Neutral Citation Number: [2025] EAT 14

Case No: EA-2023-SCO-000073-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 29 January 2025

Before:

JUDGE BARRY CLARKE

Between:

EDDIE STOBART LIMITED

Appellant

- and -

MISS CAITLIN GRAHAM

Respondent

- -
- -

Mr Paras Gorasia and Ms Adeola Fadipe (instructed by Analysis Legal LLP) for the **Appellant**
Mr William McParland (Thompsons Solicitors) for the **Respondent**

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Hearing dates: 26 September 2024

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JUDGMENT

SUMMARY

MATERNITY RIGHTS

Appeal upheld; the Employment Tribunal erred in law by awarding the claimant a manifestly excessive amount of compensation, £10,000, for injury to her feelings, and further by failing adequately to explain why it awarded the amount it did. Consideration given to the evidence of injury that will assist tribunals in such cases, and of the relationship between the manner of discrimination and the severity of the injury. Compensation in the amount of £2,000 (plus interest) substituted.

Judge Clarke:

Introduction

1. This appeal concerns the lawfulness of an amount that an Employment Tribunal (ET) awarded to a claimant, Miss Graham, to compensate her for injury to her feelings. The appellant, Eddie Stobart Ltd, was her employer at the material time. I will refer to them as claimant and respondent, as they were before the ET.

2. The claimant has been represented by Mr McParland, a solicitor; he also represented her before the ET. The respondent has been represented by two counsel, Mr Paras Gorasia and Ms Adeola Fadipe, neither of whom appeared before the ET. I am grateful to them all for their assistance.

The case before the ET

3. I set the scene by recounting the facts as drawn from the ET's judgment.

4. The respondent employed the claimant for just over ten months as a planner. She was one of nine planners based at its Newhouse depot. She started in the role in July 2021, and was paid a gross annual salary of £28,000. On 20 October 2021, she became aware that she was pregnant. She notified her line manager of her pregnancy the following day.

5. Separately, in March 2022, the respondent decided that, pursuant to a reorganisation, it would cease its planning function in Scotland. On 29 March 2022, it announced a 30-day consultation period in relation to the proposed redundancy of the nine planners in Newhouse, and the creation of four new "transport shift manager" (TSM) roles at the same location. This new role would pay a gross annual salary of £31,000.

6. As that consultation began, the claimant asserted her right to be offered suitable alternative employment during maternity leave, in preference to other redundant employees, in accordance with Regulation 10 of the **Maternity and Parental Leave etc Regulations 1999** (**MAPLE Regulations**). This assertion gave rise to the question of whether the TSM roles, properly analysed, were "suitable"

available vacancies. In respect of this assertion, the claimant communicated principally and extensively with Ms Webster, one of the respondent's HR business partners. Ultimately, the respondent took the view that TSM roles were not "suitable" and it required the claimant to attend for a competitive interview.

7. On 12 April 2022, while the redundancy process was ongoing, the claimant commenced her maternity leave. The following day, she was interviewed for the TSM role. She was unsuccessful.

8. By an email sent on 26 April 2022, the claimant presented a grievance about the matter. This was sent to Mr Taylor, the manager who had handled the initial stages of the consultation process. On 28 April 2022, she attended her final consultation meeting with a more senior manager, Mr Delaney, where she referred to sending this grievance two days prior. The grievance was not discussed further at the consultation meeting but Ms Webster, who was in attendance, had not seen it and suggested she resend it; she supplied an email address for the HR helpdesk for that purpose. The same day, the respondent sent her notice of the termination of her employment by reason of redundancy, and her employment ended on 26 May 2022. Her employment had therefore lasted for eight and a half months.

9. During her notice period, on 3 May 2022, the claimant resent her grievance to the HR helpdesk, using the email address supplied to her. The ET found that the two grievance emails, as originally sent on 26 April 2022 and resent on 3 May 2022, were received by the respondent, in the sense that they entered its IT system. However, its firewall system blocked them as a security risk, such that neither Mr Taylor nor any member of the HR team actually saw them. Consequently, they did not receive attention.

10. The claimant did not appeal the respondent's decision to dismiss her. However, during a subsequent discussion on 16 May 2022 with Ms Saunders, the respondent's overall head of HR, about the calculation of her maternity pay, she mentioned the issue of the unanswered grievance. Ms Saunders said she would look into it and a colleague advised her that the respondent had not received this grievance. Ms Saunders made no mention of this when, on 20 May 2022, she wrote to the

claimant about the calculation of her maternity pay.

11. The claimant presented a claim to the ET on 19 July 2022. Her primary complaint was that she had been "automatically" unfairly dismissed within the meaning of section 99 of the **Employment Rights Act 1996** ("**ERA**") (read alongside Regulation 20 of the MAPLE Regulations) on the basis that the TSM role constituted a suitable vacancy that should have been given to her in priority to others who were not on maternity leave.

12. In addition, the claimant complained that she had been subjected to six occasions of detrimental treatment, contrary to section 47C **ERA** (read alongside Regulation 19 of the MAPLE Regulations); a complaint of pregnancy/maternity discrimination within the meaning of section 18 of the **Equality Act 2010** ("**EqA**"); and a complaint of victimisation within the meaning of section 27 **EqA**. Two of the detriment complaints concerned the grievance. By the time of the hearing, those two complaints were taken together as an alleged failure to take adequate steps to deal with it.

13. The respondent's position was that any failure to deal with the claimant's grievance was unrelated to her being on maternity leave, because it was due to a flaw in its IT security system.

The ET's judgment on liability

14. The claimant's claim was heard by the ET (Employment Judge Nielsen sitting with members) over four days, followed by a day for deliberations, spread across March and May 2023. Its judgment was sent to the parties on 14 June 2023.

15. Having considered the evidence and heard submissions from the parties, the ET unanimously decided that the respondent had not unfairly dismissed the claimant for the purposes of section 99 **ERA**. Having considered the wording of Regulation 10(3)(a) of the **MAPLE Regulations**, the ET agreed with the respondent that the TSM vacancies were not "suitable" for her. Understandably, this occupied the bulk of its analysis. The ET also rejected the claimant's complaint of victimisation.

16. However, the ET upheld her complaints of detrimental treatment contrary to section 47C **ERA** and pregnancy/maternity discrimination insofar as it found that the respondent failed to take adequate

steps to deal with her grievance. As already noted, the ET accepted the respondent's explanation that the two grievance emails had been blocked by its firewall, but it then said this (at paragraph 111):

> "… the key points as far as the Tribunal are concerned is that the claimant did submit a grievance and it was received by the respondent and further that she made it known to the respondent both at the final consultation and to Ms Saunders that she wished to pursue a grievance about the way she had been treated. If the only issue was about receipt of the email then the Tribunal would accept that the reason that it was not seen by Mr Taylor or the HR admin team was not pregnancy/maternity related but was due to an IT issue. However, on the evidence it is clear that both Ms Webster and Ms Saunders were informed by the claimant that she had lodged a grievance. Ms Webster did make the point that she should really be lodging an appeal. Whilst that may be so it was still clear to the respondent that the claimant was unhappy with the way she had been treated and the decision not to offer her the TSM role without interview. That had been an ongoing issue throughout the consultation process and in the correspondence between Ms Webster and the claimant. Ms Saunders was specifically told about the grievance and did make some enquiries but did not follow up in writing with the claimant when she had the opportunity to do so – a fact she acknowledged. Both Ms Webster and Ms Saunders could have obtained further details regarding the grievance when they spoke. Ms Saunders could have highlighted to the claimant when she wrote back that no grievance had been received. At no point did Ms Webster or Ms Saunders check with their IT team to see whether the email might have been caught in the Mimecast system (indeed this was only done in March 2023). It might be reasonable to assume that emails being stopped in the Mimecast system was something that would occur from time to time and the respondent would be aware of this. In all the circumstances the Tribunal was of the view that the respondent should have done more to enable the claimant to challenge the decision – in circumstances where she clearly told both Ms Webster and Ms Saunders that she was seeking to do so. The Tribunal considers that this does amount to a detriment – as the claimant did not have the opportunity to have her grievance dealt with. Under Section 48(2) of the ERA it is for the respondent to show the ground on which any act or any deliberate failure to act was done. The respondents have not put forward any admissible reason as to why Ms Webster and Ms Saunders did not follow up with the claimant in circumstances where the claimant categorically told them she had lodged a grievance. The Tribunal accepts … that the claimant's absence on maternity leave from 8 April 2022 may have played a part in the decision by the respondent not to investigate the matter further or allow the claimant to challenge the decision. It is more likely than not to have materially influenced the approach they took to the grievance. The Tribunal is entitled accordingly to come to the view that the detrimental treatment was done for a prescribed reason."

17. Consequently, the only part of the claimant's claim that succeeded related to the respondent's inadequate response to her grievance.

The ET's judgment on remedy

18. The ET went on to consider remedy, reminding itself at paragraph 123 of its judgment of the limited extent of the claimant's success in her claim. No award was made in respect of pecuniary loss; the only award concerned the injury to her feelings.

19. The ET had earlier found, at paragraph 58 of its judgment, that the claimant had been upset both by "the way in which she had been dealt with by the respondent in relation to her redundancy" and "the failure of the respondent to deal with her grievance". It explained its decision to award £10,000 for injury to her feelings at paragraphs 125 and 126 of its judgment. This is the totality of what it said:

> "The Tribunal accepts the evidence of the claimant that she was upset by the manner in which her case was dealt with by the respondent and in particular what appeared to her to be the failure of the respondent to take seriously her position that she had a right to be offered the TSM role as a suitable vacancy. She raised this issue on a number of occasions and took advice from ACAS. She took time to submit a written grievance on three [sic] separate occasions. She was at the same time commencing her maternity leave and moving house. It is understandable that she would experience a degree of upset at the failure, as she saw it, of the respondent to seriously consider her case. It is an important right that employees have to have due consideration given by their employer to any grievance raised.
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> The Tribunal, in assessing damages, has had regard to the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] 15 EWCA Civ 879 and to the case of *Vento v Chief Constable of West Yorkshire Police (No. 2)* 2003 IRLR 102. The Tribunal determines that an injury to feelings award in the sum of £10,000 would be appropriate in this case (being at the lower end of the middle Vento band having regard to the date when this claim was lodged). Accordingly, the Tribunal orders the respondent to pay to the claimant the sum of £10,000."

20. Thus it can be seen that the award of £10,000 was rooted in what the ET described as "a degree of upset", based on the claimant's evidence to that effect.

21. It is common ground between the parties that, in respect of claims presented in the 2022/23 tax year, the so-called Vento bands were as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases).

The grounds of appeal

22. Neither the claimant nor the respondent has brought an appeal against those aspects of the ET's judgment on liability where they were unsuccessful. This appeal, brought by the respondent, only concerns the ET's decision to award £10,000 to the claimant in respect of her injured feelings.

23. There are two grounds of appeal, which were supported by submissions that I will briefly summarise.

24. The first ground of appeal, as developed at the hearing, is that the award of £10,000 was so excessive as to be perverse.

25. The respondent made the following points by way of submission: the failure to deal with the claimant's grievance was a one-off, isolated incident; at its highest, the claimant had sought £15,000 for injury to her feelings but lost most aspects of the claim she had advanced; and the award was disproportionate to the "degree of upset" she said in evidence that she had suffered. There was a discussion during the hearing about the relevance to the amount awarded of the manner of discrimination being incontrovertibly at the less serious end of the spectrum.

26. The claimant resisted the appeal by referring to the ET's wide discretion when awarding compensation for injured feelings; the fact it had the benefit of hearing and seeing all the evidence; and the extent of the upset identified by the claimant in her evidence.

27. The second ground of appeal was that the ET's award of £10,000 was insufficiently reasoned

and not "**Meek**-compliant" (referring to **Meek v Birmingham City Council** [1987] IRLR 250). Based on the reasoning that the ET gave as quoted above, the respondent has submitted that it does not know why it settled on the sum stated. By way of answer, the claimant submitted that I should have regard to the well-established principle that ET judgments are not expected to be elaborate and formalistic products of refined legal draughtsmanship, and so the EAT should avoid a pernickety and hypercritical approach.

The evidence the ET heard on injured feelings

28. Ahead of this appeal, the parties were offered an opportunity to agree a note of the evidence that was before the ET on the question of the claimant's degree of upset. Helpfully, they did so. The note was divided into two: the first part was the claimant's evidence in relation to injured feelings on the aspects of her claim that were upheld, while the second part was her evidence in relation to injured feelings on the aspects of her claim that were not upheld. Both parties accept that only the first part is relevant.

29. Taking this approach, the parties are agreed that the only evidence before the ET concerning the claimant's degree of upset in respect of the unanswered grievance came when she was asked by her solicitor during the hearing if she was surprised not to have received any communication after having submitted it. The agreed response she gave was this: "*shocked & upset. People dismissive of what I had to say & my rights*."

The law

30. By section 124(2)(b) **EqA**, the remedy for discrimination may encompass an order by an ET that the respondent pays compensation. Compensation is assessed in the same way as any other tortious claim, corresponding to the amount that can be awarded by a County Court or Sheriff: it should return the injured party to the same position they would have been in but for the unlawful conduct. This applies equally to awards for injury to feelings (see, generally, **Ministry of Defence v**

Cannock [1994] IRLR 509). Such awards address non-pecuniary losses, and so are a form of general damages (in Scotland, "solatium"): a sum to compensate for pain, suffering and loss of amenity. They can also be made for claims of detriment under Part V **ERA** (see **South Yorkshire Fire & Rescue v Mansell** UKEAT/0151/17), and which would include section 47C **ERA**.

31. The five key points of principle were established by the EAT, nearly 30 years ago, in **Armitage, Marsden and HM Prison Service v Johnson** [1997] IRLR 162 (at paragraph 27):

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

32. These principles were approved by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (No.2)** [2003] IRLR 102, which further said this (at paragraphs 50 and 51):

> "It is self-evident that the assessment of compensation for an injury or loss, which is neither physical nor financial presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise.
>
> Although they are incapable of objective proof or measurement in monetary

> terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury. In these circumstances an appellate body is not entitled to interfere with the assessment of the employment tribunal simply because it would have awarded more or less than the tribunal has done. It has to be established that the tribunal has acted on a wrong principle of law or has misapprehended the facts or made a wholly erroneous estimate of the loss suffered. Striking the right balance between awarding too much and too little is obviously not easy."

33. At paragraph 65 of **Vento**, the Court of Appeal then set out the bands for which its judgment is best known and quoted daily in Employment Tribunal hearings:

> 33.1.1 The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
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> 33.1.2 The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
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> 33.1.3 Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

34. As the Court of Appeal said of the Vento bands in **Kemeh v Ministry of Defence** [2014] IRLR 377 (at paragraph 54): "they are designed to ensure a measure of consistency and fairness in the way in which tribunals approach their task", before adding the essential reminder that "the aim is to compensate for genuinely injured feelings, not to punish an employer for bad management or poor personnel practice".

35. By way of guidance issued annually since 2017, following the invitation of the Court of Appeal in **De Souza v Vinci Construction (UK) Ltd** [2017] IRLR 844 (paragraph 34), these figures are now annually adjusted for inflation through the vehicle of Presidential Guidance promulgated by the Presidents of Employment Tribunals. At the relevant time, the Vento band figures were those set

out at paragraph 21 above.

36. As the EAT observed in **HM Land Registry v McGlue** (UKEAT/0435/11, paragraph 25), such awards are "not susceptible of close calculation" and "will not be interfered with unless they are manifestly excessive or wrong in principle".

37. It is clear that, when quantifying the appropriate amount to award for injury to feelings, the tribunal must focus on the effect of the discriminatory act upon the particular claimant. The tribunal is required to compensate for the injury suffered, not the manner of the discrimination. As the band categorisation in **Vento** implicitly acknowledges, however, it is difficult to do this without reference to whether the discrimination causing the injury is more (or less) "serious". As I will explore further below, the manner of discrimination can, in certain circumstances and if used with caution, provide a benchmark for assessing severity of the injury.

The importance of evidence of injury

38. As I am considering a case where the evidence of injury before the ET was sparse, it is worth asking how much evidence is needed to justify an award at all. The following points can be made.

39. First, there can be no award of compensation is there is no evidence of injury. As the EAT said at paragraph 90 of **Cannock**, an award "is not automatically to be made whenever unlawful discrimination is proved or admitted". There must be some evidence of injury to the non-exhaustive range of feelings discussed in **Vento**. The EAT's judgment in **Cowie and others v Scottish Fire and Rescue Service** [2022] IRLR 913 (at paragraph 91) provides an example of an appellate conclusion that it was permissible for a tribunal to make no award where the claimants had "failed to adduce evidence of any injury to feelings such as would warrant an award under this head". (Further, at paragraph 92 of that judgment, the EAT accepted that "upset" was "the best evidence of any injury to feelings", albeit that it was unrelated to the conduct complained of in that case.)

40. Second, while tribunals should avoid making assumptions, it can properly be borne in mind that in every kind of discrimination case a claimant will usually suffer some injury to feelings. As the

EAT put it in **London Borough of Hackney v Adams** [2003] IRLR 402 (at paragraph 11), with my added emphasis:

> "… Sometimes such injury will be the almost inevitable concomitant of the discrimination having occurred. For example, it can readily be assumed where someone has suffered an act of race or sex discrimination that will by its very nature have caused injury to feelings: it is demeaning to the individual and offensive to his or her dignity to be so treated. A tribunal will readily infer some injury to feelings from the simple fact of the discrimination having occurred. *Such injury may of course be compounded by the particular manner in which the discriminatory conduct itself is made manifest*. For example, harassment over a lengthy period will plainly result in more considerable distress than a single act of discrimination and should be compensated for accordingly. There will, however, have to be evidence of the nature of the discriminatory conduct."

41. The above suggests that the manner of discrimination can provide a basis for inferring the level of upset it has caused. This brings me to my third point: so long as the tribunal does not lose sight of the fact that it is compensating a claimant for the injury suffered, rather than the manner of the discrimination, the latter can be a useful guide to inferring the former when evidence is otherwise sparse. Of course the tribunal must take care not to allow its feelings of indignation to inflate the award, but having regard to the manner of discrimination can provide a control mechanism. I think this is what the EAT had in mind in an important footnote to its judgment in **Commissioner of Police of the Metropolis v Shaw** [2012] IRLR 291, when it said this (with my emphasis):

> "Practice is in our experience variable as to the extent to which claimants in discrimination cases give explicit evidence about the injury to their feelings. In principle they should certainly be asked to do so: it is wrong that tribunals should be asked to make assumptions … the fact remains that even when such evidence is given, it is often difficult to assess objectively because so much depends on the idiosyncrasies of the particular witness, including their articulacy and their levels of stoicism or self-awareness. *Some degree of standardisation is realistically inevitable*."

42. Albeit in the assessment of aggravated damages, the Court of Appeal also said this in Shaw (at paragraph 24, again with my emphasis):

> "It is natural for a tribunal, faced with the difficulty of assessing the additional injury specifically attributable to the aggravating conduct, to focus instead on the quality of that conduct, which is inherently easier to assess. *This approach is not necessarily illegitimate: as a matter of broad common sense, the more heinous the conduct the greater the impact is likely to have been on the claimant's feelings. Nevertheless it should be applied with caution*, because a focus on the respondent's conduct can too easily lead a tribunal into fixing compensation by reference to what it thinks is appropriate by way of punishment or in order to give vent to its indignation."

Relationship between manner of discrimination and injury

43. It can therefore be seen that the manner of discrimination is neither determinative of, nor a proxy for, the seriousness of the claimant's injury. To treat it as the sole mechanism for identifying the appropriate Vento band would abandon the caution advocated for in **Shaw** and distract the tribunal from its focus on the claimant's injury. That focus may mean that the same discriminatory behaviour results in different levels of compensation for injured feelings for two different individuals, as recognised by the EAT in **Cadogan Hotel Partners Ltd v Ozog** (UKEAT/001/14, paragraph 49).

44. At its highest, the point can be put this way: the manner of discrimination is a tool by which the tribunal can properly draw an inference of secondary fact as to the injury suffered by a claimant when, as often happens in such cases, there is little else to go on.

45. Many factual possibilities inhabit the territory between the "lengthy campaign of discriminatory harassment" associated with the top Vento band and the "isolated or one-off occurrence" associated with the bottom Vento band. The frequency and duration of the claimant's exposure to the discriminatory conduct are not the only measures that can support an inference of injury.

46. A relevant consideration is whether the discrimination can be described as "overt". As noted by the EAT at paragraph 10(2) of **Taylor v XLN Telecom Ltd and others** [2010] IRLR 499, it may validly be inferred that overt discrimination is more likely to cause distress and humiliation, because the victim has understood the motivation at the time to be discriminatory.

47. My experience of such cases suggests that the tribunal might also find it helpful to consider the existence of ridicule or exposure. Discrimination played out in front of colleagues or others to see may well cause greater harm. It may provide a reasoned basis for inferring as a fact the seriousness of the injury suffered, especially in respect of compensable feelings of humiliation.

48. A feature of workplace discrimination is that it can reflect or expose an asymmetry of power, influence and information. In some cases, this can be manifested in disciplinary threats that create worry, or in exclusion that causes isolation. Such features may again provide a reasoned basis for inferring more serious injury to feelings.

49. Although the parties did not refer me to this case, I note that, in the case of **Gilbank v Miles** [2006] IRLR 538 (at paragraph 42), when upholding a Vento award in the top band, the Court of Appeal accepted that pregnancy discrimination involving an unborn child gave the case "added seriousness and must have imposed an additional level of stress on [the claimant] as an expectant mother". Experiencing discrimination at such a time detracts from the joy associated with birth; the result is a greater relative diminution in happiness that merits recompense.

50. Ultimately, the tribunal is best placed to decide what evidence can properly form the basis for such inferences.

Evidence of injury

51. I have suggested above that the manner of discrimination is no more than a tool by which the tribunal may, in appropriate cases, properly draw an inference of secondary fact as to the injury suffered by a claimant when there is little else to go on. It therefore follows that the parties can greatly assist the tribunal by giving it more to go on. The burden is of course on the claimant to show that their feelings have been injured and to what extent.

52. While not providing a checklist, the following may be helpful to consider:

52.1 ***The claimant's description of their injury***. This is an obvious starting point: what does

the claimant actually say in their evidence? However, tribunals should be ready to scrutinise apparent stoicism with as much as care as apparent upset; for some individuals, stoicism is the refuge of the inarticulate. Equally, tribunals should take claimants as they find them, considering whether there is any fragility that makes them more vulnerable to upset or means that the experience is more impactful upon them. Direct evidence of effect on health may be appropriate in some cases, although the tribunal should avoid double counting in respect of a separate award for physical injury (depending on the injury described, evidence may be corroborated by a formal medical diagnosis or records of seeking clinical support, counselling and so on). But, in most cases, the description upon which the tribunal bases its award will usually be a claimant's account, in their own words, of how the unlawful treatment made them feel.

52.2 ***Duration of consequences***. A claimant's upset may be fleeting, or it may be long lasting, and much may depend on their own levels of fortitude and resilience. A claimant should be able to say how they are feeling at the remedy hearing, if time has passed since the conduct complained of. Of course there may not be a linear recovery path; there may be an acute stage, a recovery stage, and residual symptoms. If the injured feelings continue, the tribunal should consider how long they may continue to last, as well as how they are being manifested. In a serious case, or where there may be future vulnerability, prognosis will be relevant.

52.3 ***Effect on past, current and future work***. The discriminatory treatment may have affected the claimant's current enjoyment of their work, or have lessened their ability to look back warmly upon their past experiences at work, or have made them less likely to remain in the same line of work in future. It may be relevant to consider the extent to which their self-esteem was bound up in their occupational life, which differs from person to person.

An evidenced wish to leave an enjoyable and fulfilling line of work due to discriminatory treatment can properly inform the tribunal's assessment of the hurt caused.

52.4 ***Effect on personal life or quality of life***. The tribunal may wish to consider whether the treatment has adversely impacted personal relationships, private activities, hobbies and the like – sometimes called a "loss of amenity". If a tribunal does consider this, it will be helpful to survey an evidential landscape comparing the claimant's life before and after the discrimination. This is where a third-party view may, in appropriate cases, be helpful, such as from a family member; obviously, the tribunal must decide what weight it gives to such evidence.

First ground of appeal

53. Applying the above principles to the first ground of appeal, the respondent has persuaded me that the ET's award of £10,000 for injury to feelings was manifestly excessive and therefore perverse.

54. This is a case where there was limited evidence before the ET of the extent of the claimant's injury; she had said that she was "shocked" and "upset" because of a "dismissive" attitude towards "what [she] had to say" and her "rights". The ET, having seen and heard her give evidence at a four-day hearing, found this to be a "degree of upset". That is not to criticise the claimant for her answer, which was doubtless an honest one and plainly sufficient to engage an award for injury to feelings. But, in description and substance, this was a fleeting response. There was no finding that the injury endured beyond the immediate experience of the detriment. There was no finding of any adverse effect on her work; indeed, the ET noted that she mitigated her loss by finding alternative work almost immediately. There was no finding of any impact on her personal life or her quality of life.

55. Given the scant evidence of injury, it was open to the ET, with appropriate caution, to look at the manner of discrimination and detrimental treatment it found to have occurred; not as a proxy for the severity or otherwise of the claimant's injured feelings, but to test whether it could properly

support inferences of secondary fact about that injury. The ET was dealing with a claimant on maternity leave, and appears permissibly to have drawn an inference about whether she might experience additional stress as an expectant mother (implicit in its observation that, at the time, she was coping with starting maternity leave and moving house). But the respondent's discriminatory treatment of her was plainly not overt. The ET accepted that the emails were not blocked by its firewall for any reason connected to her maternity leave; the ET's criticism of the respondent was instead limited to some missed opportunities to ask her about the content of her grievance and to double-check with her why it had not been received. Furthermore, although there were two missed emails, in substance the respondent's failure to deal with her grievance was an isolated act; it may not have felt like it to the claimant at the time, but it must be remembered that it was the only part of her claim that the ET upheld. Given that the ET dismissed all other aspects of her claim, it follows that the grievance was not obviously meritorious; this was a procedural rather than substantive failing. There was nothing about her case that might indicate humiliation by way of ridicule or disempowerment. The ET made no findings of discourtesy in respect of the respondent's dealings with her.

56. If the ET had considered these matters, the only proper and reasonable conclusion would be that the respondent's failure to deal with the claimant's grievance was limited in its scope and impact. Accordingly, to the extent that the manner of discrimination could provide any basis for drawing inferences of fact as to the extent of her injury, it would be to the effect that the injury was minimal. At the risk of repetition: this approach would always yield where there was clear evidence from a claimant as to the extent of their injury, but this was not such a case.

57. I would add that I am concerned that the ET may have had in mind, when deciding the amount to award the claimant, her upset about not getting the TSM role. When deciding the amount of the sum, it referred specifically to "the failure of the respondent to take seriously her position that she had a right to be offered the TSM role as a suitable vacancy". However, the ET had rejected her complaint in that regard. Her position, in law, was not well founded. It might have been open to the

ET to conclude that the claimant's prior experience had increased her fragility and that, in consequence, the subsequent injury was more serious, but there was no finding to that effect. Consequently, insofar as the ET appears to have had her upset about that wider process in mind when deciding the severity of her injury, it was perverse of it to do so, as it related to a part of her claim that had failed.

58. In view of the above, this could only have been a lower band Vento case. It was perverse for the ET to place it in the middle band.

Second ground of appeal

59. That is enough to uphold the appeal. However, for completeness, I will say that I am also persuaded that the ET erred in law by providing inadequate reasons for its decision to award the claimant £10,000. This aspect of its decision is not **Meek**-compliant.

60. Specifically, the ET did not explain why it settled upon the figure of £10,000 as opposed to any other. It said that it had "had regard" to case of **Vento** but it did not explain how it had assessed the seriousness or otherwise of the claimant's injury in order to merit an award at the lower end of middle band. There was no qualitative consideration of how upset the claimant had been, in order to understand what was meant by the "degree" of upset she experienced. Without that analysis, even if only briefly set out, I cannot be confident that the ET had the correct principles in mind.

Disposal

61. I therefore allow this appeal.

62. On the issue of disposal, I have considered the EAT's powers under section 35 of the **Employment Tribunals Act 1996** together with the guidance given by the Court of Appeal in **O'Kelly and others v Trusthouse Forte plc** [1983] ICR 728, **Tilson v Alstom Transport** [2011] IRLR 169, **Jafri v Lincoln College** [2014] ICR 920 and **Burrell v Micheldever Tyre Services Ltd** [2014] ICR 935. I have paid special regard to the overriding objective at rule 2A of the **Employment**

Appeal Tribunal Rules 1993. I invited submissions from the parties, who were content for me to substitute my own assessment of the appropriate amount of compensation. I consider that is the correct means of disposal; it is especially appropriate in a case where the parties have already prepared for and attended a hearing to address issues of remedy, and where the claimant has given her full evidence on the point. It would not be just to permit her an opportunity to improve that evidence.

63. In my judgment, the proper amount to award the claimant for the upset found in this case is £2,000, which is toward the lower end of the bottom Vento band (at the time, £990 to £9,900). In arriving at that sum, I bear in mind all I have said above, but most especially the limited scope of the unlawful behaviour that injured her feelings: namely, the missed opportunities to ask her about the content of her grievance and to double-check with her why it had not been received. Nothing else in the way she was made redundant resulted in unlawful behaviour that can sound in damages. The claimant was upset that her grievance had been missed, but this cannot be conflated with her upset with the wider process that concluded with the termination of her employment. Her upset was genuine but fleeting and, based on the evidence she gave, resulted in only minimal injury to her feelings. I would have considered a lower sum but I have settled upon £2,000, doing the best I can, because – like the ET – I am prepared to infer some additional injury arising from the fact that the claimant was chasing up her grievance at a time when she should have been enjoying her maternity leave. I have also had regard to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Claims (at the date of the ET's assessment of damages, this would have been the 16th edition). Without seeking to equate an award for injury to feelings with any particular type of personal injury, I consider that the sum of £2,000 meets the requirement for broad similarity with the figures found in those Guidelines having regard to the nature, extent and duration of the claimant's injury.

64. The ET did not award interest; wrongly, it failed even to consider it. The award for injury to feelings is made by reference to the **EqA**, which engages the **Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996**. I see no reason why interest should not apply in this case simply because the award is also made by reference to a head of claim found in Part V

ERA (and the parties made no suggestion to the contrary). This accords with the approach of the EAT in **D'Souza v. London Borough of Lambeth** [1997] IRLR 677, which was to the effect that a tribunal faced with a choice should award compensation by reference to the more favourable discrimination law scheme.

65. Pursuant to Regulation 6(1)(a) of those Regulations, such interest shall be for the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. The parties are agreed that the start date begins one month after the claimant originally sent her grievance, which is 26 May 2022, that being a reasonable period for the respondent to have replied to it. They are further agreed that the end date is the date on which the ET sent its reserved judgment to the parties, which was 14 June 2023. That being so, interest applies for 385 days at 8% a year, which is £169. Accordingly, in disposal of this appeal, the respondent is ordered to pay the claimant £2,169 in compensation.