EMPLOYMENT TRIBUNALS

Claimant: Miss K Scragg (now Liptrot)

Respondents: 1. Ms Samantha Trundle
2. Mr Gary Trundle

HELD AT: Fleetwood **ON:** 28 & 29 March 2017

BEFORE: Employment Judge Tom Ryan
Mrs C Bowman
Ms B Hillon

REPRESENTATION:

Claimant: Mr T Gilbart, Counsel
Respondents: Mr J Frederick, Consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfair dismissal (sections 98 and 99 Employment Rights Act 1996) is upheld.

2. The complaint of pregnancy related discrimination is upheld. It is declared that the respondents unlawfully discriminated against the claimant in relation to her pregnancy by proposing to reduce her contractual hours and by dismissing her.

3. The complaint of breach of contract (failure to pay notice pay) is upheld.

4. The complaint of failure to pay holiday pay is upheld.

5. Remedy

5.1 Unfair Dismissal

Basic Award	304.00
Compensatory Award	
loss of statutory rights	300.00
ACAS uplift - 15%	45.00

	Total award for unfair dismissal		£649.00

5.2 Discrimination

	Injury to feelings	10,000.00	
	Interest at 8% for one year	800.00	
	Loss to date of hearing	1,836.38	
	Less earnings from employment	- 528.09	
		1,308.29	
	Interest at 8% for 6 months	52.33	
	Future loss - 52 weeks at 36.80	1,913.60	
	ACAS uplift -15% (on losses of 3221.89)	483.28	
	Total award for discrimination		£14,557.50

5.4 Notice Pay

2 weeks at £152.00	304.00	
Less sum received	144.00	
		£160.00

5.5 Unpaid Holiday Pay

5.6 weeks at £152.00	£851.20

6. The sums awarded at paragraphs 5.1, 5.4 and 5.5 above are payable by the first respondent. The sum awarded at paragraph 5.3 above is payable, jointly and severally, by the first and second respondents.

7. At the hearing it was announced that payments of the sums awarded by this judgment be made on or before 6 April 2017.

8. The Employment Protection (Recoupment of Benefit) Regulations 1996 do not apply to the award for unfair dismissal.

REASONS

1. By a claim presented to the Tribunal on 13 June 2016 Ms Katy Scragg (now Mrs Liptrot) brought complaints against her employer Samantha Trundle and Miss Trundle's father Mr Gary Trundle in respect of the complaints identified in the judgment above. The respondents resisted the complaints.

The Issues

2. The issues in the case were identified at a Preliminary Hearing for case management on 17 August 2016 by E J Porter. Numbered consecutively they are:-

Ordinary Unfair Dismissal (Section 94 ERA 1996)

1. What was the reason for the claimant's dismissal?

2. Was the reason a fair reason? This being conduct (gross misconduct), SOSR (breakdown in trust and confidence)? Or for some other reason?

Conduct

3. Did the respondent hold a reasonable belief in the claimant's guilt?

4. Was that belief formed on reasonable grounds?

5. Did the respondent carry out a reasonable investigation?

6. Did the decision to terminate the claimant's employment fall within the reasonable band of responses that a reasonable employer would take?

7. Was the dismissal procedurally fair when taking into account the size and administrative resources of the respondent?

8. Was the claimant's dismissal substantively fair?

SOSR

9. Did the claimant's conduct on 28th March 2016 result in a breakdown of trust and confidence within the claimant's role when considering the level of trust and confidence in the employment relationship?

10. Was that breakdown substantial, more than whimsical or capricious, to justify dismissal?

11. Was the dismissal procedurally fair when taking into account the size and administrative resources of the respondent?

12. Was the dismissal substantively fair?

Remedy

13. If the claimant's dismissal was procedurally unfair, would her employment be terminated in any event under the principle of Polkey -v- Dayton [1987] IRLR 503?

Automatic Unfair Dismissal - Pregnancy Related (Section 99 of the ERA)

14. Was the reason or the principle reason for the claimant's employment being terminated on 28th March 2016 the claimant's pregnancy?

Pregnancy Related Discrimination

15. Did the respondent propose a reduction in the claimant's hours with a view to avoid payments for statutory maternity pay?

16. If so, then does this proposal amount to unfavourable treatment?

17. Was the claimant's reduction in hours because of the claimant's pregnancy and/or because the claimant was seeking to exercise her right to ordinary maternity leave?

18. Did the claimant's dismissal on 28th March 2016 amount to unfavourable treatment because of the claimant's pregnancy or alternatively that the claimant was seeking to exercise her right to ordinary maternity leave?

Notice Pay

19. Was the claimant entitled to notice on termination of her contract of employment?

20. Did the respondent fail to provide the claimant with the full amount of her contractual notice?

21. What amount, if any, is outstanding to the claimant?

Holiday Pay

22. Was the claimant's holiday pay included within her basic rate of pay?

23. Did the respondent fail to provide the claimant with holiday pay throughout her employment?

24. What amount if any is outstanding to the claimant.

3. At the hearing the Tribunal heard evidence from the claimant. She called in support of her case her mother Mrs Adele Robinson and her husband Mr Samuel Liptrot. The tribunal heard evidence from the second respondent Mr Gary Trundle and his wife Mrs Pamela Trundle.

4. The Tribunal read the witness statements of all those witnesses. In addition we were provided with an agreed bundle of documents to which we refer by page number. Additionally, on the second morning of the hearing, Mr Trundle provided a copy of a Deputy Report Form that he had provided in 2016 to the Office of the Public Guardian. In respect of remedy the claimant also produced a small bundle of wage slips from her additional job with New Look showing the monies received from February to July 2016.

5. At the point of submissions Mr Gilbart produced a written summary of the relevant law and copies of the following authorities:

Henderson v Granville Tours Limited [1982] IRLR 494 EAT

Barton v Investec Henderson Crossthwaite Securities Limited EAT/18/03
EB v BA [2006] EWCA Civ 132 CA
O'Neil v Governors of St Thomas Moore Upper School and Others [1996] IRLR 372 EAT

6. The Tribunal made the following findings of fact.

Findings of Fact

7. The first respondent who, it was agreed, was the claimant's employer is a 26 year old woman who suffers from Cerebal Palsy.

8. An order was made in 2007 by the Court of Protection appointing the second respondent, the first respondent's father, as Deputy with authority to make decisions on behalf of his doctor which she is unable to make for herself in relation to her property and affairs. It is clear from the order (40/42) that the Court conferred upon Mr Trundle "general authority to take possession or control of all of Samantha Marie Trundle's property and affairs and to exercise the same powers of management investment as she has as the beneficial owner."

9. It is clear that whilst the first respondent was the claimant's employer the effective employer for the purposes of these proceedings was the second respondent her father. No argument to the contrary was advanced at any point by the respondents.

10. Insofar as the acts of the second respondent amounted to acts of discrimination which the first respondent as employer was liable, he too could be personally liable. As the judgment above shows certain of the findings of the Tribunal in respect of remedy are made against the first respondent solely since they were not made in respect of discrimination, other findings are made against both the first and second respondents. It may be incumbent upon the second respondent as deputy for the first respondent to report the findings of the Tribunal and the orders that have been made to the Office of the Public Guardian when next he reports on and makes account for his conduct of the first respondent's affairs.

11. The first respondent to whom we shall refer as Samantha hereafter clearly needed substantial personal assistance and care. The evidence before the Tribunal was in respect of personal assistance and care provided by the claimant but it is clear there were also other carers in addition to the care provided by Samantha's parents themselves. Although the question of night care or 24 hour care was not a matter the Tribunal had to consider it is clear from the report made by Mr Trundle to the Office of the Public Guardian that at least some night care was provided since he recorded payments for that.

12. Samantha had applied to the local authority for Direct Payments in respect of her personal care needs. Under such a scheme an assessment can be made by the local authority or other care provider of the amount of care that an individual needs for personal care matters such as bathing, dressing, toileting and so forth. It is Mr Trundle's case that there was an annual audit by the local authority of his daughter's care needs. However Samantha also had other benefits which he received in the form of Disability Living Allowance or Personal Independence Payments. We note in

addition that Samantha had a sum of over £327,000 standing to her account at the end of 2016 in court funds. A reference by Mr Trundle to the NHS litigation funds suggests that the first respondent may at some stage have received compensation paid into the court funds office in respect of a civil procedure. Be that as it may the evidence of Mr Trundle was that in the year 2016 the care charges amounted to £77,285 but in a note attached to the quarter protection report he indicated that that figure included £25,000 awarded to each him and to his wife in respect of annual gratuities payments for past and ongoing care.

13. Samantha requires assistance from a number of carers. The claimant was employed as a personal assistant on 29 October 2013. She was initially employed to work for 13 hours a week. Those hours were initially performed on a Tuesday but latterly on a Monday. It was common grounds that her hours of work were 9 am to 10 pm on Mondays. According to the contract of employment (45) the rate of pay was £9.00 per hour net (inc holiday pay) and the contract provided that wage payments would be made weekly in arrears by standing order. As for holiday the contract provided the claimant was entitled to 5.6 weeks annual leave holiday year running from 1st April to 31st March. It was common ground that although the claimant might be entitled to statutory sick pay since she never worked more than three days in a run there was no question of sick pay being paid either contractually or otherwise. The claimant was entitled to receive one week's notice for each completed year of employment after two years. It was common ground that she was entitled to two weeks' notice under her contract. The contract was signed by the claimant and by Mr Trundle at the beginning of 2014.

14. Another carer or personal assistant was employed from 7.30 to 9.30 on Thursday mornings in order to get Samantha up and take her to a day centre. It was common ground that in May 2015 that assistant broke her foot and the claimant agreed to work those two hours but the additional sum of £30 for those two hours was paid by Mr Trundle but never appeared in the payslips which she received to the claimant. The claimant's pay slips merely recorded a payment of £117 per week (i.e. £9 x 13) since the claimant's pay did not reach the threshold for tax she did not query with the respondents why the monies were not itemised on her pay slip.

15. In addition to her work for the respondents the claimant also had a part time job at the New Look clothing store in Blackpool. As is evidenced by the pay slips she produced for the months of February and March 2016 when she both worked for the respondents and New Look her average age was in the order of £86 a week.

16. In early December 2015 the claimant discovered she was pregnant. She was absent from work on 7 December 2015, a Monday, because she felt unwell. She received a warning from Mrs Trundle in respect of that and Mr Trundle recorded it in writing but did not send a copy to the claimant.

17. Mr Trundle agreed he was first aware of the claimant's pregnancy in early December. The claimant had suggested to Mrs Trundle that she thought her absence on 7th December might be related to pregnancy but the respondents took no further step in relation to that.

18. In October 2015 Mr Trundle had spoken to the claimant and at least one other carer concerning the apportionment of direct payment hours. Apparently the local authority had conducted an audit and had noted that the direct payment hours were not being shared out between the carers equally. Direct payments were only payments for personal care and it cannot logically be suggested that Samantha needed 13 hours of personal care on a Monday and for that reason Mr Trundle indicated that there might be a reduction in direct payments. In evidence Mr Trundle having asserted that he was told that direct payments would be reduced said that they were not going to be reduced but there had been a risk of them being reduced but in effect it was his decision to decide to change the basis of payments in order to avoid direct payments being withdrawn. However, Mr Trundle did nothing about this at that stage. He continued to pay the claimant £117 per week with a wage slip and in addition the £30 not shown in her pay slip for her work on a Thursday morning.

19. It was at the end of January 2016 according to the claimant that Mr Trundle said that Samantha had lost 15 hours funding from the local authority and he would therefore be reducing her hours of work by 5 hours a week but at the same time he said that he would make sure the claimant would lose out because he was prepared to make up the £5 pay from his own personal funds. It is right to record that the second respondent told the Tribunal on several occasions that he was funding Samantha's care personally. On closer examination it became clear that was not right and that he was administering Samantha's funds for the purposes of making payments. The fact that the conversation took place at about that time was supported by later evidence in which Mr Trundle said that he had informed carers of this about four weeks earlier. The significance of that is shown by the pay slips produced by the claimant (81 - 88) which show payments of £117 per week for each week up to the week including 3rd February 2016 but payments of £72 per week for the week of 10th February 2016 and thereafter.

20. It was the claimant's evidence and the Tribunal accepted that she did not open her pay slip every way because it just contained the same amount week on week. However during the course of March 2016 having had the discussion with her mother she accessed the government website to see what her statutory maternity pay entitlement might be. At that stage she realised that in order to be entitled to statutory maternity pay she needed to be able to show a weekly earning above the lower earning limit of £112 per week set by the government. Had there not been a change in the pay slips the claimant would have been able to do this but at this point neither her pay slips from the respondent nor New Look showing £72 per week from the respondents and about £86 from New Look would have entitled to statutory maternity pay. At this stage there was no suggestion by the respondents that the claimant's hours of works would change, there was simply a decision by them to record some payments and not others and a decision to reduce the numbers of hours they were recording or the amount of money they were recording with effect from February 2016.

21. It was this changing in the recording of the claimant's hours and pay that led to the events leading up to her dismissal.

22. On 24th March 2016 there was an exchange of text messages between the claimant and Pamela Trundle. These occurred from 11.27 in the morning until 12.14 pm.

The claimant begins by informing Mrs Trundle that she had been on the phone to the tax office to try and get things sorted and query a tax code change made at the end of October to see if she was due a rebate and she said "It has struck me that since you reduced my net pay on my wage slips to £72 if my maternity pay is calculated from that number I will receive £40 less and I should be entitled to 90% of £117. How can we resolve this before I go on maternity leave?". To which Mrs Trundle replied, curtly: "you should get if off your other job not Sam x". The claimant explained that she was not entitled from her other job but she met all the requirements by being paid by Sam apart from how she was now being paid. Mrs Trundle said that she couldn't change how the claimant was being paid to which the claimant replied that she had changed it and the reply was "yes I no but I cart (sic) change it back". The claimant responded by saying that was going to stop her getting maternity pay and Mrs Trundle's final response was: "not my fault you only do one day".

23. As a result the claimant sent a formal by letter that day to the Trundles (61) protesting that she was not happy with the way they had decided to change how she was paid her wages. She recited what happened. She suggested that what the respondents were doing was outside the law because it reduced her taxable income and national insurance calculations and she requested that they restore her correct payments to show "accurately and truthfully on all payslips with immediate effect". She said that she had been advised by ACAS how maternity pay was calculated and she said "I'm now aware that you altered the way I'm paid from exactly the week that qualifies me for SMP. I hope that this is coincidental. I would not qualify for SMP from my other employer because I do not work sufficient hours. I have worked sufficient hours and earn an average of over £112 each Monday to qualify for SMP for my employment with you". She drew attention to the fact that she had been told by ACAS that she must provide the MATB1 form in the week of 11 April 2016 and that the respondents if they refused to pay SMP must state why on the form. She said that at that stage HMRC would query any refusal and that she would provide her payslips, bank statements and a copy of the letter so that HMRC could resolve the issue. She concluded by saying "As I have always worked 13 hours on a Monday and received £117 net this automatically qualifies me for SMP and should be easily resolved. I am not prepared to fill in time sheets untruthfully".

24. The last paragraph of that letter referred to the fact that the claimant did fill in a time sheet. Mr Trundle agreed that that was done. He required it of carers so that he could show for audit purposes the amount of work and care that was provided for Samantha. He said that about four weeks earlier he had requested that the claimant for example instead of putting 13 hours on her time sheet for each Monday should enter 8 hours.

25. The claimant's letter was clearly received by the respondent at least by 26 March because there was then an exchange of text messages between the claimant and Mr Trundle (62). Mr Trundle began by saying that he had been in touch with ACAS as well and that he had reduced the claimant's hours legally and also that of two other carers. Mr Trundle accepted in evidence that he had not at that stage prior to these text messages reduced the claimant's hours at all. He referred to the payments and the cash payments and he said "you think we have done this deliberately because of your pregnancy you are wrong I will take legal action against you also, I will no longer be paying cash to you which you so readily accepted in the past, your hours are 8

hours only and this is legal, read your contract. You start at 10.30 am until 6.30 pm, no more cash payments to you for Wednesdays either, it is your job to declare cash to the tax office not mine I have done nothing illegal". In a later text message he said he would write an official letter if the claimant wished and then as a further text message ten minutes later he said "the extra hours you knew were paid out of my own personal money not Samantha's you also knew that … you have not given me any timesheets that show your new hours which should only show 8 hours" and then, in a further text message, "If I reduced your hours to avoid maternity pay why would I because maternity is paid to me by the government".

26. The claimant saw this response at 11.39. After she had consulted ACAS she replied: "This is a variation of my contract I don't agree to, if you wish to change it (sic) I will need 3 weeks notice as per my contract. Therefore on Monday I will be coming in and doing my shift as has been normal over the past three and a half years". That email was sent about forty minutes after the respondent's last email and the claimant's evidence and that of her husband which the Tribunal accepted was that she had taken advice from ACAS in that intervening period and they had advised her not to attend work at the varied hours otherwise she might be taken to have agreed to the variation.

27. The respondent continued saying amongst other things "you may come in at 9 am but you won't get paid until 10.30 am until 6.30 pm" and then in a later email he said "no more direct contact with me Katy please use ACAS as I am going to do". Having received those text messages and with the assistance of her mother the claimant wrote a further letter of formal complaint at (64). From Mrs Robinson's evidence it is likely that this letter was delivered on the morning of 28 March but had not been seen by the respondents prior to what then occurred.

28. The events of 28 March 2016 were in dispute. In summary, the claimant's account was that she attended work at 9 am. She opened the outer gates to the property by means of the keypad but when she attempted to access the house to go in to care for Samantha by obtaining the key from the box fixed externally to the house she discovered the key was not there. By that stage the electric gates began to close and she would have been trapped between the gates, which could only be opened from inside the house, and the door which was locked against her. Mr Trundle came out and told her that she did not start work until 10.30 and he shouted at her "You do not start work at half past ten we could have settled this if you had not gone to ACAS beforehand. I've done nothing illegal you are not to start work until half ten".

29. The claimant said she was was frightened and felt vulnerable. She called her husband on the telephone because he had dropped her off and he returned. He could not get in because the gates were locked. Mr Trundle continued to shout at her and she discovered later that at this point Mr Liptrot decided to call the Police. The incident log for that telephone call and indeed a later one made by the respondent to the Police have been produced before us. The log confirms that the call made by Mr Liptrot was made at 9.04 am . At about this time Mr Trundle unlocked the door on Samantha's side of the property and told the claimant to come in and he said to her that if she did not come in to the house immediately she would be in breach of contract. The claimant decided to telephone her mum for advice and she did so. Mrs Robinson advised her to start work as ACAS recommended, so the claimant went

into the property and closed the door behind her. At this point Mr Liptrot was seated outside in the car.

30. A short while later Mrs Robinson arrived and her evidence, supported by that of the claimant, was that Mrs Trundle opened the door to Mrs Robinson and invited her in. Mrs Robinson's evidence which the Tribunal accepted was that she introduced herself to Mrs Trundle as Katie's mother. Mr Trundle confirmed that Mrs Robinson had not been to the property before. She gave her name to Mrs Trundle and held out her hand. Mrs Trundle invited her in to the kitchen where Samantha was in her night clothes watching television and Mrs Trundle said “I hope that you have come to talk about what Katie is doing wrong.” Mrs Trundle accepted that she had said that. Mrs Robinson replied "Katie is not doing anything wrong. She simply wants to clarify her employment rights and her entitlement to maternity pay." Mrs Trundle then said her other employer will pay her maternity pay. Mrs Robinson's evidence was that at that point a man stormed into the kitchen from a doorway and started screaming at her to get out of his house. She was frightened by his aggression and she pointed out that she had been invited in by Mrs Trundle but he continued to shout get out and came right up to her and was very aggressive. Mrs Trundle said to her she had better go at which point Mrs Robinson left the property and joined Mr Liptrot who was still on the road outside speaking to the claimant on his mobile phone.

31. At that point Mrs S ascertained that the letter of 26 May had been put into the Trundle's letter box that morning and she thought the letter might help. She could see it in the letter box but could not retrieve it so she knocked on the door again to tell them the letter was there.

32. At this point it appears that the claimant had gone across to Samantha's side of the house and was tidying up DVDs.

33. Mrs Trundle agreed, as we have indicated, with part of the account given by Mrs Robinson but also said that when Mrs Robinson arrived she was attempted to gain access by banging on the door and shouting that the Trundles were crooks and cheats. She also gave evidence that Mr Liptrot was shouting at the end of the driveway and she said she recalled him specifically shouting "pay her the fucking money".

34. Mr Trundle's account was that the claimant did arrive at 9 am but it was contrary to the agreed working hours that he said had been agreed on 8 February. He informed her that her working hours did not commence until 10.30 am but that the claimant did not listen to him and gained access to the property using the key safe. He said he did not close the gate upon the claimant but asked her to return at 10.30. When she came in he again asked her to return at 10.30 and according to him she refused. He said “I don't believe I was aggressive or confrontational with Katie during this conversation.” He supported his wife's evidence that Mr Liptrot was at the end of the driveway shouting the words we have recorded and he also said that the claimant's mother was attempting to gain access to the premises by banging on the window and shouting that the Trundles were crooks and cheats. He said that he phoned the Police at this point because of the affect on his daughter. The Police incident report (71) indicates that it was not until 9.40 am that Mr Trundle telephoned the Police.

35. Mr Trundle denied that he had shouted at the claimant or been aggressive towards her. However he explained that he had written the text messages of the previous Saturday in frustration and anger and they were hot headed. He was unable to give a proper explanation for why he had written them in the way he did and why he had on that day told the claimant for the first time that her start time was 10.30 in the morning. He also accepted that he was extremely angry with the claimant's mother and he said in answer to a question from Counsel that he was still angry with the claimant's mother at the time he gave evidence before us a year later.

36. Having seen Mr Trundle in the witness box and the intransigence with which he held on to what to the Tribunal appeared to be untenable positions in relations to the details of the case, the Tribunal found that it was probable that Mr Trundle had been aggressive and shouted both at Mrs Robinson and indeed at the claimant.

37. In the Tribunal's judgment what is significant is the content of the Police reports. We need to exercise caution realising that we have not heard from the makers of the reports about the accounts taken from the two witnesses in the case, Mr Liptrot and Mr Trundle, about what they were saying or perceived to be saying at the time to the Police.

38. We deal first with the account apparently given by Mr Liptrot (67 -). The report begins by saying “Inf (i.e.informant) has pregnant finance (sic) coming to do a job. Her employer is causing partner distress. He is shouting and screaming at inf. This appears to be a civil matter over pay and female being pregnant, partner is called Kati.” At 9.09am the Police record “Garry got verbal and confrontational with Katie” and, shortly thereafter, “Garry has taken daughter away and Katie is stood on prop” (i.e. property). And at 0913, “I have advised this is a civil matter …I have advised Katie to remove herself from any risk and to recall if situation escalates.” That incident log ends at 9.23 a.m.

39. The incident log in respect of Mr Trundle's call starting at 9.40 begins "Disgruntled ex employer (sic) here who is refusing to leave. She has come with her boyfriend and mother - she is called Katy Scragg - she worked with us for 2.5 years but we have made the decision not to pay her maternity”. As to that Mr Trundle agreed with the other matters contained in the report but said that the recording office must have misunderstood that. As was pointed out in submissions by Mr Gilbart it would be highly coincidental for the recording officer who appears from the log to have been a different recording officer from the first call to have mis-recorded that when it was in fact the substance of the dispute. We find that is what Mr Trundle said.

40. The report goes on to show that Mr Trundle said that Katie “has not made threats”… “she still works here and is due on duty at 10.30”. He apparently reported at 9.45, “Katy's boyfriend has now left - he didn't make any direct threat he was just asking for what they believe are her rights.” It does record slightly earlier that Mr Trundle was wanting Katy's “mum to leave”. He appears to have said that “Katy was employed by social workers”. When at 9.50 he spoke again he said “he is happy for Katy to be there but he states mum of Katy won't leave the house and is constantly ringing the bell”. It appears that Police Officers did attend and at 11.55 the record is “Katie Scragg has left for the day on the request of Gary Trundle father of Sam. Advice given to all parties to seek employment advice re Katie's maternity leave rights.”

41. It is sufficient to record that in the Tribunal's judgment it appears to us that the reports made by both parties appear to provide significant corroboration for the account given by the claimant. She does not dispute that she was asked to leave and the records do not corroborate the account given by Mr and Mrs Trundle. The evidence of Mr Trundle showed that he had a lack of understanding of the need to record his employee's hours and payments correctly. We noted his insistence that he had done nothing wrong and that he was going to take legal action against his employee on the previous Saturday (for no reason that the Tribunal could understand). Taking all this together with the very curt attitude of Mrs Trundle, both in her text messages and in the witness box, enables the Tribunal to say with a degree of confidence that it can reject the account of the respondents' witnesses where it varies with that of the claimant.

42. For the avoidance of doubt we reject the allegations made by the Trundles against Mrs Robinson and Mr Liptrot. Insofar as it was suggested that the claimant was in any way aggressive the Tribunal rejects that too. It appears to be common ground that during at least part of this time the claimant attempted to go about the duties that she would normally do, tidying up CDs and DVDs in Samantha's part of the property.

43. At about 11 am on the 28th March using his daughter's mobile phone Mr Trundle sent the claimant a text message "Your services are no longer required, letter in post Samantha Trundle" to which the claimant responded "Will you please confirm the step I should take in order to appeal against my dismissal" and the reply in a text message was "There's a letter in the post to you". That letter written and signed by Mr Trundle with Mrs Trundle's consent appears at page 77 of the bundle.

44. However, before we turn to that we record also that there is a form of contemporaneous account of what occurred on the 28th March because the respondents keep a book in which the carers write as to what occurred. Notably, (page 78) for the previous Monday the record reads Monday, 21 March Katie 9 -10." For the following week there is recorded "Monday 28th March Katie 9 to 10" But 9 to 10 has been struck through "10.30 am to 6.30 pm" written in.

45. The respondent also produced a further copy of that note which appears to have been completed at a slightly later time (page 66). The first part of that account was written by the claimant and she recorded, "Arrived at 9 am Sam's door was locked. Gary told me I couldn't start work until 10.30 am. Sam was taken to Pam's lounge. Gary unlocked the door and I entered the property at 9.03 and got Sam's clothes ready for the day, moved her clocks forward throughout and sorted her CDs" and then on a new line "Left on request". That has been annotated by Mr Trundle by adding the words, "By the Police. He then continued on the note as follows "The Police were called to remove Katie's mother and boyfriend and also asked Katie to leave at Samantha's request as she was very upset. The Police took 20 minutes to persuade Katie to leave. I immediately sacked her and paid her for that day and the following Monday." Then he recorded "Blackpool Police" and gave the incident number.

46. Mr Trundle accepted he did not sack the claimant by word of mouth when she was in the premises and he did not pay her at that time. What is clear from the note is that his complaint about the behaviour on the day was aimed at the claimant's mother and

boyfriend. Mr Trundle accepted that he had not had recourse to the contract of employment which contains additional procedures in deciding to dismiss the claimant nor had he responded in any way to her request for or considered offering her any kind of appeal against the decision.

47. The letter of dismissal appears at page 77.

> "To Katie Scragg
>
> As from 28 March your employment has been terminated for the following reason unreasonable behaviour and having to be removed by the Police.
>
> You have also been asking Samantha to help you more as you are struggling to wash and change her, you are the one that should be helping her.
>
> You have also told Samantha that you should not be driving for any length of time.
>
> You have also told Samantha that you should not be sitting down for any length of time.
>
> You also told her you are going to ask Samantha's dad to help you with the shopping."

We break off to say that Mr Trundle accepted as we think his wife did that all those matters were relevant to the fact that the claimant was pregnant. The letter continues:

> "We had to call the police into our home because Samantha was scared to death of your mother calling us cheats and crooks. You will never work back with Samantha again she is too frightened to see you.
>
> As to your change of hours you were given 4 weeks notice as was Sophie and Vicki we discussed it in great detail.
>
> You were paid on Monday even though you did not work. You will receive another payment on the 4th April consider both these payments 2 weeks notice.
>
> Your claim that I changed your hours because of your pregnancy is untrue I also changed Sophie's hours and Vicki's hours on exactly the same day.
>
> You have been taking cash payments from Samantha for as long as you worked for her but suddenly you do not want cash anymore. I have a deal with the NHS Litigation Authority and HMRC and social services that I can pay cash when and if I need to. This is why I keep detailed records of every payment I make you should declare your payments to HMRC not me I paid you out of a private bank account and your other payments from the direct payment scheme.
>
> Good luck with ACAS as I shall also be using them."

48. As to the recording of the claimant's pay Mr Trundle's evidence was that he had only recorded the direct payments. He had not recorded the additional payments that were made and that notwithstanding his having said that his daughter's funding was cut, he accepted that there was never a cut in the funding. He could not explain to the Tribunal why the payroll provider which is an outside agency to whom he provides

information could not have recorded different forms of payment i.e. personal care, attendance, matters of that sort by simply making different payments for different amounts of money during the course of the week. It would have made no difference to the claimant's position in relation to national insurance or tax because of the level of payments and he did not produce any records to show any formal recording by way of pay slips to the claimant. However the claimant produced her bank statements and these showed that at the point when her direct payments payslip was reduced from £117 to £72 the respondent had begun additionally to pay her the sum of £50 a week and so there was no reduction in payment. In fact the second respondent had decided to pay on his daughter's behalf the claimant an extra £5 a week, the difference between £117 and £72 being £45 and an additional £50 was paid by direct debit week on week until the conclusion of her employment.

49. It was common ground that Mr Trundle had paid the claimant two payments of £72 per week by way of notice pay after the employment terminated.

50. Finally we turn to the question of holiday pay. The claimant's evidence which the Tribunal accepted was that whenever she could not work on a Monday whether it was because she was sick or whether because she was on holiday she would receive the normal payments because the direct debits were weekly but she would be required to take the money in cash, put it in an envelope and leave it for the carer who had covered her shift and in that way although the payment was made initially to one employee the employee who did the work was remunerated. Mr Trundle accepted in evidence that that was the arrangement although he later sought to resile from that and say that was the arrangement in respect of sickness absence but not in respect of holiday absence.

51. We should record that on the respondents' behalf in any event Mr Frederick accepted that it was simply not adequate for the contract to record that the net payment of £9 per hour included holiday pay as a proper way of recording what is commonly called a rolled up holiday pay arrangement.

52. In any event, on the respondent's evidence it does not appear this was a rolled up rate. On the respondent's evidence the claimant was paid her proper pay for each week when she was on holiday but if the claimant is right that she was required to pay that over to the person who took over the shift when she was on holiday then the claimant was not being paid at all in respect of holidays. The rolled up rate argument was not pursued by the respondent.

Submissions

53. Both parties made submissions.

54. At the outset of the submissions we enquired of Mr Frederick whether he was continuing to pursue allegations of gross misconduct since it appeared that the respondent was relying upon the behaviour of the claimant's mother and husband in relation to the misconduct and that nothing that the claimant could have done could properly be said to have amounted to gross misconduct. Mr Frederick agreed that he was not pursuing conduct as the reason for dismissal but submitted that it was some

other substantial reason. He explained that was the altercation on the 28th March resulting in the Police being called and Samantha being distressed.

55. With regard to some other substantial reason he maintained that it was Mr Trundle's response that the claimant could not have returned after this event. He said it would be unreasonable to expect that the claimant would be allowed in to the respondent's home. He said that Mr Trundle's evidence was that Sam didn't want Katie to provide her personal care anymore. We say in passing that we were far from persuaded that that was what Sam had said, given our doubts about the credibility of the respondents evidence generally. Be that as it may, we note that Mr Trundle was saying in evidence as Mr Frederick submitted that he was still angry over the altercation and he said that that amounted therefore to some other substantial reason.

56. We asked Mr Frederick to explain how if it was the respondents that had triggered or caused this altercation by failing to record the claimant's hours and payments properly and then on the previous Saturday unilaterally varyied her hours of work so that she would, if she accepted those hours, have been in a difficult position and that that was the cause of the difficulty, how the respondents could then say that the ensuing result could amount to a fair some other substantial reason for dismissing the claimant. He submitted that in all the circumstances it was fair bearing in mind it was a highly heated altercation and the circumstances were too severe to come back from. He did not cite any authorities in support of the proposition that he made.

57. Mr Frederick submitted that the dismissal of the claimant was nothing to do with the wage slips and that the way in which the claimant was paid had nothing to do with the fact of maternity. He submitted that holiday pay was included in the hourly rate and he conceded that the notice pay that the claimant should have received should have been based upon the total payments that she should have received for that week which would have been an additional £160 over the two weeks.

58. The claimant's submissions were that some other substantial reason as then or as now advanced by the respondent was not the reason for dismissal. In any event Mr Gilbart submitted that any dismissal must be found to be unfair. The claimant's contract signed by Mr Trundle with her on behalf of his daughter, provided a disciplinary procedure. It was agreed that the disciplinary procedure was not adhered to in any way, none of the stages of the procedure were followed. Mr Trundle accepted that the claimant had no opportunity to explain her position, no opportunity to discuss relevant issues with the employer and even if Mr Trundle took the view that he knew what had happened it did not absolve him of the need to discuss it with the claimant. The claimant, Mr Gilbart submitted, was dismissed by text message and when she asked about the appeal the letter that we have quoted provides no detail of the appeal.

59. Mr Gilbart submitted that the letter contained no details of an appeal and raised a number of performance matters that had not previously been raised with the claimant

60. The Tribunal he submitted should have regard to the tests for fairness in section 98(4). While recognising the size and administrative resources of the undertaking, this was a respondent that failed to do anything.

61. Mr Gilbart referred to the case of Henderson -v- Granville Tours as providing a useful example although not necessarily a statement of principle in relation to the degree in which a small employer should carry out an investigation. The facts are not of grweat assistance. In overturning the decision of the then Industrial Tribunal that the dismissal was fair the EAT, referring to the need to take into account the size and administrative resources of the employer's undertaking, said this "No doubt the respondents do not have a sophisticated personnel department and have to rely upon the Transport Manager as the effective person making decisions in relation to drivers. The smallness of the undertaking does not afford any excuse or indeed explanation for a failure to carry out a proper investigation into a complaint by a customer."

62. Mr Gilbart submitted that here the size of the respondent did not prevent them from speaking to the claimant, nor from setting out their concerns and asking for a response and it did not prevent them from taking time to reflect or allowing matters to cool off after what was a heated altercation on 28 March before making a decision.

63. Mr Gilbart also supported the contention that with this altercation was in effect brought about by the previous treatment of the respondent and it flew in the face of common sense to say that it was some other substantial reason justifying a dismissal. He submitted that in reality the Tribunal should look at what the claimant did. It was clear from the Police log that the respondent was happy that the claimant was there. Mr Trundle agreed with that, his evidence was not that she was the aggressor, he does not maintain that in his witness statement or even in the dismissal letter. In answer to Mr Gilbart in cross examination Mr Trundle had said “Katie didn't do anything particularly on the day except for not leaving on request.” Mr Gilbart submitted, in our view with some justification, that there might even be some doubt as to whether there was a refusal to leave upon request. In all the circumstances he submitted that the dismissal could not be for some other substantial reason.

64. Mr Gilbart addressed the question of whether there should be a Polkey reduction. Essentially he submitted there should be no Polkey reduction in this case because there was no reasonable prospect that this claimant's employment would have ended other than for these reasons and the fact that Mr Trundle, the operating mind for the purposes of dismissal, was still angry about the matter. Resisting the allegations of the claimant at this stage showed that there was no reasonable prospect of the claimant having been fairly dismissed in these unusual circumstances.

65. So far as the allegation of discrimination is concerned Mr Gilbart referred to the failure to reconsider or review the warning of December 2015 when a reasonable employer would have considered whether the absence might not have been due to pregnancy. In addition to that there is a close coincidence in time that is when the claimant was going through the process of seeking maternity pay there was a change to the pay slips at that time. The respondent’s case that there was a purported reason for the changes that took place because of a change in funding was untrue. Mr Trundle accepted there was no change in funding. There was a decision by him to change the manner of payment. The claimant relied in submissions on the respondent's attitude to statutory maternity pay, in particular the text message of Mrs Trundle. She was unable to explain to the Tribunal why she had expressed herself in that way and Mr Gilbart drew to our attention to paragraph 5 of Mrs Robinson's statement in which

when she explained to Mrs Trundle that her daughter simply wanted to clarify her employment rights Mrs Trundle had said “her other employer will pay her maternity pay.”

66. Mr Gilbart submitted that the respondents were clearly working on the basis that statutory maternity pay should not come from them and he described the respondent's activity as seeking to muddy the waters. He referred to page 62 of the bundle, that is the text messages between Mr Trundle and the claimant on the 26th March 2016 in which the hours were reduced from 13 to 8 hours on a Monday. He referred to the reference to timesheets but he submitted with some force that that made no sense if that was the first time it was said, it would only make sense if the claimant had been asked to fill in different times to the ones she was working in the past and indeed that was the respondent's evidence. He referred to the Police report and Mr Trundle's information namely that he apparently said to the officer taking the record we have made the decision not to pay her maternity. In our judgment the fact that it was the first thing he said when he is describing why there was a dispute at his house is of significance. Mr Gilbart referred to the texts from Mrs Trundle as being dismissive and intransigent, and he submitted that it was not without significance that four days after the formal letter the claimant was dismissed with no procedure.

67. For those reasons he submitted there was evidence from which the Tribunal could conclude that the dismissal of the claimant was related to pregnancy and having regard to the Barton v Investec guidelines there was enough to pass the burden of proof to the respondent. What was required when the burden of proof did pass to the respondent is found in paragraphs 10, 11 and 12 of those guidelines. They read as follows:

> "(10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the burden of proof directed.
>
> (11) That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts on which such inference could be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.
>
> (12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof".

68. Against that background Mr Gilbart submitted the respondents’ answer was wholly inadequate, the evidence was incoherent, contradictory and difficult to understand. He submitted that Mr Trundle failed properly to explain why he took the decision that he did. The decision was wholly unsupported by documentary evidence and the audit documents and the covering letters simply did not assist the explanation for why he had decided to reduce hours and record the claimant's pay as he had. Mr Gilbart also drew attention to the fact that Mr Trundle's eventual explanation was that they were trying to adjust the hours in order to keep funding from the local authority. He

submitted that the way in which that explanation was given was such that the Tribunal could reject it but, even if it were accepted by the Tribunal, it assisted rather than otherwise the claimant's argument. It fits in with the picture of the claimant paints of the respondents resisting the requirement to pay maternity pay. Mr Gilbart also submitted that in the letter of dismissal which we have quoted the earlier paragraphs on performance all might be associated with women who are pregnant not being able to sit for too long, not being able to drive for too long, needing help with shopping and matters of that sort.

Relevant law

69. Against that background we turn to the relevant legal provisions.

70. The Social Security & Benefits Act 1992, in summary provides that employees have a right to statutory maternity pay from their employer if they have been continuously employed for at least 26 weeks ending with the qualifying week. That qualifying week which is the 15th week before the expected week of confinement. The expected week of confinement here was 23 July 2016. In addition the normal weekly earnings averaged over the eight weeks up to and including the qualifying week must have been at least equal to the lower earnings limit for payment of Class 1 National Insurance contributions. That figure was £112 a week with effect from 6th April 2015.

71. Section 99 of the Employment Rights Act 1996 makes it unfair to dismiss an employee if the reason or principal reason for the dismissal is of a kind prescribed by regulations or takes place in prescribed circumstances. For the purposes of this claim the reasons prescribed by the Maternity Parental Leave Regulations 1999 as amended are any connected with the pregnancy of the employee or the fact that she sought to take, or avail herself of the benefits of ordinary or additional maternity leave.

72. Our attention was drawn to a passage from Harvey on Employment Law: "where dismissal is alleged to be because of the pregnant woman has committed some serious misconduct or on the grounds of capability or redundancy then it will have to be established by the employer (who will in most cases, unless the employee had less than a year's service, bear the burden of proof) that the reason for dismissal is not for pregnancy or a related reason".

73. In the course of submissions we put to Mr Gilbart, and he agreed, that so far as the burden of proof is concerned, this form of automatic unfair dismissal (as it is sometimes called) is no different from that in relation to other forms such as trade union or public interest disclosure dismissals. The case of Kuzel v Roche establishes the following. It is for the employer to show the reason for the dismissal that he or she asserts. If that reason is rejected and the claimant has raised facts which could lead the Tribunal to conclude that the reason related to, as here, pregnancy then it is open to the Tribunal to accept the reason advanced by the employee, but it need not necessarily do so.

74. In relation to the complaint of discrimination the principal provisions are sections 18 and 39 of the Equality Act 2010. By Section 18(2) a person discriminates against a woman if in the protected period in relation to pregnancy he treats her unfavourably because of the pregnancy. The protected period begins with conception and ends at

the end of the maternity leave period or, if earlier, when she returns to work or in any other case at the end of the period of two weeks beginning with the end of pregnancy.

75. Section 18(4) of the Equality Act 2010 defines discrimination because of the protected characteristic of pregnancy as including unfavourable treatment "because she is exercising or seeking to exercise … the right to ordinary or additional maternity leave."

76. By Section 39(2) an employer must not discriminate against a person as to the terms of employment, in the way opportunities or benefits are afforded or by dismissing them or by subjecting them to any other detriment.

77. In relation to a dismissal for pregnancy related reasons, the pregnancy or the pregnancy related reasons such as maternity leave must be the principal reason for the dismissal. The tests are different. In deciding whether there is discrimination under the Equality Act the unfavourable treatment need not be the sole or main reason but it must not be merely a trivial or insignificant part of the reason. If an employee establishes that their dismissal was the principal reason it will be almost inevitably the case that it will therefore also be discriminatory because if it is the principal reason it is highly unlikely to be a trivial or insignificant part of the reason.

78. Against that background we reach the following conclusions.

Conclusions

79. There is no dispute that the claimant was dismissed.

80. The respondents' reason for the dismissal was not her conduct nor was the reason in the Tribunal's judgment some other substantial reason justifying dismissal.

81. In our judgment the evidence established that this claimant was dismissed after she sought reasonably to raise the issue of what was on her pay slip with the respondent. She met with a hostile and antagonistic response and an immediate proposal to actually reduce her hours rather than just reduce the recorded hours.

82. It occurred to the Tribunal that the claimant could have put her case forward with some prospect of success as a case of dismissal for asserting a statutory right namely the right to receive a properly itemised pay slip. It was clear that led to the altercation which led to the dismissal. It seems to us that that analysis, although not the case advanced by the claimant in this case, shows by that further process of reasoning, that the respondents' suggestion that the dismissal was for some other substantial reason, could not be upheld. All the more is this so where the respondents' attitude was, as we find here, the cause of the dispute that led eventually to the dismissal. An argument for a potentially fair reason simply cannot be sustained.

83. Can the claimant establish a prima facie case of dismissal related to pregnancy?

84. There may be cases in which a person can be dismissed without wrongdoing on their part for some other substantial reason but it is clear that in this case it was the

conduct either of the claimant or on the claimant's behalf by her mother and husband that was the matter that operated on the mind of Mr Trundle when he wrote the decision to dismiss.

85. For the reasons advanced by Mr Gilbart this is a case in which the Tribunal can say that the burden of proof passes to the respondent to show that the dismissal was for a reason unconnected with pregnancy. This the respondent cannot do on the facts we have found. The reason for dismissal was not because the claimant was pregnant but because in connection with her pregnancy she sought to avail herself of her right to statutory maternity pay. In order to establish that right she needed to identify that one of her employers at least was responsible for paying the statutory maternity pay. In order to do that she needed to have her hours recorded correctly by the employer for whom she did the requisite number of hours. That was the respondent in this case.

86. That establishes unfair dismissal under section 98 and 99 of the ERA. It is also evidence of discrimination on the same basis. Dismissing the claimant in those circumstances was patently unfavourable treatment.

87. The claimant also establishes the fact that the proposed reduction in hours on the 26th March 2016 was connected with her pregnancy and the potential loss of entitlement to maternity leave and statutory maternity pay was also patently unfavourable treatment.

88. The burden of proof then passes to the employer to show that on the balance of probabilities pregnancy was in no sense whatsoever part of the reason for the treatment. Given the contents of the letter of dismissal and the pregnancy related performance issues there raised, the respondent's unsatisfactory evidence about the reason for recording pay and the intransigent objection to recording it in a proper way, the Tribunal finds that the respondent cannot discharge that burden of proof.

89. For those reasons we concluded that the reason for dismissal related to pregnancy and because it related to pregnancy it cannot be some other substantial reason of a kind such as to justify the dismissal of this employee from the position which she held.

90. For those reasons the Tribunal concluded that the claimant's complaint of unfair dismissal, pregnancy related unfair dismissal and pregnancy related unfavourable treatment were all made out.

91. So far as unfair dismissal is concerned for the reasons advanced by Mr Gilbart which we do not need to repeat here again we reject the submission that there could be any Polkey reduction in relation to the consequences of dismissal. By following a fair procedure, it seems to the Tribunal that exactly the opposite result would pertained. If the employer acting reasonably had offered the claimant a reasonable procedure it seems to the Tribunal that it is much less likely that the claimant would have been dismissed. There was no suggestion that the claimant would have been dismissed in any other circumstances than these.

92. We turn to the ancillary claims of holiday pay and notice pay. The notice pay liability was conceded by Mr Fredericks in the course of submissions. As regards holiday

pay, the Tribunal prefers the evidence of the claimant to that of Mr Trundle. We are satisfied that the claimant has accurately and honestly recorded what occurred namely that on any occasion when she was absent on a Monday she was required to pay over to whoever covered her duty the sum that she received by way of direct payment from the respondent. In those circumstances she was not paid for her holidays.

93. We turn to the question of remedy.

94. We afforded the parties an opportunity to see if they could resolve matters of remedy and they were able to reach some agreement. We have set out the basis of the calculation in outline in the judgment above.

95. We first record what was agreed. The basic award of £304 and the sum of £300 for loss of statutory employment rights was agreed between the parties. The awards for notice pay and holiday pay were also agreed between the parties.

96. The matters which the Tribunal had to decide were the amount of earnings to be deducted from the loss to date of hearing, the amount of future loss, the award for injury to feelings and whether there should be any uplift of the compensatory award due to the respondent's unreasonable failure to comply with the ACAS code.

97. The claimant gave evidence in relation to earnings after dismissal. She was not challenged on this evidence. The pay slips she produced from New Look showed that from April through to July she had taken on additional work at New Look. It was agreed that the best evidence that the Tribunal could look to was to work out the average in her weekly pay from New Look before she was dismissed, because she was undertaking that work alongside the work she did for the respondent and the money she earned for the New Look work that she did in the months afterwards. On an average basis the Tribunal could therefore work out over the relevant period what was the average amount that she earned up until the point when she ceased to work prior to the birth of her baby.

98. In relation to future loss the claimant's case was that she would have sought to return from maternity leave (which was due to end about a week from the date of our hearing) to work for the respondent if that work had still been available. No evidence has been advanced by the respondent to show that that work would not be available. The claimant's case was that she would only work for one day a week for Samantha after the baby was born because one day's child care together with some help from her husband in the hours between the afternoon and 10 o'clock at night was all that they could afford. Alternatively, if she returned to work for New Look she could do about 16 hours a week.

99. The claimant was not questioned in relation to injury to feelings. It is clear that from the very beginning the claimant was asserting that she had been subject to unreasonable treatment in relation to her pregnancy and her demeanour in the Tribunal was of a young woman who was extremely distressed by the actions of the employer. Nothing that Mr Trundle said in evidence could be thought to assuage that distress for one moment.

100. So far as the loss to date was concerned the Tribunal calculated that between April and the first week of July the claimant's weekly earnings were on average £37.72 less than if she had continued in the employment of the respondent. Accordingly multiplying that by the 14 weeks that that period represents the amount to be deducted from the £1,836.38 of loss in the same period form her work for the respondent is £528.09 leaving a total of £1,308.29.

101. So far as injury to feelings are concerned the sum advanced by the claimant was £10,000 as in the Schedule of Loss. Mr Frederick submitted on behalf of the respondent that this was a single incident effectively taken at the point of dismissal or thereabouts and therefore it should not result in an award higher than the top of the lower band. The sum put forward by the claimant is towards now the bottom of the middle band.

102. In the Tribunal's judgment a number of matters are relevant. Mr Gilbart submitted that it was apparent from the claimant's evidence how she felt on 28th March, how she felt with regard to her pregnancy and how she felt both then and now. Mr Gilbart submitted it was relevant that the claimant knew that the respondents were taking action because she asserted her rights in relation to pregnancy, that as a result of this discrimination she had lost her job, that the act of discrimination and dismissal were wholly unnecessary when the claimant was making reasonable requests and the employer, had it acted reasonably could have corrected the pay slips to show properly what the pay was and there would have been no difficulty. The nature of the working relationship with Samantha was a relevant factor. Clearly from the re-examination of the claimant we can conclude that Samantha had an ability to communicate and the impression formed by the Tribunal was of a good working relationship. It is relevant in the Tribunal's judgment as well to consider the nature of that relationship which was by its very nature deeply personal. The claimant had in addition undertaken career qualifications as part of this job. By losing her job she has lost the opportunity to continue with that qualification.

103. For those reasons Mr Gilbart submitted that the sum advanced of £10,000 was entirely appropriate. Mr Frederick submitted that this should be a lower band Vento award but at the top end. He submitted that: this is a claimant with short service; it was not an act over a lengthy period of time and there was no direct evidence of injury to feelings.

104. The Tribunal prefers the submissions of the claimant's Counsel. In our judgment it is relevant that this was a discrimination which caused someone to lose their job. The nature of the job and the nature of the relationship of themselves are likely to lead to increased injury to feelings particularly if the job was undertaken, as it is apparent this job was, by a caring and committed individual who had formed a good relationship with her employer. The continued resistance, even up to trial, to claims that were meritorious lends credence to the fact that the claimant was even up to the hearing, although she managed it well, clearly distressed.

105. Taking all those matters into account the Tribunal thought that it was appropriate to make an award at the level suggested by the claimant of £10,000.

106. So far as future loss was concerned the claimant sought 52 weeks at her weekly rate of £152 from the respondent, but she recognised that she should give credit for the 16 hours of work which she say she will perform for New Look and which will now be remunerated slightly more than when she was employed by New Look before her pregnancy, the minimum wage now being £7.20 per hour. It seems to the Tribunal to be a reasonable attempt to mitigate and there is no evidence of any other capability or qualifications which would lead her to get higher paid employment in the short term, particularly with a young baby. Therefore we consider that the appropriate sum by way of reduction is the earnings she will receive from New Look, of £115.20 a week. The difference between the earnings on a weekly basis is therefore £36.80.

107. In our judgment given the nature of the claimant's new employment and prospects a 52 week period of loss is appropriate and accordingly we award for future loss the sum of £1,913.60.

108. The final matter concerns the question of whether there should be an ACAS uplift. This is only sought in respect of the award for unfair dismissal, compensatory award and for the past and future loss in relation to the dismissal. The claimant submitted through Mr Gilbart that that should be at the rate of 25% having regard to the level of failure by the respondent. Mr Frederick submitted that given the size and administrative resources of the respondent whilst there should be some increase in the award it should be at a more modest 10 -15%.

109. The Tribunal has to make a balance in these cases in deciding whether it is appropriate to award the uplift and at what level. Situatuions range between the small or, as here very small, employer without recourse to external resources and the large well resourced company or body perhaps even one with internal legal advice. Failures to comply with the Code may be unreasonable if they are unintentional or deliberate. In our judgment an uplift of 25% which is the maximum should be reserved for those cases where there has been a deliberate and serious failure. Where there has been some minor failure which has not really affected the outcome the Tribunal might in the case of a very small employer without resources perhaps decide that it is not just and equitable to make any uplift at all.

110. In our judgment this is a case that lies somewhere between those extremes. There was absolutely no attempt to comply with the ACAS code of practice by this employer. We rather doubt whether in fact Mr Trundle even really appreciated what the ACAS service provided or what the code of practices provided. True it is that he had a disciplinary procedure which he did not follow. It seems to us more likely that this was a failure born out of rash, hot headed behaviour because he was angry, not so much with the claimant, but with the claimant's mother and husband. But then he could have drawn back from the brink and he could have offered the claimant some kind of attempt to hear her. He did not do so. It is that which in our judgment justifies, even bearing in mind it is a very small employer, a proper decision to make some increase in the awards to reflect the fact that nothing was done. However in our judgment it would be unjust to penalise this employer in these circumstances to the degree advanced by Mr Gilbart. In the circumstances we consider that the higher of the two percentages advanced by Mr Fredericks is the appropriate one and therefore we uplift under Section 207B of the Trade Union and Labour Relations Consolidation Act 1992 the awards that we have indicated and shown in the judgment above by 15%.

111. We turn to the question of interest. We indicated to the parties that we proposed to award interest on the injury to feelings over the period of one year from effectively the date of dismissal to the date of hearing at the full statutory rate of 8% for the whole year. The Tribunal calculates the mid-point date in respect of the other heads by taking the whole period and half the rate. This gives exactly the same figure. That is the basis upon which we arrived at the interest figures in relation to the other matters in respect of which they were sought by Mr Gilbart. We do not include notice pay and holiday pay in that because they are not alleged to be discriminatory acts and we do not include the sums awarded under the Employment Rights Act. We make it clear that we have avoided the losses in relation to dismissal under the Equality Act 2010 rather than the Employment Rights Act 1996 precisely so that interest is available to the claimant in respect of her loss.

112. Finally we draw attention to the fact that as we have indicated above the awards in respect of unfair dismissal, notice pay and holiday pay can only lie against the claimant's legal employer who is in this case the first respondent. However given that it was Mr Trundle who is responsible for the acts of discrimination rather than Samantha it is appropriate that the awards be made jointly and severally against both first and second respondents in respect of discrimination.

113. We should in conclusion apologise to the parties for the length of time that it has taken to produce the written version of this judgment and reasons. It is due to the volume of other judicial work.

Employment Judge Tom Ryan
6 July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 July 2017

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2401661/2016

Name of case:	Miss K Scragg (now Liptrot)	v	1. Samantha Trundle 2. Mr Gary Trundle

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is:	10 July 2017
"the calculation day" is:	**11 July 2017**
"the stipulated rate of interest" is:	8%

MR S HARLOW
For the Employment Tribunal Office