear finding that the employer is determined to dismiss the employee whatever the merits and has deliberately and cynically ignored the procedures in case they get in the way of his being able to do so", or (at para 34) "where the flagrant and deliberate refusal to comply is for a discriminatory reason".

69. In **Acetrip v Dogra** UKEAT/0016/20/VP (18 March 2019), HHJ Auerbach accepted that the guidance in **Chaggar** and **Wardle** can be applied to the current regime for uplifts (at para 94), and went on to say that, not only is it "not an error of law, as such, positively to consider the absolute value of the award in deciding, finally, what adjustment to make in the 0% to 25% range" (para 95), but "in a case where the underlying award is of a significant amount, the Tribunal needs to take into account [the absolute value of a percentage uplift] as a relevant consideration" (para 99; see also paras 102-103). However, since he was remitting the quantum to the ET for a number of other reasons, he left it to them to decide what, if any, adjustment to make their original uplift of 25%.

70. In **Banerjee v Royal Bank of Canada** [2021] ICR 359 EAT, the ET had awarded an uplift of 25% at the liability hearing, before it knew what the result would be in money terms, because remedies were to be determined at a later hearing. Lord Summers referred to the warning in **Wardle** against an uplift which would in money terms be "disproportionate" and said (at para 6):-

> "It will be evident from the foregoing that in fixing the ACAS uplift the tribunal should, at least in cases where the risk I have adverted to can be foreseen, hear evidence about quantum before fixing the appropriate percentage. No doubt in some cases it is not necessary to hear evidence on quantum. If the sums involved are modest the tribunal may not consider that it is necessary to establish the multiplicand since it can foresee that the final figure will be within an acceptable range. But in some cases detailed evidence of quantum will be critical."

71. In **Secretary of State for Justice v Plaistow** UKEAT/0016/20/VP (6 July 2021), Eady J considered the authorities and said (at para 90):

> "It would be neither just nor equitable if, having regard to the actual sums involved, the final figure awarded by way of uplift was entirely disproportionate in terms of both the employee's loss and the employer's breach."

72. The Remedies Decision does not, in terms, confirm that the ET considered whether the absolute value of the 25% uplift in money terms would be disproportionate to the other awards or as a sum of money in itself. I have already quoted the relevant passage in full (at para 39 above). However, I see no reason why the ET should have thought that it was disproportionate and, since I am asked to reassess the percentage myself if there was any error in the ET's approach, I can say that this argument does not persuade me to reduce it below 25%.

73. Since **Wardle** was decided, the maximum uplift has been halved from 50% to 25%, and the assumption in favour of any uplift, formerly set at a minimum of 10%, has been removed. There must be cases in which the top of the range 25% is applied, otherwise the range set by Parliament is not being respected. The present case was rightly, in my judgment, placed at the top of the range. The discretion given to the ET by the statute is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift, which will be such as the ET considers "just and equitable" up to the limit of "no more than 25%". While the top of the range should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have

to be classified, additionally, as exceptional. Elias LJ's word "egregious" is a strong one, but the dictionary definition of this word in its negative sense is no more than "Conspicuously bad or wrong; blatant, flagrant". It is also relevant to observe that Elias LJ was commenting on a statutory regime which allowed for uplifts of up to 50%, rather than 25% as now and that when, in para 29, he referred to "very exceptional cases", this was when he was considering cases when the uplift "exceeded the maximum payable for injured feelings".

74. The observations of Elias LJ in **Wardle** were made in a case in which the uplift of 50% amounted to £90,000, compared with an award of injury to feelings of only £15,000, including the element attributed to aggravated damages. In the case before me, the ACAS uplift amounted to just over £11,000 for Mrs Biggs and a little less than £15,500 for Ms Stewart, which were in both cases much lower than the awards made to them for injury to feelings of £20,000 for Mrs Biggs and £25,000 for Ms Stewart, neither of which included the awards of £5,000 each by way of aggravated damages.

75. I do not, therefore, consider that the absolute value of the 25% ACAS uplift in money terms is so high as to be excessive, disproportionate or otherwise objectionable, and I see no need for it to be adjusted downwards.

Conclusion on Issue (i)

76. For the reasons I have explained, I reject the appeal on Issue (i), the 25% ACAS uplift.

77. In future, when considering what should be the effect of an employer's failure to comply with a relevant Code under section 207A of **TULRCA**, tribunals might choose to apply

a four-stage test, in order to navigate the various points which I have been considering in this appeal:

i) Is the case such as to make it just and equitable to award any ACAS uplift?

ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?

Any uplift must reflect "all the circumstances", including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.

iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

This question must and no doubt will be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot, in the nature of things, be a mathematical exercise. The EAT must be reluctant to second guess the ET's decision either to adjust or not adjust the percentage in this

respect, or the amount of any adjustment, because it is quintessentially an exercise of judgment on facts which can never be as fully apparent on appeal as they were to the fact-finding tribunal. The EAT will certainly not substitute its own view for the judgment of the ET in the absence of an obvious error.

iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

Whilst wholly disproportionate sums must be scaled down, the statutory question is the percentage uplift which is "just and equitable in all the circumstances", and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims. Nor should there be reference to past cases in order to identify some numerical threshold beyond which the percentage has to be further modified. That would cramp the broad discretion given to the ET, undesirably complicate assessment of what is "just and equitable" by reference to caselaw, and introduce a new element of capping into the statute which Parliament has not suggested. Indeed, the reduction by Parliament in the range from 50% to 25%, after the decision in **Wardle** may be taken to be a reconsideration of what is proportionate in the most serious cases, and, therefore, a strong indication on that aspect.

Mr Hamilton's cross-appeal

78. Mr Hamilton has an independent cross-appeal against the application of an ACAS uplift to him of 25%, as well as adopting the points I have already considered.

79. It was pointed out on his behalf that in **Catanzano v Studio London Ltd and others** UKEAT/0487/11/DM HHJ Burke QC decided that joint and several liability for discrimination applied to compensation but not to the uplift of 25% or less, for which the individual respondents in that case were not responsible.

80. However, that was a decision which flowed from its facts, which included a finding that "The history of what happened to the grievance process did not involve either the Second or the Third Respondent" (para 24).

81. In the present case, the ET found Mr Hamilton personally directly responsible: see paras 24 to 26 above, for example.

82. It was also argued that Mr Hamilton's culpability ought not to have been assessed as highly as that of Sir Benjamin, and that he ought not, therefore, have been subject to the same 25% uplift.

83. This is not a point of law appropriate for an appeal to the EAT. The ET clearly considered that Mr Hamilton was doing Sir Benjamin's bidding (para 17.e. of the Liability Decision) and it was entitled to consider him equally responsible and equally to blame. The ET made findings of fact which directly implicated Mr Hamilton.

Issue (ii): Whether the ET was correct to gross up the awards for injury to feelings and aggravated damages, on the basis that they were taxable under section 401 of ITEPA.

84. Issue (ii) in the appeal is whether, as a matter of law, it was incorrect to take the view (as the ET did) that the awards for injury to feelings and aggravated damages (both of which were compensatory awards) fell to be taxed under section 401 of the **Income Tax (Earnings and Pensions) Act 2003** ("ITEPA") and, consequently, to gross them up (as the ET also did) so that the amounts after tax reflected those which the ET thought it right for the claimants to receive.

85. No submissions were made about grossing up for tax at the ET hearing, but written submissions were made on behalf of the claimants in favour of grossing up. The ET then received the claimants' grossing up calculations, to which the respondents made no response, save to say that they objected to grossing up, without providing any submissions as to why or, apparently, any counter-calculations (Remedy Decision para 13). Consequently, the ET accepted and applied the claimants' calculations.

86. A procedural point was initially taken in relation to this, but it is no longer a live issue. The grossing up was performed as part of a reconsideration of the original Remedy Decision, which had not dealt with any grossing up. The reconsideration was sought by the claimants under rule 70 of the ET Rules and it was dealt with by the ET on the papers in the circumstances which I have outlined, leading to the Remedy Decision in its final form. It is common ground that, strictly speaking, there ought to have been a hearing, because of the requirements of rule 72 of the ET Rules. However, the parties agree that nothing turns on this. The question I am asked is simply whether the decision on grossing up was right or wrong. Although there was no hearing, the respondents were

given an opportunity to make representations, and so there was no substantial unfairness: see **Stanley Cole (Wainfleet) Ltd v Sheridan** [2003] ICR 1449 per Buxton LJ at para 49.

87. Section 401 of **ITEPA** provides, so far as material:

> "**401 Application of this Chapter**
>
> (1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—
>
> (a) the termination of a person's employment…"

88. The phrase "directly or indirectly… in consequence of, or otherwise in connection with" could hardly be broader and more ample than it is. Such wide wording does on the face of it cover more than damages for the dismissal itself. It appears expressly to cover awards for injury to feelings and aggravated damages which are made not only "in consequence" of the claimants' dismissals, but "in connection with them" also.

89. Section 406 of **ITEPA** is also relevant and provides, so far as material:

> "**406 Exception for death or disability payments and benefits**
>
> (1) This Chapter does not apply to a payment or other benefit provided—
>
> (…)
>
> (b) on account of injury to… an employee.
>
> (2) Although "injury" in subsection (1) includes psychiatric injury, it does not include injured feelings."

90. In **Moorthy v Commissioners for HMRC** [2018] ICR 1326, the taxpayer brought proceedings for unfair dismissal and age discrimination against his former employer. He then settled all his claims, not limited to employment tribunal claims, in return for "an ex gratia sum of £200,000 by way of compensation for loss of office and employment".

91. The first issue in that case was whether the sum was taxable under section 401. The judgment of the Court was given by Henderson LJ who said, at para 45:

> "…it is in my judgment clear beyond reasonable doubt… that the entirety of the £200,000 payment to Mr Moorthy fell within section 401(1)(a) of ITEPA 2003. On any natural reading of the statutory language, the payment was received by him "directly or indirectly in consideration or in consequence of, or otherwise in connection with" the termination of his employment. The payment was described in the Compromise Agreement itself as representing "compensation for loss of office and employment". There was no suggestion that any part of it related to anything which occurred before 4 February 2009, when the chain of events was set in motion which led to Mr Moorthy's selection for redundancy and the termination of his employment (after a year's garden leave) on 12 March 2010. The First Tier Tribunal found as a fact that Mr Moorthy suffered no discrimination of any kind before that date, nor did he have any claims for arrears of salary or other payments to which he was contractually entitled. However one looks at the matter, the whole of

> the payment was at the very least "connected with" the termination of Mr Moorthy's employment, and it cannot possibly be said that either tribunal erred in law in so concluding."

92. He also said (at para 49):

> "…cases of the present type are very fact-specific, and what matters is always the application of the statutory language in section 401(1)(a) to the facts found in the particular case."

93. In the present case, the claimants did suffer discrimination before their actual or constructive dismissals, but the ET made explicit findings that all the discrimination, before and after the termination of employment, was very much "in connection with" their dismissals, to quote the statutory language. This can be seen from the following passages of the ET decisions:

i) When making its findings on maternity and pregnancy discrimination in para 13 of the Liability Decision, the ET said that Sir Benjamin found the claimants "becoming pregnant at roughly the same time as highly inconvenient" and "we find it the case that he thereafter decided to dispense with the claimants' services…" (para 13.a. of the Liability Decision).

ii) It is in this context that the ET placed the decision to leave the Claimants employed by "an obviously struggling company" (para 13.b. of the Liability Decision).

iii) The ET then found Sir Benjamin "hoped that the delays in payment would

encourage the claimants to resign" (para 13.c. of the Liability Decision).

iv) The ET held that Ms Stewart's suspension and dismissal "was one of the most egregious acts of discrimination possible" and decided that "the only possible motivation" of the suspension was "driving her out of employment" (para 13.d.ii. of the Liability Decision).

94. In the Remedy Decision, also, the same connection was made.

i) When deciding on injury to feelings, the ET found that "From the moment that [Sir Benjamin] was aware of [Ms Stewart's] pregnancy (6 October 2017)" he was unhappy with both claimants being pregnant and "he decided to engineer their departure from their employment" (Remedy Decision para 11.c.i.3).

iii) All the discrimination for which the injury to feelings award of £20,000 was made to Mrs Biggs was characterised as part of the "process" of engineering their departures, and "a course of conduct" to that end (para 11.c.i.3.).

iv) The same point was applied to Ms Stewart when the ET gave reasons for its £25,000 injury to feelings award to her (para 11.c.ii.1.) and, in addition, in respect specifically of Ms Stewart, the ET found that the whole disciplinary process was "designed to drive her from the business" (Remedy Decision para 11.c.ii.3.b. on p 9).

v) Thus, all the ET's reasoning on its awards for injury to feelings linked those

awards to the discriminatory determination to dismiss or drive out the claimants and, thereby, demonstrated that these awards were "in connection with" their dismissals.

vi) Similarly, the ET's awards of aggravated damages were explained in para 11.d on pp 9-10 of the Remedy Decision and the ET made it clear in that section that all the conduct in respect of which aggravated damages were being awarded to both claimants was "based on [Sir Benjamin's] vindictive desire to get rid of the Claimants…" (para 11.d.i.).

vi) That is, in my view, enough, but I also note that when applying the ACAS uplift "to both the awards for unfair dismissal and injury to feelings", the ET said "the two unlawful acts are intimately linked and cannot be distinguished from each other" (Remedy Decision para 11.e.).

95. Consequently, in my judgment, the awards both for injury to feelings and by way of aggravated damages were, on the findings of the ET, "in connection with" the termination of their employment and, therefore, within the scope of section 401 of **ITEPA**.

96. The second issue in **Moorthy v Commissioners for HMRC** [2018] ICR 1326 was whether section 406 of **ITEPA** (which excludes taxation under section 401) applied to injury to feelings, and not merely to physical injuries (which he had not suffered) so as to exclude compensation for injury to feelings from taxation. The Court of Appeal decided that it did apply, and consequently that the part of Mr Moorthy's settlement which was attributable to injury to feelings was not taxable (see paras 66 and 70 of the

judgment of Henderson LJ). It is important to appreciate that, at the time material to the decision in **Moorthy**, sub-section (2) of section 406 was not in force (a point emphasised by Henderson LJ at para 80).

97. However, sub-section (2) of section 406 was in force at the times material to the case before me. Consequently, the awards for injury to feelings are excluded from section 406 by sub-section (2) and the charge to tax imposed through section 401 remains. It is not suggested that section 406 has any impact on the aggravated damages and my conclusion about the aggravated damages in para 95 above therefore also stands.

98. Consequently, in my judgment, the ET was correct to gross up all the awards both for injury to feelings and for aggravated damages.

Conclusion

99. The result is that the appeals are dismissed on both of the issues which remained for me to decide, as is Mr Hamilton's appeal.