Case number: 1306748/2019 Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Ms Kinga Michalewicz		Auria Solutions Limited

AT A REMEDY HEARING

Held: At Nottingham and via CVP **On**: 18 February 2022

Before: Employment Judge R Clark.
Mrs B Tidd.
Mr M Alabhai.

REPRESENTATION
For the Claimant: Ms J Spencer, lay representative (Polish lawyer)
For the Respondent: Ms S King of Counsel

JUDGMENT

Upon the claim of pregnancy or maternity related discrimination under s.18 of the Equality Act 2010 succeeding, the unanimous decision of the tribunal is that: -

1. The respondent shall pay the claimant compensation in the sum of **£8,236.47**

REASONS

1. Introduction

1.1 In our liability judgment we determined that the claim of pregnancy or maternity related discrimination under s.18 of the Equality Act 2010 claim succeeded. This remedy judgment should be read alongside that earlier judgment.

1.2 Ms Michalewicz was again assisted throughout today's hearing by a polish interpreter. The interpreter was unable to attend the hearing in person due to transport disruption caused by storm Eunice but was able to join remotely.

1.3 With the agreement of the parties, we reserved our decision. That was partly due to the practicalities of delivering an ex-tempore decision through a remote interpreter but mainly to assist the participants deal with those same disruptions to transport caused by the storm.

2. The Substantive Issues

2.1 The successful claim has given rise to the following remedy issues: -

a) The calculation of financial loss following dismissal. The claimant seeks an award based on her gross earnings.

b) The assessment of chance that a non-discriminatory dismissal would have occurred earlier than the back stop date of 31 July 2019.

c) Whether we should account for the maternity allowance benefit paid during part of the relevant period from 20 May 2019.

d) The findings of fact on injury to feelings and out subsequent assessment and valuation of that injury.

e) Whether we should apply a separate additional 10% uplift in respect of **Simmons v Castle [2012] EWCA Civ 1288**.

f) Whether to award interest and if so the amount.

3. Evidence

3.1 No new evidence has been adduced by either party save for two payslips and some information concerning the payment of maternity allowance. Other than that, we have before us the original hearing bundle and the claimant's original witness statement. The other witnesses called by the claimant on the last occasion did not deal with matters relevant to remedy. We also have an updated schedule of loss from the claimant and a combined schedule / counter schedule of loss from the respondent which helpfully identifies the areas of agreement and dispute.

3.2 Ms Michalewicz was available for cross examination today. Ms King did not seek to challenge her evidence so far as it dealt with remedy. As Ms Michalewicz has previously adopted her written witness statement on oath before us, we have accepted it unchallenged.

3.3 The remedy issues were therefore dealt with by each party making submissions on the issues, each speaking to a skeleton argument.

4. Facts

4.1 So far as it is necessary to make further findings of fact on the evidence concerning remedy, we do so on the balance of probabilities.

4.2 At the date of dismissal of 1 April 2019, we find the claimant was earning on average the sum of £359.49 gross per week. We find this equated to a net sum of £295.44 per week.

4.3 We find the claimant was a member of a defined contribution pension scheme. She has lost a benefit in the amount that the respondent would have contributed to that pension fund. Calculation of that has been difficult in the absence of clear evidence of the scheme or historical contributions from either party. The best we have is that found in the claimant's last full payslip. It shows a sum that equates to £4.87 per week being contributed to the pension fund by the employer. That is only around 1.38% of the gross pay at a time when the minimum employer's pension contribution was set at 2%, rising to 3% from 6 April 2019. The evidence is thin and our analysis is drawn from that limited evidence. The variance from the minimum may be explained in a history that is not before us. We return to this issue in our discussion on the losses.

4.4 We find that the claimant was paid one weeks' pay in lieu of notice following her dismissal. She was not allowed to work her notice and had to leave immediately after she was told of the decision. She was not given a right of appeal against the decision because it was made "out of process". That is, because the respondent takes the view that those with less than 2 years' service are not entitled to engage in its usual employment procedures.

4.5 We have not been asked to quantify any financial savings to the claimant in respect of her costs of attending work, such as daily travel costs. Therefore, we do not make any findings of fact leading to any adjustments to loss in that regard.

4.6 We have already found that the claimant's employment fell within a scheme of dismissing those with less than 2 years' service during a window coinciding with the closure and ex-patriation of the production lines. We have already found that meant her employment would have come to an end by 31 July 2019 at the latest. Within that time, however, there remains the prospect that the claimant may have been dismissed before the end of July 2019 for non-discriminatory reasons. This does not require us to make findings of fact as to when it would have happened on the balance of probabilities. It is a counter-factual assessment which we approach as an assessment of chance. However, even that approach requires us to make what appropriate findings of fact we can on the surrounding circumstances that will inform that assessment. The evidence of what was actually going on in respect of this has been thin at all stages of this case. We can only make findings on two matters of general principle applying at the time. The first is that as the respondent progressed with the wind down of the lines, the opportunities for retaining the affected staff in alternative work declined. Secondly, as that happened there may have been better prospects of retaining employment to the very end for those with specific or niche skill sets which the claimant did not have.

4.7 We find the claimant would have commenced her maternity leave on 20 May 2019. Because of her dismissal, she did not receive the maternity pay she would otherwise have received. She did receive the alternative state benefit of maternity allowance paid at the rate of £148.68 per week. Had she still been in work, we find she would have been entitled to the first 6 weeks of maternity pay calculated at 90% of normal earnings. That is, £325.54 per week (£359.49 x 90%). In fact, the claimant instead received maternity allowance at the

lower rate throughout. This was £148.68 per week. This was paid for 10 weeks of the notional period we are concerned with and we find the claimant received £1,486.58.

4.8 We note that this is the figure contended for by the respondent against which losses should be calculated. Neither party has made submissions on the incidence of taxation should it apply to that figure and we therefore make no finding in that regard and do not depart from the respondent's proposed figures.

4.9 We then turn to injury to feelings. It is not in dispute that the claimant has given evidence of injury to feelings and we accept there is an injury to be assessed and compensated.

4.10 The evidence of injury is found is in the claimant's own account and description of her injury. There is no independent medical evidence and there is no third-party evidence in support. We were not taken to anything in the contemporaneous documents that went to the issue. We therefore reach our findings on the claimant's witness evidence although we are satisfied the conclusions we come to about the injury are consistent with the manner of the discrimination and surrounding circumstances. There is some caution to be exercised because of the way the evidence was produced but this evidence is unchallenged and we are satisfied that: -

a) In early March 2019, the claimant had a positive meeting with her shift manager Mr Bassi concerning her pregnancy. The topics they discussed included her future plans following maternity leave. That meeting provided some sense of comfort to the claimant that the earlier risk of redundancy may not be about to affect her. She therefore went into the second meeting on 1 April 2021 without any sense of what was about to happen and, not unreasonably, from a position of some sense of relative security.

b) She was initially shocked by the news she was being dismissed. This shock flows in part from the contrast with the previous maternity meeting only a short time before.

c) She started to cry during the meeting. She felt very stressed.

d) She was then asked to say goodbye to her colleagues there and then and return her work property. She had to do that on the day as, whilst she was entitled to one week's notice, she was required to finish that day and instead paid in lieu.

e) She was then faced with a similar level of shock from her colleagues when she told them and she was still obviously in shock, crying and trembling whilst her colleagues supported her with kind words.

f) She then experienced a similar emotional response when she went home and had to tell her partner. She was again crying and talks of how her partner tried to counsel (or perhaps console?) her.

g) She was not permitted the opportunity to appeal against that decision.

h) We find she experienced stress and depression. There is no clinical diagnosis to this effect and we accept it only as a layperson's description of a poor state emotional wellbeing. Nevertheless, we find the claimant was worrying about her future and that of her baby over a period. Her low emotional threshold would later manifest in a consultation with her midwife and she also visited her GP. In both consultations she was again physically emotional, trembling and crying, and on both occasions was advised to try and not to worry too much as this could be dangerous for her and her baby and that she should try to stay positive.

i) At this time, the claimant says she felt close to a complete breakdown. Again, we take that as a clear measure of how she describes her emotional response but not any form of clinical psychological assessment.

4.11 The evidence of injury before us covers the initial few months after her dismissal. We understand that the claimant has set out the acute response to the dismissal. We are prepared to infer some continuing effect in her in the way in which she naturally reflected on the events for a period and that has no doubt resurfaced from time to time during the course of litigating this case. Aside from that, this is not a case where we can identify evidence of long-term injury or long-term loss of amenity. Save for the residual effects caused by the ongoing litigation, we can infer in the absence of evidence to the contrary that the balance of the claimant's emotional state tipped toward the positive on the birth of her son in August 2019.

5. Discussion and Conclusions

5.1 We start by recording that, for the purpose of discharging **s.124(5) of the Equality Act 2010**, we consider we have made a public declaration in the form of our earlier liability judgment together with this remedy judgment. We have not been asked to consider an individual recommendation nor do we consider that is something we could embark on of our own volition in this case. Were therefore go on to consider an order for compensation.

Pecuniary loss - Issue a)

5.2 All heads of compensation are to be assessed on the tortious basis. That is, to put the claimant in the position she would have been in but for the discriminatory act. (**Ministry of Defence v Cannock [1994] IRLR 509.)**

5.3 We assess pecuniary loss based on the figures we have found for the entire 17-week period from dismissal to 31 July, save that those figures must take account of the sums paid by the respondent and received by the claimant mitigating her loss. We must then make an adjustment to reflect the chance that the claimant would have been dismissed earlier.

5.4 There is no dispute that in the seven weeks between the date of dismissal on 1 April 2019 and what would have been the commencement of her maternity leave on 20 May 2019 the claimant has lost her normal earnings. We remind ourselves we are making an award of damages compensating for loss. It is not an award of wages nor an order for the payment of wages due. We are satisfied it is therefore to be assessed net, reflecting the actual loss to

the claimant contrary to Ms Spencer's submissions. That is 7 weeks at £295.44 resulting in a loss of £2,068.08. We are satisfied that the claimant would then have received maternity pay. The loss to the claimant for the remainder of the period we are concerned with amounted to £2,535.97.

5.5 During the same period, we are satisfied the claimant has also lost the benefit of the contribution the employer would have made to her pension fund. The evidence on this has been thin and appears to show a contribution of £4.87 per week. We have considered whether we should calculate this loss on the basis of the minimum percentage figure that employers were required to contribute under the auto-enrolment pension provisions. That was 2% up to 6 April 2019 and 3% thereafter. Had there been clearer evidence of how the £4.87 per week arose, or other evidence of pension contribution, we may have been able to reach a different conclusion. Similarly, had the evidence before us provided a figure equating to 2%, we may well have been prepared to infer that it *would have* risen to 3% from April 2019. None of that is open to us and, despite our reservations about this figure, we accept Ms King's submission that we are compensating for the discriminatory act found, and not for any other error or failing on the employer's part in calculating pension contribution. The only evidence we have of loss is the evidence of the actual contributions paid equating to £4.87 per week. Therefore, that is the loss we seek to compensate. We should add that there is no suggestion by either party that that figure would have changed again during the period of maternity leave when maternity pay would have been paid and we adopt the respondent's submission of 17 weeks' loss at £4.87 per week totalling £82.79. The total financial loss in the period before credits or adjustments is, therefore, £4,686.84.

Credits and mitigation – Issue c)

5.6 We were not explicitly addressed on the order of credits and adjustments but we take the view it is implicit in the way the schedules have been produced that the parties agree that any adjustment for chance of earlier dismissal should follow any adjustments for any credits and mitigation. This approach would also be consistent with the analogous approach in unfair dismissal applied in **Digital Equipment Co Ltd v Clements (No 2) [1997] IRLR 140**, in the EAT and as it was then refined in the Court of Appeal **[1998] IRLR 134.**

5.7 That means we must consider the issue of credits and mitigation next. The first of which is the payment of one week's notice which, in net terms, applies a credit of £295.44. The second is the sum received in state benefits as maternity allowance amounting to £1,486.58. Ms Spencer argues the claimant should be allowed to retain that *in addition* to receiving compensation for the loss of statutory maternity pay that would have been paid in the relevant period. We accept the respondent's argument that as a matter of law, this has to be credited. Ms King relies on **Chief Constable of West Yorkshire v Vento [2001] EAT/0522/01** at paragraphs 42-44 and **Chan v Hackney London Borough Council [1997] ICR 1014** at 1024 in support of this proposition. We acknowledged some potential differences with those authorities where the state benefit in question is maternity *allowance* (MA) paid to unemployed or non-qualifying workers which has a close relation to the statutory maternity pay (SMP) paid to qualifying employees in employment. However, we are satisfied the principles remain and may be even more apt. First, we are compensating for loss.

Where the effect of the dismissal meant some of the amount that would have been paid in SMP was in fact paid by the State in MA, the individual has not suffered loss. Secondly, so far as there might be concern about where the responsibility for paying that should rest, the State can, and has in other contexts, enacted means of recovering or recouping benefits paid to successful claimants from the defendant/respondent. That is beyond our concern. We therefore deduct the amount of MA paid, so far as it is attributable to the period we are concerned with in the sum of £1,486.58.

5.8 The effect of those adjustment is that the basic loss to the claimant is reduced to £2,904.82

Chance of earlier dismissal – Issue b)

5.9 Part of the task of putting the claimant in the position she would have been in but for the discriminatory act requires a counterfactual assessment of what would have been. (**Chagger v Abbey National plc and another [2009] EWCA Civ 1202 CA**). We have already found that the claimant's employment would have ended in any event at the latest on 1 July 2019. However, we have to deal with the chance that it could have ended before then, as was the case for others, many of whom were in the same position as the claimant and some lost their employment before the claimant in fact lost hers. Others were dismissed later in the period. We approach this as a loss of chance percentage adjustment within the absolute backstop when we have already found employment would certainly have ended. We take the view that adopting this approach means we can make a sensible and permissible assessment of the 'what would have happened' question. Neither party suggested an alternative approach.

5.10 We have concluded that we must rule out either extreme of a non-discriminatory dismissal on 1 April (meaning losses are reduced by 100%), and that the employment would have lasted for the entirety of the period (meaning a nil chance reduction). It therefore follows that we consider we are bound to make *an* adjustment for the chance of a non-discriminatory dismissal before 31 July. The question is what is the chance of it?

5.11 Ms King says that dismissal at an earlier date was more likely than not and that we should apply a reduction of 50%. Ms Spencer says we should stick to the original back stop period and make no reduction. We are not able to take either approach. We have found some attraction in Ms King's submission but our analysis of the evidence does not lead us there. That is partly a reflection of the way the respondent's case has been put before us at the liability stage. Frankly, had there been greater attention to the question of why and when Ms Michalewicz was selected within that program of dismissing those with under 2 years' service, we may have been faced with an entirely different case to that which left us drawing the adverse inferences we felt obliged to draw. That same deficiency now limits the remedy stage. Ms Michalewicz might well have been dismissed at any time during that period and Ms King might be correct in her submission. However, we have three factors guiding our assessment of chance. First, the most we can say is that there was a real prospect of an earlier dismissal and Ms Michalewicz was not best placed to remain to the very end. Secondly, and despite that, the absence of clearer evidence of what was actually happening

at the time means we feel compelled to exercise caution in our assessment of that chance. Thirdly, we have to be satisfied that any earlier selection for dismissal would not itself have been discriminatory and factor that into the assessment of chance too. Doing the best we can, we draw back from Ms King's proposal and assess the chance to be 25%.

5.12 Applying that adjustment to the basic loss of £2,904.82 reduces the total pecuniary loss to £2,178.62.

Non-Pecuniary loss – Issue d)

5.13 We then turn to non-pecuniary loss. In this claim the only claim is for compensation for injury to feelings. We are not bound to make such an award, even where injury is made out, if there are reasons why doing so would not be just and equitable. In this case, we start by recording we are satisfied there is nothing in this case that would mean it was not just and equitable to compensate for that injury and the respondent does not argue as such.

5.14 Having decided to make an award, we must then adopt the usual measure of damages in the same way as damages for tort. In particular, we must apply those principles set out in **Prison service v Johnson [1997] IRLR 162** per Smith J at para 27 as: -

> ***(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.***
>
> ***(2) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use Lord Bingham's phrase, be seen as the way to untaxed riches.***
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> ***(3) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.***
>
> ***(4) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.***
>
> ***(5) Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.***

5.15 We of course have regard to the three bands set out in the guideline case on quantum **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] ICR 318 CA** and the associated Presidential guidance.

5.16 Applying those principles, we remind ourselves we must look to the evidence of injury as the measure of seriousness and, therefore, band and the compensation figure itself. Some professional texts, and even some early authorities, can require reading with extra care to avoid being misdirected into focusing on the manner of discrimination rather than the injury caused. Ms Spencer has relied on **Base Childrenswear Ltd v Otshudi UKEAT/0267/18** and **Komeng v Creative Support UKEAT/0275/18.** We accept these are crucially important recent reminders that the measure of quantum flows from the injury to the claimant, not the manner of the discrimination. The manner may remain relevant to the fact-finding stage when

the injury is seen and assessed in its context, but the manner does not directly determine quantum. Even **Vento** has to be read in that way. Defining the levels of seriousness by reference to one off or a long campaign of discrimination has to be interpreted by reference to the level of injury one might expect to see in that type of case.

5.17 We must be satisfied that the discrimination has caused the injury as a matter of fact. There is no need for foreseeability (**Essa v Laing [2004] IRLR 313**). If not, it is not compensable. Similarly, if there are multiple causes, we may then have to assess the extent to which the discriminatory act has contributed or exacerbated the injury.

5.18 Based on our findings of fact, we are first satisfied that there is evidence of injury. We are equally satisfied that the injury was caused by the discriminatory dismissal. That fact of causation is all that is required. We are satisfied that the injury caused was neither trivial nor minimal. Without losing sight of the total picture before us, there are four key factors in the evidence that have increased our assessment of the gravity of the injury and three which may mitigate the seriousness. The features which increase the seriousness are: -

a) First, the claimant's unchallenged evidence of her emotional response. There were 4 or 5 occasions in which she found herself reduced to a state of tears and physically trembling. That occurred during the meeting when receiving the initial shock of the dismissal decision; when she was then immediately required to say her goodbyes to her colleagues before she left work for the last time and dealing with their own shock of her dismissal reflecting back on her; when having to explain the events to her partner when she got home; and, again, when relaying matters to her midwife and her GP. She describes depression and being close to a breakdown. We have accepted that evidence insofar as it provides a lay assessment of injury, albeit that does not carry the weight it would if they were supported by a clinical assessment to that effect.

b) We consider that the claimant was vulnerable to an adverse acute emotional reaction as a result of this dismissal decision because of the very recent assurances about her future employment after her maternity leave. We accept as a general principle that when a redundancy programme is announced, the fact that employees are warned of the prospect of their selection may have the effect of preparing them for the possibility and limiting the impact of actually being given notice. That could well mean that the potential injury to feelings in a discriminatory dismissal is limited to some degree. In this case, however, the earlier risk of redundancy was overtaken by the meeting in early March which then had the opposite effect. The claimant described that meeting as being a "nice" meeting and we are satisfied it was not unreasonable for her to leave it with a sense of relief that her employment appeared to have a future despite the recent redundancy programme. We are satisfied that that has exposed her to greater emotional injury when the decision to dismiss was conveyed a matter of 3 weeks later. That is not to say that was discriminatory or actionable in itself, but it was a fact which had the effect of lowering her guard such that her emotional vulnerability at the time of the discriminatory act was increased. In any tort, the tortfeasor takes their victim as they find them.

c) A significant factor in this case is that the relevant protected characteristic is not simply the reason by which the discrimination claim is made out. Pregnancy is itself something which should be a joyous experience and goes to the individual's emotional state. Feelings are not simply injured, in the sense of diminishing what would otherwise be a neutral or normal state, but the very positive emotional response one might expect and enjoy about being pregnant is itself denied or diminished. We are satisfied that is part of the injury that the claimant has suffered.

d) In this case, that third factor goes even further. Not only has the claimant's joy of pregnancy been undermined, but she was on two occasions given clinical advice to try not to worry about her situation as this could have a negative effect on her and her unborn baby.

5.19 The three factors which go to mitigate the seriousness are the fact that the employment would have ended anyway. However, whilst we keep that in mind, its force as a mitigating factor has been substantially undermined by the reassurances the claimant reasonably took away from the March meeting. The second factor is that the discrimination was neither overt nor consciously hostile to her state of pregnancy. In fact, there was potentially some benevolent thought processes, albeit misplaced, operating in the background although that, in itself, is irrelevant to both liability and the assessment of quantum. This factor is really an absence of the converse situation, which would stand as a potentially aggravating feature. The third factor is the duration of injury. The evidence we have does not provide a basis for an extended period of injury, at least of the acute phase.

5.20 Turning to the assessment, we have no doubt this is not a 'most serious' case to warrant the top band. Despite our provisional assessment, we have considered whether this injury is properly categorised as 'serious' or 'less serious'. After further consideration we maintain our provisional assessment that the injury is not 'serious', in the sense used by Vento and the applicable guidance and conclude that it is properly classified as 'less serious" for those purposes. We note both parties contend for an award within the lower band.

5.21 We must then turn to consider where the injury falls to be compensated within that band. The applicable Presidential Guidance for this claim is the second addendum for claims presented after 6 April 2019. In that, the range for the lower band is between £900 and £8,800. The claimant seeks an award at £8,000. The respondent contends it should be no more than £3,500. We have concluded the injury is more serious than our provisional view expressed at the liability stage which was based primarily on the one-off nature of the event.

5.22 Ms King referred us to three first-instance remedy decisions. Beyond general principles, we found these to be of very limited assistance, as is often the case in attempting any comparative exercise in this area damage. That is due, in part, to the limited description of injury contained in the reports, often reporting only the nature of the discriminatory act. It also requires us to be confident that the quantum in those comparative first instance decisions was accurately assessed at the time. The first case (Attwood v Heart of England Tourist Board [1303273/07]) describes a claimant whose emotional response suggests limited injury to feelings were found. We regard this as much less serious injury than in the present

case. The second case (Cunningham v Maxime Parsons [301988/07]) also suggests a limited injury albeit the Employment Tribunal appears to have found the claimant was playing down her emotional response which it otherwise found to have significantly affected her. Each of those uplift to around £1500. We can see nothing in the third case (Yague v Arena Sales Ltd [1300326/16]) that describes the injury suffered from which we could and the facts of discrimination are different and do not, in any event, inform the assessment of quantum.

5.23 Whilst Ms Spencer referred us to **Base Childrenswear** and **Komeng**, they are relied on for the general principles we accepted above and not to provide a comparable basis for the assessment and valuation in this case.

5.24 We are of the view that the emotional response of the claimant shows a relatively significant injury to feelings, albeit of a "less serious" Vento characterisation. We might have been persuaded to arrive at a figure closer to the claimant's contention had there been evidence of the injury lasting for a longer period or having wider effect on Ms Michalewicz's life. As it happens, the evidence, although significant at the time, does not lead to any longer-term effects and was itself *relatively* short lived, at least in the acute phase. There is no independent, third party or medical evidence supporting the injury. The claimant promptly commenced job hunting, although we accept that is also driven by economic necessity. Nevertheless, beyond the matters we have identified there is no evidence of the injury inhibiting that task or adversely affecting her relationships, socialising, wellbeing or other activities or amenities of life. There does appear to be some ongoing effect evidenced by the claimant in her account of the medical consultations which appear to take place over the subsequent month or two following the dismissal. We cannot say that there is evidence of any significant emotional injury after then although we would be prepared to accept that there will always be a gradual process of moving on and some residual effects remaining. That is so not least because of the fact that the events have been relived through the conduct of this claim. Overall, we are assessing an injury with an acute phase lasting a few months plus a gradual residual tail off.

5.25 We are required to have regard to the general level of awards made to compensate pain, suffering and loss of amenity. That means considering the judicial college guidelines for the assessment of damages in personal injury cases. It is still in its 15th edition but a revision is imminent, its current figures being over 2 years old. In undertaking that task, we do not rely on any particular injury nor do we try to equate injury to feelings with any particular nature of other injuries. We merely have regard to the totality of the types of injury, effects and duration. We note the guide applies a consistent scale for various less serious injuries where there is a full recovery in a defined period. Full recovery in three months attracts awards up to around £2300; for one year it is up to around £4080 and for 2 years, to around £7000. In most types of injury there is often a path of recovery from the initial, acute onset to the residual stages of recovery which is factored into these timescales and the judgment to be applied in arriving at a final figure. We remind ourselves that duration is only one factor in the overall assessment of severity.

5.26 We are not asked, and nor do we consider it appropriate, to make any separate assessment of aggravated damages. There may be aspects of the employer's subsequent

response, such as denying an appeal against the decision, which has added to the injury but which was not, in itself, a discriminatory act. Such might well fall within the nature of matters that can properly be taken into account in such an award. However, we take the view that what is called aggravated damages is itself no more than an element of the award of injury to feelings (see **Shaw v Metropolitan Police Commissioner [2012] All ER (D) 32 (Feb), UKEAT/0125/11/ZT)**. It must be compensatory and to avoid being a punitive response, must also be based on the injury caused by the conduct, as opposed to the conduct itself. We take the view that the approach we have taken as been to compensate the injury in totality for all actions that we are entitled to compensate for and not for those we are not. This is not a case where anything further needs to be said about aggravated damages and we therefore seek to arrive at a single, overall figure based on our assessment of injury.

5.27 Turning to valuation itself, we think Ms King's submission is slightly closer to the mark than Ms Spencer's but we take the view that this is an injury of substance, albeit within the lower band. We have arrived at a figure of £5000 for injury to feelings. That is not a trivial sum but it is a figure we think does justice to the gravity of pregnancy discrimination and the injury actually suffered without being a disproportionate, untaxed windfall for the claimant. It is broadly in line with awards for personal injury, adopting the concepts and valuations in that compensation regime.

Simmons v Castle uplift

5.28 Ms Spencer's submissions on quantum for injury to feelings sought an additional uplift of 10% to reflect the decision in **Simmons v Castle**. We explored the basis of this during her submissions and the point seemed to evaporate but, to the extent that she maintains her argument that we should apply an additional uplift to any figure we arrive at, we take the view that that is wrong. The effect of Simmons is now firmly incorporated into the annual presidential guidance on the valuation of injury to feelings. We have applied the relevant banding for the relevant year of this claim which already includes the uplift. The relevance of Simmons as an independent consideration now only arises when the tribunal might be informed by an earlier quantum valuation for personal injury or injury to feelings and which was made before Simmons. Such comparisons must be uplifted not only for inflation in the intervening period but also for the effect of this decision. Beyond that, the figure we have set is a figure we consider to be consistent with the correct banding and incorporating that general uplift in damages. As a result, there is no further separate uplift to be applied.

Interest

5.29 We are obliged to consider interest on the awards under the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996** as amended. Neither party says we should not apply interest at all and we consider that it is appropriate to do so. Notwithstanding our decision on the calculation of interest set out below, the principle of applying interest remains sound as the claimant has been kept out of her money for some time. However, Ms King invites us to vary the rate or duration on which interest is applied to take account of the delay caused by the pandemic and the injustice caused to the respondent.

5.30 We have sympathy with that submission. This case has taken a little short of three years to conclude from the date of dismissal. The rate of interest is set at 8% which is substantially higher than the returns available on high street investments and also the rate of inflation over the period. There has undoubtedly been delay in this case being concluded and the application of interest would mean there is a real risk that, perversely, the claimant might be in a better position financially than she would have been had this sum been paid to her on the date of dismissal and she had invested it. The application of interest should be compensatory and should not have the effect of a generous savings account.

5.31 So far as Ms King invites us to make an adjustment, we do not construe the regulations as permitting us to vary the rate of interest itself, save where there is agreement between the parties which is not the case here. However, by regulation 6(3), we are permitted to vary the period over which interest is calculated where the circumstances would otherwise mean a serious injustice would be caused if the regulations were applied by default. The question is on what basis could or should the period be adjusted? It seems to us that any adjustment must have some relationship to the factors causing the injustice so as to otherwise maintain Parliament's intention that interest be applied to these cases at that rate. The delay that has happened in this case does not appear to us to have been due to covid, at least not directly, and we are not aware of any postponements to the hearings that have been listed. The extensive delay that there undoubtedly has been appears to be due to the tribunal's current extreme listing pressures. There are, however, two aspects of that delay which it seems to us have had a particular effect on the justice between the parties. They are, firstly, that there was a delay of around 3 months in promulgating the liability decision. Secondly, the listing of the remedy hearing was itself then substantially delayed by having to work around the existing sitting commitments of the tribunal which coincided with two extremely lengthy hearings. That added over 6 months to the delay. The extent of the injustice is mitigated somewhat as we understand that since the liability judgment, and despite a counter-schedule acknowledging compensation of up to around £6500 might be ordered, no interim payment has been made and the respondent has of course retained its money in the meantime. Nevertheless, we are satisfied the inability to achieve reasonably prompt access to the tribunal system should not itself cause injustice to either party. Some injustice will always arise with delay. The regulations require it to be a *serious* injustice and, in the circumstances of this case, we are satisfied that the added delay caused by the system and not either party would lead to serious injustice if the default period was applied. However, such a departure from the default should not be made without first considering the effect it would have on the justice to the claimant. We are satisfied that a small adjustment to the period to account for this later delay will not cause injustice to the claimant who will still benefit from an interest award adding more value to the compensation than could have been achieved by savings and more than might have been lost by the erosion of its value through inflation. We therefore intend to award interest to 1 June 2021, to reflect the time when, ideally, the case should have concluded and we adjust the midpoint accordingly in the following calculations.

5.32 The award of pecuniary loss attracts simple interest calculated daily at an annual rate of 8% from the midpoint to the calculation date of 1 June 2021. That is 1 May 2020 and

amounts to 396 days. The calculation is therefore £2,178.62 x 8% = £174.29 ÷ 365 x 396 = £189.09.

5.33 The award of non-pecuniary loss attracts simple interest calculated daily at an annual rate of 8% from the date of discrimination to the calculation date of 1 June 2021. That is 1 April 2020 and amounts to 792 days. The calculation is therefore £5,000 x 8% = £400 ÷ 365 x 792 = £867.95.

6. Summary of Awards of Compensation

6.1 The total award is £8,236.47 made up of : -

a)	Pecuniary loss of	£2,178.62
b)	Interest on pecuniary loss of	£ 189.09
c)	Injury to feelings	£5,000.00
d)	Interest on injury to feelings of	£ 867.95

EMPLOYMENT JUDGE R Clark
DATE 28 February 2022

JUDGMENT SENT TO THE PARTIES ON
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AND ENTERED IN THE REGISTER
……...…….

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FOR SECRETARY OF THE TRIBUNALS