EMPLOYMENT TRIBUNALS

Claimant: Miss K Sangster

Respondent: UK Carline Limited

HELD AT: Manchester and by CVP **ON:** 28 and 29 June 2022
22 August 2022(In Chambers)

BEFORE: Employment Judge Holmes
Ms A Ross - Sercombe
Mr T Walker

REPRESENTATION:

Claimant: Mr D Doran, HR Consultant
Respondent: Mr R Evans, Solicitor

RESERVED JUDGMENT ON REMEDY

It is the unanimous judgment of the Tribunal that :

1. The claimant did not unreasonably fail to mitigate her loss by not applying for Universal Credit, or otherwise.

2. There is no basis for reducing the awards on the basis that the claimant would have been dismissed non – discriminatorily in any event by reason of her performance , her conduct or that she would have been made redundant.

3. The claimant is entitled to an award of aggravated damages.

4. The respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, and the Tribunal uplifts the awards , pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 by 25%.

5. The claimant is entitled to interest on the awards.

6. The remedy to which the claimant is entitled for sex discrimination accordingly is compensation in the following sums :

A.Loss of earnings:

Net Total	**£30,764.40**
ACAS uplift – 25%	**£7,691.10**
Total:	**£38,455.50**

B.Injury to feelings:

£25,000.00

of which £5,000.00 is awarded by way of aggravated damages.

ACAS uplift – 25%	**£6,250.00**
Total:	**£31,250.00**

Interest:

A.Loss of Earnings:

Calculated at the halfway point between the date of discrimination , 9 July 2019 , to the date of calculation, 29 June 2022, 543 days @ 8%

£38,455.50 x 8% £8.43 per day x 543 days = **£4,577.49**

B.Injury to Feelings:

Calculated from the date of discrimination 9 July 2019 to the date of calculation, 29 June 2022, 1086 days @ 8% , £8.33 per day

£31,250.00 x 8% £6.85 per day x 1086 days = **£7,439.10**

REASONS

1. By a claim form presented on 18 September 2019 the claimant claimed sex discrimination arising out of her dismissal from her employment as an account manager on 9 July 2019 . The liability hearing concluded on 20 January 2021, and by a reserved judgment sent to the parties on 23 March 2021, the claimant's claim of sex discrimination succeeded.

2. The parties were invited to agree remedy, and , in default , were to seek a remedy hearing. Agreement was not possible, and the parties sought a remedy hearing.

3. Case management orders were agreed, but a preliminary hearing was held on 16 May 2022 to consider an application for a postponement of the listed two day hearing , and to make further case management orders for the remedy hearing. Those orders were made and sent to the parties on 19 May 2022.

4. The remedy hearing had been listed, after several attempts , on 28 and 29 June 2022. The respondent's main witness, Darren Godbert, the Managing Director, who had commenced to give evidence in the liability hearing, however, was unavailable for the remedy hearing, as he was abroad on a pre – booked holiday. The Tribunal had, notwithstanding the striking out of the response, given the respondent permission to participate in the remedy hearing, and he would be permitted to give evidence on remedy.

5. The respondent made an unsuccessful application to postpone the remedy hearing. Whilst it may have been possible for Darren Godbert to give evidence by CVP whilst abroad, provided that the requirements of the Presidential Guidance on Taking Evidence from Abroad had been complied with, in the end the respondent did not seek to adduce that evidence that way, but instead Mark Tillotson , the respondent's Sales Manager, was called in his place. Darren Godbert had made two witness statements in connection with remedy. Mark Tillotson refers to, exhibits, and adopts these witness statements, although, as will be seen, he was not personally aware of all of the matters to which Darren Godbert deposes.

6. The claimant , having made a further witness statement for the remedy hearing , gave evidence again. She adduced a witness statement from Rikki Luella McDonald, a friend, and a mental health nurse, and a statement from Jonathan Nolan, the claimant's former colleague, which statement had also been adduced in the liability hearing. Neither of the these witnesses were called, and so were not cross – examined. The claimant, having filed a schedule loss , which is undated, (pages 37 to 40 of the bundle) then prepared a further schedule (pages 40 to 44 of the bundle) , which appears to have been drafted around February 2022. Her final schedule of loss, again undated, but the most recent, was added at pages 50A to 50D of the bundle. In that version, following guidance from the Tribunal, the claimant breaks down her periods of financial loss into three periods, 9 July 2019 to 5 April 2020 , 5 April 2020 to 23 March 2021, and 23 March 2021 to 23 March 2022.

7. The respondent prepared a counter schedule, dated 13 May 2022, which is at pages 51 to 62 of the bundle.

8. For the respondent, as indicated, Mark Tillotson gave evidence. There was an agreed bundle for the remedy hearing. References to page numbers are to the remedy bundle, unless otherwise stated.

9. There being no time for oral submissions after the conclusion of the evidence, both parties made written submissions, which the Tribunal has read. Mr Doran's are dated 4 July 2022, as are Mr Evans'. The Tribunal , having concluded the hearings in June, received the written submissions , re-convened in Chambers on 22 August 2022. The Employment Judge apologises that this reserved judgment has been delayed, due to a combination of the complexity of the issues, and the pressures of other judicial business.

10. The Tribunal proposed an updated list of Issues, in the case management orders made on 19 May 2022. The parties have not dissented from them, and they are:

1.Loss of Earnings and other benefits.

a) *What were the claimant's pre – dismissal net earnings?*

b) *What losses did the claimant sustain as a result of loss of the benefits of a company car and private health insurance?*

c) *Over what period or periods is the claimant seeking to recover compensation for loss of earnings, and for what period(s) should the Tribunal make any such award?*

d) *In particular, should the claimant's period of loss of earnings be limited to January 2020 as by that date she had been able to return to a position in the motor industry?*

e) *Had the claimant not been dismissed , what would her net earnings , and other benefits in kind, with the respondent have been over the period(s) for which she seeks compensation?*

f) *What sums has the claimant received by way of earnings, and benefits in kind, in subsequent employments in the period(s) for which she seeks compensation, for which credit has to be given against any award?*

g) *Has the claimant unreasonably failed to mitigate her loss by failing to apply for relevant state benefits?*

h) *What pension loss has the claimant sustained, and how should that be compensated ?*

2.Reductions and uplift.

a) *Should the Tribunal reduce its award on the grounds that the claimant's employment would have ended in any event by reason of poor performance; the fact that the Claimant did not have two years service at the time of dismissal; and /or had the Respondent observed a fair process, the Claimant would still have been dismissed or there was a substantial chance that the Claimant would still have been dismissed and when would it have so ended , or what were the chances of it so ending?*

b) *Should the Tribunal reduce its award on the grounds that the claimant's employment would have ended in any event in November 2020 by reason of redundancy? If so, what payments would the claimant have received in those circumstances?*

c) *Should the Tribunal apply an uplift to its award for the respondent's failure to*

follow any relevant ACAS code of practice, and, if so, by what per centage?

3.Injury to feelings.

a) Has the claimant established that she suffered injury to her feelings?

b) If so, what is the appropriate award to make in respect of this?

4.Aggravated damages.

a) Are there grounds for the Tribunal increasing its award for injury to feelings by way of aggravated damages, the claimant contending that the Respondent:

deliberately and maliciously discriminated against the Claimant and deliberately victimised and demeaned the Claimant from April 9th 2019 to the date of her dismissal on 9th of July 2019, including taking her Company Car from her to which she had a contractual right to keep for the duration of her notice period;

acted unreasonably throughout the period of pre-Tribunal disclosure, making unreasonable and unfounded remarks as to the honesty and integrity of the Claimant, including failing to disclose a number of important documents that should have been disclosed and had been requested by the Claimant;

made a covert recording of part of the Claimant's dismissal meeting and failed to inform, or disclose, the existence of the covert recording to the Claimant.

cross- examined the Claimant in the Tribunal without disclosing the existence of the covert recording to the Claimant or the Tribunal Panel.

deliberately treated the Claimant unreasonably displaying unnecessarily aggressive and contemptuous behaviour towards the Claimant throughout the various stages of the Tribunal preparation period, including the Tribunal itself.

The cumulative effects of the unreasonable behaviour of the Respondent towards the Claimant caused unnecessarily personal trauma and suffering to the Claimant and unnecessarily pro-longed the Tribunal process by 5 days during which she had to take time off work and pay for parking etc in Manchester.

b) If so, does the Tribunal make such an award, and by how much does it increase its award for injury to feelings by way of aggravated damages?

5.Interest.

What interest , at what rate, and for what period , should the Tribunal award in respect of its awards?

11. The parties had agreed the claimant's pre – dismissal earnings at the weekly rate of £462.47.

12. Having heard the evidence, and considered the submissions, the Tribunal unanimously makes the following findings of fact relevant to the issues on remedy:

A.The claimant's financial losses and mitigation.

i)Pre – termination earnings and benefits in kind.

12.1 The claimant's pre – dismissal earnings were agreed at £462.47. That was to include loss of employer's pension contributions. The claimant was also entitled to private medical insurance, at a monthly value of £16.78 which is also accounted for in the agreed weekly pay figure. The agreed loss of earnings figure does not, however, include any sum for the value of the company car (a VW Golf 1.4 TSI) with which she was provided as a benefit in kind. The parties could not agree how that should be valued. The claimant was taxed during her employment on the basis that its value to her was £488.08 per month.

12.2 The claimant was paid notice pay. This is claimed to have been in the sum of of £1923.07 (page48 of the bundle), but the figure is left blank in the counter schedule of loss at page 59. The claimant's final payslip is at page 692 of the bundle. It shows a total net payment of £1612.69. Of that , however, £56.77 is holiday pay. That was taxed, and hence the net amount of holiday pay was £56.77 – 20% = £45.41. The total net notice pay that the claimant therefore received was lower, and was £1567.18.

12.3 The claimant was, at the time of her dismissal, in receipt of working tax credits by way of state benefits. These were historic benefits to which the claimant remained entitled after the change to Universal Credit ("UC"). She was a single mother of two children. After her dismissal she made enquiries of the DWP as to her entitlements if she were to apply for UC. She was told that if she applied for UC , having been dismissed she would be sanctioned for 13 weeks before she would receive any money. She was fearful for the effect this would have upon her existing benefits, which were at risk if she made this application, and so did not do so.

12.4 The claimant therefore continued to receive these credits in the sum of , initially, £288.11 from 25 July 2019, then at the rate of £284.94 per week (see pages 512 to 516 of the bundle). The relevant facts relating to this aspect of the claims are set out in more detail further below.

12.5 The claimant was put in touch with a couple of Directors in the automotive industry who were looking for a Franchisee. This gave her something to distract her, and so she registered on 17 July 2019 a limited company, Stinger Leasing Ltd, with Companies House, She also registered a web domain, and got figures together to help in working out the feasibility of the venture. When it then came down to the financial aspect, the initial subscription fee, along with the subsequent monthly subscription fees for the using someone else's finance systems, and database this was not feasible for her. She also applied for start-up loans and government grants with Princes' Trust, Angel Investments, and others , but they were all turned down , and she had no family to turn to.

12.6 Around this time the claimant was applying for many jobs. She was , however, limited as to the radius within which she could search, as she no longer had a car. Nonetheless she was applying for roles in various industries. She applied for 74 jobs

that she can find in her emails, including positions below her skills set , and also a little bit too ambitiously, above it . She was desperate to get back into work. She went to an open evening presentation for a role with Burnley Police as a Custody Detention Officer and as a Trainee Pharmacy Assistant at a local Chemist.

12.7 The claimant hired a car from 19 July 2019 to 26 July 2019 so that she could attend interviews, which cost £101.18 (see page 46 – the invoice does not appear to be in the bundle, but the Tribunal understands this to be an agreed figure).

12.8 The claimant applied for, and was interviewed for on 10 September 2019 , a post with Hippo car leasing, based in Blackburn. She had a second interview on 10 October 2019 , and a third, with the Sales Director and two team leaders on 17 October 2019. That day she received feedback from the recruitment agent that all had gone well, and he was waiting to receive a job offer for the claimant. On 11 October 2019 Jonathan Nolan, then the respondent's Corporate Business Manager , provided the claimant with a reference, under cover of an email (page 409 of the bundle) in which he said that he thought the claimant would be a "good fit" for Hippo. The claimant would have earned around £20,000 per annum if she had taken up that employment.

12.9 The claimant received a text message from Jonathan Nolan on 17 October 2019, who had on a date which is unclear but must be between 11 and 17 October 2019, resigned from the respondent. In the message (page 610 of the bundle) he relates to the claimant how he had received a telephone call from Darren Godbert in which he was "pissed off" that he (Mr Nolan) had supplied the reference for the claimant.

12.10 The claimant heard nothing further from the recruitment agency, so chased up her consultant . On 23 October 2019 she received a message informing her that Hippo had decided to give the job to someone else. The claimant was shocked as she had been led to believe that the job was going to be offered to her, and she was unaware that she was in competition with anyone else.

12.11 The claimant , along with Jonathan Nolan who has expressed the same in his witness statement, and had previously done so to the claimant, suspects that Darren Godbert intervened in the claimant's Hippo job application, and prevented her from being offered it.

12.12 The respondent has, albeit somewhat late in the day, sought evidence from Hippo about this, and an email exchange between that company and the respondent's solicitors between 14 and 17 June 2022 is exhibited at MT3 to Mark Tillotson's witness statement, (pages 408 to 409 of the bundle). It is a somewhat terse exchange , in which Hippo do indeed confirm that Darren Godbert did not contact the company and did not intercept the claimant's application in any way, and that no one else from the respondent did so either. No explanation is given, however, nor was one sought, as to why the claimant was not in fact offered the post.

12.13 The Tribunal's conclusion on this is that it cannot be satisfied on a balance of probabilities that the respondent did in fact influence the decision by Hippo not to offer the claimant the post. The Tribunal can well understand the suspicions of Jonathan Nolan and the claimant that this was the case, but it cannot say that it was. It may have been, but that is as high as it can be put. The Tribunal, however, has no hesitation in

accepting that the claimant believed, and in the light of the information given to her by Jonathan Nolan, reasonably believed , that this was the case, and this belief increased her distrust of the respondent, and her fears that it may in future seek to influence or interfere with her future employment in what is the relatively small world of vehicle financing.

12.14 The claimant's immediate post dismissal employment history , therefore , is as follows:

Cordant People Temp Agency - Boohoo.com - Burnley, Lancashire

Temp position: Social Media Enquiry Handler

Salary & Benefits - Hourly Paid minimum wage £8.21/hour

9 - 13 September 2019 (4 night shifts) from 8pm - 7am

Reason for leaving - temporary work and the Agency had no work available beyond that point. The claimant took this job as an emergency measure whilst she was trying to obtain work back in the automotive industry.

Her net earnings were for this period were : £328.89

12.15 She then obtained this employment:

Limitless Digital Group Limited - Burnley, Lancashire

Position - Purchasing Assistant

Salary and Benefits £18,000/annum.

No Employer Pension payments

First interview - 18 September 2019

Second interview - 7 October 2019

Formal offer of employment: 8 October 2019

Start Date: 21 October 2019

Leaving Date: 3 January 2020

Reason for leaving – the claimant was offered a position with XLCR Vehicle Management Ltd and took the opportunity to return to a job sector she was familiar with and enjoyed. Another reason for returning to this sector was that it offered an opportunity to earn more money through commission.

Earnings in this employment: £2764.12

12.16 The claimant's next employment was :

XLCR Vehicle Management Limited - Colne, Lancashire

Position: Leasing Consultant

Salary & Benefits: £16,229 + 10% Commission.

No Employer Pension payments

First interview – 4 December 2019

Second interview - 5 December 2019

Formal offer of employment: 11 December 2019

Start Date: 6 January 2020

Leaving date: 15 June 2020

Reason for leaving: the claimant was placed on Furlough in March 2020 and decided to look for a similar role in the meantime to support herself and her children. She then resigned from XLCR as she was put at risk of redundancy , and as she was the last person to join the business it was almost certain she would have been made redundant.

Earnings in this employment: £7009.91

12.17 The claimant then obtained this employment:

Cameron Clarke Leasing Ltd (Trading as Select Car Leasing) - Preston

Position - Leasing Consultant

Salary and Benefits: Commission only @ up to 40% of Monthly Gross Profit.

Pension payments of £486.37

First interview: 14 May 2020

Second interview: 19 May 2020

Offer of employment: 19 May 2020

Start Date: 8 June 2020

Leaving Date: 31 July 2021

Reason for leaving: Following a period of sickness due to stress and low mood (see fit note dated 19 May 2021 at page 451 of the bundle) caused by the constant anxiety related to thinking the respondent may try and interfere with her role at Cameron Clarke, she decided that she needed to relocate and start a new life away from the North West. She made enquiries within Cameron Clarke for a transfer to their sister site in Reading, Select Car Leasing. Select Car Leasing refused the application to transfer to Reading due to the uncertainty caused by Covid.

Earnings in this employment : £19,597.87

12.18 This resulted in in her making contact with Planet Leasing and securing a role with them in the South East of England. She moved her family to the South of England to start a new life to help improve her health and work with a new company.

Planet Leasing Limited - South East

Position - Leasing Consultant

Salary & Benefits: Salary £18,000/annum + Commission @ 20% of Monthly Gross

Profit.

First telephone conversation - 24 June 2021

First face-to-face meeting/interview: 26 June 2021

Offer of employment: 26 June 202 1

Start Date: 6 September 2021

End date: 1st April 2022 when the claimant became a franchisee.

Earnings: £13,193.84

12.19. In all these employments the claimant did not have the benefits in kind of private health care or a company car.

12.20 The claimant on 1 April 2022 left her employment with Planet Leasing, choosing to become a franchisee of that business. She has limited her claim for loss of earnings to this date in April 2022, a period of just under three years from the date of her dismissal, some 33 months.

ii)The earnings of the claimant and her comparators during this period.

12.21 The Tribunal has been provided with details (in summaries, but not primary evidence in the form of payslips of the relevant individuals) of the earnings of the claimant's comparators and other members of her team.

12.22 Leaving aside issues of ***Polkey*** , the Tribunal has to assess what the claimant would have been likely to earn had she not been dismissed. To do so, it has considered the evidence of what her comparators and colleagues actually earned.

12.23 This falls into three broad periods. The first is the period from the date of the claimant's dismissal on 9 July 2019 up until the onset of Covid – 19, and the effects of lockdown and furlough in March 2020. The second is that period of lockdown and furlough, and the third is from when furlough ended , or would have ended, up until the time that the claimant limits her loss of earnings claim, i.e 1 April 2022. Within that broad overall period are more specific periods, demarcated by the periods of further employment or unemployment. From 9 July 2019 to 1 April 2022 the Tribunal has identified some seven periods potentially to be considered in the calculation of the claimant's loss of earnings.

12.24 In general terms, after an initial period of unemployment of just over two months, the claimant found some work, which was short lived, but after a further period of about a month, she obtained better paid employment , which she then left to take up a position back in the car industry in January 2020. Summarising the facts set out above as to the periods of the claimant's subsequent employments, the figures for the losses sustained by the claimant in these periods are:

1.The first period:

9 July 2019 to 13 September 2019 – when the claimant obtained work with Cordant for one week

9.5 weeks at £544.08 per week : £5168.76

Plus additional cost of actual car hire: £ 19.57

(£101.18 - £81.61 - see the calculation at para. 27 below)

Less Notice pay : £1567.18

Less earnings with Cordant £328.89

Net Loss: **£3,292.26**

2.The second period :

18 September 2019 to 21 October 2019 when the claimant obtained work with Limitless

5 weeks at £544.08 per week **£2,720.40**

3.The third period:

21 October 2019 to 3 January 2020 – the claimant's employment with Limitless

11 weeks at £544.08 : £5984.88

Less earnings: £2764.12

Net Loss : **£3,220.76**

4.The fourth period:

6 January 2020 to 15 June 2020 – the claimant's employment with EXCLR

23 weeks at £544.08 : £12,513.84

Less earnings : £7009.91

Net Loss : **£5,503.93**

5.The fifth period :

15 June 2020 to 31 July 2021 – the claimant's employment with Cameron Clarke (Select)

59 weeks at £544.08 : £32,100.72

Less earnings : £19,597.87

Net Loss: **£12,502.85**

6.The sixth period :

31 July 2021 to 6 September 2021 – the claimant out of work pending her move to Essex

5 weeks at £544.08 : **£2,720.40**

7.The seventh period:

6 September 2021 to 1 April 2022 – the claimant's employment with Plant Leasing

30 weeks at £544.08 : £16,322.40

Less earnings : £13,193.84

Net Loss : **£ 3,128.56**

Total of all 7 periods: **£33,089.11**

12.25 Had the claimant remained employed by the respondent, however, she would, like her comparators have been put on furlough due to the Covid – 19 pandemic. The furloughed employees retained their company cars and private health care. Whilst not expressly stated, it is likely that this would have been from March 2020.

12.26 In terms of the earnings of furloughed employees, the respondent has produced, as exhibit DG11 to Darren Godbert's witness statement, a summary of the earnings of comparators in this period. The figures for Andrew Hall and Darren Preston show that in the months from March to October 2020 their pay was indeed static, £1712.36 per month for the former, and £1783.11 for the latter, bar a few pence. Those figures equate to annual salaries of £20,548.32 and £21,397.32. It is assumed that these are gross figures. This is higher than the figure of £20,000 which Darren Godbert refers to, although it may include some commission.

12.27 There is no suggestion that the furloughed employees lost their private health care, or the use of their company cars. These elements can therefore be ignored. As the furlough scheme permitted payment of 80% of the salary of the furloughed employees, it seems to the Tribunal that the simplest way to estimate what the claimant would have earned when furloughed is to take 20% from her earnings. That should apply only to the pay/commission element, and not to the other benefits in kind, especially as there was no such reduction in these benefits for the furloughed employees.

12.28 Using the calculation on page 47 of the bundle , which forms the basis of the agreed weekly loss figure of £462.47, the claimant's average net monthly pre - dismissal earnings were £1944.02, which equates to £448.83 per week. Reducing that by 20% gives £359.06, to which the other elements for pension , healthcare , and company car need to be added, making in total £454.32. For those weeks when the claimant would have been furloughed, therefore, her net weekly loss should be based on that figure.

B.The respondent's case for reductions on the grounds of Polkey

i)Dismissal in any event within two weeks , or so.

12.29 The respondent contends that the claimant would have been dismissed in any event by Darren Godbert for gross misconduct once he had been made aware of the claimant's poor performance, and her two rogue deals , which had unravelled around the time of her dismissal.

12.30 The Tribunal has not heard from Darren Godbert , and Mark Tillotson's evidence was that dismissal was a matter for Daren Godbert alone. Whilst the respondent contends that Darren Godbert would have dismissed the claimant in any event (and in a non – discriminatory manner) this has not been established to the Tribunal's satisfaction.

ii)The claimant would have been dismissed in November 2021 for redundancy

12.31 The oral evidence in support of this contention came from Mark Tillotson, who referred to and adopted the written evidence of Daren Godbert, which was not tested in cross – examination.

12.32 Mark Tillotson did not carry out the redundancy exercise, and could not assist upon how selection for redundancy was made.

12.33 In Darren Godbert's second witness statement he said that in November 2020, Dan Preston, Andy Hall, Euan Chalmers and Ben Egeleton, all of the Contract Hire Team were made redundant. Their complete years of service as at November 2020 were:

Dan Preston 1 year

Andrew Hall 2 years

Euan Chalmers 2 years

Ben Egeleton 4 years

The redundancies were caused by the effects of Covid 19. The underlying criteria for redundancies in the Contract Hire Team were said to be performance in the first instance , and length of service.

12.34 In terms of performance, Darren Godbert's second witness statement sets out the following information as to the relative performance of two members of the Contract Hire team:

Andrew Hall's performance was as follows:

He improved in July 2019 but fell below average in August and September 2019.

He was above average in October 2019.

In November and December 2019, he was average.

He was slightly above average in January 2020.

In February 2020, he was average.

He was slightly above average in March 2020 although the sales "fell off the cliff" after 23rd March 2020. He was then furloughed.

Dan Preston's performance was as follows:

In July 2019, he was below average.

In August 2019, he was slightly above average.

In September 2019, he was average.

In October 2019, he was below average.

In November 2019, he was average.

In December 2019, he was below average.

In January, February and March 2020, he was below average. However, during this period he was absent due to compassionate leave.

12.35 No further specifics , or figures, of the extent to which these employees were performing above or below average have been provided.

12.36 In fact, of the four employees whose employment terminated in November 2020, three, Hall, Chalmers and Egleton were not dismissed, but left under Settlement agreements (see pages 728, 736 and 744 of the bundle), and so took voluntary redundancy.

12.37 Only Dan Preston was taken through a formal redundancy process (see pages 752 to 753 of the bundle). In the letter inviting him to an employment review meeting dated 1 October 2020, Darren Godbert says this:

"Our review has identified a number of actions that we need to take to reduce the immediate payroll costs of the company to support the wider cost reduction exercises. We have implemented reduced salaries across the workforce, cut all but essential marketing spend and renegotiated reduced costs and contracts with our suppliers but this is not enough which has led us to focus of the group of Colleagues who have les than 2 years' service within several departments including customer support, sales, rental and apprenticeships and its [sic] *with deep regret that you fall not this group of colleagues."*

12.38 No selection criteria have been produced, nor is there any evidence of the aims of the exercise , in terms of the number of employees in the Contract Hire department by which the respondent wanted to reduce it, so there is also no evidence of what any cut off point would have been in any selection exercise.

12.39 The exercise was carried out by Darren Godbert, and the new Finance Director. Mark Tillotson was not involved in the process.

12.40 The claimant , the Tribunal is quite satisfied, would not have accepted voluntary redundancy at that time. The respondent would therefore have to have taken her through a compulsory redundancy exercise. The Tribunal is not satisfied that the claimant would, on a balance of probabilities, have been dismissed for redundancy in November 2020, nor that there was an ascertainable per centage chance that she would have been so dismissed for this reason. It is impossible to say.

Injury to feelings.

12.41 The claimant was aged 28 at the time of her dismissal. She had been employed by the respondent since 5 January 2018. She enjoyed her job. She has two children, and is (or was at the time of her dismissal, and for the ensuing three years) a sole parent. The precise ages of her children is not directly in evidence, but the Tribunal believes that, at the time of the dismissal they were around 4 and 5 years of age (see page 415 – GP notes dated 19 May 2021 when they are noted as being 6 and 7).

12.42 The claimant was very close to her grandfather, who died quite suddenly in early January 2019. The claimant was pregnant at the time, and experienced a miscarriage on 15 January 2019. She was very upset by these events. She explained all this to Darren Gobert, whose wife is a psychotherapist. He suggested that the claimant may benefit from some counselling from her, which the claimant accepted, and undertook. Those sessions started in March 201. She was due to have 8, and had taken 6 of them by the time of her dismissal on 9 July 2019.

12.43 Having been asked to attend a meeting with Darren Godbert at 10.00 a.m., which was termed a “performance review”, the meeting was put back to 1.00 p.m.. During the morning the claimant could see that Darren Godbert was having meetings with other people. She became anxious during the morning as to what was going to happen in the meeting. The claimant was dismissed by Darren Godbert in a glass fronted office which was visible to other members of staff, of whom there were up to 30 . She felt it was like a goldfish bowl. She was sweating and anxious in the meeting, and broke down in tears. She left the room, to compose herself, and feels that other members of staff will have seen her in tears. In her absence, Darren Godbert took out his mobile phone, and set it to record the next part of their meeting. When the claimant came back into the room, he did not inform her that he had done this. The claimant begged him not to sack her, but he proceeded to do so. He told her to say her goodbyes, and she was not allowed to take her company car home. She felt ashamed, humiliated and embarrassed. She was driven home by the office handyman, Steve.

12.44 Unbeknownst to the claimant at the time, and for some 14 months thereafter, Darren Godbert had recorded the second part of the meeting on his mobile phone. The claimant was cross - examined without being aware that the respondent and its legal representative were in possession of the recording. The existence of the

recording was revealed when Darren Godbert was being cross examined on 29 September 2020.

12.45 She got home around 3pm, and her two daughters were due to be picked up from the private nursery they attended at the time , before and after school club. She could have gone to pick them up as she was home , but she could not face going out and having to keep a brave face. She felt lost, made herself a coffee and sat in silence, sobbing, trying to make some sort of sense as to what had just happened and what she was going to do. Some colleagues messaged her to express their disbelief , and that they had not seen her dismissal was coming . She was in a state of absolute anxiousness that she had never experienced before, she was shaking uncontrollably. She could not think straight , and all she wanted to do was hide from the horror she was experiencing. She cried uncontrollably for a few hours after the humiliation that she had just suffered, wondering how she was going to get her life back on track. She had just lost her only source of income, had lost her car which gave her freedom but the most painful thing was that she had lost access to the therapist, Darren Godbert's wife, whom she was seeing, and who was helping overcome some very difficult recent issues in her life. This was so important because her self-esteem, self-confidence, and self-respect were all coming back.

12.46 One of the most difficult things was her children seeing her in the state she was in , crying and shaking. They also became affected by seeing her like that, and this only made her feel worse. It was a complete nightmare. This continued for two days and then it recurred off and on for quite a few weeks.

12.47 The claimant's medical history includes treatment for depression and anxiety in 2016, when she was prescribed Sertraline (page 4442 of the bundle) , and in February 2017 she was referred to the community mental health team (page 444 of the bundle). She was prescribed two further ant-depressants, Mirtzapine, and Citalpram in January and June of 2017 (page 442 of the bundle). In March 2018 she was referred (see page 458 of the bundle) to Minds Matter, a counselling service, but as there was a waiting list she never received any treatment at that time. These conditions appear to have receded by the time that the claimant started work for the respondent, but she clearly had a vulnerability to mental health issues, having previously suffered from some.

12.48 The immediate effect of her dismissal was little short of devastating. As single parent with no income, and no car, she was very concerned at how she would provide for her children. She was also concerned not to let them see how upset she was, and how worried she was. A friend, Rikki Louella McDonald , came round to see her after her dismissal, and was most concerned at what she saw. She is a mental health nurse, and wanted to get some treatment for the claimant . She arranged for the claimant to see her GP.

12.49 The claimant saw her GP on 6 August 2019 (page 416 of the bundle) with skin problems which could have been shingles. She reported that she was under stress having lost her job, but did not seek any treatment for any mental health issues. She was having trouble sleeping, and was prescribed Zopiclone for this (se page 441 of the bundle)

12.50 Around this time the claimant had only £50 to her name, virtually empty cupboards in her house, and very little in the fridge. She was very concerned that her

children would need new uniforms for the new school term, and one of her children had a birthday coming up on 2 September. Rikki Louella McDonald lent her £200. The claimant was unable to afford new uniforms, and so had to send her children to school that term in their old uniforms, until she could afford to buy new ones.

12.51 As she applied for jobs, and had interviews on the telephone or face to face , she found it difficult to explain why she had lost her job. She had flashbacks to her dismissal, and panic attacks that she may never be able to work again. Her confidence was very low.

12.52 In the middle of September 2019 the claimant was due to go on holiday with her two children, which she had paid for. Seven days before they were due to fly came the announcement that Thomas Cook had gone into Liquidation. Whilst disappointed, the following day the claimant received an email from the tour operator to inform her that she would be getting a refund within 48 hours. She then had a choice to make about what to do with the refund, either to use it all on bills that she had been unable to pay or to buy a car, which would then allow her to search for jobs further afield, which would give her a better chance of getting a job. She opted for the latter, and bought a car.

12.53 During her period of employment with Cameron Clarke, June 2020 - July 2021, she was happy and building her confidence back up again within the vehicle leasing sector. She was not on a salary but paid on commission only. The commission possibilities were high at up to 40% of monthly gross profit and, although not on a salary, it allowed her to build up a reasonable income.

12.54 Although she was happy in the role she was constantly under a cloud as she thought that at some point UK Carline would do what she believed they had done with the Hippo role , and intervene in some way to damage her reputation, whether it be with her employers or customers. As she was on commission only she did believe (though as a matter of law she was probably wrong) that she had the security of the same employment rights she would have had as an employee. This was always nagging away at her, and caused her at times to have flashbacks, particularly if she was asked to attend a one on one meeting with any of the Managers.

12.55 The claimant issued her claim on 18 December 2019. The final hearing was held on 22 to 25 September 2020. The claimant was cross – examined about the dismissal meeting with Darren Godbert. Her account was challenged. The respondent used a note, at pages 512 to 515 of the bundle, which had only been disclosed on 10 September 2020 , as the basis for the cross – examination. It was not, however, until Darren Godbert gave evidence on 25 September 2020, that he admitted that he had covertly recorded the second half of the meeting. The claimant was very upset in the hearing at the revelation that her dismissal had been covertly recorded , and had to leave the hearing in some distress.

12.56 The Tribunal adjourned, and on the drive back with her friend and representative Mr Doran, the claimant was so upset that they broke the journey, stopping at a McDonald's. The claimant was visibly upset, so much that another customer came over to her, and Mr Doran arranged for a contact of his , who was a counsellor, to speak to her. The claimant took some time to recover from the hearing, and every time she thought of the respondent, felt physically sick. She feared what

else they may do to stop her career, and feared that they may even have her followed, as they had secretly recorded her, and had hidden that fact for over a year. She therefore decided to start looking for work , and to move to, another part of the country, in the south.

12.57 The Tribunal's judgment on liability was promulgated on 23 March 2021.

12.58 Around April 2021 the claimant decided she had to move away from the area and start afresh if she could. This was mainly to help her health and wellbeing as it was becoming more and more difficult to extricate UK Carline and their perceived threats from her mind. Cameron Clarke Leasing where she was working at the time was based in Preston. They had a trading partner within the Select Car Leasing Group who were based in Reading. She applied for a transfer to Select Car Leasing in Reading as a means to retain her employment within the group , and establish a solid grounding for her and her daughters' future. The Directors at Cameron Clarke were supportive and arranged for her to meet the co-owners of Select Leasing via a zoom meeting. This meeting went very well but the Select Directors informed her that they had made a policy decision to 'tread water' for a period due to the uncertainty around Covid, supply of vehicles and other issues. They also advised her that they did not feel comfortable in relocating her and her family due to this uncertainty.

12.59 In May 2021, the feelings of anxiety the claimant was having resulted in her having time off work due to stress and low mood. She referred herself to Minds Matter, and saw her GP on 19 May 2021 (see page 415 of the bundle) . She referred to the Tribunal claim process , and how she was having nightmares, irrational thoughts, and was not sleeping. She had broken down at work that day. She was given fit notes to cover her absence from work from 19 May to 3 June 2021 (page 451 of the bundle), and from 3 June to 30 June 2021(page 448 of the bundle). in the first the conditions referred to were "low mood, stress", and in the second "low mood". She was prescribed Citalopram (page 441 of the bundle). Her referral to Minds Matter is documented by a letter from that team dated 1 June 2021, page 449 of the bundle. The claimant was assessed by Minds Matter in her consultation with them , and her result on the PHQ9 Depression measurement was 23, and on the GAD Anxiety measure was 21. The Tribunal understands that on the former , the scale is 0 to 27, with 20 to 27 indicating severe depression, and on the latter, the scale is any score higher than 15 indicates severe anxiety. (Darren Godbert's wife in her treatment of the claimant utilised these measures, and, as can be seen over the course of the records of that treatment at pages 473 to 508 of the bundle, the claimant's scores on these measures came down from initially around 12 of the PHQ9 scale, and 8 of the GAD scale, to 1 or 2 on the former , and to 1 on the latter). On one occasion, albeit only briefly, the claimant when driving considered driving into the central reservation to kill herself.

12.60 This period of sickness was the final straw and the claimant decided that she needed to get herself away from the North West for her health and wellbeing. This was the trigger for her to reach out to Planet Leasing and secure a position with them in the South East.

12.61 The claimant left Cameron Clarke on July 31 2021, on very good terms and with the support and well wishes of the Directors to take up her position with Planet Leasing on the 6 of September 2021.

State Benefits.

12.62 Prior to her dismissal the claimant was in receipt of Working Tax Credit. This was despite her being employed and earning in the region of £25,000 per annum. She was a sole parent of two young daughters, and received this benefit because of the level of her earnings, and her childcare costs. The system of Universal Credit came into force around 2013. Working Tax Credit is accordingly what is known as a legacy benefit. The claimant made enquiries of the DWP as to the position once she had been dismissed. She was told that once she went onto Universal Credit she could not go back onto Working Tax Credit. Further, on making a telephone enquiry, she was told, as is backed up in the bundle (see page 290, the CAB advice "after you are dismissed") that she may be sanctioned for 13 weeks, because she was dismissed for misconduct, or could be seen to have been. She was fearful that this would mean she would have no money at all, or would have to get a loan which she would then have to repay, and would then have lost once and for all the certainty of the Tax Credit system which she was familiar with, and which was likely to continue providing her and her children with an income. She accordingly decided not to apply for Universal Credit.

12.63 The claimant received from 25 July 2019 £284.94 per week (after an initial payment of £288.11 for the first week) by way of Tax Credit (see pages 512 to 516 of the bundle). This was after the claimant notified the DWP of a change of circumstances. It is apparent, however, that these payments were based upon an estimate, provided by the claimant , of her likely earnings for the tax year 6 April 2019 to 5 April 2020, of £21,071.53. She had, of course, already earned some £7,685.02 gross in that tax year (see her payslip of 30 June 2019 , page 322 of the bundle), and had provided the DWP with an estimate of her likely earnings on the basis that she expected to obtain other employment during the tax year, as she in fact did.

12.64 Subsequently, in April 2020 her Tax Credits were re-assessed (see pages 517 to 522 of the bundle). This was on the basis of the claimant's earnings as an employee of £21,262.10 in the year 6 April 2020 to 5 April 2021. On that basis her weekly payments (after reduction to reclaim previous overpayments) were £307.58. Thereafter, on 27 August 2021 (see pages 523 to 527 of the bundle) her tax credits were amended, on the basis of the claimant's income for the year 6 April 2020 to 5 April 2021 at £21,969.00, and an estimated income for the next tax year of £15,000. In fact the claimant has earned more than that. On that basis her weekly payments were £246.17 and £5.96 up until April 2022, when they changed.

12.65 These assessments are always provisional, and are reviewed after the relevant years, with adjustments made in the light of the actual level of earnings and what has been paid in the interim, resulting in reclaims, or further payments, depending upon what the actual figures for the year being assessed reveal.

13. Those then are the relevant facts. To the extent that the submissions (which were extensive) relate to issues of fact, it will be appreciated that the Tribunal has largely accepted the claimant's evidence, and her supporting evidence. Whilst noting what is said about the absence of the claimant's two witnesses, Rikki Louella MacDonald , and Jonathan Nolan, they were only corroborative of the claimant's evidence, which was tested in cross - examination. As ever with untested written statements, the Tribunal has given them such weight as it considers is appropriate in all the circumstances. The same, of course, can be said, for the respondent, whose main

witness on several crucial issues of fact, Darren Godbert, was not present before the Tribunal, and his evidence was given, second – hand, as it were, by Mark Tillotson. The Tribunal will comment in further detail upon its findings of fact on the issues when discussing the specific issues below.

14. The parties provided written submissions. They are, with respect, not as helpful as they might have been. In the case of Mr Doran, a lay representative, that is not a criticism, but he has set out his submissions in a logical manner, and has included some figures. Mr Evans', by contrast contain an erroneous reference to the Tribunal having found the claimant was unfairly dismissed, and are peppered with capital letters, bold type , and sometimes both , in a manner rather more redolent of claimants acting in person than a professional representative. This is doubtless at attempt to provide emphasis , but the manner and frequency with which it has been done has not achieved that objective. Further , his submissions wholly omit any reference to how the Tribunal should approach valuing the loss of the company car, and have virtually no figures.

15. Further, Mr Evans's submissions seek to invite the Tribunal not to accept the claimant's evidence as to the seriousness of the consequences of the dismissal upon her . She is alleged, in several aspects, to have tried to "bolster and embellish her case". The Tribunal does not so find. The respondent is reminded that , coming into this remedy hearing, it was not the claimant who had made a surreptitious recording of the dismissal meeting, and then concealed its existence until cross examination in the liability hearing , some 14 months later. If any party had credibility issues before the remedy hearing, it was the respondent, not the claimant . The Tribunal accepts that there were issues as to accuracy in the evidence adduced on behalf of the claimant , and particularly in relation to that of Rikki Luella McDonald, but none of these led to Tribunal to suspect for one moment that the claimant was being less than truthful in her account of her perception of the events that occurred after her dismissal, nor of the way she felt on several occasions in terms of sometimes extreme reactions (such as suicidal ideation, thankfully brief) to the situation in which she found herself. That not all of this is reflected in her medical records is, in the Tribunal's view, entirely understandable, accepting , as she told the Tribunal, the claimant's fear that to be diagnosed , as a single parent, with serious mental health issues may have led to issues as to her ability to look after her children, and as to her employability.

16. The Tribunal also takes into account the claimant's previous medical history , and the fact that she was actually undergoing counselling for anxiety and related conditions from Darren Godbert's wife at the time of her dismissal. That her mental health was affected by her dismissal in these circumstances was entirely to be expected.

17. That Rikki Luella McDonald was being asked to make a witness statement some 3 years after the events which she was recalling may explain some of the discrepancies as to dates and detail, as may the fact, with all due respect to Mr Doran, that this statement was being taken by a non – lawyer. Her evidence, even allowing for the discrepancies that Mr Evans rightly highlighted, nonetheless supports in broad terms the picture painted by the claimant that in the months immediately following her dismissal in July 2019, she was in a very bad way, financially and emotionally, such as to give rise to serious concern on the part of her friend , and a referral to the GP which led to the prescription of sleeping tablets.

18. In terms of the evidence of Jonathan Nolan, again, untested in cross – examination, the Tribunal knows (because he says so in para. 64 of his first witness statement for remedy) that Darren Godbert did indeed contact him after he had provided the claimant with a reference for her application for a post with Hippo, and "took him to task" for this . His explanation for doing so was that Johnathan Nolan when providing this reference had used a title , General Manager , as indeed he had, which was inaccurate. Whether this is a credible explanation remains, in the absence of the Tribunal hearing from Darren Godbert, in serious question. It does suggest, as Jonathan Nolan's witness statement (para. 17) states, that he had been going through Jonathan Nolan's emails, after he had resigned.

19. Be that as it may, whether or not Darren Godbert did actually try to interfere with the claimant's application to Hippo is not a matter upon which the Tribunal is prepared, in the absence of Darren Godbert, to reach a conclusion, nor does it need to .The evidence of Jonathan Nolan, corroborated to this extent by the evidence of Darren Godbert, however, and that of the claimant , leads the Tribunal to find that the claimant believed that the respondent had interfered in her application to Hippo, and that belief was, in the circumstances, a reasonable one.

20. The parties have prepared schedules of loss and a counter schedule, and it is to these, and the source materials , in the absence of closing submissions which address all of the issues to be determined, that the Tribunal has also had to turn in order to make the determinations that it needs to.

The principles to be applied in assessing compensation for unlawful discrimination.

21. By way of overview, the following principles can be said to underpin the approach to compensation for all forms of unlawful discrimination:

The measure of damages is the same as it would be before a civil court, and in particular the Tribunal can award a sum for injury to feelings ;

There is no upper limit on the amount of compensation that can be awarded;

The Tribunal is not obliged to make an order for compensation if it does not consider it just and equitable to do so; but, having decided to make such an order, it must adopt the usual measure of damages: there is no jurisdiction to award only such as the tribunal considers just and equitable in the circumstances ***(Hurley v Mustoe (No 2) [1983] ICR 422***).

In effect, the complainant is to be put into the financial position they would have been but for the unlawful conduct of the employer ***(Ministry of Defence v Cannock [1994] IRLR 509***).

Following the approach taken in personal injury claims, the complainant will not recover losses that are , or should be avoided by means of insurance paid for by the employer;

Unlike the approach in tort, however, there is no requirement that the loss suffered be 'reasonably foreseeable'; compensation can be awarded in respect of all harm that

arises naturally and directly from the act of discrimination, at least in cases where the discrimination was deliberate and overt (***Essa v Laing [2004] IRLR 313,*** and ***Abbey National plc and Hopkins v Chagger [2009] IRLR 86***).

22. In calculating compensation according to ordinary tortious principles the Tribunal must take into account the chance that the respondent might have caused the same damage lawfully if it had not done so on discriminatory grounds. (***Livingstone v Rawyards Coal Co (1880) 5 App Cas 25***, 'damages … to put the party who has been injured … in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation'.) In the context of discriminatory dismissals this means asking the '***Polkey***' question, namely what would have happened if there had not been a discriminatory dismissal? (***Abbey National plc and Hopkins v Chagger [2009] IRLR 86***.)

The claimant's pre – termination net earnings and benefits in kind.

23. Whilst the net weekly figure of £462.47 has been agreed as the claimant's pre – dismissal earnings , to include employer's pension contributions , it does not include the value of the company car. It also, it seems (though both parties have been silent on the issue) does include loss of private health insurance, which was valued at £16.78 per month in the claimant's payslips, or £3.87 per week. Given that the figure provided in Appendix 1 to the claimant's updated schedule of loss for net weekly pay is indeed £462.4 7 (page 47 of the bundle) , which includes the pension contribution and the private healthcare, the Tribunal will take it that the agreed figure does include healthcare.

Assessing the value of the company car.

24. That leaves the issue of valuation of the company car. The claimant was taxed upon it at the rate of £88.42 per month from the end of April 2019 onwards (see her payslips at pages 689 to 691 of the bundle) on the basis that its notional value to her was £442.08 per month, £102.01 per week. That, however, is a gross basis, so the net notional value per month to the claimant , on this basis , was £353.66, which is £81.61 per week.

25. The respondent, however, invites the Tribunal to take a wholly different approach. The argument is that the Tribunal should value the loss of the company car at £75.79 per month (see its counter – schedule, for example, at pages 55 to 56 of the bundle). The basis for this calculation is set out in para. 12 of Mr Godbert's witness statement of 13 May 2022 (pages 206 to 207 of the bundle). In his calculation Mr Godbert refers to the cost of the vehicle to the respondent of leasing such a vehicle as being £80.00 per month. A typical lease, however, would be £240.00 per month. He then deducts the £88.42 per month that the claimant was taxed in respect of this vehicle, which then leaves a figure of £151.58 per month . He then splits the claimant's milage 50/50 between work and business, and then comes up with a figure of £75.79 per month for the value of the company car to the claimant. The respondent also, be it noted, applies this figure to the value of provision of company cars to other retained employees, in schedules of their earnings , which will be considered below.

26. This is, with respect, a wholly erroneous approach for a number of reasons. The first is that in setting the amount of tax that an employee is liable to pay for provision

of a company car, HMRC take its on the road price. That the car is actually leased, rather than bought outright, is, as far as the Tribunal is aware, irrelevant. Notwithstanding that, the respondent seeks to take the lower benefit in kind monthly figure based on the leasing costs, but deduct from it the tax that the claimant actually paid on the notional value, based on the purchase price. This is not comparing like with like. Thirdly, the concept of private/business mileage is irrelevant, and has been since 2002. HMRC no longer makes any such distinction, and the basis of taxation of such benefits in kind is based now upon a combination of the purchase price and level of emissions. Private and public usage is now irrelevant.

27. The respondent's approach is thus just wrong, and the Tribunal sees no reason not to value the loss of the company car to the claimant at £81.61 per week, save for the one week where she actually hired a car at a cost of £101.18. Her net weekly loss of earnings and other remuneration is therefore £462.47 plus £81.61, a total of £544.08.

Loss of earnings – over what period ?

28. The next issue is the period in respect of which the Tribunal should make any award for loss of earnings. The claimant's case is that it should be from the date of her dismissal until 1 April 2022, which is the period she seeks.

29. The first question is what, but for any arguments as to whether the claimant would have lost her employment in any event (the ***Polkey*** issues) , should be the appropriate period over which the Tribunal should award loss of earnings? The period sought is just over 32 months. Clearly, save in cases of career ending discrimination, a successful claimant, particularly a relatively young one, cannot simply expect that she will be compensated for the rest of her working life. There will come a point by which she will have, or will be expected to have, fully mitigated her losses, or by which it can no longer be said that the ongoing cause of any continuing losses was the increasingly distant act of discrimination that she suffered.

30. The Tribunal has to assess, as a starting point, before considering any reduction for ***Polkey*** issues, what would be a reasonable period. Such periods are easier to recognise than to prescribe. The Tribunal considers that in this case , although the act of discrimination was a single act, its effects have been long lasting. The prolongation of the proceedings, and the recurrence of its effects upon the claimant , have led the Tribunal to consider that the period of 32 months is, at first sight, a reasonable one, and , subject to the other issues, one upon which the Tribunal was minded to base its award for loss of earnings.

31. The respondent contends for a much shorter period, however, on a number of different bases. In relation to this first issue of the period over which the Tribunal should award loss of earnings, Mr Evans , at para. 100, submits that , at most , the Tribunal should limit the loss of earnings to two periods. Period 1 - the period from dismissal up to commencement of new employment. Thereafter, period 2, 3 months in new employment, to be so restricted because it is not the respondent's fault that the claimant is unable to earn the same salary, that is not sufficiently connected to the dismissal. There is no chain of causation. It would not be just and equitable to visit the claimant's inability to secure employment at the same rate of pay as the respondent.

32. There are a number of flaws with those submissions. Firstly, there is no basis at all for limiting the claimant's losses to the time when the claimant commenced new employment. If, as was the case, that new employment , whilst mitigating the claimant's losses, did not produce remuneration , in pay and benefits in kind, which fully replaced the lost remuneration , then the respondent is, prima facie liable to meet the shortfall on a partial loss basis. Secondly, the argument that it is not the respondent's fault that the claimant was unable to earn the same salary misses the point. It is not the claimant's fault either. As Mr Evans recognises in paras. 97 and 98 of his submissions, the provision of a company car appears to have been an atypical benefit provided by employers in this section. That may be so, but if an employer dismisses an employee from a particularly well remunerated job, he remains liable to compensate the employee for such losses as flow from that dismissal for such period as the Tribunal finds to be attributable to the dismissal. The unavailability of equally well paid employment does not break the chain of causation, it simply limits the extent to which the claimant is able to mitigate the losses that flow from that dismissal. Thirdly, though less importantly, unlike compensation for unfair dismissal under s.123 of the ERA, compensation for unlawful discrimination is not assessed on the basis of what is just and equitable, but on ordinary tortious principles. If therefore, the loss flows from the tortious act, it is recoverable unless the chain of causation is broken.

33. The Tribunal has therefore determined that the period of 32 months from the date of dismissal to the date when the claimant has become a franchisee is a reasonable period, and that the (largely partial) loss of earnings that the claimant has suffered in that time flow from the respondent's tortious act in dismissing her.

The likely effects of furlough.

34. The Tribunal must also consider the effect upon the claimant of furlough, had she remained in the respondent's employment. The evidence of Darren Godbert (in his witness statement of 13 May 2022) states that all the contract team were put on furlough, though he does not give a date. The Tribunal will accept that this was probably from March 2020. In terms of the earnings of furloughed employees, the respondent has not disclosed actual payslips of the comparators , but has instead produced, as exhibit DG11 to Darren Godbert's witness statement, a summary of their earnings in this period. This is , regrettably, the respondent's preferred method of presenting this evidence. The Tribunal is not provided with original core material in the form of any payslips of the comparators, but is provided with a summary. Such summaries are not accurate, however, as, for instance, they include the respondent's figure for the value of the company car which it has applied to the claimant , £75.76 per month, when this will not have been what appeared on the payslips of the relevant employees. Further, these summaries do not make it clear if the figures are gross or net.

35. The respondent refers the Tribunal to exhibit DG11, page 261 of the bundle, to support its argument that the claimant , had she remained employed would have been furloughed, and that she would not have earned as much as she did previously. The figures for the two comparators , Andrew Hall and Darren Preston show that in the months from March to October 2020 their pay was indeed static, £1712.36 per month for the former, and £1783.11 for the latter, bar a few pence. Those figures equate to annual salaries of £20,548.32 and £21,397.32. It is assumed that these are gross

figures. This is higher than the figure of £20,000 which Darren Godbert refers to, although it may include some commission.

36. There is no suggestion that the furloughed employees lost their private health care, or the use of their company cars. Thus , in assessing what lesser remuneration the claimant would have received if furloughed, these elements can be ignored. As the respondent paid , as the furlough scheme permitted, 80% of the salary of the furloughed employees, it seems to the Tribunal that the simplest way to estimate what the claimant would have earned when furloughed is to take 20% from her earnings. That should apply only to the pay/commission element, and not to the other benefits in kind, especially as there was no such reduction in these benefits for the furloughed employees.

37. Using the calculation on page 47 of the bundle , which forms the basis of the agreed weekly loss figure of £462.47, the claimant's average net monthly pre - dismissal earnings were £1944.02, which equates to £448.83 per week. Reducing that by 20% gives £359.06, to which the other elements for pension , healthcare , and company car need to be added, making in total £454.32. For those weeks when the claimant would have been furloughed, therefore, her net weekly loss should be based on that figure. Taking her net weekly loss figure of £544.08, less the £454.32 per week that she would have earned on furlough means that during the furlough period the claimant should receive £89.76 per week less for these weeks.

38. The question then arises of for what period should the Tribunal base its award on this reduced figure? The respondent says that the majority of employees were put on furlough until November 2020. Of the contract hire team , only 5 returned early, 2 on 1 June 2020, and 3 on 1 July 2020. Should the Tribunal proceed on the basis that the claimant would have been one of those who returned early ?

39. The best that the Tribunal can do is say that there was a 50/50 chance that she would have been one of those who returned early. The maximum period of furlough would have been the 8 months between March to November 2020. The claimant would certainly have been furloughed for the first three or four of them, and had a 50% chance of being furloughed for the next four. The Tribunal considers that the fair way to resolve this issue is to award the claimant loss of earnings on the basis of 6 months reduced earnings on furlough.

40. The difference between the claimant's weekly loss at the full rate and at this reduced rate is £544.08 - £454.32 = £89.76. This will be deducted for 26 weeks from the loss of earnings calculation.

The calculation of losses:

1.The first period:

9 July 2019 to 13 September 2019 – when the claimant obtained work with Cordant for one week

9.5 weeks

Net Loss: **£3,292.26**

2.The second period :

18 September 2019 to 21 October 2019 when the claimant obtained work with Limitless

5 weeks at £544.08 per week **£2,720.40**

3.The third period:

21 October 2019 to 3 January 2020 – the claimant's employment with Limitless

11 weeks

Net Loss : **£3,220.76**

4.The fourth period:

6 January 2020 to 15 June 2020 – the claimant's employment with EXCLR

23 weeks

Net Loss : **£5,503.93**

5.The fifth period :

15 June 2020 to 31 July 2021 – the claimant's employment with Cameron Clarke (Select)

59 weeks

Net Loss: **£12,502.85**

6.The sixth period :

31 July 2021 to 6 September 2021 – the claimant out of work pending her move to Essex

5 weeks at £544.08 : **£2,720.40**

7.The seventh period:

6 September 2021 to 1 April 2022 – the claimant's employment with Plant Leasing

30 weeks

Net Loss : **£ 3,128.56**

Total of all 7 periods: **£33,098.16**

Less reduction for the reduction in earnings that the claimant would have suffered if she remained in the employment of the respondent, and had been furloughed for 6 months – 26 weeks at £89.76:

£2,333.76

Net Grand Total Loss of Earnings **£30,764.40**

Mitigation or other deductions.

41. Having determined the period for which the Tribunal proposes to award compensation for loss of earnings, the Tribunal now turns to the issue of whether the claimant has unreasonably failed to mitigate her losses, in the specific ways advanced by the respondent. There are two linked, but separate issues here, dealt with in paras. 82 to 88 of Mr Evans' submissions. The first is that , in not claiming Universal Credit, which would have been deductible from any award for loss of earnings, the claimant unreasonably failed to mitigate her loss.

i) State benefits – failure to mitigate.

42. The claimant did not apply for Universal Credit after her dismissal. The respondent argues that this was, in itself, an unreasonable failure to mitigate her loss. To this end the respondent has suggested , in the counter - schedule of loss, the submissions and Darren Godbert's evidence, that the claimant would have received by way of Universal Credit in total a sum of around £2,700 in respect of the first period of loss between August and October 2019. The respondent contends that in not applying for Universal credit, the claimant unreasonably failed to mitigate her loss.

ii)State benefits : credit for sums received by way of Working Family Tax Credit and Child Tax credit.

43. This is a linked issue, and is argued in para. 87 of Mr Evans' submissions. He says that as the claimant received these sums, she must give credit for them against her loss of earnings claim. Para. 87 does not specify the period over which it is contended any such deductions should be made, but, as the period for which the respondent contends that the claimant unreasonably failed to mitigate her loss by not applying for Universal Credit is between August and October 2019, the Tribunal presumes that this will be the period in respect of which the respondent will also contend that the claimant has to give credit for the Working Tax Credits that she received.

Discussion – (i) The alleged failure to mitigate.

44. These are not simple issues, but it probably helps to go back to first principles. Every victim of a tort (and sex discrimination is a statutory tort) is under a duty to take reasonable steps to mitigate their loss. The law is well summarised in this passage from the judgment of the Court of Appeal in ***Wilding v British Telecom Communications plc [2002] IRLR 524***, where Potter L J said this:

"*37. …. (i) It was the duty of [the Claimant] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from … his former employer; (ii) the onus was on [his former employer] as the wrongdoer to show that [the Claimant] had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of [the former employer], the way in which [the Claimant] had been treated and all the surrounding circumstances should be taken*

into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of [the Claimant].”

Later in the Judgment , Sedley LJ drew attention to the difference between a test of acting reasonably on the one hand and not acting unreasonably on the other; they are different. As he said in paragraph 55:

“… it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.”

45. Thus the duty is not a high one, and it is not for the victim of a tort to consider taking every measure that might reduce the liability of the tortfeasor. The duty is to act reasonably, and the burden of establishing that the claimant acted unreasonably rests upon the respondent.

46. Whether failure to apply for state benefits to which a claimant was entitled amounts to an unreasonable failure to mitigate loss has not been considered by the higher Tribunals or Courts for some time. It was considered, it seems, in the Scottish EAT in ***Secretary of State for Employment v Stewart [1996] IRLR 334***.In that case, in a claim to be paid by the Secretary of State in respect of unpaid notice pay that his insolvent employer failed to pay him, it was held that failure to claim unemployment benefit payable in respect of the notice period could amount to an unreasonable failure to mitigate loss. The EAT, however, stopped short of holding that it did in that case, as it did not have any evidence as to why the claimant had not sought such a benefit. It also considered whether the benefit would actually have been payable, which appeared uncertain. It remitted the matter back to the Industrial Tribunal.

47. Whilst the matter is not free from doubt, and one can see policy considerations as to whether a discriminating tortfeasor should be able to reduce his liability by requiring his victim to seek assistance from the State , the Tribunal will proceed on the basis that failure to apply for relevant benefits can amount to unreasonable failure to mitigate loss in discrimination claims (unfair dismissal, of course, is subject to the recoupment provisions, so different considerations apply).

48. In this case the claimant has given an explanation, which the Tribunal accepts, as to why she did not apply for Universal Credit. She was in receipt of legacy benefits, in the form of Tax Credits. Once she left that system and went onto Universal Credit she could not go back. Further, on making a telephone enquiry, she was told, as is backed up in the bundle (see page 290, the CAB advice “after you are dismissed”) that she may be sanctioned for 13 weeks, because she was dismissed for misconduct, or could be seen to have been. She was fearful that this would mean she would have no money at all, or would have to get a loan which she would then have to repay, and

would then have lost once and for all the certainty of the Tax Credit system which she was familiar with, and which likely to continue providing her and her children with an income.

49. The Tribunal cannot see that as an unreasonable step. The Tribunal has no hesitation in accepting that this was the information that the claimant was given. The fact that it was not in writing but in a phone call does not make the Tribunal question it, not least of all because it appears to have been likely to have been the case. Legacy benefits do cease once lost, and dismissed employees risk a period of 13 weeks' sanction. Darren Godbert's Exhibit 14 which is advice from the CAB , confirms that there can be a 13 week delay imposed as a sanction. Whilst he suggests that this is only a delay, and not total loss of the benefit, the Tribunal does not consider that this makes any difference to someone in the claimant's position. She was faced with either a delay or loss of benefit . Either would severely impact upon her ability to provide for her family.

50. Mr Evans submits that the claimant should have done more than make one phone call, and should have actually made an application. The Tribunal does not agree. Other than to waste her time when she was looking for other work, and risk the application succeeding, when she would not then be able to revert to the Tax Credits, what would be the point? Further, and finally, as the judgment of Potter J in ***Wilding*** cited above makes clear, the victim's state of mind is a relevant factor , and the Tribunal fully accepts that the claimant's state of mind at the time was such that she was fearful that to apply for Universal Credit would be likely to lead to her having no money at all for 13 weeks, and not being able to go back onto Tax Credits.

51. In short, it is not the duty of a victim of discrimination carefully to weigh up , and finely balance , all the measures which may be open to them which, if taken, may then benefit the respondent by reducing its liability for loss of earnings . Provided they act reasonably in all the circumstances they will not be held unreasonably to have failed to mitigate their losses. they So , although accepting the possibility that failure to apply for a particular form of State benefit can amount to an unreasonable failure to mitigate, the Tribunal holds that in all the circumstances in which the claimant found herself , it did not.

Discussion (ii) Deductions for Tax Credits received.

52. That then leaves the second issue, that of the deductibility of the Tax Credits that the claimant actually received. The position as to which benefits are deductible in these circumstances has also been the subject of some discussion in the higher Tribunals and Courts. As a basic principle, unlike unfair dismissal where recoupment applies, in determining compensation for discrimination, account has to be taken for benefits received as a result of the discriminatory act, in this instance the dismissal.

53. No case law has been cited to us on this issue. Certain benefits have been considered in this context, but there are no cases that the Employment Judge can find where Working Tax Credits are considered. The Tribunal has therefore had to go back to basic principles, and see how other benefits have been treated.

53. In respect of invalidity benefit (this benefit became known as incapacity benefit and then contribution based employment and support allowance), there are three approaches revealed by the case law:

(1) that no deduction should be made. This was the approach of the EAT (Judge Hargrove QC presiding) in ***Hilton International Hotels (UK) Ltd v Faraji [1994] IRLR 267.*** The justification for this approach is that it is well established that certain payments in the nature of insurance benefits are not taken into account in personal injury litigation. They are sometimes termed 'collateral benefits'. It is not easy to define the principles by which it is possible to identify which sums are to be taken into account and which are not. As Lord Bridge stated in ***Hussain v New Taplow Paper Mills Ltd [1988] AC 514 at 528***, 'Many eminent common law judges … have been baffled by the problem'. Here, the employee was required to give credit for payments made to him under a permanent health insurance scheme paid for by his employer. It was held that they were indistinguishable in character from uninsured sick pay payments. In the context of personal injury claims, the courts have held that no credit has to be given for sums received through benevolence or charity, nor for the proceeds of insurance bought by the employee (see eg ***Parry v Cleaver [1970] AC 1, [1969] 1 All ER 555***). In that case the House of Lords held that no credit had to be given for an invalidity benefit under a statutory pension scheme. In ***Smoker v London Fire and Civil Defence Authority [1991] IRLR 271***, the ***Parry*** principle was applied to a pension received from an employer, again in the context of a personal injury claim. In ***Hopkins v Norcros plc [1994] IRLR 18,*** the Court of Appeal held that the same principle applied in wrongful dismissal cases. The court refused to distinguish between breach of contract cases and cases brought in tort such as ***Parry***.

(2) that a full deduction should be made. This was the view of another Division of the EAT (Mummery J presiding) in ***Puglia v C James & Sons [1996] IRLR 70***, The court expressly departed from the ***Faraji*** decision, commenting that certain decisions were brought to its attention that were not brought to the attention of the court in the ***Faraji*** case, in particular ***Sun and Sand Ltd v Fitzjohn [1979] IRLR 154,*** the EAT noting that case to have held that unless there was a provision in the contract entitling the employee to receive full wages in addition to sick pay then the sick pay received ought to be deducted from the award.

*(*3) that half the sum should be deducted. This was the approach adopted by yet another Division of the EAT (Judge Hicks QC presiding) in ***Rubenstein v McGloughlin [1996] IRLR 557***. In that case the court analysed the authorities and recognised that at common law there would either have to be a total deduction or none; there was no room for apportionment.

54. In ***Rubenstein*** the EAT summarised the common law principles as follows:

"Our conclusions from the common-law cases are as follows:

(1) To the clear rule against recovery of loss not truly suffered (of which a paradigm case, too plain to be included in the authorities cited to us, would be continued payment of full wages by the employer) there are at least two equally clear exceptions, of which the one relevant for our purpose is that for financial provision against the loss,

pre-purchased by the plaintiff, the paradigm case being an accident insurance policy with commercial insurers, negotiated independently of the employment relationship.

(2) Between the two extreme cases lies a spectrum of factual situations, some of the variables being the extent of the employee's contribution, whether the employee's involvement is voluntary or obligatory, if the latter whether the obligation is contractual or statutory, and in the last case whether there is any contribution from general taxation.

(3) Only by statute can this variety be reflected in any apportionment; the common law must allow in full or refuse deduction of any benefits received and may thereby fail, in either event, to do justice to the situation.

(4) Under these restraints a wholly principled distinction is difficult, if not impossible, to achieve.

(5) In these circumstances the courts have required deduction of statutory benefits such as unemployment benefit, supplementary benefit and statutory sick pay, and also of one non-statutory benefit, namely the permanent health insurance provided by the employer in ***Hussain.***

(6) They have not required deduction of contractual benefits such as contributory retirement pensions, a disablement pension or an incapacity pension, or of one statutory benefit, namely the national assistance grant in ***Foxley [v Olton [1965] 2 QB 306****,*

(7) The deductions in point (5) above have been required notwithstanding that the benefits were funded in part by employees' contributions, and the benefits in point (6) have not been deducted notwithstanding that the employees' contributions were only partial."

55. Whilst the ERA 1996, in s.123(1) gives scope for a more flexible approach to award what is just and equitable, it has been held that in the case of benefits such as invalidity benefit to which the employee has contributed but which cannot be categorised as a private insurance arrangement, the just and equitable solution is to deduct one-half of the amount of the benefit from the compensatory award. That cannot, however, apply in the case of awards for discrimination.

56. In ***Morgans v Alpha Plus Security Ltd [2005] IRLR 234***, the EAT (Burton J presiding) considered all three approaches in ***Hilton***, ***Puglia*** and ***Rubenstein*** before opting to follow the judgment of Mummery J in ***Puglia*** and affirming that the full amount of invalidity benefit must be deducted from the pre-termination net wage for the purpose of calculating the loss of earnings element in the compensatory award. That was, however, an unfair dismissal case.

57. In respect of Housing Benefit, in ***Savage v Saxena [1998] IRLR 182***, the EAT (Hargrove J presiding) held that housing benefit is different to invalidity benefit and should not be taken into account in calculating unfair dismissal compensation. This was both because the EAT considered that it was too remote, since the payment is made in respect of the needs of the household and not the individual, and also

because once an award of unfair dismissal compensation is made, housing benefit may be recovered from it. Accordingly, if the benefit were deducted from the compensation, the employee would in effect be paying twice. The operation of the housing benefit scheme therefore provides against double recovery. Housing benefit has been replaced by universal credit.

58. The Tribunal has also considered, however, the case of ***Chief Constable of West Yorkshire Police v Vento (No.2) 2002 IRLR 177***. In this case, which was a discrimination claim, the issue arose of whether , for the purpose of assessing lost earnings, elements of social security benefits that a claimant receives in respect of children and/or household are not to be distinguished from benefits paid in respect of the claimant him or herself. The EAT upheld an Employment Tribunal's decision to discount from the claimant's compensation for lost earnings those sums she later received as income support, including the elements of benefit provided in respect of her children and mortgage interest payments. There would be an element of double recovery were the claimant not required to give credit for the benefits relating to her children and mortgage when calculating the financial losses resulting from her discriminatory dismissal. (It should be noted that the EAT's decision in ***Vento*** was subsequently appealed to the Court of Appeal in relation to other aspects of that decision, but this aspect remains good law.)

59. In approaching this issue, the Tribunal bears in mind the principle that the claimant must, as against any loss of earnings claim, give credit for any benefits received as a result of the discriminatory act of dismissal. That is why JSA, and now UC, if received as a result of loss of earnings resulting from dismissal, falls to be deducted.

60. The issue here, however, is that it is far from clear that the Working Tax Credits received by the claimant after her dismissal were as a result of her dismissal, or, if they were, to what extent they were. The claimant's evidence, and there is nothing to contradict it , is that she was in receipt of Working Tax Credits from 2015. Whilst this type of benefit does still exist, there is no reason to doubt the claimant's account that if she were to have applied afresh for benefits after her dismissal, she would, as indeed is the respondent's case, then be subject to the Universal Credit scheme.

61. Examination of the Working Tax Credits documents at pages 512 to 527 of the bundle reveals that there is some complexity to the Working Tax Credit regime. Tax Credits comprise of various elements, only one part of which is the Working Tax Credit element. Within it, however, is a "childcare element". It is of note that the first element, the "pure" working tax credit element, for 2019 to 2020 was assessed at £0, as the claimant's earnings reduced her entitlement to nil. Under the childcare element, however, her earnings reduced that element by £2244.82 (see page 514 of the bundle).

62. The other elements of the Tax Credit, however, are referred to as the Child Tax Credit elements. Again, there is no reduction to this entitlement by reason of the claimant's earnings. The Tribunal notes that this remained the case for the ensuing two years when the claimant was employed by other employers as set out in the evidence, and was earning.

63. In July 2019 the claimant clearly notified the DWP of her change in circumstances. She did not, however, tell the DWP that she expected to be out of work, with no earnings but she provided an estimate of her total earnings in that financial year (which was only, of course 3 months old at that time) of ££21,071.53 (see page 513 of the bundle). Her Tax Credits were calculated on that basis. That , the Tribunal appreciates, is less than the £33,941.00 figure that the claimant had provided for the previous year, which appears itself to have been an estimate, and to have overstated the claimant's actual earnings that year. It is clear, however, that the assessments are provisional, and that the entitlement is adjusted retrospectively up or down, once actual earnings figures for each year are provided.

64. The Tribunal's understanding of the Child Tax Credit element of Tax credits is that it largely replaced what was known as "Family Allowance", i.e. sums paid by the State in respect of the care of children . It was not dependent upon means, and was not restricted to a particular limit on the number of children. Child Tax Credit, however, was limited to 2 children, and it seems that there could be some reduction for parental income, though none was made in the claimant's case.

65. It is difficult to see what, if any, additional sums by way of Tax Credit the claimant actually received after her dismissal, and because of it. In the Tribunal's view, it is only any sums which can be demonstrated to have been paid by way of increased Tax Credit payments by reason of the dismissal that would fall to be deducted. That would almost certainly not be the totality of the payments of Tax Credit that were made, as the Child Tax Credit elements would be likely to have remained, even if reduced by reason of the claimant's income.

66. Whilst the position is not free from doubt, as there is no obvious basis or authority for making any deduction for this particular type of benefit, the burden of showing that this type of benefit is deductible against the loss of earnings claims, and in what amounts, lies upon the respondent. For all these reasons, the Tribunal's conclusion is that it is not persuaded that all , or any portion , of the benefits that the claimant received in the form of Tax Credits after the date of her dismissal fall to be deducted from her loss of earnings in any period in respect of which the claimant claims them, and no such deductions will be made.

Failure to otherwise mitigate her losses:

67. Whilst not greatly pressed in the respondent's submissions, the Tribunal has considered whether, generally, the claimant unreasonably failed to mitigate her losses by making greater efforts , or more focussed and realistic efforts, to find alternative employment. As the submissions at para. 88 show, no positive case has been asserted, and the comments as to lack of evidence are of no weight, as the Tribunal has accepted the claimant's oral evidence, and the examples she was able to retrieve some email applications. The Tribunal unhesitatingly accepts that the claimant , with her concerns as to how she was to look after her children , did all that she reasonably could to find alternative employment following her dismissal.

The Polkey issues.

68. As Mr Evans submits (paras. 49 to 81 of his submissions) , the respondent's ***Polkey*** argument is threefold*:*

a.Dismissal would have been likely within weeks for performance.

b. Dismissal within weeks for failing to follow Company policy/ procedure.

c. Dismissal by November 2020 for redundancy

69. In applying the ***Polkey*** (as applied in principle in ***Abbey National plc and Hopkins v Chagger [2009] IRLR 86)*** the Tribunal is assisted by the guidance of Elias, P. in ***Software 2000 Ltd v Andrews [2007] IRLR 568*** when the EAT reviewed the authorities and gave the following guidance regarding the correct approach to '***Polkey***' and in particular the difficulties inherent in what is a predictive exercise.

"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) [N/a following the repeal of the statutory disciplinary and grievance provisions]

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it—the onus being firmly on the employer—that on the balance of probabilities the

dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s 98A(2).[Now repealed]

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the ***O'Donoghue*** *case.*

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

a.Dismissal would have been likely within weeks for performance.

70. Dealing with these in turn, for the first ,the Tribunal has to assess the chances of the claimant being dismissed non – discriminatorily (not unfairly, an error which has crept into Mr Evans' submissions and Mr Godbert's evidence) for poor performance. It was submitted that the with the background of poor performance, once the two deals had fully unravelled, the respondent would have dismissed , non – discriminatorily, the claimant and this would like to have been within no more than 7 days of 9 July 2019 (erroneously "19th July" in Mr Evans' submissions), and any losses would have ceased by 16 July.

71. The point is made that the claimant's service was less than 2 years, so she had no statutory rights, and had no right under s.92 of the ERA which sets out an employee's right to a written statement of reasons for dismissal, which also has a qualifying service requirement of two years.

72. That may be so, but it does not address the question of whether any dismissal of the claimant in these circumstances would not still have been discriminatory. Just because an employer had a legal right to act in a certain manner does not mean that to do so would not be discriminatory. The essence of unlawful discrimination is difference in treatment. An employer can treat two employees perfectly lawfully, but if he treats them lawfully, but differently , on the grounds of a protected characteristic, he then unlawfully discriminates.

73. The claimant's position was, as far as the Tribunal can tell, largely the same as Andrew Hall's in this regard. His start date appears to have been no earlier than the claimant's (he only had 2 years service in November 2020) so as at July 2019 he too lacked qualifying service, and therefore could have been dismissed in precisely the same manner for his poor performance. He was not. Indeed, from Darren Godbert's second statement of 26 May 2022, at para. 6, we know that whilst his performance "improved" in July 2019 (we are not told by how much), it fell below average in August and September 2019. He remained in employment until he left under a Settlement Agreement in November 2020.

74. There has never been any explanation for the better treatment of Andrew Hall, who , as recorded in the Liability judgment , was also being scrutinised for his performance, which in June 2019 was worse than the claimant's , but who received the "is this the Best Andy" email from Darren Godbert (see para. 8.19 of the judgment). He had also received a warning on 17 July 2018. He received no such warning in July 2019, or for the rest of the year. Indeed, no performance management appears to have been applied to him at all, he was permitted to fall below average in his performance for the next two months.

75. In terms of the evidence of Darren Godbert, firstly, and most obviously, "he would say that wouldn't he" is an obvious retort, and this assertion has not been tested. Added to that is the evidence that the Tribunal found in its liability judgment of a male – dominated culture, and the continued tolerance by the respondent of under – performance , by Andrew Hall in particular , but also others. Mark Tillotson , who was actually tasked by Darren Godbert to check the claimant's two deals which appeared to be almost too good, was unclear as to whether he actually did so. He, amongst others, had the opportunity to check them, and either failed to do so, or failed to do so thoroughly. Neither he, nor anyone else , was disciplined over this issue.

77. The position therefore is that the respondent has simply failed to show that the claimant would have been dismissed on a non – discriminatory basis for poor performance within a week or so of the date upon which she was actually dismissed. The burden of proving a ***Polkey*** reduction lies upon the respondent, and, particularly in the absence of Darren Godbert whose evidence could have been tested on this issue (Mark Tillotson accepting that he was unaware that Darren Godbert was going to dismiss the claimant , and such matters being for him to decide) , the respondent has failed to establish this basis for any ***Polkey*** reduction.

b. Dismissal within weeks for failing to follow Company policy/ procedure.

78. The respondent relies for this argument upon the fact that that , in addition to poor performance , there was an issue over two "trades" which had gone awry. These two trades were looked at by the Tribunal during the September 2020 hearing. The Tribunal found in the decision of March 2021 that the decision to dismiss on July 2019 was not due to the two trades because they were "still unravelling". It is likely , however, that the two awry trades would have unravelled within a matter of days of the 9th July meeting.

79. Reliance was placed on the evidence of Mark Tillotson, as to why these two trades had unravelled , and he adopted the majority of Mr Godbert's evidence from Mr Godbert's First and Second Statements.

80. The Tribunal noted that evidence, but from it it was apparent that the system allowed such errors to be made, and there were or should have been opportunities to check what the claimant had done. Indeed, Mark Tillotson himself may even have done so, after Darren Godbert expressed some surprise when he saw the proposed deals, and asked him to check that they were as good as they appeared to be.

81. The Tribunal appreciates that in these circumstances, the claimant may have been at risk of some action, but it still has to consider whether to dismiss her in these circumstances would not still have been discriminatory. The Tribunal's conclusion is

that the respondent has failed to demonstrate this. A number of factors lead to this conclusion. The first is the lack of any action, on performance grounds, against Andrew Hall. This suggests that the respondent was far more concerned with the claimant's performance than that of any man, and was therefore more likely to take action about any issue that arose than it did or would have done in the case of Andrew Hall. He had previously been the subject of a warning, but whilst the same concerns over his performance were being raised in July 2019, no action whatsoever was taken against him. Further, the Tribunal considers that the reason why Daren Godbert was so exercised about the unravelling deals was that he was looking to dismiss the claimant for her performance, and these deals made it look , temporarily, that she had improved and delivered sufficiently to avoid that fate, when she in fact had not done so. The respondent tried to characterise the claimant's conduct as costing the company money, when analysis revealed that it did not, it simply meant that the company made less money than it looked as if it was going to.

82. Secondly, Darren Godbert showed no interest in enquiring into, let alone taking any action against, anyone else who could also have been considered also responsible for these errors getting through the system. He had asked Mark Tillotson to check the deals , and he had told Darren Godbert that they were OK. When it turned out they were not, Darren Godbert did nothing even to enquire whether Mark Tillotson, a male, was also responsible for them going through, and whether he had in fact checked them. Thirdly, though of less weight, is our finding , at para. 8.61 of our liability judgment, that when another male employee Matthew Hardman made a serious mistake, he was simply require to sit next to the Compliance Officer, and was not dismissed. In short, given these facts, and the culture, as we recorded in our Liability judgment , of males being afforded more leeway , and getting more encouragement and support than the claimant received, the respondent has failed to persuade us that any dismissal of the claimant for these additional issues relating to the two trades which went awry would not also have been discriminatory. This ground for a ***Polkey*** reduction fails.

c. Dismissal by November 2020 for redundancy

83. The respondent's third proposition is that the Tribunal should reduce any award for loss of earnings on the basis that the claimant would have been made redundant in November 2020. Again, the Tribunal did not hear from Darren Godbert, so only has his written witness statements and the documents exhibited or in the bundle. Mark Tillotson did not carry out the redundancy exercise, so could not assist upon how selection for redundancy was made. Dan Preston, Andy Hall, Euan Chalmers and Ben Egleton, all of the Contract Hire Team were "made redundant", as Darren Godbert put it, but this is not accurate. All but Dan Preston left under Settlement Agreements. Aside from these agreements, and the letter inviting Dan Preston to an employment review meeting dated 1 October 2020, and the dismissal letter that was its result (pages 752 and 753 of the bundle) there has been no disclosure of any documents relating to this process.

84. Whilst Darren Godbert says that performance was one of the "underlying criteria", there has been no evidence whatsoever of how this was set as a criterion, and how it fitted with any other criteria. To the extent that the respondent was trying to achieve some reduction in staffing, there is no evidence either of what it was trying to

get the Contract Hire team down to. There is no evidence, therefore, of any cut off point after applying the criteria, so it is impossible to know, if the criteria had been applied to the claimant , which side of the line she would have fallen, if it was still necessary to make any compulsory redundancies at all. It may not, of course, actually have been necessary to do so. The respondent appears (for again the Tribunal has not been given enough detail) to have sought voluntary redundancies from those with short service, but, as can be seen from the fact that Ben Egelton with 4 years service took voluntary redundancy, the respondent did not confine itself solely to short service staff when seeking volunteers. Voluntary redundancies can often negate or reduce the need for any compulsory redundancies, and this may have occurred here. Clearly Dan Preston did not volunteer, and he was taken through the compulsory process. His service was only one year, whereas the claimant by November 2020 would have had two, and was approaching 3 in January 2021.

85. Further, the letter to Dan Preston makes no mention of any criteria other than length of service. The respondent has thus failed to adduce any evidence of what the selection criteria actually were , or how they would have been applied to the claimant. We know that on length of service she would not necessarily have been at risk, and if performance was indeed a criterion, whether she would or would not have performed better than those against whom she would have been competing for a post is a matter of pure speculation. We certainly know that her comparators did not simply improve consistently over this period (not that we have any actual figures) , so whether the claimant would or would not have been at risk on the basis of her performance is impossible to say. The claimant , the Tribunal is quite satisfied, would not have accepted voluntary redundancy at that time.

86. The Tribunal does note that the claimant obtained employment with XLCR in January 2020. In March 2020, the Claimant was placed on furlough. In May 2020, XLCR put the claimant and others at risk of redundancy due to Covid 19. The claimant agreed to voluntary redundancy with XLCR. The reason , however, was that, as she had only been employed for three months, she knew she would be first to be made redundant. She preferred therefore to leave and look for other work before that happened. That does not affect our finding that , had she still been employed by the respondent, she would not have accepted voluntary redundancy from the respondent in November 2020.

87. The upshot of all this is that the respondent has, again, failed to adduce anything like enough evidence to persuade the Tribunal that the claimant's employment, had she not been dismissed in July 2019, would have ended by reason of redundancy in November 2020, or even that there was a quantifiable chance that it would have. This is a classic "riddled with uncertainty" case, within para (3) of the formulation of Elias J. in ***Software 2000*** cited above, and therefore no ***Polkey*** (or more appropriately ***Chagger***) reduction will be made.

Injury to Feelings.

88. The starting point is the relevant range of bands of ***Vento*** , which , by the Second Addendum to Presidential Guidance Originally Issued on 5 September 2017 (20 March 2019) , in respect of claims presented on or after 6 April 2019, were set at:

a lower band of £900 to £8,800 (less serious cases);

a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band);

and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

89. The respondent's position (see para. 4 of the submissions) is, firstly, that the claimant has not established any, or any significant , injury to feelings, and so, at the highest, any award should be confined to the lower band. This was a one - off act of discrimination, dismissals occur every day, and people generally recover from such events in time. They get better not worse, and the claimant was able to set up a new company, apply for a loan, apply for jobs, and indeed successfully so, and to look after two young children, whilst working full time from October 2019. Her assertions as to the effects of her dismissal upon her are not backed up by the medical evidence, with very few consultations with her GP, and little to support her contentions. In short, Mr Evans' submissions seek to minimise the effects of the dismissal upon the claimant, and he invites the Tribunal to disregard much of her evidence.

90. The Tribunal declines to do so. Whilst the evidence was not perfect, the Tribunal is quite satisfied that the claimant has indeed suffered the significant injury to feelings that she sets out in her witness statements and her oral evidence to the Tribunal. That the claimant did not consult her GP every time she felt low is , in the Tribunal's view, entirely understandable. As she said, anyone in her position would be concerned that being diagnosed with serious mental health issues may lead to them being considered unfit to care for their children, and the risk that there may then be intervention by child protection agencies. Further, the Tribunal accepts that the claimant had to, and did, simply, "get on with it". Whilst the respondent suggests that her ability to take all the steps in mitigation (to its benefit, of course, as well as her own) casts doubt upon the effects of the dismissal upon her, that she did so, the Tribunal finds , does not undermine the considerable upset , distress and anxiety that her dismissal caused her. Rather it is totally consistent with the lengths to which any parent of young children is likely to go in such circumstances to provide for their family, however they personally may be feeling at the time.

91. Contrary to Mr Evans' submissions, there is corroboration of the claimant's evidence. Her GP records provide some, as does the evidence from Minds Matter in June 2021, when she was found to score very highly on the scales for depression and anxiety.

92. The Tribunal roundly rejects the suggestion that the claimant has sought to "bolster and embellish her case" as has been repeatedly suggested throughout these proceedings. The Tribunal accepts the claimant's perception of the effects of the dismissal upon her.

93. For the claimant Mr Doran invites the Tribunal to accept the claimant's evidence that this was more than just a "one – off" case. He cites the case of ***Base Childrenswear Ltd v Otshudi [2019] UKEAT 0267/18/2802*** where HHJ Judge Eady QC (as she then was) set out her reasons for agreeing the middle band of the Vento Guidelines was appropriate;

"The fact that the ET's finding of unlawful discrimination related to an isolated event - the Claimant's dismissal - did not mean it was required to assess the award for injury to feelings as falling within the lowest Vento bracket: the question was what effect had the discriminatory act had on the Claimant? On the ET's findings of fact in this case, it had permissibly concluded that this was a serious matter (something acknowledged by the Respondent) that gave rise to an injury to feelings award falling within the middle of the middle Vento bracket. Moreover, in reaching that decision, the ET had been careful not to double-count matters that it subsequently considered relevant to the question of aggravated damages, personal injury or any ACAS uplift. It had, further, not taken into account irrelevant factors when it referred to the Claimant's grievance, her notification to ACAS or the pursuit of her ET proceedings; these were potentially relevant matters to which the ET was entitled to refer when testing whether the Claimant had genuinely been aggrieved by the Respondent's discriminatory conduct. There was, therefore, no proper basis on which the EAT could interfere with the award made."

94. Mr Doran highlights the similarities with the claimant's case. This is clearly the law. It is up to the Tribunal to determine the appropriate level of the award, and it must not be fettered by notions of the bands applying to specific circumstances. The Tribunal has to consider all the circumstances in each case, make findings of fact, and then consider, not unduly trammelled by the bands, which are only guidelines, what the appropriate award in the specific case before it should be. Further, the tortfeasor has to accept its victim as it finds her, and any particular pre-existing vulnerability or susceptibility of the claimant to more severe adverse reaction to her treatment does not relieve the respondent of liability to compensate her on that basis.

95. The respondent has provided the Tribunal with eight first instance decisions on injury to feelings. The awards range from £5,000 to £22,500, and the years in which the awards were made range from 2017 to 2022 . The Tribunal has considered them, but all such awards are fact sensitive, and none of the cases cited is on all fours with the facts of this one.

96. The Tribunal finds that , although the act of discrimination was a one – off act of dismissal, there are several factors which merit taking it out of the lower band. They are:

a) As a result of the discriminatory dismissal, the claimant lost not only her employment, but also access to counselling that had been provided to her by Darren Godbert's wife;

b) The claimant had a medical history of anxiety and stress, for which the counselling was being provided; she was vulnerable;

c) The claimant's dismissal was peremptory, with no due process or warning, and she considered, highly public, in that it was carried out in Daren Godbert's glass fronted office on a floor where other colleagues would have been able to see, and possibly hear, what was going on; they would have seen her leave that meeting in tears and then re-renter it; she was then taken home immediately;

d) The dismissal meeting , after the break that the claimant took to compose herself, was then surreptitiously recorded; the existence of that recording was

not revealed until Darren Godbert gave evidence on 25 September 2020, some 14 months after the dismissal. The claimant was very upset in the hearing, when this was revealed, and felt violated ; this continued on the journey back that evening, and the Tribunal has heard her vivid account of how she felt and reacted that day;

e) The claimant received no written explanation for her dismissal, and the email she sent seeking one was ignored;

f) In the aftermath of her dismissal the claimant was very upset , and fearful of how , as a one parent family, she was to continue to provide for her young children;

g) The claimant lost not only of her employment, but also of use of a company car, which created difficulty for her in seeking alternative employment, without the use of a vehicle to attend interviews, or to then get to any work shat she then obtained; it also impacted upon her childcare until she bought another car;

h) The absence of any written explanation for her dismissal meant that the claimant was wary of how future employers may view her;

i) The claimant as a one parent family was in receipt of Working Tax Credits, legacy benefits which would be put at risk if she applied for Universal Credit, which she continued to receive as her only source of income;

j) The claimant had to try to hide her distress and upset at losing her employment from her children; she lost confidence;

k) The claimant around August 2019 had virtually no food in her cupboards, and fridge. At one point she had only £50 to her name, and had to decide whether to buy new school clothes for her children, or buy a birthday present for one of her children on 2 September 2019;

l) The claimant borrowed £200 from her friend Rikki Luella McDonald;

m) The claimant on 6 August 2019 consulted her GP , who noted that she was under stress , having lost her job, and was prescribed sleeping tablets;

n) Having applied for, and believing that she was about to succeed in obtaining, a post with another leasing company, with the prospect of being able to restore her financial situation in the industry in which she was experienced and comfortable, she was unsuccessful. The claimant believed, on reasonable grounds, that the respondent had intervened to prevent getting that employment. She remained highly distrustful of the respondent, and this informed her subsequent approach to alternative employment and life choices;

o) Although successful in obtaining employments within the automotive industry, the claimant remained fearful of the influence that the respondent may have or seek to have in the future if she remained in the north west;

p) She sought therefore initially to re-locate with her then employer to Reading, but this could not be accommodated;

q) Around this time, May 2021, the claimant had a period of sickness absence due to stress and anxiety, the cause of which the Tribunal is quite satisfied was her dismissal and the ongoing Tribunal proceedings , which were at that stage still proceeding, after a successful liability judgment. There were two fit notes issued at that time, covering the period of 19 May to 30 June 2021, each referring to low mood, and the entry by the claimant's GP (at page 415 of the bundle) states that she had broken down at work.

r) The referral that the claimant made to Minds Matter at that time (page 449 of the bundle) shows that on both the PHQ9 measure for depression, and the GAD7 for anxiety, the claimant scored highly, indicating that she was suffering from severe symptoms of both conditions;

s) The claimant has stated that on occasions that she considered suicide or self harming by driving her car into the central reservation; whilst she accepted that this had not been recorded in her medical records, the entry for 19 May 2021 (page 415 of the bundle) does record "irrational thoughts", at time when her scores for depression and anxiety were very high;

t) The respondent , legally represented , has fought the case at every turn, and has had to be forced to give disclosure of documents; the claimant has been cross – examined and submissions made , on the basis that she has not been truthful and has deliberately sought to bolster and embellish her case.

97. The Tribunal has considered all these factors , in determining the level at which to set the award for injury to feelings. There are, the Tribunal considers, two particularly relevant matters to consider in making this assessment. The first is the severity of the injury to feelings suffered by the claimant , and the second is the period of time over which she so suffered them. The Tribunal's conclusion is that the injury to feelings sustained by the claimant was more than minor. At times it was severe, although this was not the case all of the time, but there were clearly times when she suffered quite intensely. That was certainly true of the dismissal itself, and its immediate aftermath, but those feelings did abate to some extent after a period of time, once the claimant had obtained her first role back in the automotive industry, but they never completely went away, and there were subsequent flare - ups, particularly during the hearing in September 2020, and in May 2021.

98. Thus the period over which the claimant has suffered injury to feelings has been a protracted one. What could have been viewed as a one - off act of discrimination has had effects upon the claimant's feelings long after the act itself, in fact for almost three years, up until the remedy hearing in June 2022.

99. For all these reasons the Tribunal has concluded that the appropriate award for injury to feelings lies outside the lower band, and lies in the medium band. Whilst Mr Doran has invited the Tribunal to make an award at the top of that band, the Tribunal does not consider that the circumstances merit such an award, but rather around the middle of the band, and sets the award at £20,000.

Aggravated damages.

100. The claimant argues that, in addition to the award for injury to feelings , the Tribunal should also make an award of aggravated damages. As a matter of principle, aggravated damages are available for an act of discrimination ***(Armitage, Marsden and HM Prison Service v Johnson [1997] IRLR 162***). Although Tribunals in England and Wales plainly have the jurisdiction to make awards of aggravated damages in appropriate circumstances, the award must still be compensatory and not punitive in nature, see ***Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291*** (a whistleblowing case). In reducing the award of aggravated damages from £20,000 to £7,500, the EAT (Underhill P presiding) observed that such damages are really an aspect of injury to feelings and tribunals should have regard to the total award made (ie for injury to feelings and for the aggravation of that injury) to ensure that the overall sum is properly compensatory and not—as in ***Shaw***—excessive. Although the EAT did not require Employment Tribunals to adopt the Scottish approach of only making one award, it laid down guidance to the effect that Tribunals should formulate any award of aggravated damages as a subhead of injury to feelings as follows: 'Injury to feelings in the sum of £X, incorporating aggravated damages in the sum of £Y'.

101. Further guidance on the interplay between aggravated damages and awards for injury to feelings was provided by the EAT (Langstaff P presiding) in ***HM Land Registry v McGlue UKEAT/0435/11***. Allowing that aggravated damages 'have a proper place and role to fill', the EAT warned that a Tribunal should also 'be aware and be cautious not to award under the heading “injury to feelings” damages for the self-same conduct as it then compensates under the heading of “aggravated damages”'. Such damages are not intended to be punitive in nature and are not dependent upon a sense of outrage on the part of the tribunal.

102. The EAT considered the categories of conduct where it might be appropriate for an award of aggravated damages to be made, i.e where the distress caused by an act of discrimination may be made worse by :

(a) being done in an exceptionally upsetting way, eg 'In a high-handed, malicious, insulting or oppressive way', per Lord Reid in ***Broome v Cassell [1972] 1 All ER 801, [1972] AC 1027*** *;*

(b) by motive: conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress provided the claimant is aware of the motive;

(c) by subsequent conduct: eg where a case is conducted at a trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise, eg ***Prison Service v Johnson, HM Prison Service v Salmon [2001] IRLR 425*** and ***British Telecommunications v Reid [2004] IRLR 327***.

103. Although an award of aggravated damages may be justified in such cases, a Tribunal considering making such an award should look first as to whether, objectively viewed, the conduct is capable of having aggravated the sense of injustice and having injured the complainant's feelings yet further. On the facts of ***McGlue***, the Tribunal's findings did not disclose this to be a case meeting the necessary standard to justify an award of aggravated damages. Moreover, the total award (of £17,000) for compensation for non-pecuniary losses (injury to feeling and aggravated damages)

was, when one stood back and considered it, too high. The appeal was allowed in part on this point and the award of aggravated damages of £5,000 was overturned. As allowed in ***McGlue***, malice or other bad intention on the part of the respondent will provide a reason for making an award of aggravated damage, but any such award is likely to be reduced if a genuine apology has been made.

104. Aggravated damages may also be awarded if a respondent has defended proceedings in a way that is wholly inappropriate and intimidatory: ***Zaiwalla & Co v Walia [2002] IRLR 697***. Mr Doran cites this case in support of his claim for aggravated damages on behalf of the claimant, and Mr Evans also cites it.

105. An award of aggravated damages will not be supported, however, merely because an employer acts in a brusque and insensitive manner towards an employee and/or is evasive and dismissive in giving evidence, see ***Tameside Hospital NHS Foundation Trust v Mylott UKEAT/0352/09*** . The EAT (Underhill P presiding) warned that a finding of malice against a manager was a serious finding that ought not to be made lightly and which would need to be fully supported by the factual findings if made.

106. Moreover, as the EAT made clear in ***Munchkins Restaurant v Karmazyn UKEAT/0359/09***, if the reason the Tribunal is considering making an award for aggravated damages relates to the behaviour of the respondents' representative, it should (a) first consider whether to make a costs award instead; and (b) only make an aggravated damages award if there was hurt caused to the claimant(s) additional to that which would have occurred in any event by a legitimate and robust defence of the claim, and (c) only make such an award that would compensate for the hurt caused by the conduct that went beyond that which would have been acceptable.

107. Mr Evans submits that the claimant has only set out a generalised claim for aggravated damages. He submits that none of the criteria in ***Shaw*** have been established by the claimant . He says that the manner in which the discrimination was carried out was not particularly upsetting , as it was likely that the claimant knew that she had been dismissed for poor performance and the two trades.

108. The Tribunal does not accept the respondent's submissions. The Tribunal is satisfied that the respondent's behaviour does merit an award of aggravated damages. Firstly, the manner of the dismissal was high handed, and insulting. The claimant was called into a meeting which Darren Godbert knew would lead to her dismissal, but the claimant did not. The email inviting her to it simply said that it was to discuss her performance. Further, the Tribunal accepts the claimant's account of that meeting. It has heard and assessed her account of it, but has not had the benefit, for reasons that are entirely of the respondent's making, of hearing Daren Godbert's evidence about it tested in live evidence . That it was also then surreptitiously recorded , in breach of her human rights, after the claimant had already had to leave the meeting in tears, and was clearly in a distressed and vulnerable condition, the Tribunal finds high handed and oppressive. It was obviously done to disadvantage the claimant , and advantage Darren Godbert. That was further compounded by the fact that, in breach of its disclosure obligations, the respondent concealed this fact for a further 14 months, and only revealed its existence after the claimant had been cross – examined. The

respondent has , in this way in particular , but also generally, in other ways, sought to defend the proceedings in a manner which , in the view of the Tribunal, has gone beyond the merely legitimate and robust. The claimant's credibility has been questioned in both the liability, and more recently , and rather more upsettingly, in the remedy hearing, in which it has been suggested that she has sought to bolster and embellish her claims.

109. The Tribunal takes into account the need for care in assessing aggravation, and the need to ensure that , as it is a facet of the injury to feelings award, it bears some relationship to it. The Tribunal's view is that an appropriate amount by which to increase the award for injury to feelings by way of an award of aggravated damages is £5,000 .

Uplift for failure to follow the ACAS Code of Practice

110. The potential risk of double-recovery in awards for non-pecuniary damages was illustrated in the case of ***Base Childrenswear Ltd v Otshudi UKEAT/0267/18*** (note this case proceeded to the Court of Appeal on a different point: ***[2020] IRLR 118***, which is referred to in the submissions), where the Employment Tribunal had taken account injury to the claimant stemming from the employer's failure to properly address the claimant's grievance both in relation to an award of aggravated damages and as one of several reasons for making a 25 per cent uplift for failure to comply with the ACAS Code of Practice. However, there is not necessarily any overlap between a Code of Practice uplift and an award for injury to feelings or an award of aggravated damages, since in a particular case the Tribunal may make the Code of Practice uplift entirely for punitive rather than compensatory reasons: ***Sir Benjamin Slade v Biggs [2022] IRLR 216***. In that judgment the EAT also said that in cases where there was an overlap, it might be insignificant or unquantifiable in which case no reduction should be made to account for overlap. Valuable guidance is given to Tribunals as to how to approach the relationship between an uplift under s.207A, and an award of aggravated damage s at para. 77 of the judgment, where Griffiths J., said this:

"In future, when considering what should be the effect of an employer's failure to comply with a relevant Code under s 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."*

111. It is always necessary, before uplifting any award on this basis, to identify what relevant ACAS Code of Practice has been breached, and to what extent. Whilst the respondent has categorised the reason for the claimant's dismissal as conduct, or poor performance, the Tribunal considers that the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures, which came into force on 1 March 2015 applied to the claimant's dismissal. The Introduction to the Code provides:

Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.

112. Thus, whether characterised as being for conduct or performance, the Code of Practice applied to the claimant's dismissal. In the manner in which the respondent conducted that dismissal, it wholly failed to comply with the basic requirements of the

Code by informing the claimant in writing in advance of the conduct or performance issues that were to be addressed, giving her notice which contained sufficient information about the alleged misconduct or poor performance and its possible consequences , to enable her to prepare to answer the case at a disciplinary meeting, together with any written evidence.

113. Whilst a meeting was held, it thus was not held in accordance with the Code. The respondent then breached the Code further by not informing the claimant in writing of the action to be taken , and the reasons for it. The respondent then further breached the Code by not affording the claimant a right of appeal.

114. It is no answer for the respondent to say that the claimant knew she was under scrutiny for her performance, and will have known what the meeting was going to be about. An employee facing a meeting which may lead to their dismissal is entitled, under the Code, to be given advance warning of what is to be discussed, so that they can prepare for the meeting, and of the fact that the meeting may lead to their dismissal.

115. The Tribunal's initial view was that , as this was a wholesale disregard of the Code of Practice, a maximum uplift of 25% would be justified , subject to any issues in relation to double recovery , were aggravated damages to be awarded. It is appreciated that there was at least a meeting, so some limited compliance was achieved, but given the circumstances, the lack of warning or chance to prepare, and failure to adjourn to another day to allow the claimant properly to prepare, that meeting was token compliance, which was then subverted by the unfair and illegal covert recording of the second part of it. For the respondent, Mr Evans does not address the issue of an uplift at all in his submissions. In the counter -schedule of loss (pages 60 and 61 of the bundle) the respondent submits that it did not unreasonably fail to follow the ACAS Code of Practice. It is said that this was not intentional or deliberate. The suggestion is made that as the claimant only had one year's length of service , the one off nature of the default, and the inevitable dismissal, a lower uplift , if any, of 12.5% should be awarded.

116. Those arguments are, with respect, specious. Length of service is irrelevant, although many employers do equate lack of qualifying service for unfair dismissal with dispensation from the requirements to comply with the ACAS Code, which apply regardless of length of service. They in fact protect employers as well as employees, as, if followed, they ensure transparency , and the recording of the reasons why action was taken, which can often assist an employer in showing a lack of any discriminatory motive. Similarly, the alleged inevitability of any dismissal is no reason to mitigate an uplift, any more than is the fact that this was a "one – off" occurrence. Dismissals are generally one – off occurrences.

117. The Tribunal therefore considers that, notwithstanding that there was a meeting, this case does indeed justify a maximum uplift of 25%.

118. Should the Tribunal reduce that because it is also making an award of aggravated damages? Is there any overlap ? The Tribunal does not consider so. The basis of the award for aggravated damages is in very large part the respondent's conduct after the dismissal. Further, another significant factor is the covert recording of the meeting, and its subsequent concealment. That a meeting was held at all was, of course, compliance with the ACAS Code. That it was covertly recorded was not a breach of the Code in itself. To that extent , the ACAS uplift is not compensating the claimant for that, the award of aggravated damages is.

119. Taking all these matters into consideration , and without performing the type of precise mathematical apportionment discussed in ***Biggs*** above, the Tribunal does not consider that to award a 25% uplift to both the loss of earnings and injury to feelings awards would result in double – recovery, and will make such an uplift.

120. In relation to interest, the Tribunal sees no basis (indeed none has been advanced) for not applying interest on the sums awarded on the usual basis of 8% from the mid - point of period of loss of earnings, and from the date of the dismissal in respect of the award for injury to feelings.

Conclusion : summary of awards.

121. It is appreciated that these are substantial awards. The Tribunal has, as required by the authorities, stepped back to consider the totality and proportionality of its awards, and whether there is any element of double recovery. The two core constituent parts of the awards are that for loss of earnings, and that for injury to feelings. These are substantial in themselves, but, the Tribunal is satisfied, have been assessed on the correct principles based on the measure of damages in tort. That the respondent's contentions for reductions on several grounds have failed means that the proposed awards, particularly for loss of earnings, will be made in full. To the extent that ACAS uplifts have been applied to both the loss of earnings and injury to feelings awards that is, the Tribunal considers, entirely justified, and there can indeed be a penal element in such uplifts. The aggravation of the injury to feelings award , the Tribunal considers , does not overlap with the uplift applied to that award, and there is no reason why the Tribunal should not apply both. There is, in any event, no scope for the Tribunal considering any "just and equitable" limitation to these awards, unlike cases of unfair dismissal. Even if there was any legal basis for making any reduction on that ground, the Tribunal would not, in any event, make any. The respondent was responsible for the claimant's treatment, and in its actions and conduct of this litigation have prolonged the effects of the discrimination it perpetrated. It remains liable for the full consequences of its acts.

122. The Tribunal's awards are therefore :

Loss of Earnings:

9 July 2019 to 13 September 2019	
Net Loss:	**£3,292.26**
18 September 2019 to 21 October 2019	
Net Loss	**£2,720.40**
21 October 2019 to 3 January 2020	
Net Loss :	**£3,220.76**
6 January 2020 to 15 June 2020	
Net Loss :	**£5,503.93**
15 June 2020 to 31 July 2021	
Net Loss:	**£12,502.85**
31 July 2021 to 6 September 2021	
Net Loss :	**£2,720.40**
6 September 2021 to 1 April 2022	
Net Loss :	**£3,128.56**
Total of all 7 periods:	**£33,089.11**
Less reduction for the reduction in earnings that the claimant would have suffered if she remained in the employment of the respondent, and would have been furloughed for 6 months – 26 weeks at £89.76	**£2,333.76**
Net Total	**£30,764.40**
ACAS uplift – 25%	**£7,691.10**
Total:	**£38,455.50**
Injury to feelings	**£25,000.00**
(of which £5,000.00 is awarded by way of aggravated damages)	
ACAS uplift – 25%	**£6,250.00**
Total:	**£31,250.00**

Total: **£69,705.50**

Interest:

A.Loss of Earnings:

Calculated at the halfway point between the date of discrimination , 9 July 2019 , to the date of calculation, 29 June 2022, 543 days @ 8%

£38,455.50 x 8% £8.43 per day x 543 days = **£4,577.49**

B.Injury to Feelings:

Calculated from the date of discrimination 9 July 2019 to the date of calculation, 29 June 2022, 1086 days @ 8% , £8.33 per day

£31,250.00 x 8% £6.85 per day x 1086 days = **£7,439.10**

Employment Judge Holmes

Date: 26 October 2022

RESERVED JUDGMENT SENT
TO THE PARTIES ON
27 October 2022

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2411560/2019**

Name of case: **Miss K Sangster** v **UK Carline Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 27 October 2022

the calculation day in this case is: 28 October 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
   www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.