EMPLOYMENT TRIBUNALS

Claimant:	**Mrs L Freear**		
Respondent:	**Vossloh Cogifer UK Ltd**		
Heard at:	**Hull**	**On:**	**23 and (deliberations only) 24 March 2017**
Before:	**Employment Judge Maidment**		
Members:	**Ms S D Sharma**		
	Mr G D Wareing		
Representation			
Claimant:	Miss N Twine, Counsel		
Respondent:	Mr N Siddall, Counsel		

RESERVED REMEDYJUDGMENT

1. As compensation for loss of earnings (11 – 18 January 2016) arising out of unlawful discrimination the Respondent is ordered to pay to the Claimant the sum of £703.31 plus an additional sum of £67.08 in respect of interest. As compensation for injury to feelings the Respondent is ordered to pay to the Claimant the sum of £12,000 plus an additional sum of £1,236.92 in respect of interest. No award in respect of aggravated damages is made.
2. As compensation for unfair dismissal the Respondent is ordered to pay to the Claimant a compensatory award in the total sum of £29,727.78.
3. The Respondent is ordered pursuant to Rule 76(4) of the Employment Tribunals Rules of Procedure 2013 to pay to the Claimant her costs in the sum of £1,200 in respect of her Tribunal issue and hearing fees

REASONS

The issues

1. In a hearing which concluded on 16 November 2016 the Claimant brought various complaints in respect of a series of alleged acts of unlawful discrimination based on her sex and in particular her being pregnant and about to depart on maternity leave. The Claimant also brought a complaint of automatically unfair dismissal pursuant to section 99 of the Employment Rights Act 1996 – the Claimant had insufficient service to bring a claim of

ordinary unfair dismissal with service of less than one year. The Tribunal was not, therefore, asked to consider any basic award entitlement or compensation for the loss of statutory rights.

2. Indeed, the Claimant was successful in her complaint of automatically unfair dismissal.

3. The Claimant was also successful in two distinct complaints of direct maternity discrimination pursuant to section 18 of the Equality Act 2010 in respect of her being selected for redundancy and informed of that fact on 9 December 2015 and her being subjected to a disciplinary investigation and process on 17 December 2015. This was in circumstances, which the Respondent urges the Tribunal to note, that the Claimant actually pursued 11 separate allegations of unlawful discrimination including some which in turn related to a number of distinct aspects of alleged mistreatment. Therefore, whilst the Claimant was successful in respect of two allegations pursued, she was unsuccessful in respect of the majority of her complaints of unlawful discrimination.

4. The Tribunal is asked to consider compensation for the acts of unlawful discrimination as found, particularly compensation for injury to feelings, and compensation for the Claimant's unfair dismissal which involves an assessment of loss over various distinct periods and a need for the Tribunal to evaluate the Claimant's likely prospects of obtaining alternative future employment.

The evidence

5. The Tribunal had before it at this remedy hearing a further agreed remedy bundle numbering some 133 pages together with the much larger two volume bundle of documents used at the earlier liability hearing. Having clarified the points of dispute and explored any potential points of agreement between the parties, the Tribunal took some time to read into the further relevant witness evidence to be adduced.

6. This involved reading a further witness statement prepared on behalf of the Claimant and re-reading a statement made by Mr David Kitney prior to the liability hearing and which the Tribunal had already read at that stage together with relevant documentation referred to therein i.e. various job advertisements. In evidence, Mr Kitney effectively brought his statement up to date with reference to available positions particularly in and around March 2017. The Tribunal had already prior to this remedy hearing reminded itself of its Judgment on liability. The Tribunal has since re-read the Claimant's witness statement at the liability stage and considered further the schedules of loss submitted on behalf of the Claimant at the time of the liability hearing and at the point of this remedy hearing.

7. The evidence the Tribunal heard at this remedy hearing has related predominately to, from the Claimant, matters potentially relevant to her claim for compensation for injury to feelings and, from both the Claimant and Mr Kitney, in respect of her job search and likely opportunities for someone of her skills and experience in attaining a management accountancy position. The Tribunal heard firstly from the Claimant and then from Mr Kitney before hearing the parties' submissions based upon that evidence and further in respect of all heads of loss claimed.

8. Having considered the live evidence given at this stage and relevant documentation, the Tribunal makes the further findings of facts as follows.

The facts

9. The announcement on 9 December 2015 made by Mr Lindsay to the Claimant that she was to be made redundant came as a shock to her and caused her additional feelings of turmoil. There had been no previous indication that her employment was at risk whether by reason of any material performance concerns or otherwise.

10. The Claimant was not due to be in work in the two days following Mr Lindsay's notification of her future redundancy. The Claimant went to see her doctor on 11 December 2015 who recorded her as being very upset and, whilst not sure, thinking that the redundancy was because she had handed in to Mr Lindsay her request for maternity leave earlier the same day. The Claimant was signed off as unfit to attend work for a period of two weeks due to stress.

11. This was the first absence the Claimant had had from the Respondent's employment due to stress. Previous absence had been pregnancy related and in particular related to the Claimant having been diagnosed as having an ovarian cyst.

12. On 17 December the Claimant was notified by letter of the threat of disciplinary action. The Tribunal's earlier findings were that the Respondent had in the immediately preceding days been proactively looking to identify errors made by the Claimant in her management of the Respondent's accounts and financial reporting. The Tribunal also noted the making, in the Respondent's letter of 17 December 2015, of unjustified and unsustainable allegations of gross misconduct. As with the redundancy notification, the Tribunal found that the Claimant was notified of the threat of a disciplinary investigation because of her pregnancy and/or impending maternity leave. They were therefore acts of unlawful discrimination.

13. The Claimant was signed off as unfit to attend work for a further two weeks to 8 January 2016 and did not return to work indeed before she resigned from her employment with immediate effect on 18 January 2016. The Tribunal has found that the reason for that resignation was the notification of the redundancy situation and subsequent notification of the investigation in respect of matters which might lead to a disciplinary hearing.

14. On 23 December 2015 the Claimant had been referred to the North Lincolnshire Psychological Therapy Services. This resulted in the Claimant attending counselling with a Mr Dean Willets on 14 and 21 January and again on 4 February 2016. The Claimant said that this counselling identified that communications from the Respondent had caused the Claimant anxiety and depression. The Claimant was unable to take anti-depressants, which were otherwise likely to have been prescribed, due to her being still pregnant at this point and up until the middle of March 2016 when she gave birth to her son.

15. The Claimant's medical reports record within her counselling session on 14 January 2016 her as showing *"anxiety and low mood related to work related events … she advised that she is being made redundant three hours after she advised her employers that she was pregnant".* The Claimant was then initially discharged from the counselling referral on 3 March approximately two weeks before she gave birth.

16. Having given birth, the Claimant continued to have feelings of depression which she attributed herself in part to post natal depression – *"baby blues"* as she described it – but felt her feelings of upset which she had experienced before giving birth because of the Respondent's treatment not only continued but became progressively worse.

17. This caused the Claimant to return to her doctor in May 2016. She was prescribed anti-depressants which she reluctantly decided to now take to aid her recovery from depression, but in circumstances where it meant that, contrary to her wishes, she had to stop breast feeding her infant son. The Claimant was prescribed setraline. The dosage prescribed was in fact increased in August 2016 and the Claimant remains taking such medication on a daily basis up to the date of this remedy hearing.

18. Further, from the end of May the Claimant resumed further counselling services of a cognitive behavioural therapy nature. She described how her feelings of anxiety and upset caused by the Respondent's treatment of her remained in the background in her thoughts and that the therapy was aimed at providing her with coping mechanisms. This counselling was effective to a reasonable extent so that she was able to stop attending her weekly sessions in mid November 2016 on the basis that she would seek to use the coping mechanisms she had been taught and could return to counselling if needed without having to start from scratch in terms of obtaining a GP referral.

19. The Claimant in her witness evidence described her condition as *"lifelong"* which was clearly not an accurate characterisation but was explained by the Claimant as her not being able to see when *"it will ever leave me"* and where her feelings of anxiety and upset arising from her treatment by the Respondent, she said, were *"constantly in my mind and head".*

20. The Claimant described suffering from a loss of confidence which had given rise to her constantly doubting herself and her abilities. She said that the questioning of her performance by the Respondent affected her daily and had caused her to shy away from social situations and to avoid, for instance, attending mother and baby groups so that she would not have to explain her loss of job. The Tribunal considers the Claimant's need to avoid such situations as likely to be a little overstated, but accept the Claimant's evidence of having real concerns.

21. The Claimant has on her evidence clearly, the Tribunal finds, shown significant determination to overcome her upset and to seek to regain as she put it her *"sense of individual value and financial independence".*

22. The Claimant's role with the Respondent was her first position at an independent senior management level and the Claimant believed she would now struggle to use her previous employment with the Respondent in applications for future employment as evidence indeed of her experience and employability.

23. During the first part of the Claimant's sickness absence from 11 December 2016 she had been paid her contractual entitlement to full salary. However, for the week from 11-18 January 2016, immediately prior to her resignation from her employment with immediate effect, she received Statutory Sick Pay only at the rate of £106.14.

24. The Claimant was due and had notified the Respondent of her intention to commence a period of maternity leave from 10 March 2016. Prior to the commencement of her maternity leave the Claimant had not informed the

Respondent (and had not decided finally for herself) of a likely return to work date but said that she intended to take from 9 to the full 12 months of maternity leave before returning to the Respondent's employment. Indeed it was ultimately accepted by her that the Claimant's return to work from maternity leave would have been on 18 March 2017 and that compensation ought to be considered on that basis – indeed, given the proximity of date of this remedy hearing to the Claimant's return to work date (had she not left the Respondent) there is no objection by the parties to the Tribunal looking forward only from today's date in terms of future loss.

25. The Claimant has been actively looking for alternative employment since around the middle of January 2017. She has been looking for roles within an approximate 30 mile radius or one hour travel time by car from her home to enable nursery drop offs and pick ups on a regular basis. She contacted two agencies in January to inform them that she was looking to return to full-time work and would be available to start in March albeit was available for interviews immediately. Her son started nursery part-time on 8 February 2017 to allow her to increase her efforts and to familiarise himself with the nursery environment prior to her hoped for return to full-time work.

26. The Claimant described recruitment agencies as being the main and most realistic route for finding senior accountancy and finance roles. The Claimant firstly contacted Elevation Recruitment with whom she was familiar in terms of previous job searches. She was advised of a suitable role with NISA based in Scunthorpe at a salary of £45,000. Her CV was sent to them on 16 January but she was not selected for interview. The Claimant spoke to the same agency on 24 January regarding an interim role based in Doncaster. Again the Claimant was not selected for interview.

27. The second agency she contacted was Brewster Pratap. On 23 February 2017 she was sent a job specification by them for a role in Doncaster at a company known as Palram. This was for a financial accountant with a salary of £40-50k dependant upon experience. The Claimant felt that the job specification matched her CV perfectly. On 2 March 2017 she attended a first interview with the finance director and HR manager. The Claimant was forced during discussions to describe why she had left the Respondent's employment after less than a year's service. The Claimant was not selected for a second interview and was told that the feedback received from the agency was that this was due to a lack of *"cultural fit".*

28. During February the Claimant was also in touch with an agency known as Bureau UK following a role she had seen advertised by them on the Linkedin website. This was for a role with AAK in Hull. On 7 February 2017 the Claimant submitted her CV but subsequently learned that the maximum salary for the role was to be £38,000. The reduced salary and increased travel costs for a role in Hull led to her withdrawing from the process.

29. At the beginning of March the Claimant spoke to an agency Chase and Holland which had placed her with the Respondent. They wished to put her forward but unfortunately for the same role at Palram which she had already investigated.

30. At the beginning of March 2017 the Claimant also sent her CV to Hays Recruitment as they were recruiting for a financial controller in Scunthorpe offering a salary of up £50,000. However the Claimant was not suitable as they were seeking someone with more construction industry experience. On

15 March, Hays rang the Claimant regarding a role in Hull at Kingspan Access Floors and the Claimant has submitted her CV and is awaiting feedback in respect of this.

31. The Claimant said that in the past she had been very successful when applying for jobs achieving success in six of the jobs she applied for out of a total of eight since qualifying as an accountant. However, she is noticing a lower success rate on her attempt now to return to work.

32. Mr David Kitney is managing director of his own executive recruitment firm, Emerson Kitney, operating primarily in the Humber region. From 2012 he has operated a joint venture with the Hull based accountants, Smailes Goldie, to assist their clients to fill accountancy and finance vacancies. He gave examples of senior financial roles of around the Claimant's previous level enjoyed with the Respondent into which he has managed to place candidates.

33. He referred in his evidence to the UK labour market reports showing finance and accountancy professionals as one of the top sector/skills sets in demand. His evidence was that locally, if anything, the picture was better than nationally as there was a lack of senior professionally qualified people within the area yet, with reference to roles the Claimant might be suitable for, a larger than average percentage of individuals engaged within manufacturing.

34. Prior to the liability hearing he had estimated that it would take the Claimant, in his opinion, 6 to 12 weeks to find suitable employment. He considered her CV to be strong and that she was at an advantage in terms of her ability to start a position immediately.

35. When being cross-examined the Claimant had put to her a number of potential avenues she could explore regarding alternative employment and indeed the specific jobs identified by Mr Kitney previously and now in more recent snapshots of available employment. The Claimant confirmed that she would be prepared to work in Doncaster, Grimsby, Hull and Lincoln although Sheffield would be too long a journey time. The Claimant accepted that she had not updated her Linkedin profile with specific detail regarding her job search nor had she uploaded her CV to the Total Jobs or CV Library websites. She had uploaded them, however, to similar recruitment websites.

36. She was firstly asked about the roles Mr Kitney had identified as possible alternative employment in 22 September 2016. The Claimant agreed that a number of those vacancies appeared to be suitable ones including ones she might have applied for if she had been looking for employment at that time. A senior financial analyst role in Selby, however, was not suitable because the role required commercial expertise. The Claimant explained the roles she had applied for since her job search commenced and referred to two further jobs having been applied for just this week.

37. The Claimant was referred to a group finance controller position based in Doncaster which the Claimant said she could do but noted that it was a job advertised through Hays with whom she was registered and that she could only assume that the position was not available or they had not regarded her as suitable. A role available in Goole, she said, was at too low a level requiring indeed a lesser AAT level of qualification to her own CIMA qualification. A further role in the salary bracket of £50,000-£60,000 was a role, she said, she couldn't do because it was with her previous employer, Young's Seafood, at a level higher than her own previous line manager. She

had indeed spoken to her line manager about this role and whilst Young's Seafood would have the Claimant back there was not a suitable vacancy.

38. The Claimant was shown a range of jobs collated from a search on 16 March 2017. The Claimant would have been capable of performing a financial controller role in Scunthorpe but said this was the one she had applied for and they wanted construction industry experience. A financial controller role in Doncaster the Claimant had identified as the same Palram role she had already applied for. Indeed, this Palram role appeared to be duplicated in three other advertisements. A further role was one for which the Claimant was not qualified due to her lack of audit background.

39. A subsequent search of available positions on 21 March had come up with potentially 18 relevant vacancies albeit some of these overlapped with the previous week's search. The Claimant said she had since applied for a divisional management accountant role in Doncaster on a six month contract. A financial controller role advertised at the salary range of £40,000-£50,000 was the aforementioned role with Young's Seafood. Other roles, the Claimant accepted, were ones where she might have the appropriate skill set and would pursue the opportunity.

40. The Claimant clarified in evidence that the role she had taken with the Respondent was her first step up from the level at which she had performed with Young's. It was a move to a role where she had three direct reports in contrast to having only one with Young's Seafood. For the first time she was part of the senior management team, thus enabling her to become involved in more areas of the business and, because of the smaller nature of the employer, to work closely with the managing director, thus giving her more commercial experience and experience in a different sector. With the Respondent, in contrast to with Young's Seafood, she had direct dealings with the bank and was ultimately responsible for the statutory accounts and tax. Before, with Young's Seafood, her responsibilities would have been checked at a higher level. With the Respondent she was more involved in VAT matters than previously and in fixed asset management. She confirmed that her salary level with Young's Seafood had been £42,000 per annum.

41. Mr Kitney, when he gave evidence, was asked to comment on the Claimant's own evidence regarding her job search. He said that it clearly showed the Claimant was looking for work although he thought she had limited herself to some extent by the agencies she had engaged with which were predominantly, he thought, South Yorkshire based. His view as of now was that the Claimant would still be able to obtain a suitable role within 6-12 weeks - *"essentially within three months"* - and that it was to her advantage still that she was immediately available. He was of the view that the Claimant had quite a desirable professional background and would get employment if she looked at the right level albeit she might need to open up her own job criteria and scope slightly wider and be willing to consider roles in the region of £40,000 per annum in terms of salary, i.e. comparable to what she was previously earning prior to joining the Respondent. He expressed the view that at £47,000 per annum with the Respondent she was probably at the top end of the bracket based on her level of accountancy experience.

42. The Claimant had commenced employment with the Respondent on 5 May 2015 and her employment was terminated with effect from 18 January 2016. The Claimant was paid a gross salary of £47,000 per annum giving net

monthly pay of £2923 which equated to a weekly sum of £703.31. The Claimant's salary figures were not in dispute.

43. As already referred to, the Claimant was absent due to sickness for a period prior to her resignation from her employment effective on 18 January 2016. She had been paid full salary in accordance of her contract of employment up until 11 January 2016 but in the period from 11-18 January received Statutory Sick Pay only at the rate of £106.14. It is agreed that if the Claimant had not been absent due to sickness during this period she would have received normal salary of £809.45 after tax.

44. The Claimant's maternity leave period would have commenced on 10 March 2016. The Claimant received from the Respondent her full maternity pay entitlement during the period of leave despite the termination of her employment albeit there was a delay in the commencement of such payment. The Tribunal has found already that there was no unlawful discrimination arising out of such delay.

45. In terms of additional benefits, the Claimant enjoyed the benefit of an entitlement to bonus pursuant to her contract of employment albeit bonus payments remained discretionary.

46. The Tribunal has heard limited evidence regarding the calculation of bonus payments. At the liability hearing it had been contended on behalf of the Claimant that she had a contractual entitlement to a bonus. The Tribunal's findings were that no such entitlement arose but its concentration was on the contractual provisions regarding the need for an individual to be in employment at the time bonus was paid and not being subject to any notice of termination.

47. The Tribunal has been shown a bonus provision schedule in respect of 2015 prepared by the Respondent in connection with these proceedings and disclosed some time earlier than today to the Claimant.

48. This indicates that bonuses were paid with employees being awarded a percentage of salary on the basis of departmental performance and a further percentage based on personal performance. Bonuses were only payable at all on condition that the Respondent met set criteria in terms of its overall financial performance.

49. The schedule indicates that the departmental bonus for the procurement department was set at 4%, for design, quality and production and product sales department at 3%, for commercial and CSC department at 3% and for the finance/administration department at 3%. Departmental members with no line management responsibility simply received the 3% or 4% departmental bonus dependant upon which department they worked in. They were then entitled to a personal bonus up to 4% with levels of bonus in fact awarded between 2-4%.

50. The schedule then separates out six members of the senior management team below Mr Lindsay who received a departmental bonus of either 10% or 13% for the calendar/financial year 2015. It appeared that this bonus might be arrived at by the addition of the individual departmental bonus awards dependant upon the breadth of the senior managers' responsibilities, i.e. a senior manager with responsibility across all of the departments might if all the individual departmental bonuses were added together have achieved an entitlement of 13%. However, the two individuals out of the six in the management team receiving the full 13% bonus appear, on the face of it, to

be responsible for procurement only with no correlation in respect of the other senior managers all of whom were awarded a departmental bonus of 10% and having responsibility for multiple business areas. Mrs Preston it is noted received a bonus of 10% in respect of commercial and CSC. The Claimant is not included in this group in circumstances where she had left her employment prior to bonuses being paid and where no assessment had been made of her bonus entitlement.

51. The Claimant's role made her responsible for finance/administration and indeed on the Respondent's own case put her in a position where she might be regarded, certainly by some colleagues within the wider group business and by some externally as the effective 'number two' in the business. The Claimant had replaced Mrs Preston who had moved to a different albeit, in reality, still more senior role to the Claimant.

52. On balance the Tribunal concludes that, had the Claimant been entitled to and been awarded a departmental bonus in 2015, she would have had allocated to her an award of 10%. No member of the senior management team had a lower attribution, the Claimant had responsibility for a significant department (and indeed sole responsibility) whereas a number of the senior management team from the schedule appear to share responsibility in the departmental area with at least one other individual.

53. The Tribunal has been told by the Respondent that the Respondent's performance was sufficient to again trigger bonus entitlement for 2016 and that departmental and personal bonuses were made. The Tribunal has no evidence of the percentage awards made. Albeit not in formal evidence, it was indicated to the Tribunal from Mrs Preston that her personal bonus award had been at the rate of 6% for the 2016 financial year.

54. The Tribunal has heard no evidence as to how bonus is assessed during or to reflect periods of maternity leave or, for instance, periods of long term sickness.

55. As part of the Claimant's remuneration package she also received a contribution to her pension. Whilst the Tribunal is not clear from the evidence as to the method of calculation, it has been agreed between the parties that an agreed monthly average in terms of employer's pension contribution should be assessed at the rate of £91.57.

56. Finally, the Claimant also had the benefit of private health insurance. It was put forward in the Claimant's schedule of loss that replacement cover purchased by her self would cost £225.67 per month but no evidence of such quotation was provided. The Respondent has indicated in a schedule that the cost to itself of providing cover for the Claimant was a little under £1,000 per annum, but on behalf of the Respondent it was accepted that a small premium ought to be added to that to reflect the fact that the Respondent would be able to obtain a level of discount given the size of the scheme as opposed to a lone individual seeking a quote for health cover on the open market. No guidance could be given to the Tribunal as to what that premium might be. The Tribunal felt itself to be in an unsatisfactory position given that the Respondent disputed the Claimant's figure which the Claimant had not been able to corroborate by showing the Tribunal a copy of a quote received, but where the Respondent also was unable to provide any evidence as to how much open market cover was likely to cost. In the circumstances the Tribunal suggested to the parties that by a quick internet search of health

insurance provider sites an indicative cost could be obtained which should be capable of agreement. In a break between the submissions on behalf of the Respondent and the Claimant such exercise was undertaken by the parties such that the Tribunal was informed that monthly quotes for health cover had been obtained from Aviva at the rate of £105, from BUPA at the rate of £130 and from AXA at the rate of £137.00.

57. On balance the Tribunal determined it appropriate to adopt, in terms of calculation of loss, the BUPA figure given that it fell within the middle of the two other quotes and was from a specialist health care insurance cover provider.

Applicable law

58. The Tribunal heard submissions on behalf of the Respondent and then the Claimant. Some of the parties' respective arguments based on the legal principles now set out are dealt with in the Tribunal's conclusions below.

59. As regards injury to feelings arising out of the two allegations of discrimination which were found to be proven, there was no dispute as to the correct legal approach. It was submitted with reference to **Prison Service and others v Johnson [1997] ICR 275** that the purpose of an award for injury to feelings is to compensate the Claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with **Ministry of Defence v Cannock [1994] ICR 918** the aim is to award a sum that, in so far as money can do so, puts the Claimant in the position he or she would have been had the discrimination not taken place. It was urged upon the Tribunal, on behalf of the Respondent, pursuant to **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05** that an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the Claimant.

60. The Tribunal was referred to the **Vento** guidelines (derived from **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Nevertheless, the Tribunal considers that the decisive factor is the effect of the unlawful discrimination on the Claimant.

61. The parties accepted that the bands originally set out in **Vento** have increased in their value due to inflation and, on the weight of current authority, a further uplift in accordance with a more general uplift of 10% given to general damages pursuant to the case of **Simmons v Castle [2012] EWCA Civ 1039**. It was not disputed that on the basis of those uplifts the middle band now ran from £6,600 at the lower end to £19,800 at the top end.

62. The Claimant in her schedule of loss sought in addition an award for aggravated damages. The Tribunal was referred, for the principles to be applied, to the decision of Underhill J in **Commissioner of Police of the Metropolis v Shaw [2012] ICR 464**.

63. Aggravated damages are not ordinary damages for injury to feelings in consequence of discriminatory acts – that would be mere duplication. They may be awarded inappropriate cases in respect of the manner in which the

wrong was committed. In this regard a Tribunal might be looking to see whether there has been behaviour of *"a high-handed, malicious, insulting or oppressive manner"*. Secondly the motive for the conduct of the employer may be relevant, if the employee was aware of it, in circumstances where spiteful, vindictive or deliberately wounding conduct is considered likely to cause more distress than conduct which results from ignorance or insensitivity. Under both these heads this Tribunal is mindful of the need to avoid duplication if indeed such factors are already compensated for within the award of injury to feelings.

64. The third head under which aggravated damages may be available is where an award is warranted by the Respondent's subsequent conduct after the discriminatory action. For instance, an award may be appropriate in the case of an employer who has deliberately refused to investigate a clear complaint of discrimination, failed to apologise when discrimination was patent or used his superior power and status to cause further distress. Conduct in the course of litigation may aggravate injury in a manner which can properly result in compensation, albeit respondents are allowed to defend themselves and an adversarial approach to a claimant's evidence is not in itself a ground for an aggravated award.

65. There is no claim in these proceedings for compensation for personal injury.

66. Further, awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the Tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the Claimant, so far as possible, into the position that she would have been in had the discrimination not occurred - see **Ministry of Defence v Cannock** above. Whilst Mr Siddall argues for the rejection of the application of any "but for" test in causation when assessing damages flowing from discriminatory acts, he accepts and suggests that compensation should be awarded for losses which flow from an act of discrimination.

67. Clearly in this case loss of earnings is sought for a period after the Claimant's dismissal. On the Tribunal's enquiry, Miss Twine confirmed that she was arguing for such compensation consequential on the Employment Tribunal's findings of unfair dismissal. It was not part of the Claimant's pleaded case determined by the Tribunal that there was a discriminatory dismissal. Indeed, extending compensation for pre-dismissal discriminatory acts beyond the effect of date of termination would provide a back door route to a remedy attributable to a discriminatory dismissal. The Claimant's act of resignation on her acceptance of the Respondent's treatment of her as a repudiatory breach of contract is what gives rise to the post dismissal loss of earnings. Again, there is no finding of a discriminatory dismissal.

68. The availability of a compensatory award in a complaint of unfair dismissal is governed then by section 123 of the Employment Rights Act 1996. The amount of an award is capped and such cap is not broken by the Claimant having succeeded in a complaint of automatic unfair dismissal based on pregnancy/maternity.

69. It was urged upon the Tribunal by Mr Siddall to give effect to the case of **GAB Robins v Triggs [2008] IRLR 317** where the court distinguished in a claim of constructive unfair dismissal between antecedent breaches of the implied term of trust and confidence (which caused the employee in that case a

period of sickness and reduced earnings) and the employee's dismissal. The dismissal was effected, it was said, purely and simply by the employee's decision that she wished to discontinue her employment. That entitled her to compensation for loss which flowed from the dismissal, but that loss did not include loss flowing from wrongs already inflicted upon her by the employer's prior conduct. They were not caused by the dismissal but by the prior breaches of trust and confidence.

70. Applying the above legal tests to the Tribunal's factual findings and having considered the arguments raised by both parties the Tribunal reached the conclusions as to compensation set out below.

Conclusions

71. As regards injury to feelings, the Tribunal considers that, in compensating the Claimant for the two acts of discrimination which were well founded, an award should be made in the sum of £12,000 to which must be added interest of £1,236.92 calculated on the basis of a prevailing rate of interest of 8% over a 67 week period from the Claimant being informed of her being at risk of redundancy on 9 December 2015 until the date of this hearing. The Tribunal considers that an award is appropriate in the middle band of the range of available awards according to the principles to be derived from the **Vento** case.

72. The Tribunal makes its assessment mindful, as urged by Mr Siddall, of the Claimant having in her original schedule of loss sought an award within the mid band quoting indeed that band as the appropriate level of compensation awardable at a time when she pursued 11 separate allegations of discrimination whereas her success before this Tribunal has been in respect of only two of those allegations.

73. The Tribunal is of the view that the Claimant at all times regarded her notification of redundancy and then her notification of a disciplinary investigation as the most serious acts which affected her at the time of her employment with the Respondent. What had occurred in these proceedings was an effective expansion of the Claimant's complaints, which is not uncommon in complaints of discrimination where, for instance, a Claimant might be asked to consider whether there was anything else which happened prior to the key acts complained of which might sometimes in hindsight be viewed as also discriminatory or at least corroborative of the primary alleged acts of discrimination. The Claimant, it is recognised, did make allegations which the Tribunal did not accept and/or where the Tribunal did not accept that the degree of upset had been caused to the Claimant which she maintained in her evidence.

74. However, the Tribunal's task is to identify the injury to feelings which was caused as a matter of fact by the proven acts of discrimination and then to assess how that injury ought appropriately to be compensated for.

75. Certainly, the Tribunal does not categorise the injury to feelings as properly being considered within the middle band simply because there were two incidents occurring on 9 and 17 December 2015 rather than one single isolated incident.

76. The proven acts of discrimination arising out of the notification of redundancy and a disciplinary investigation did on the facts cause to the Claimant significant upset and distress. They caused her a period of sickness absence from work due to stress at what was already a difficult and stressful time for

her in terms of her pregnancy which had not been without its own medical problems. The proven acts of discrimination occurred over a relatively brief period but the acts in themselves were of a significant nature in that they caused the Claimant to resign from her employment in circumstances where the Tribunal has found that they amounted to a fundamental breach of trust and confidence such as to allow the Claimant to resign without giving notice. The Tribunal is mindful that there was no complaint of discriminatory dismissal and injury of feelings is limited to the two acts of discrimination successfully complained of and those alone.

77. The Claimant had in obtaining employment with the Respondent achieved a goal in terms of career progression which brought her within a senior management team of an organisation for the first time. The potential removal of that career in circumstances where the Respondent sought to terminate her employment or take steps which might lead to termination by reason of her pregnancy and forthcoming maternity leave, but to use firstly redundancy and then disciplinary issues as a pretext for potential dismissal, was a significant blow to the Claimant.

78. Indeed, it was a blow which resulted in mental health illness and concerns which endured for a significant period. The Claimant was unable to be prescribed anti-depressants when first ill due to the Respondent's conduct because of her pregnancy. When her condition continued (and indeed, to an extent, worsened after the birth of her child) she was forced to make a choice between taking anti-depressant medication or continuing to breastfeed her infant son. The Claimant required the services of a mental health counsellor and cognitive behavioural therapy over a period of some months in order to provide her with coping mechanisms, but in circumstances where the evidence shows a significant loss of confidence and self worth experienced by the Claimant which has endured over a period of time and certainly endured for the entirety of the calendar year 2016.

79. This is not a case on the borderline between the lower and middle band but one which should be firmly evaluated within the mid range of that middle band. In their submissions Miss Twine put forward a figure of £15,000 as an appropriate level of award for injury to feelings, whereas the top level contended for on behalf of the Respondent was that of £8,000. Such submissions do not restrict the Tribunal which still has a full discretion to award more than the Claimant was seeking or indeed, if appropriate, less than the Respondent's own assessment of the appropriate level of compensation. Ultimately, the figure of £12,000 is viewed as just equitable when considered against the evidence of distress suffered by the Claimant. To have caused the Tribunal to consider the appropriateness of a greater award would have likely to have required the production of medical evidence which demonstrated a more serious effect on the Claimant.

80. Miss Twine on behalf of the Claimant contended that an additional award should be made for aggravated damages or at least the award for injury to feelings be uplifted to reflect an element of aggravation. She relied on the conduct of Mr Lindsay whilst the Claimant's employment subsisted. Certainly, the Tribunal has been critical of his treatment of the Claimant, including following her raising issues of complaint and concern, but has been asked to adjudicate upon such behaviour as freestanding acts of pregnancy/maternity discrimination and has not upheld such complaints. Further, the Tribunal considers that already within its award of injury to feelings it has reflected the

manner of Mr Lindsay's treatment of the Claimant in terms of the redundancy and then misconduct investigation notifications.

81. A stronger argument for aggravated damages lay in the Respondent's conduct of these proceedings and in particular the volume of detailed evidence presented and deployed against the Claimant in its maintenance that she was guilty of significant and numerous errors in her management of the Respondent's accounts. The Tribunal's recollection was that a significant period of time had been taken up in cross-examining the Claimant on detailed accountancy matters in circumstances where, no doubt to Mr Siddall's surprise, when asked what would have happened to the Claimant had the disciplinary case been pursued, Mr Lindsay said that the Claimant would at most have been subjected to a form of warning - it was very unlikely that she would have been dismissed. The Tribunal has no doubt that the main aim of the Respondent building this case of the Claimant's performance errors was to support a Polkey argument that her employment would have been terminated for reasons of conduct/capability in any event.

82. However, on a review of the evidence at the liability hearing, the Tribunal does not consider that Mr Siddall did spend so long in going through minute points of financial and accountancy detail – perhaps it only felt like that given the subject matter. Furthermore, Mr Siddall is correct that the Tribunal would have heard evidence of this nature in any event in support of the Respondent's contention, as it was entitled to advance, that it had genuine performance concerns about the Claimant which was the reason for the possibility of a disciplinary investigation (as opposed to the reason for such investigation being the Claimant's pregnancy/maternity). Certainly, the Respondent acted properly in altering its position following Mr Lindsay's answer to the aforementioned question, such that Miss Twine was able to spend significantly less time with Mrs Preston and no longer needed to address each disputed point of accountancy performance with her.

83. Miss Twine pointed further to what she characterised as an artificial distinction between sickness and pregnancy which was part of the Respondent's case. This was indeed a reflection of Mr Lindsay's position, but again he was entitled to assert that in his own mind he did not see the relevant sickness absence of the Claimant as in any way connected with her pregnancy. In many ways Mr Lindsay's view of the world and the people who inhabit it is not conventional. Neither his assertion of his point of view or motivation for his treatment of the Claimant nor the Respondent's reliance on alleged accountancy errors made by the Claimant are such as to justify an additional award in respect of aggravated damages or an uplifting to the award of injury to feelings. The award for injury to feelings already made is, the Tribunal considers, reflective of the Respondent and Mr Lindsay's treatment of her and attitude towards her.

84. Turning to questions of financial loss the Tribunal is firstly asked to consider the period from 11 to 18 January 2016 up to the point of the Claimant's immediately effective resignation and during which period she was absent due to sickness and in receipt of Statutory Sick Pay only. In respect of this period the Claimant claims compensation flowing from the acts of discrimination in the sum of £703.31, i.e. the difference between net salary during the period of £809.45 and the Statutory Sick Pay received of £106.14. The Tribunal asks itself whether "but for" the well founded acts of discrimination involved in the redundancy notification on 9 December 2015

and the notification of disciplinary investigation of 17 December 2015, the Claimant would have been fit and in attendance at work earning her normal contractual salary. Mr Siddall urges the Tribunal instead to ask itself whether it is satisfied that the discriminatory acts of the Respondent materially resulted in the Claimant's sick leave. The Tribunal answers both such questions in the affirmative.

85. The Claimant's sickness absence after being notified of a decision to terminate her employment by reason of redundancy was caused by notification of her redundancy in circumstances where the decision to terminate was in fact motivated by the Claimant's pregnancy and impending maternity leave. The Claimant linked the redundancy notification with her pregnancy in her own mind at the outset and was significantly upset by that such that she was unable to attend work due to her feelings of stress and anxiety. Such feelings were exacerbated then by the further discriminatory act on 17 December in which the Claimant was told that she was subject to a disciplinary investigation. The way in which Mr Lindsay in particular conducted himself in terms of discussions regarding her potential redundancy and invitations to meetings to discuss that and performance issues and indeed her sickness absence certainly added to the Claimant's feelings of stress and the Tribunal is obviously mindful that no independent acts of discrimination were found to arise from such behaviour. Nevertheless, the primary cause of the Claimant's absence, which then continued through to the point of her resignation, was her being discriminated against in the Respondent seeking to terminate her employment and using firstly the pretext of redundancy and then the pretext of potential disciplinary issues to do so. Certainly had she not received discriminatory notifications of potential redundancy and then a disciplinary investigation, she would not have felt as she did such that she was unable to attend work due to sickness. The Tribunal considers that compensation for loss flowing from the unlawful discrimination ought to be awarded in the sum sought of **£703.31**.

86. The Tribunal is then asked to consider compensation for loss of earnings from the period of the Claimant's resignation to her commencement of maternity leave, i.e. a period of 7.5 weeks up to 18 March 2016. The loss sought as compensation is loss flowing from a (constructive) dismissal in circumstances where there has been no finding of a discriminatory dismissal. As Miss Twine accepted any compensation awardable must be compensation for loss of earnings flowing from an unfair dismissal.

87. However, the Tribunal accepts Mr Siddall's submissions in this regard that the Claimant in fact, in terms of seeking the difference between her ordinary contractual salary and the Statutory Sick Pay she actually received during this period, is seeking compensation which arises from two antecedent and discriminatory breaches of trust and confidence. Indeed the authority of **GABB Robins** frustrates the recovery of compensation in such circumstances. The Tribunal is limited in its award to losses flowing from the separate and supervening act of dismissal. For this period, as part of the Claimant's compensatory award for an unfair dismissal, she is therefore entitled to compensation for 7.5 weeks at the Statutory Sick Pay rate she would have received had she not been dismissed giving a total for the period of **£796.05**.

88. There is unsurprisingly, but sensibly, no argument that the Claimant failed to mitigate her loss in seeking alternative employment prior to her

commencement of the maternity period and indeed nor does the Respondent seek to suggest a failure to mitigate during the maternity leave period which, for the purposes of the Tribunal's calculation, would have expired as at the date of this hearing. The Claimant received her full statutory maternity pay entitlement.

89. In terms of the period of maternity leave, an agreed monthly figure of £91.57 is to be applied in respect of this 52 week period giving a total pension contribution loss of **£1,098.84**.

90. Similarly, the Tribunal has determined that the loss of health care benefit ought to be assessed at the figure of £130 per month giving a further total under this head of compensation for the period of maternity leave at **£1,560**.

91. The Tribunal then turns to the question of the Claimant's bonus entitlement.

92. Had the Claimant not been dismissed on 18 January 2016 she would, shortly after that date, have received a bonus payment for the calendar year 2015. Such bonus was discretionary, but the Tribunal considers that the Respondent having hit its overall targets, the Claimant would have received the full departmental aspect of her bonus. On the basis of the aforementioned findings the Tribunal is of the view that the Claimant would have received 10% of her salary in respect of this element of bonus entitlement. As regards the personal performance element, the Tribunal is asked to consider that, given the performance issues discovered by the Respondent, Mr Lindsay would have exercised his discretion and done so quite reasonably in not awarding a personal performance element. Had the Claimant's performance been regarded as entirely satisfactory she would have received an additional payment of 4% of salary in respect of this bonus year. The Tribunal accepts, as indeed the Claimant did on cross-examination, that some of the highlighted errors in the accounts were indeed errors and errors for which she bore responsibility. Some of the performance criticisms of the Claimant were legitimate. However, on the Tribunal's findings, clearly the performance issues were by and large ones which were sought out and built up as part of a case to pursue against the Claimant which was an act of unlawful discrimination. Mr Lindsay's ultimate position was that if a disciplinary case had proceeded given that the Claimant had received no previous warnings, a form of warning would have been the greatest sanction he was likely to have imposed. In the circumstances whilst the Tribunal can consider that an award of bonus at less than the full level otherwise available might have been justified on non-discriminatory grounds, absent discrimination the Claimant is likely to have received a personal bonus of still 3%. The Claimant however had worked for the Respondent for only seven out of the 12 months of the 2015 bonus year such that any payment would have been pro rated. The Tribunal calculates bonus at the rate of 13% of salary, reduces it by 5/12ths and then deducts tax at the rate of 40% to give a net bonus payment which would have been due to the Claimant and paid to her of **£2,138.50**.

93. As regards the bonus year 2016 the Claimant is likely again to have received a bonus based on departmental performance of 10% - the best evidence the Tribunal has of likely bonus entitlement for this year is the actual bonus calculations in respect of the preceding bonus year 2015. In terms of personal performance the best assessment that the Tribunal can make is that again the Claimant would have received an element attributable to her own performance at the rate of 3% of salary.

94. The parties have made no representations to the Tribunal regarding how bonus would have been treated in the context of the Claimant's absence on maternity leave for a significant part of the bonus year. The Tribunal considers it just and equitable to regard the departmental element as payable in full given that it was not dependant on the Claimant's attendance and performance at work, but that the personal performance element ought to be pro rated on the basis of her absence from work for 75% of the bonus year. The departmental bonus element for the year would have constituted £4,700 and the personal performance 3% element £352.50, calculated on a pro rata basis against a full year entitlement of £1,410 giving a total of **£5,052.50** from which no deduction in respect of tax falls to be made given the Claimant's level of earnings during this tax year. This gives a sum for total immediate loss of **£10,645.89**.

95. Turning to the future loss calculation for the compensatory award, on the evidence, the Tribunal considers that the Claimant will be successful in obtaining alternative employment three months after the date of today's hearing. The Claimant has provided convincing evidence of a focused and determined search for employment at, reasonably, the level which she previously enjoyed with the Respondent. Mr Kitney is of the view that the Claimant will obtain alternative employment given her experience, marketability and jobs available. He does not, however, suggest that this will happen immediately albeit obviously an element of good fortune can change that situation fundamentally. He indeed came round to the view that three months would be a reasonable period for the Claimant to be expected to obtain alternative employment. The Tribunal notes that the Respondent itself struggled to find a suitable candidate for the vacancy which the Claimant filled for some significant time. The Tribunal notes also that the Claimant is an individual who has said that she is used to getting jobs quite quickly and, in terms of the number of applications made, with a strong percentage chance of success. The Tribunal notes, however, that if she reduced her expectations to perhaps the level below the position she had enjoyed with the Respondent a significantly greater number of jobs are opened up as potential opportunities for her. Prior to working with the Respondent, the Claimant had indeed worked at such lower level. The salary the Claimant enjoyed with the Respondent was said by Mr Kitney to be at the upper level of expected payments for a position of the type the Claimant held. The Claimant has sought to make a move to a higher level of management, but as a matter of fact, had only a relatively few months experience working at that level such that she cannot market herself to prospective employers as someone significantly experienced at that higher level.

96. Ultimately, the Tribunal concludes that three months after the date of this hearing the Claimant will be successful in obtaining employment, but at a position carrying with it a salary of £40,000 per annum rather than the £47,000 she had previously enjoyed.

97. In respect of the further three month period when the Claimant will still be searching, but not have commenced new employment, the net salary loss for such three months is calculated at the sum of **£8,769**. To this must be added pension loss of **£274.71** and loss of private health care benefits of **£390**. There is also a continuing loss of bonus. Based on the same percentages applied to the 2015 and 2016 bonus the Claimant's loss is assessed as a quarter of an annual bonus likely to have been paid of £6,110 gross or £3,666

net giving a further element of compensation of **£916.50**. This gives a total for this first three month period of compensation for future loss of **£10,350.21**.

98. The Tribunal considers that realistically the Claimant will have to remain in her new employment at a salary level of £40,000 for a year before being then in a position to apply for an internal or external promotion which would bring her back to her previous levels of earnings with the Respondent of £47,000. The Tribunal therefore considers it just and equitable to further compensate the Claimant over a further period of 12 months. Over such period the Tribunal applies a loss of salary figure of £7,000 (i.e. the difference between £47,000 and £40,000 per annum) from which tax must be deducted at the rate of 20% giving a loss of salary earnings figure of **£5,600** for this future 12 month period. The Tribunal considers that the Claimant in any new employment is likely to have health care benefits and also pension benefits but that there will be a continuing deficit in terms of pension loss given that her level of earnings are at the rate only of 85% of her previous earnings. On this basis it is appropriate to calculate a pension loss as being the difference between what she previously received and a monthly figure of £77.93 giving a monthly deficit in terms of pension contributions when compared to what she received with the Respondent of £13.64 and therefore a 12 month figure in terms of pension loss totalling **£163.68**.

99. The Claimant is then likely in her new employment to have a potential to earn a bonus, but in circumstances where, applying a system of bonus entitlement similar to that enjoyed with the Respondent, she is likely to drop into a lower category below a senior management team and therefore be in receipt of an equivalent to a departmental bonus at the rate of 3% only together with a personal element of a further 3%. A bonus entitlement based on 6% of the new £40,000 salary would give a gross figure of £2,400 when compared to a bonus expectation with the Respondent of £6,110 i.e. a deficit of £3,710 which equates to a net value of **£2,968** and which should be added to the other elements of compensation. This gives a total amount in respect of this second (12 month) period of continuing loss of **£8,731.68**.

100. The Tribunal is therefore in a position, in summary, finally to order the Respondent to make a payment to the Claimant as compensation for unlawful discrimination of **£13,236.92** in respect of injury to feelings and an additional figure of **£703.31** in loss of earnings prior to the termination of the Claimant's employment, to which must be added 62 weeks of interest at the rate of 8%, i.e. a further sum of **£67.08** – a total of **£770.39**. As compensation for unfair dismissal the Respondent is to be ordered to pay to the Claimant a total of **£29,727.78** consisting of immediate loss of **£10,645.89** and future loss of **£19,081.89**.

Employment Judge Maidment

Date: 2 May 2017