EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103385/2020 (V)

Final Hearing held in Glasgow and conducted remotely by Cloud Video Platform on 1, 2, 3 and 4 March 2022; further written representations from parties on 8 and 9 March 2022; with private deliberation by the Tribunal in a Members' Meeting held remotely, on Microsoft Teams, on 14 June 2022

Employment Judge Ian McPherson
Tribunal Member Anthony Perriam
Tribunal Member Diane Massie

Mrs Nadia Ghaffar	**Claimant** **Represented by:** **Mr Danish Kayani - Claimant's Husband**
Innocence Nursery Ltd	**Respondents** **Represented by:** **Mr Giles Ridgeway - Employment Law Advocate:** **ELAS Group**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that:

(1) The respondents did not unlawfully discriminate against the claimant, contrary to **Sections 18 and 39 of the Equality Act 2010**, by reason of her pregnancy, when dismissing her, during the protected period, with effect from 22 April 2020.

(2) Her dismissal on that date by the respondents was also not an automatically unfair dismissal in terms of **Section 99 of the Employment Rights Act 1996**.

(3) The claimant was dismissed by the respondents on grounds of redundancy, and her pregnancy was not the reason for her dismissal.

(4) In these circumstances, the claimant's complaints against the respondents are not well-founded and, accordingly, they are dismissed by the Tribunal in their entirety.

REASONS

Introduction

1. This case called before the full Tribunal, for Final Hearing, on Tuesday, 1 March 2022, for four days, further to Notice of Final Hearing issued by the Tribunal to both parties on 7 December 2021. That Notice of Hearing was issued in error, insofar as it stated that the case would be heard by an Employment Judge sitting alone. While no amended Notice of Final Hearing appears to have been issued to parties, the case was listed for a full Tribunal including two non-legal members, and there was no objection by either party to this full Tribunal.

2. On 21 February 2022, Employment Judge Mary Kearns, having considered an application from the respondents' representative, Mr Ridgeway, dated 17 February 2022, and objections made by the claimant's representative, Mr Kayani, on 18 February 2022, to postpone the listed Final Hearing on 1-4 March 2022, refused that postponement application, as the case had been postponed four times previously, and Judge Kearns advised that the situation with the respondents' witness, Mr Aqeel Amjad (who had been cited to give evidence at Glasgow Sheriff Court in a criminal case) could be monitored once this Tribunal hearing was underway.

3. Two of the four earlier postponements had been granted on the respondents' application, by their then representative, Mr Tom Muirhead from Citation Ltd, and the other two were due to listing errors made by the Tribunal staff. Following a Case Management Preliminary Hearing, held by telephone conference call, on 31 March 2021, Employment Judge Kearns had ordered

that a four-day Final Hearing would be fixed, and she made various case management orders in preparation for, and conduct of, the Final Hearing. Her written Note and Orders, dated 31 March 2021, were sent to both parties' representatives, under cover of a letter from the Tribunal on 16 April 2021.

4. Thereafter, by letter from the Tribunal to both parties' representatives, dated 26 May 2021, Employment Judge Shona MacLean directed that the case would proceed to be listed for Final Hearing way by Cloud Video Platform, that formal Notice of Final Hearing would be issued in due course, and parties were asked to comply with the enclosed Case Management Orders for a CVP Final Hearing signed by Employment Judge Peter O'Donnell on 24 May 2021. Judge O'Donnell's Orders related to timetable for documents, CVP tests, and details of financial loss.

5. Unfortunately, as preliminary discussion with both parties' representatives, at the start of this CVP Final Hearing showed, neither party had properly prepared for, or complied with, the previous case management orders made by Employment Judges Kearns and O'Donnell, and accordingly, at the start of this Final Hearing, the presiding Judge, sitting with the full Tribunal, required to conduct a case management discussion with both parties' representatives, with a view to ensuring the good and orderly conduct of this Final Hearing.

Claim and Response

6. Following ACAS early conciliation, between 18 May and 18 June 2020, the claimant, acting through her husband, Mr Danish Kayani, presented her ET1 claim form, on 18 June 2020, citing Saima Kiyani, of Innocence Nursery, as the named respondent. The ACAS early conciliation certificate had been issued with Innocence Nursery Limited as the prospective respondent. Following referral to an Employment Judge, the claim form was accepted by the Tribunal, because the claimant had made a minor error in the name/address of the respondent, and it would not be in the interests of justice to reject the claim.

7. The claimant alleged that she had been discriminated against on the grounds of pregnancy or maternity following the termination of her employment as a nursery practitioner on 22 April 2020. The background and details of the claim were set forth in a typewritten paper apart, and the claimant there stated her claim, as follows:

> *"I feel I have been made redundant due to being pregnant. Under government guidance the nursery was told to shut on the 20th March, I received a letter from my employer stating I would be laid off temporarily and would receive Statutory Guarantee pay of £29 a day for 5 days. My employer then wrote to me (25/3/20) and stated that due to the current coronavirus outbreak I was to be made redundant with 1 months notice, therefore my employment would end on 22/4/20. The letter also stated that I was able to appeal this decision. I contacted my employer (27/3/20) after making the decision to appeal this as being made redundant would have left me in financial difficulty with no means of getting another job due to being 5 months pregnant. The furlough scheme had been introduced to save employees from losing their jobs so I saw no reason why my employer chose to make me redundant. The reason given to me at that point was due to a decline in demand, however the nursery was always understaffed the whole time I was working there with staff and children moving between rooms to try and ensure that staff to children ratios were met- with the majority of time they were still not met so this reasoning did not make sense.*
>
> *Over a week later I had heard nothing back from my employer regarding the appeal so I sent a reminder email. The next correspondence I received from my employer was an email (7/4/20) in which my employer denied any knowledge of me being pregnant (although while I was working there, she let me away for 2 midwife appointments and my 12 week scan after seeing proof of appointment letters and my maternity file. I had also provided her with my 20 week scan appointment which was due to take place the week after the*

closure of the nursery. She had also informed the staff of my pregnancy and informed the children in my room to ensure they took extra care and were vigilant around me). In this email, there was no mention of the appeal or its process.

I responded to this email (8/4/20) and clarified that she knew of my pregnancy and there was no need to deny it. I also asked what the criteria was for picking me to be made redundant and again reminded her that I wanted to appeal the decision.

I then received a letter (13/4/20) inviting me to an appeal hearing via telephone on the 15th of April. Due to unforeseen circumstances I had to reschedule this appeal. The appeal was rescheduled for the 24th of April. I then received a phone call from my employer on this date and was asked my reasoning for appealing the decision. While providing my reasoning my employer showed no interest in listening to me and was shouting over me while I was trying to speak. When I asked about the main criteria for making me redundant, I was told it was due to my performance and room numbers. This had not been mentioned in any previous correspondence. If I was being made redundant due to my performance then this would have been stated in the initial letter for redundancy or I would have been dismissed at the end of my probationary period, I had no disciplinaries on my record and my performance was never properly reviewed or highlighted as an issue as my employer was understanding of me being pregnant and this impacting my performance. My employer continued to deny knowledge of me being pregnant and kept saying that I have not given this to them in writing. To me there is no reason for them to deny knowledge of the pregnancy unless there was something to hide. I had not yet handed in my MATB1 form as you don't receive this from the midwife till your 22/23 week appointment but I had made my employer aware of when I would be receiving this. The appeal process did not seem very professional and I felt as if it was done to tick a box.

I feel I have not been given a solid reason for being made redundant. The nursery is very busy with approx. 65 children and with them currently being closed they are unaware of how many children will be there when they re-open. I feel it would have made more sense to have furloughed me until the nursery re-opened as the rest of the staff were furloughed so it wouldn't have left me in this situation. Also, I feel that I have been discriminated due to my pregnancy as there was also another member of staff who worked in the same room as me and had the same performance issues as me, however this person was moved into another room and was given an opportunity to improve. This opportunity was not given to me and the only difference between me and this person was that, I am pregnant."

8. In the event of success with her claim, the claimant indicated that she was seeking an award of compensation only against the respondents, which she calculated in the total sum of **£12,500**, being £4,500 for the pay of May, June and July 2020, plus £8,000 for "***the stress and inconvenience caused during pregnancy and the stress of constantly having to chase the employer, along with the hardship caused by non payment of wages in April."***

9. The claimant's claim against the respondents was accepted by the Tribunal administration, and a copy served on the respondents, Innocence Nursery Limited, by Notice of Claim dated 22 June 2020, requiring the respondents to submit an ET3 response by 20 July 2020. The parties were advised that the case was also listed for a Case Management Preliminary Hearing, to be held by telephone conference call, on 22 September 2020.

10. No ET3 response form was lodged by, or on behalf of the respondents, by the due date of 20 July 2020. In those circumstances, on 23 July 2020, Employment Judge Mary Kearns instructed that, rather than proceed to issue a **Rule 21** default judgment, the case should proceed to the listed telephone conference call Preliminary Hearing on 22 September 2020. However, on 2 September 2020, Citation Limited, acting on behalf of the respondents, wrote

to the Glasgow Employment Tribunal, stating that their client had not received the ET1 claim form, Notice of Claim or Notice of Hearing, and intimating that they were instructed to act for the respondents in this matter, they asked for the Tribunal's assistance as soon as possible.

11. On 1 September 2020, the claimant's Preliminary Hearing agenda was submitted to the Glasgow Employment Tribunal, with copy sent to Saima Kiyani, for the respondents. The claimant stated that she had not received a copy of any ET3 response for the respondents. She complained of being treated less favourably as a result of being pregnant, contrary to **Section 18 of the Equality Act 2010,** as also automatic unfair dismissal, for being made redundant because she was pregnant, in addition to a claim for unlawful deduction of wages for holiday pay and notice pay. She sought financial compensation totalling **£19,000**, comprising loss of earnings at £8,000, injury to feelings at £9,000, and holidays and notice pay at £2,000.

12. Following referral to Employment Judge Mark Whitcombe, on 9 September 2020, the claimant was advised that no ET3 response had been received from the respondents, the respondents had stated that they were not in receipt of the Notice of Claim, so Judge Whitcombe directed that the Tribunal send this on to them, and he further instructed that the date of the Preliminary Hearing for 22 September 2020 be postponed, and a further Case Management Preliminary Hearing listed at a later date. For the avoidance of doubt, Judge Whitcombe confirmed that no extension of time to submit the ET3 response had been given at that time. By subsequent letter from the Tribunal, dated 9 September 2020, parties were advised that the postponed Case Management Preliminary Hearing had been relisted for 11 November 2020.

Extension of Time granted to the Respondents

13. Thereafter, by email to the Glasgow Employment Tribunal, copied to the claimant, on 15 September 2020, Mr Tom Muirhead, Tribunal Advocate with Citation Limited, attached a copy of the respondents' draft ET3 response to the claim, also containing an application for an extension of time for

submission of the ET3 response. That draft response was prepared in the name of "***Kiyani Nursery Limited, t/a Innocence Nursery***." An explanation was provided as to why no ET3 response had been lodged on time as a result of non-receipt of the Notice of Claim issued by the Tribunal, and it was submitted that the interests of justice required an extension of time.

14. Grounds of defence were set forth, including a denial that the claimant was dismissed because she was pregnant, as alleged, and averring that the claimant had not, at any time prior to her dismissal, informed the respondents of her pregnancy, and denying that the respondents had informed staff of the claimant's pregnancy, as alleged. It was averred that the claimant was selected for redundancy because the area in which she worked was the worst affected by the reduction in child placement, and the fact that her performance was poor.

15. On 29 October 2020, parties were advised by the Tribunal that the Preliminary Hearing, by telephone conference call, to be held on 11 November 2020, would determine the respondents' application to submit a late ET3 response, and the claimant's application to amend the ET1 claim form. Mr Muirhead, Tribunal Advocate, from Citation Limited, intimated a respondents' PH Agenda to the Tribunal, with copy to the claimant, on 10 November 2020.

16. The case thereafter called before Employment Judge Paul McMahon on 11 November 2020, and it was continued until 19 November 2020 to allow evidence in respect of the respondents' application to submit a late ET3 response, and the claimant's opposition thereto. At that Preliminary Hearing on 11 and 19 November 2020, the claimant was represented by her husband, Mr Kayani, while the respondents were represented by Mr Muirhead, consultant with Citation Limited.

17. By written Note and Orders dated 7 December 2020, and sent to both parties by the Tribunal on 25 January 2021, Employment Judge McMahon directed that the respondents' application for an extension of time to submit a response to the claim was granted and that response, submitted in draft form together

with the application for an extension of time on 15 September 2020, was accepted, and he ordered that the case should proceed and a further Case Management Preliminary Hearing should be listed.

Further Case Management of the Claim and Response

18. Thereafter, on 4 February 2021, the claimant's representative submitted to the Glasgow Employment Tribunal, with copy to Mr Muirhead for the respondents, details of an amendment requested by the claimant to include a claim for holiday pay and notice pay. This followed upon an earlier application by the claimant, on 8 October 2020, copied to the Glasgow Employment Tribunal, and Mr Muirhead for the respondents, stating that the claimant would like to amend her claim by including a claim for unlawful deduction of wages for holiday and notice pay.

19. On 23 February 2021, Mr Muirhead submitted comments on that application submitting that the amendment was time barred and should be refused and, in any event, the amendment was misconceived and it had no reasonable prospects of success as the claimant's representative had accepted, in the email of 8 October 2020 to the Employment Tribunal, that the claimant was paid her notice pay, albeit late, and the claimant's accrued but untaken holiday leave, quantified at **£377.89**, had been addressed by sending a cheque to the claimant for that amount, but that cheque had not been cashed, so the respondents were cancelling that cheque, and issuing a fresh one to the claimant in respect of the sum due.

20. On 3 March 2021, the Tribunal issued Notice of Preliminary Hearing, by telephone conference call, to be held on 31 March 2021, to discuss case management, and listing the case for Final Hearing in the period May / July 2021. On 31 March 2021, the case called before Employment Judge Mary Kearns for that Preliminary Hearing. She ordered the case be listed for a four-day full Hearing, and she made various case management orders. That Note and Orders by Judge Kearns was issued to parties on 16 April 2021, along with date listing stencils for a Final Hearing to be fixed in June, July, or August

2021. In particular, she ordered that a List of Issues was to be sent to the Tribunal no later than 28 days prior to the first day of the Final Hearing.

21. Further, in addition to orders for further information, and exchange of documents, Judge Kearns ordered that, no later than 21 days before the first day of the Final Hearing, parties must mutually exchange witness statements, and that witness statements, once formally adopted by the witness, would stand as their evidence, and they would not be read out, unless the Tribunal directed otherwise. Further, she ordered that, within 28 days of the date of her Note, the claimant should send to the respondents (copied to the Tribunal) a Schedule of Loss with supporting documentation.

22. On 13 May 2021, the claimants' representative forwarded to the Glasgow Employment Tribunal, with a copy to Mr Muirhead for the respondent, the claimant's Schedule of Loss. It included past losses of £5,928.75; future losses of £3,162; injury to feelings at £14,000; holiday pay at £377.89, plus interest and totalling **£24,976.04**.

Claimant's Further and Better Particulars, and Respondents' Reply

23. In a separate email of the same date, 13 May 2021, Mr Kayani provided "***further and better particulars***" of the claim, as requested by the Tribunal. It was there stated that the claimant's 2 midwife appointments were 10-week appointment – Tuesday 14th January 2020, and 16-week appointment – Tuesday 25th February 2020, and 12-week scan on Friday 31st January 2020, and 20-week scan on 26th March 2020.

24. It was also there stated that the claimant showed Saima Kiyani her appointment letters and maternity file (appointments) a few weeks in advance of each appointment as she was told to give Ms Kiyani as much notice as possible for her appointments to be authorised, to ensure appropriate cover was in place at the nursery ; it was stated that the claimant showed Ms Kiyani her 20-week scan appointment letter, in advance of the appointment date, although she was unsure of the exact date she showed it to her; and it was

further stated that the claimant had advised Ms Kiyani that she would receive her MATB1 form at her 24-26 week appointment, and this would be given to Ms Kiyani upon receiving it, however the nursery closed towards the end of March and the claimant did not get the form through until the end of April.

25. The staff member whose performance the claimant had asserted was noticeably a lot worse than the claimant's, and in respect of whom the claimant alleged there were performance / personal appearance and hygiene issues, was identified as being a "Kirstie Wardlaw."

26. Thereafter, on 14 May 2021, Mr Tom Muirhead, Tribunal Advocate with Citation Limited, forwarded to the Glasgow Tribunal, with copy to the claimant's representative, an agreed List of Issues, containing ten legal issues, and a further twelve factual issues.

27. On 27 May 2021, Mr Muirhead intimated the respondents' reply to the claimant's further and better particulars. It was there denied that the claimant showed Saima Kiyani her appointment letters and maternity file, as alleged; it was further denied that the claimant showed Ms Kiyani her 20-week scan appointment letter, as alleged ; it was also denied that the claimant had advised Ms Kiyani that she would be receiving her MATB1 form at her 24-26 week appointment, as alleged ; and it was positively asserted that the claimant did not, at any time prior to her dismissal, inform Ms Kiyani that she was pregnant.

28. Further, the respondents denied the claimant's allegation that staff member Kirsty Wardlaw was moved rooms in the nursery due to issues with her performance / personal appearance / hygiene, as alleged, and it was explained (as per the respondents' ET3) that Ms Wardlaw was moved to the baby room around the time of the claimant's appointment because the claimant was a qualified primary school teacher and best placed in terms of that qualification to serve the needs of the children in the ante pre-school room (children aged 3-5 years), and it was further stated that the respondents did

not have issues with the performance, personal appearance, or hygiene of Ms Wardlaw, as alleged.

29. Following issue of Employment Judge O'Donnell's Case Management Orders dated 24 May 2021, in particular order 3(a) to (f), requiring the claimant, within 14 days, to prepare and lodge with the Tribunal (copied to the respondents), details of financial loss, in a written statement with supporting documentation, the claimant's representative forwarded a document, with details of financial loss, on 17 June 2021, totalling **£24,976.04** (as previously provided on 13 May 2021, but now answering Judge O'Donnell's order 3 (a) to (f).)

30. Unfortunately, if not inexplicably, that document was not included in the Joint Bundle presented to the Tribunal by parties for use at this Final Hearing. Mr Kayani's email to the Tribunal, on 17 June 2021, was only sent to the Glasgow ET office, and it does not appear to have been copied to the respondents' representative, as it should have been per **Rule 92**.

31. With access to the Tribunal's hard copy casefile, the terms of this reply of 17 June 2021 were, however, made known to the full Tribunal, and to both parties, during the course of evidence led at this Final Hearing.

Final Hearing before this Tribunal

32. On 4 February 2022, Mr Tom Muirhead, Tribunal Advocate for Citation Limited, had sent to the claimant's representative, and copied to the Tribunal, a draft timetable for the four-day Final Hearing by CVP on 1-4 March 2022.

33. Thereafter, on 7 February 2021, Mr Muirhead wrote to the Glasgow Tribunal office, copied to the claimant's representative, advising that his colleague, Mr Giles Ridgeway, would be the Tribunal Advocate who would represent the respondents at this Final Hearing.

34. On day 1 of the Final Hearing, Tuesday 1 March 2022, having regard to the need for witness timetabling, and noting parties' witness running order and estimated times for evidence of each witness, the Tribunal decided to make a formal **Timetabling Order** under **Rule 45.**

35. We did so**,** having regard to the interests of justice, and the Tribunal's duty under **Rule 2** to deal with the case fairly and justly, and conclude the case within the four allocated sitting days of this listed Final Hearing, by adopting parties' time estimates, and so imposing limits on the time that both parties might take in presenting evidence, questioning witnesses and making submissions, and stating that the Tribunal might prevent the parties from proceeding beyond any time so allotted.

36. This Final Hearing was conducted remotely by video link using the HMCTS Cloud Video Platform ("***CVP***"). There were a number of occasions on which there were connectivity issues affecting the ability of one or more of the participants to see and / or hear each other. However, we persevered, and we were able to overcome these difficulties and conduct a fair hearing.

37. The claimant's sister, Ms Aiysha Mirza, attended the public Hearing on CVP on Thursday 3 March 2022, as an observer, after a public access request from her to the Tribunal office. She did not participate, and attended with camera off, and microphone muted.

38. On 9 September 2021, Mr Muirhead, the respondents' then representative, advised the Tribunal that parties had agreed a Joint Bundle, and a link was provided to an electronic copy of the same. At that stage, witness statements had not been exchanged between the parties. An updated version of the Bundle, as there was one page missing from the Schedule of Loss at the end of the Bundle, was circulated by Mr Muirhead to the Tribunal and claimant's representative on 15 September 2021.

39. In Mr Muirhead's email to the Tribunal, on 16 September 2021, seeking a postponement of the Final Hearing then listed for 21-24 September 2021, which postponement was granted by the Tribunal, he referred to having reviewed the claimant's witness statements "***this morning***", and her claims that several documents lodged by the respondents had been "***fabricated",*** and that in respect of some of the "***forged***" documents the signature shown was not hers.

40. From perusal of the Tribunal's case file, the claimant's witness statement, and those of her two witnesses, Kelly Quail and Jasmine Mannix, had previously been sent to the Tribunal, and to the respondents' representative (then Mr Muirhead of Citation Limited) on 15 September 2021, and fresh copies were sent to the Tribunal by the claimant's representative, Mr Kayani, on 28 February 2022. The Tribunal received the respondents' 4 witness statements by email from Mr Muirhead at Citation Limited on 4 February 2022.

Agreed List of Issues

41. Notwithstanding the clarity of Employment Judge Kearns's case management order of 31 March 2021, as issued to parties on 16 April 2021, providing that an agreed List of Issues for determination by the Tribunal was to be sent to the Tribunal no later than 28 days prior to the first day of the Final Hearing, when this Final Hearing commenced, on day 1, being Tuesday 1 March 2022, the presiding Employment Judge required to discuss, with both parties' representatives, the fact that there appeared to have been a failure to comply with Judge Kearns's order, and enquiring about the up to date position as to whether or not there was an agreed List of Issues for determination by the Tribunal.

42. In an emailed set of directions issued to both parties, on the presiding Judge's instructions, on 28 February 2022, parties' representatives were called upon to provide an explanation to the Tribunal as to why Judge Kearns' s order of 31 March 2021 appeared not to have been complied with by them. Mr Ridgeway, the respondents' representative, replied to the Tribunal, having originally stated that there was no agreed list, to confirm that there was in fact an agreed list, namely that prepared by Mr Muirhead on 14 May 2021, and apologising for the confusion caused by his earlier correspondence.

43. In the event, that list of 22 separate issues, excluded items that the claimant's representative had added, and, in those circumstances, the matter was discussed with both parties' representatives at the start of this Final Hearing. Following discussion between Mr Ridgeway and Mr Kayani, during the

lunchtime adjournment, a revised list of issues was forwarded by Mr Ridgeway to the Tribunal at 13:59 on 1 March 2022, with his suggested additions at paragraphs 5 to 8, 13 and 19, stating that the claimant's representative wanted to keep issues 9 and 11, as shown highlighted in red, and to include the furlough issue, highlighted in blue, at issue 20.

44. After further discussion with parties' representatives, when the full Tribunal resumed for the afternoon session, the Tribunal accepted the parties' revised list of issues, but under deletion of items 9 and 11, as holiday pay and notice pay had been paid, and so there was no live dispute for the Tribunal to adjudicate upon in those respects, as set forth in the following terms:

"*Legal Issues*

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

2. Was the reason or principal reason for the Claimant's dismissal her pregnancy, childbirth or maternity, contrary to section 99 of the Employment Rights Act 1996?

3. Did the Claimant's dismissal fall within the protected period defined by section 18 (6) of the Equality Act 2010?

4. If so, was the Claimant's dismissal because of the Claimant's pregnancy/maternity, such that it amounted to unfavourable treatment in terms of section 18 of the Equality Act 2010.

5. *Was the Claimant subject to direct discrimination and was the dismissal due to her pregnancy.*

6. Was the less favourable treatment done because of the pregnancy.

7. Are there facts from which the Tribunal could decide, in the absence of any other explanation that the Respondent discriminated against the Claimant?

8. *If so has the Respondent proved that it did not discriminate against the Claimant?*

9. *Has the Claimant's application to amend to include claims for holiday pay and notice been submitted outside of the relevant 3-month time limit?* ***[deleted]***

10. *If so, would it have been reasonably practicable to submit the claims in time?*

11. *If the amendment is permitted, has the Respondent made unlawful deductions contrary to section 13 of the Employment Rights Act 1996?* ***[deleted]***

12. *If the claims succeed, what remedy does the Claimant seek?*

13. *Has the Claimant taken reasonable steps to mitigate her losses?*

14. *What compensation should be awarded if the claims are successful?*

Factual Issues

15. *Did the Respondent know that the Claimant was pregnant?*

16. *Was the decision to dismiss the Claimant taken within the protected period?*

17. *What was the reason for the Claimant's dismissal and was this a reason connected to the Claimant's pregnancy or maternity?*

18. *In dismissing the Claimant, or in dealing with her appeal, did the Respondent follow a proper procedure? If not, was that failure for a reason connected to the Claimant's pregnancy or maternity?*

19. *Has the Respondent discriminated against the Claimant by dismissing her?*

20. *Did the Respondent consider placing the Claimant on Furlough as an alternative to redundancy and if not, was that decision taken for a reason connected with the Claimant's pregnancy or maternity?*

21. *Was there a genuine reduction or anticipated reduction in the need for employees of a particular kind, such that a redundancy situation arose?*

22. *Did the Respondent advertise for staff on the reopening of the Nursery, if so, what was the reason for this?*

23. *Did the Respondent have issues with the Claimant's performance and conduct and was the Claimant subject to disciplinary warnings and informal discussions as a result of these?*

24. *Did the Respondent permit the Claimant to take time off for ante-natal appointments, if so, when were those appointments?*

25. *Did the Claimant show the Respondent her maternity file and appointment letters, if so, when did this take place?*

26. *Did the Respondent advise other staff members and children attending the Nursery about the Claimant's pregnancy, if so, when did this occur?*

27. Did the Respondent wrongly advise the Claimant that she was not due any outstanding wage payments?"

Witness Statements

45. Evidence in chief was led at this Final Hearing using the pre-prepared witness statements intimated by both parties. We heard from the claimant, and her two witnesses, and from four witnesses led on behalf of the respondents. Each witness was sworn and, after having confirmed the terms of their witness statement, and that it did not require amendment, they were cross examined by the other party's representative, asked questions of clarification by the Tribunal and, in some instances, but not all, re-examined.

46. In addition to the seven witness statements before the Tribunal, the Tribunal also had a Joint Bundle of 64 documents, extending to 218 pages, to which a few additional documents were added in the course of the Final Hearing, namely an updated Schedule of Loss for the claimant, payslips from the claimant's new employment, and bank statements relating to those payments from her new employer.

Findings in Fact

47. We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out below, in a way that it is proportionate to the complexity and importance of the relevant issues before the Tribunal.

48. The Tribunal has found the following essential facts established:

(1) The claimant, Mrs Nadia Ghaffar, aged 29 at the date of this Final Hearing, is the mother of two children (first child born 15 August 2020, and second child born November 2021). She is married to Mr Danish Kayani, her husband, a car salesman, who acted as her representative in these Tribunal proceedings.

(2) She was formerly employed by the respondents, as a nursery practitioner, working 40 hours per week, from 11 November 2019 until 22 April 2020, when her employment was terminated by the respondents, for the then stated reason of redundancy, as set forth in the respondents' letter of 25 March 2020, copy produced to the Tribunal at page 160 of the Bundle, as detailed later in these findings.

(3) The respondents, Innocence Nursery Limited, are a private limited company registered in Scotland (company number **SC443605**) running a nursery for childcare activities.

(4) Its registered office is at Parklands Country Club, 196 Ayr Road, Newton Mearns, Glasgow, G77 6DT. It was formerly named Kiyani Nursery Limited, on incorporation on 26 February 2013, but changed its name to its current name on 9 June 2016, according to the Companies House website entry for the company.

(5) It was accepted in evidence, at this Final Hearing, by Ms Saima Kiyani, that the name of the respondents, shown as Kiyani Nursery Limited, t/a Innocence Nursery, as per the ET3 response submitted on 15 September 2020, was in error, and that the correct identity of the respondents is Innocence Nursery Limited.

(6) The respondents' sole director, and person having significant control of the company, is Ms Saima Kiyani, known as Sam Kiyani, aged 49, at the date of this Final Hearing. She is the sole shareholder of the company, and the proprietor of the business run as the Innocence Nursery, Newton Mearns, where she is the nursery manager.

(7) A copy of the Innocence Nursery's certificate of registration from the Care Inspectorate, dated 28 July 2016, was produced to the Tribunal at page 45 of the Bundle, showing that the nursery was able to provide a day-care service, operating Monday to Friday from 07.30 to 18.30 hours.

(8) The nursery registration is for 16 children aged 0 to 2 years; 24 children aged 2 years to 3 years; and 23 children aged 3 years to those not yet at primary school. As per its registration, all children were to have the opportunity to access outdoor play on a daily basis, and minimum staffing levels were as per the National Care Standards for Early Education and Childcare.

(9) A copy of the claimant's CV was produced to the Tribunal at pages 46 to 47 of the Bundle, along with a copy of her application form to the respondents, dated 28 October 2019, at pages 48 to 52. A copy of various of her training certificates / qualifications was produced at pages 53-56.

(10) According to her CV, the claimant had a Postgraduate Diploma in Primary Education (PGDE) from Glasgow University, a BAcc degree in Accountancy from University of the West of Scotland, and an HND in Accountancy from City of Glasgow College.

(11) Further, and again according to her CV, the claimant had previous work experience as operations staff, sales assistant, primary school teacher, customer service associate, and checkout assistant.

(12) The claimant's employment with the respondents started on 11 November 2019. A copy of the new starter form and health screening questionnaire were produced to the Tribunal at pages 57 to 59 of the Bundle. In section C of that health screening questionnaire, when asked to give her health history, the claimant stated in answer to the question: "***Are you pregnant?"*** the answer ***"No."***

(13) In her evidence to the Tribunal, the claimant stated that she did not know she was pregnant when she joined the respondents' employment. She was issued with her MATB1 form after she had left the respondents' employment on dismissal on 7 April 2020.

(14) No copy MATB1 form was provided to the Tribunal by either party. The claimant explained that she had sent it off to get her statutory maternity pay, while the respondents' position was that they had never been given it by the claimant.

(15) In her evidence to the Tribunal, the claimant accepted that there were no texts, emails, or letters from her, before her dismissal, to advise the respondents that she was pregnant, but she stated that she had advised Ms Saima Kiyani verbally, and shown her the maternity appointment letters.

(16) When put to her in cross-examination that she had not done so, the claimant stated that she did do so, she had told her before anybody else, she was 100% certain, and she had no reason to hide her appointments, and no manager would let you leave for an appointment if you'd not shown them the appointment letter.

(17) When shown Ms Kiyani's diary entry for 31 January 2020, recording "***Nadia dentist***", at page 131 of the Bundle, the claimant stated that when she showed Ms Kiyani her appointments, she definitely told her it was a maternity appointment for a scan, and Ms Kiyani wrote them up on the weekly diary on the wall, and she had never shown her her own diary. She did not know why the diary showed dentist, other than Ms Kiyani had written it down to make her point that she did not know the claimant was pregnant.

(18) The claimant's induction records with the respondents were produced to the Tribunal at pages 107 to 120 of the Bundle.

(19) A copy of the claimant's contract of employment with the respondents, dated 11 November 2019, was produced to the Tribunal at pages 60 to 67 of the Bundle.

(20) She was employed as an Early Years Childhood Practitioner, and she joined on a three-month probationary period. If she did not reach the

required standard, her contract stated that her employment could be terminated with required notice and, in borderline cases, the respondents reserved the right to extend her probationary period.

(21) Her hours of work were stated to be 40 hours a week, worked over 5 days, Monday to Friday, and worked flexibly, and she was to be paid at the rate of £10.50 an hour, by payment to her bank, on the last working day of each calendar month. Her holiday entitlement for the calendar year was 28 days, inclusive of any bank/local holidays.

(22) According to her ET1 claim form, copy produced to the Tribunal at pages 4 to 18 of the Bundle, the claimant worked an average of 40 hours per week for the respondents, but her net and gross pay was not specified by her, although it was stated (at section 5 of the ET1 – page 8 of the Bundle) that she received 3 weeks' pay in lieu of notice, and that she was not in the respondent employer's pension scheme.

(23) The respondents' ET3 response form, defending the claim, copy produced to the Tribunal at pages 19 to 31 of the Bundle, neither confirmed, nor denied, the claimant's ET1 details about her earnings. In her evidence to the Tribunal, the claimant stated that she worked more than 45 hours per week.

(24) There was produced to the Tribunal, at pages 209 to 212 of the Bundle, various wage details, being monthly payslips issued to the claimant by the respondents for the period 5 December 2019 to 5 April 2020, and then 5 June 2020, showing variable basic hours worked at £10.50 per hour, as follows:

Date	Basic Hours	Gross Pay	Deductions	Net Pay
Month 8: 05-	130	£1365.00	Total £141.92	£1223.08

Dec 2019				
Month 9 : 05-Jan 2020	188	£1974.00	Total £386.74	£1587.26
Month 10 : 05-Feb 2020	187.17	£1965.29	Total £383.80	£1581.49
Month 11: 05-Mar 2020	181.83	£1909.22	Total £365.32	£1543.90
Month 12 : 05-April 2020	140	£1470.00	Total £262.33 (including True Potential @ £38.32)	£1207.67
Month 2: 05-Jun 2020	Basic 169 Holiday 56	£2362.50	Total £414.48 (including True Potential @ £73.70)	£1948.02

(25) The deductions made from the claimant's payslips were for income tax and NI, but those for April and June 2020 also showed deductions made by the respondents for "***True Potential***", at £38.32 on 5 April 2020, and at £73.70 on 5 June 2020. A separate document was produced to the Tribunal, at page 213 of the Bundle, showing that pension contributions were made at the rate of 5% by the employee, and 3% by the employer.

(26) As an employee of the respondents, the claimant was subject to the terms of the respondents' Employee Handbook, a copy of which, dated October 2019, was produced to the Tribunal at pages 68 to 106 of the Bundle.

(27) In terms of the claimant's contract of employment with the respondents, it was stated that, should her conduct or performance fall below the standards required, then disciplinary action might be taken, and a more detailed explanation of the disciplinary procedure and rules was contained in the Employee Handbook.

(28) The claimant was not asked during, or at the end of her probationary period, to attend an employment review to discuss her overall work performance, including absence, timekeeping, and general attitude. According to the respondents' proprietor, Ms Saima Kiyani, in her evidence at this Final Hearing, the claimant passed her probation, without it being extended.

(29) According to the claimant's contract of employment with the respondents, if there was satisfactory completion of her probationary period, then the claimant was entitled to give one month's written notice to the employer (previously one weeks' notice), and the employer was required to give the claimant one month's notice following satisfactory completion of the probationary period.

(30) In terms of section 3 of the Employee Handbook, reproduced from page 78 of the Bundle produced to the Tribunal, the following provision was made for absence from work / appointments, as follows:

> *"Appointments*
>
> *If you need to be absent from work to keep a medical, dental or other essential appointment, prior permission should always be obtained from Management. Payment for absences of this nature will be at the discretion of the Nursery. You must try to arrange such appointments outside normal working hours wherever possible and any regular appointments that may have to be made during working hours must be supported by an appointment card. Any such absences from the workplace should be minimal."*

(31) Disciplinary procedures were set forth in section 6 of the Employee Handbook, produced to the Tribunal at pages 88 to 93 of the Bundle. As reproduced at page 88 of the Bundle, the following provision was set forth as regards a "***formal verbal warning***", namely: *"In the case of conduct, attendance or performance not reaching the required standard, the problem will be discussed with you at a disciplinary hearing where you will be given the opportunity to offer a satisfactory explanation. If the explanation is unsatisfactory, you will be issued with a formal verbal warning. The topics discussed at the meeting will be confirmed in writing to you and the verbal warning will remain on your file for six months."*

(32) In the "***general***" provisions of the Employee Handbook, set forth at page 89 of the Bundle produced to the Tribunal, it was stated that: *"If you are a short service employee or are still within the probationary period, you may not be issued with any warnings before dismissal."*

(33) Further, in terms of section 7 of the Employee Handbook, various employment policies were set forth. As reproduced at page 94 of the

Bundle, under "***Equal opportunities and discrimination policy***", it is stated that: *"The Nursery recognises that discrimination is not only unacceptable, it is also unlawful. The Nursery's aim is to ensure that no job applicant or employee is discriminated against, directly or indirectly, on any unlawful grounds. "*

(34) Also, as reproduced at page 102 of the Bundle, provision was made for ***"layoff / short time working***", and "***Redundancy policy***".

(35) In particular, the "***Redundancy policy***," set forth in section 7 of the Employee Handbook, as reproduced at page 102 of the Bundle provided to the Tribunal, provided as follows: *"If a redundancy situation arises, for whatever reason, the Nursery will take whatever steps are reasonable in an effort to avoid compulsory redundancies, e.g.:*

- *Analyse overtime requirement;*
- *Reduce hours;*
- *Layoff with statutory Guarantee Pay;*
- *Ask for voluntary redundancies, whether anyone has plans to retire or is considering a career move.*

If compulsory redundancies are necessary, employees will be involved and consulted in various meetings to discuss selection criteria, any alternative positions, and be given every opportunity to put forward any views of their own.

Employees will be given the opportunity to discuss the selection criteria drawn up. The Nursery reserves the right to reject any voluntary applications for redundancy if it believes that the volunteer has skills and experience that need to be retained for the future viability of the Nursery."

(36) There was produced to the Tribunal, at pages 143 and 144 of the Bundle, a copy of the claimant's "***maternity file***", containing a copy of

the claimant's "***plan of care for your pregnancy***", from her GP surgery, at Drs Geddes & Partners, showing an appointment chart, from weeks 8 to 42, and appointments made for clinic J on Tuesdays 25 February, 7 April and 19 May 2020, and the hospital midwife's NHS key booking information form, for the claimant, printed on 14 January 2020, page 1 of 3.

(37) The claimant also produced to the Tribunal, at pages 123 and 133 of the Bundle, an outpatient appointment letter dated 10 December 2019, for a maternity outpatient department scan, at Queen Elizabeth University Hospital Glasgow, on Friday, 31 January 2020, and another outpatient appointment letter dated 31 January 2020 for a maternity outpatient appointment, for a scan, again at Queen Elizabeth University Hospital Glasgow, for Thursday, 26 March 2020.

(38) On the claimant's evidence to this Tribunal (although disputed by the respondents' evidence at this Final Hearing) she advised the respondents' proprietor, Ms Saima Kiyani, of her pregnancy, on or about her first maternity outpatient appointment for a scan on 31 January 2020, and she provided Ms Kiyani with a copy of the appointments made, which the claimant stated Ms Kiyani photocopied, put in a filing cabinet in her office, and handed the originals back to the claimant.

(39) Ms Kiyani has categorically denied that she was aware of the claimant's pregnancy prior to dismissing her, and that the claimant's pregnancy was the reason for her dismissal. She asserts that the reason for dismissal was redundancy, and the claimant's performance. Further, Ms Kiyani categorically denies having ever seen the documents disclosed by the claimant, and produced in the Bundle for the Tribunal, at pages 123, 133,143 and 144.

(40) On the evidence before the Tribunal, we are satisfied that the claimant's pregnancy was known to, and acknowledged by, the respondents'

proprietor, Ms Saima Kiyani, and other staff, in the period leading up to the claimant's redundancy from the respondents' employment in April 2020. The claimant told Ms Kiyani face to face, and she was never asked to put it in writing that she was pregnant.

(41) Further, we are satisfied that, one morning in February 2020, as she was sitting with some children in the nursery, Ms Saima Kiyani, the nursery manager, came into the room and spoke to the children, and told them that the claimant was pregnant, and the children and some parents were excited by this news. Both Ms Kiyani and other staff in the nursery were aware of the claimant's pregnancy.

(42) According to the respondents' ET3 response, and as confirmed in evidence to this Tribunal by the proprietor, Ms Saima Kiyani, at paragraph 1 of her witness statement, as at March 2020, the respondents employed around 15 staff, including the claimant. However, in cross-examination, Ms Kiyani stated that there were 9 staff, 2 made redundant (the claimant and Fiona McTaggart), 1 resignation (Jasmine Mannix), so leaving 6 staff in the nursery. She described herself as the manager, and a "***supernumerary***" member of staff.

(43) At that time, March 2020, the Innocence Nursery operated across three rooms, each with its own staff, as follows:

i. 1-2 years room: Kirsty Wardlaw, Val White, Carol Ann, Fiona McTaggart, all of whom were practitioners, and Caitlin Howie, supervisor;

ii. 2-3 years room: Robert and Amena, both practitioners, and Nicola Newman as supervisor;

iii. 3-5 years room: the claimant and Jasmine Mannix, both practitioners;

(44) March 2020 was a difficult time for the respondents, as it was for many employers. There was a lot of uncertainty around the COVID-19 pandemic and the lockdowns and restrictions that were associated with that. Ms Kiyani, in her evidence to the Tribunal, spoke of it being a "***fluid situation,"*** and that she was liaising with her "***HR department***" (whom she identified as Citation Ltd), as well as managing everything else.

(45) The respondents received an email from East Renfrewshire Council, the local authority, on 20 March 2020, a copy of which was produced to the Tribunal at pages 151 and 152 of the Bundle, telling the respondents about the local authority's plans to close all local authority nurseries and schools, and that they were seeking private nurseries to support the needs of key workers' children and vulnerable children.

(46) Following that email from the Council, Ms Kiyani immediately updated the parents of the children at the Innocence Nursery in an email and letter dated 20 March 2020, a copy of which was produced to the Tribunal at pages 153 and 154 of the Bundle, seeking confirmation of those parents who qualified.

(47) The respondents' nursery registration certificate, a copy of which was produced to the Tribunal at page 45 of the Bundle, allowed the respondents to have up to 23 children in the 3-5 year old room, which is the room in which the claimant then worked.

(48) The nursery attendance records for that room, known as the "***ante pre-school room,"*** copies of which were produced to the Tribunal at pages 184 to 208 of the Bundle, showed that room had almost full attendance in early March 2020.

(49) However, parents began taking their children out of the nursery as lockdown approached, and while the attendance records for early March were fairly healthy, from 5 March 2020, the numbers began to

fall, and by the time the first lockdown arrived, on 20 March 2020, the respondents only had one child in the 3-5 year old room.

(50) As a result, on 20 March 2020, Ms Saima Kiyani, the respondents' proprietor, met with the claimant and Fiona McTaggart, another nursey practitioner employed there, and the respondents' note of that meeting was produced to the Tribunal at page 155 of the Bundle. In that note, Ms Kiyani recorded as follows:

> *"SK and FM present.*
>
> *SK explained that numbers had decreased. Phone calls to cancel places due to current COVID situation. SK explained the decision to make staff redundant was based on situation. Letter will be emailed.*
>
> *Fiona explained how she enjoyed working in baby room and was sad to leave.*
>
> *SK thanked Fiona for all her help and would be in touch in future if need be.*
>
> *….*
>
> *NG and SK present.*
>
> *SK explained that numbers had significantly decreased in 3-5 room and children heading for school hadn't helped situation.*
>
> *Nadia knew children were leaving and was aware of decline of numbers in summer. The decision to make staff redundant was based on this. Letter will be emailed."*

(51) In her evidence to the Tribunal, the claimant stated that the respondents' note of this meeting, at page 155 of the Bundle, was "***fabricated***", because there was no mention of redundancy at that meeting on 20 March 2020, a fact vouched by the fact that the letter of

that date which she received from the respondents does not refer to redundancy.

(52) That letter of 20 March 2020 addressed by Ms Kiyani to the claimant was produced at page 156 of the Bundle, and it was in the following terms:

> "*Dear Nadia*
>
> *I am writing to confirm the details of our meeting on 20th March. As discussed, COVID-19 reasons for lay-off in the light of the current loss of trade due to social restrictions caused by the coronavirus, we do not have sufficient work within the business to maintain current staffing levels. This has resulted in a need to temporarily layoff your position of Early Years Practitioner with effect from Monday 23rd March until further notice.*
>
> *You are entitled to receive Statutory Guarantee Pay of £29 (NB £30 after 5 April 2020] a day for the first five workless days in any 13-week and the company will make payments to you in the same way as we would have paid your wages.*
>
> *During the period of temporary layoff, you remain an employee of the Company and as such you must hold yourself available for work. I know this is a very worrying and uncertain time for many reasons and we will do all we can during this time to generate work and alleviate this situation [within the government restrictions]. I am of course always available if you want to talk anything through. I obviously hope we can return to normal working as soon as possible, but I will keep you informed of any changes or developments.*
>
> *It would be advisable for you to use this letter to obtain further information and advice about any government benefits you can claim during this period, but unfortunately, we cannot give any*

specific advice in this regard. This process does not affect your continuity of service with the Company, nor does it break your employment in any way.

This process and the payments we are making to you are fully in accordance with your terms and conditions of employment.

If you have any queries relating to this letter, please do not hesitate to contact me and I will endeavour to answer any questions that you raise.

Yours sincerely,

Sam Kiyani

Company Director"

(53) In her evidence to the Tribunal, Ms Kiyani stated that while, in those meeting notes, with the claimant and Fiona McTaggart, she had made reference to the two staff members being redundant, she gave evidence that she in fact placed them on layoff initially, and her reference to "***redundancy***" was just the wrong terminology. While she gave evidence that a similar letter was also sent to Fiona McTaggart, a copy of the letter to Ms McTaggart was not produced to the Tribunal in the Bundle.

(54) Ms Kiyani gave evidence to the Tribunal that she had to make many short notice changes over the next few days, as per her office diary manuscript notes, a copy of which were produced to the Tribunal at pages 157 and 158, for 23 / 24 March 2020, as also pages 161 and 162, of the Bundle, for 25 and 26 March 2020. In her evidence to the Tribunal, she accepted that that was her own diary, and not accessible to staff in the nursery.

(55) There was also produced to the Tribunal, at page 159 of the Bundle, a letter sent by Ms Kiyani to parents / carers dated 24 March 2020 after

a number of parents had decided to leave the nursery altogether as a result of the uncertainties surrounding COVID-19.

(56) According to Ms Kiyani's evidence, despite freezing fees, and fees that had been paid being credited to parents' accounts, to be retained for when the nursery reopened, the whole situation was uncertain, and it also created difficulties in terms of the nursery's finances.

(57) In addition, Ms Kiyani stated that there were only 18 children on the register and 11 of those were going to be starting school in August 2020. She referred to this in her email to the claimant dated 7 April 2020, a copy of which was produced to the Tribunal at page 170 of the Bundle.

(58) Under reference to the nursery attendance records, for the 3-4 years room, for August 2020, as produced to the Tribunal at pages 194 to 208 of the Bundle, the numbers did not improve by that stage, and Ms Kiyani stated that they were just under half of that which the nursery had back in early March 2020.

(59) Ms Kiyani advised the Tribunal that she reviewed the situation again as matters developed, and by letter dated 25 March 2020, a copy of which was produced to the Tribunal at page 160 of the Bundle, she advised the claimant that her employment would be terminated on the grounds of redundancy.

(60) She set out the claimant's termination payments and her entitlement to accrued holiday leave, which she advised the claimant should be taken during her notice period, and she also set out the claimant's right to appeal against the decision.

(61) In that letter of 25 March 2020, as set out at page 160 of the Bundle, Ms Kiyani advised the claimant as follows:

"*Dear Nadia*

I write further to our conversation on 20th March. As we discussed, as a result of the current coronavirus outbreak, decline in numbers, we have seen a significant loss of trade due to the social restrictions currently imposed.

As we discussed, I am very saddened that I can see no alternative but to make you redundant. When we employed you, it was anticipated that your position would be permanent, but unfortunately, none of us could have foreseen what is currently happening.

As a consequence, I am writing to confirm that you are to be made redundant, notice of this dismissal being given today with effect from 25.3.20. You are entitled to a month's notice, which you are required to work, therefore your last day of employment will be 22.4.20.

You are not entitled to a statutory redundancy payment as you have less than two years service. Any outstanding wages will be processed with the normal payroll run following your last day of employment, at which time you will also receive your Form P45.

I understand you have accrued 7 days holiday, which you have still to take. I confirm that you are required to take all 7 days of this holiday period during your notice period between November and March.

You have the right to appeal against this decision and if you wish to do so you should write to me, within five working days from receipt of this letter.

Thank you for your contribution to the Company, and I wish you good health and every success in finding suitable alternative employment as soon as possible.

Yours sincerely,

Sam Kiyani

Company Director"

(62) In her evidence to the Tribunal, the claimant confirmed getting receipt of this letter of dismissal for redundancy, but she queried why she was not put on furlough, like other employees of the respondents, such as Kirsty Wardlaw. There was no legal obligation on the respondents to furlough staff.

(63) No copy P45 for the claimant was produced to the Tribunal by either party, and it was not established in evidence before the Tribunal when, or if, any P45 was issued by the respondents, and / or received by the claimant.

(64) Two days later, on 27 March 2020, Ms Kiyani wrote to Fiona McTaggart, the other nursery practitioner who was also made redundant by the respondents, as per the copy letter from Ms Kiyani to Ms McTaggart, copy produced to the Tribunal at page 163 of the Bundle, and reading as follows:

"*Dear Fiona*

I write further to our conversation on 20th March. As we discussed, as a result of the current coronavirus outbreak, decline in numbers we have seen a significant loss of trade due to the social restrictions currently imposed.

As we discussed, I am very saddened that I can see no alternative but to make you redundant. When we employed you, it was anticipated that your position would be permanent, but unfortunately, none of us could have foreseen what is currently happening.

As a consequence, I am writing to confirm that you are to be made redundant, notice of this dismissal being given today with effect from 27.3.20. You are entitled to a week's notice, which you are required to work, therefore your last day of employment will be 3.4.20.

You are not entitled to a statutory redundancy payment as you have less than two years service. Any outstanding wages will be processed with the normal payroll run following your last day of employment, at which time you will also receive your Form P45.

I understand you have accrued 2 days holiday, which you have still to take. I confirm that you are required to take all 2 days of this holiday period during your notice period between the above dates.

You have the right to appeal against this decision and if you wish to do so you should write to me, within five working days from receipt of this letter.

Thank you for your contribution to the Company, and I wish you good health and every success in finding suitable alternative employment as soon as possible.

Yours sincerely,

Sam Kiyani

Company Director"

(65) As is evident from the copy letters for the claimant and Ms McTaggart, as produced to the Tribunal, their respective letters of 25 and 27 March 2020 were in similar, but not identical terms. Ms McTaggart was given one weeks' notice of redundancy, and she was told that she had to take

her 2 days' accrued holidays during the one week notice period between 27 March and 3 April 2020.

(66) The claimant, on the other hand, who was given notice of redundancy on 25 March 2020, and as she was entitled to one month's notice, was given 22 April 2020 as her last day of employment, being 4 weeks' notice, not a full calendar month, and she was told that she had to take her 7 days' accrued holidays during her notice period "***between November and March."***

(67) That latter provision in the letter to the claimant of 25 March 2020 makes no sense, and stands in contrast to Ms McTaggart's letter of 27 March 2020, and how she was to be treated in that regard.

(68) While the claimant appealed against her redundancy dismissal, as detailed later in these findings, the Tribunal does not understand that Ms McTaggart appealed.

(69) No documentation to that effect was produced to the Tribunal, no evidence to that effect was given on the respondents' behalf at this Final Hearing, and the respondents' ET3 response makes no such reference to any appeal by her.

(70) On 31 March 2020, Miss Jasmine Mannix, who worked with the claimant in the 3-5 years room, resigned her employment by text message to Ms Kiyani. According to Ms Kiyani's evidence to the Tribunal, Ms Mannix was scheduled to be dismissed on the grounds of redundancy, but she resigned before her redundancy was confirmed.

(71) Miss Mannix's media messages, copy produced to the Tribunal at pages 166 and 167 of the Bundle, set out her reasons for leaving, namely:

> *"Hi Sam, as much as I have enjoyed childcare over the years, I have come to realise I'm not enjoying it. If I could just come and play with the children and be outdoors with them without the*

added extras it would be but I feel like I need a change of career. It wouldn't feel right doing something that I'm not putting my all in and my not feeling passionate about anything. Thank you for the past few months though and maybe it's something I'll come back to in the future."

"I think I'm going to give care a go, I love being around old people. I absolutely love working with the children but I just don't want to deal with the paperwork side of things if I could just go and roll about in the mud with them all day it would be great! But sometimes I feel like I'm trying to focus on paper work and other stuff which I struggle with sometimes ! xx."

(72) In her evidence to the Tribunal, Ms Kiyani stated that, in coming to her decision to dismiss the claimant, in addition to the respondents' reduced need for staff, she also took into account that the claimant's performance was poor. That was not, however, a reason for the claimant's dismissal expressly stated by Ms Kiyani in the claimant's letter of dismissal dated 25 March 2020.

(73) Ms Kiyani further advised the Tribunal that Fiona McTaggart was also dismissed for redundancy, at the same time as the claimant, and that she too was selected because of her performance, and that she (Ms Kiyani) made the decision to select those two staff because they were the poorest staff performers on her team. Again, Ms McTaggart's performance was not a reason for dismissal expressly stated by Ms Kiyani in her letter of dismissal dated 27 March 2020.

(74) Despite her evidence to the Tribunal that the claimant was given a proper induction, on commencement of employment with the respondents, Ms Kiyani stated that there had been a need to manage the claimant's performance in the short time that she was employed at the Innocence Nursery.

(75) Ms Kiyani referred to a supervision session that she held with the claimant, on 25 November 2019, a copy record of which was produced to the Tribunal at pages 121 and 122 of the Bundle, where it was recorded that the claimant found the children "***high maintenance***", that they were "***constantly asking questions why ?",*** and she found it "***very draining".***

(76) Further, Ms Kiyani also stated that she found this surprising coming from the claimant as a qualified nursery practitioner and where, given the nature of children, they have enquiring minds, need a lot of attention and above all need support and guidance from nursery staff.

(77) Ms Kiyani advised the Tribunal that she gave the claimant some guidance to "***be professional at all times***" and recommended that the claimant read up on child protection and medication policy, and that she also continue to read other policies and procedures.

(78) She further reminded the claimant at the end of that session that she was not permitted to use her mobile phone at work, which included during toilet breaks, pointing out to her that the cloak room had cameras installed.

(79) Ms Kiyani gave further evidence to the Tribunal that she had reason to caution the claimant again about her mobile phone use, at a personal development meeting held on 11 December 2019, a note of which meeting was produced to the Tribunal at page 124 of the Bundle.

(80) Although Miss Kiyani stated that she had made the claimant aware, at their meeting on 25 November 2019, that there were cameras in the cloakroom, at this personal development meeting, as per Ms Kiyani's notes, Ms Kiyani stated that the claimant stated that she did not realise that there were cameras in the cloakroom, and she apologised and said she would not do this again.

(81) Ms Kiyani suggested that the claimant be more involved with her children as her attitude seemed that she did not want to be there, and the claimant again said that she found the children demanding and that she was tired of the ***"why"*** questions, and that she was "***fed up."*** The claimant said that she would try to improve and appreciated that they were only little but that she was not used to being asked so many questions.

(82) Further, Ms Kiyani stated in her evidence to the Tribunal, despite the claimant's reassurance to her that she would not use her mobile phone at work, she continued to do so, and Ms Kiyani decided to give her a "***letter of concern***", which she issued to her on 30 December 2019, a copy of which was produced to the Tribunal at page 125 of the Bundle. In her evidence to the Tribunal, the claimant stated that she never received this letter from the respondents.

(83) Ms Kiyani reminded the claimant that if she continued to breach the respondents' Electrical Device Policy, then this would result in disciplinary action being taken against her. Along with her letter, she attached a copy of the respondents' Mobile Phone and Electrical Device Use policy, a copy of which was produced to the Tribunal in the Bundle at pages 126-128, this version of the policy being an updated one (adopted on 5 January 2020) from the previous version that was in force in 2019.

(84) Matters were further discussed by Ms Kiyani with the claimant in a personal development meeting held on 31 January 2020, a copy of Ms Kiyani's note of that meeting being produced to the Tribunal at page 132 of the Bundle.

(85) The claimant's comments made at that meeting, as recorded by Ms Kiyani, were: "***not read Tina Bruce***", "***need to better manage my time***", "***not researched documents provided or read them***", "***children should not be out jumping in puddles"***, "***my fault, I need***

to organise my paperwork + plan accordingly", "***children take too long and I loose patience with them***", "***this job requires me to be cheerful with children and I struggle being cheerful and happy around them".***

(86) All of these comments by the claimant gave Ms Kiyani concern, given the role that the claimant occupied in the nursery and, according to Ms Kiyani's evidence at this Final Hearing, at no time during any of her discussions with the claimant, at these formal meetings, did she mention to Ms Kiyani that she was pregnant.

(87) Some similar concerns were raised about the claimant at a supervision session that Ms Kiyani held with Jasmine Mannix on 3 February 2020, a copy of Ms Kiyani's notes of that meeting being produced to the Tribunal at page 134 of the Bundle.

(88) As per those notes, Miss Mannix reported to Ms Kiyani having real difficulty working with the claimant, describing it as "***stressful and very hard work."*** She said that "***she just sits writing at the table or staring into space"***, that "***activities were never planned"***, that the claimant's ***"children come running to her***", that she is "***always moaning***", "***doesn't want to get dirty***", "***always checking her mobile phone"***, "***has problems with her boyfriend and there constantly arguing"***, and that she is left with "***all the children while*** (the claimant) ***stands around looking unhappy + miserable"***.

(89) Further concerns were raised by Jasmine Mannix at a supervision meeting held on 12 February 2020 with Caitlin Howie, her supervisor, and a copy of the notes of that supervision were produced to the Tribunal at page 136 of the Bundle.

(90) It records that Miss Mannix finds all staff great although she stated that she found Nadia Ghaffar "***extremely lazy***," and that "***Nadia sits daydreaming, is never prepared,"*** and that she finds it difficult to work with her.

(91) Further, on 12 February 2020, Jasmine Mannix reported to Ms Kiyani that, during a field trip, the claimant had again been using her mobile phone. Ms Kiyani therefore decided to give the claimant a "***formal verbal warning,"*** which she recorded in a document dated 13 February 2020, a copy of which was provided to the Tribunal at page 137 of the Bundle.

(92) That letter stated as follows:

> *"DISCIPLINARY PROCEDURE*
>
> *RECORD OF FIRST VERBAL WARNING*
>
> *Name:Miss Nadia Ghaffar* *Date: 13.2.20*
>
> *Post Title: Child Development Officer* *Room:Ante-Pre School*
>
> *<u>Reason(s) for Verbal Warning being issued:</u>*
>
> *You have been spoken to on two occasions regarding the usage of your mobile phone during working hours. On the 30th December you were given a letter reminding you not to use your mobile phone whilst leaving the playroom to use the toilet. You were reissued with the Electrical Device Policy reminding you of your duty.*
>
> *On the 12th February you used your mobile phone whilst on a field trip with children to contact "boyfriend".*
>
> *Duration of the field trip you periodically checked your mobile phone to check text messages. This was reported to us by your colleague Jasmine Mannix.*
>
> *<u>Action required by yourself and/or management to ensure that further disciplinary action is not necessary.</u>*

- *Refrain from using your mobile phone whilst working with children.*
- *Mobile phone to be used only on your break and away from the children.*
- *Familiarise yourself with the Electrical Device policy and Child Protection.*

You will be monitored for three months to ensure you are not using your mobile phone during operating hours and are requested not to take your mobile phone out on any field trips with the children.

Received.

Nadia Ghaffar"

(93) The claimant, in her evidence to the Tribunal, denied having received that verbal warning, or written record as per that letter of 13 February 2020.

(94) Ms Kiyani, in her evidence to the Tribunal, stated that before issuing the warning to the claimant, she met with her to discuss the issue of concern, where she recalled that the claimant had accepted that she had done wrong and she did not challenge the disciplinary warning.

(95) Ms Kiyani further stated that Mr Aqeel Amjad was present at that meeting but, in his evidence to the Tribunal, he did not refer to that in his written witness statement, nor in his oral evidence to the Tribunal.

(96) On 14 February 2020, Kelly Quail , the deputy manager at the nursery, met with the claimant to discuss her action plan, being the personal development plan dated 31 January 2020, a copy of which was produced to the Tribunal at page 132 of the Bundle.

(97) Notes of that meeting to review the claimant's action plan were produced to the Tribunal at pages 138 to 141 of the Bundle. Present at that meeting were Kelly Quail and the claimant. As per those notes, the claimant is recorded as having said that she was "***sick of the place***," and when asked what she meant by "***bitching***," the claimant replied that she was "***fine***."

(98) According to those notes, the claimant advised Ms Quail that she had not studied the documents that she had been asked to, and concerns were raised about the claimant not ensuring children received outdoor play. Ms Quail reminded the claimant that the Tina Bruce publication had not been studied by her, nor had she studied other key documents. Ms Quail also raised concerns about the claimant's demeanour and attitude and relationships with parents and carers.

(99) Yet further concerns were raised about the claimant in a meeting held with Jasmine Mannix, Kelly Quail and the claimant on 2 March 2020. A copy of the notes of this meeting were produced to the Tribunal at pages 145 to 149 of the Bundle.

(100) Miss Mannix felt that the claimant's attitude was not good as though she did not want to be there, and the claimant said that she did not want to get dirty. Ms Kiyani, in her evidence to the Tribunal, was surprised at this comment, as it was part and parcel of the work that the nursery does, and she stated that she had reminded the claimant that she was employed to work in early years and that getting dirty was part and parcel of the job.

(101) On 31 March 2020, Miss Jasmine Mannix resigned from the respondents' employment at the nursery. Ms Saima Kiyani wrote to her, on 1 April 2020, copy letter produced to the Tribunal at page 168 of the Bundle, accepting Miss Mannix's resignation, and advising that her last day with the company would be 28 April 2020, and that her accrued holidays were to be paid in her final pay on 28 April 2020.

(102) On the evidence available to the Tribunal, we are satisfied that there were some performance issues affecting the claimant, while employed by the respondents, as recorded in the respondents' notes produced to this Tribunal, and referred to in Mr Amjad's letter of 7 May 2020 rejecting her appeal against dismissal, but not so serious performance issues that they caused the respondents to consider ending her appointment during her probationary period.

(103) Indeed, on the undisputed evidence before the Tribunal, the claimant's probation was not ended, nor extended, and her letter of dismissal issued by Ms Kiyani on 25 March 2020 made no reference whatsoever to any performance issues relating to the claimant.

(104) In her claim to the Tribunal, the claimant has alleged that in December 2019, the respondents moved Kirsty Wardlaw to the 1-2 years room because she was alleged to have performance issues.

(105) In her evidence to the Tribunal, Ms Kiyani denied this allegation, and she explained that Kirsty was moved to the 1-2 years room around the time of the claimant's appointment, as the claimant was ideally suited to the 3-5 years room, having qualified as a primary school teacher. Contrary to the claimant's allegations, Ms Kiyani stated that she had no issues with Kirsty Wardlaw's performance, personal appearance, or hygiene.

(106) Following issue of the claimant's letter of termination on 25 March 2020 (page 160 of the Bundle), confirming her redundancy and last day of employment on 22 April 2020, the claimant exercised her right to appeal against Ms Kiyani's decision, and she did so in writing within five working days from her receipt of Ms Kiyani's letter.

(107) The claimant appealed against her dismissal by letter dated 27 March 2020 addressed to Ms Kiyani, a copy of which was produced to the Tribunal at page 165 of the Bundle. Her letter of appeal read as follows:

"Hi Saima,

Hope you are also keeping well in these very tough times.

With reference to your email dated 25/03/2020, I have taken some advice and do not quite understand why you have decided to make me redundant as you already know I am a vulnerable person being pregnant. Your reasoning does not make any sense "as a result of the current coronavirus outbreak." There has been a government scheme introduced to help employers in these difficult times which means the government will pay 80% of the wages therefore this will not cost you much and will not put me in financial hardship.

The advice that I have been given is to ask you to put me on furlough leave for the time being so that I am covered by the governments scheme, and re-evaluate the situation once you re-open.

You have always been looking for staff and with everything going on there is no way for you to be able to tell what the demand will be when you re-open. I feel the reason why I am being made redundant is due to the fact that I am pregnant as you have not told me your criteria for picking me.

I would like to appeal this decision on the basis that this is unfair and you are doing this due to my pregnancy, I feel it is very coincidental that I have been picked.

I hope this matter can be resolved as otherwise you will leave me no choice but to take it further.

I look forward to hearing from you.

Kind Regards,

Nadia Ghaffar"

(108) On 6 April 2020, the claimant, having heard nothing further from Ms Kiyani, since her letter to her dated 27 March 2020, emailed her stating that she would like to know what Ms Kiyani was doing with regards to her appeal. A copy of that email was produced to the Tribunal at page 169 of the Bundle.

(109) The following day, 7 April 2020, Ms Kiyani sent an email to the claimant, a copy of which was produced to the Tribunal at page 170 of the Bundle. That email from Ms Kiyani to the claimant read as follows:

> *"Hi Nadia*
>
> *Firstly I don't appreciate you threatening me.*
>
> *Secondly I'm not sure how you feel discriminated due to a pregnancy I know nothing of.*
>
> *You are more than aware that there are only 18 children on the register. 11 going to school in August. It is not viable for me to carry staff unnecessarily. You are not the only member of staff that has been laid off.*
>
> *I am not aware of any staff being advertised or recruited for Innocence.*
>
> *The nursery is closed till further notice.*
>
> *You are more than welcome to escalate this how you deem fit.*
>
> *Do not hesitate to contact me if you wish to discuss this further.*
>
> *Kind Regards,*
>
> *Sam Kiyani"*

(110) In her witness statement to the Tribunal, Ms Kiyani stated that her email of 7 April 2020 to the claimant (page 170 of the Bundle) was sent in response to "***repeated phone calls that I had received from her threatening legal action and accusing me of discrimination."***

(111) In her oral evidence to the Tribunal, Ms Kiyani could not provide any further detail or specification of these repeated phone calls. The claimant denied having threatened Ms Kiyani by repeated phone calls, or otherwise.

(112) On 13 April 2020, Mr Aqeel Amjad, wrote to the claimant, as per the copy letter produced to the Tribunal at page 171 of the Bundle. On letter heading bearing both the Innocence Nursery logo and address, as well as a Citation stamp, Mr Amjad, who was described as Admin / Accounts Manager, wrote to the claimant to acknowledge receipt of her written appeal dated 27 March 2020 against her dismissal for redundancy.

(113) Mr Amjad invited the claimant to an appeal hearing to discuss the grounds of her appeal at 2.00pm on Wednesday, 15 April 2020, explaining that, due to the restrictions imposed by the coronavirus, he proposed that this meeting take place by telephone.

(114) He advised the claimant that, if she wished, a work colleague or accredited trade union representative could accompany her at the meeting, and he asked the claimant to confirm whether these meeting arrangements were suitable to her as soon as possible in case alternative arrangements were necessary.

(115) In the event, following an email from the claimant on 14 April 2020, a copy of which was not produced to the Tribunal in the Bundle, Mr Amjad again wrote to the claimant, by letter dated 21 April 2020, a copy of which was produced to the Tribunal at page 172 of the Bundle.

(116) In acknowledging the claimant's email of 14 April 2020 requesting to reschedule the telephone call to discuss her appeal, Mr Amjad invited her to an appeal hearing at 2.00pm on Friday, 24 April 2020. His invite letter was otherwise in the same terms as his earlier letter dated 13 April 2020.

(117) In his evidence to the Tribunal, Mr Amjad stated that he called the claimant, as discussed by him with Citation, the respondents' external HR advisors, to discuss the claimant's appeal against dismissal.

(118) In his oral evidence to the Tribunal, Mr Amjad recalled that this telephone call appeal hearing with the claimant lasted around ten minutes, and he stated that he took handwritten notes, during the call, which were later typed up, and a copy of the typed up minutes of the appeal meeting held on 24 April 2020 were produced to the Tribunal at pages 173 to 176 of the Bundle.

(119) Whilst Mr Amjad, in his oral evidence to the Tribunal, referred to handwritten notes having been taken during the phone call on 24 April 2020, these handwritten notes were not produced to the Tribunal.

(120) Further, the claimant, in her evidence to the Tribunal, stated that she did not receive a copy of these typewritten notes of the appeal hearing until she received the Bundle from the respondents' consultant, Mr Tom Muirhead from Citation Limited. In particular, a copy of these minutes was not sent to the claimant, along with Mr Amjad's letter of 7 May 2020, rejecting her appeal and confirming that her dismissal stood.

(121) In her evidence to the Tribunal, and as per paragraph 10 of her witness statement, the claimant referred to this appeal hearing as ***"conducted over the phone by Saima's cousin Aqeel who refused to listen to my point of view and decided to shout at me over the phone. His attitude throughout was very aggressive and unprofessional. I had never been part of an appeal before but this was not how I believed one should have been carried out. The process felt like a complete waste of time and it felt like it was only done to tick a box. I knew that due to Aqeel's negative attitude and aggressive nature that the decision had already been made about continuing with the redundancy. The conversation ended with me feeling victimised and dissatisfied."***

(122) Following her telephone conversation on 24 April 2020 with Mr Amjad, the claimant emailed the respondents, providing further information, as requested by Mr Amjad. Her email, a copy of which was produced to the Tribunal, at page 177 of the Bundle, read as follows:

> *"Dear Aqeel,*
>
> *Further to our telephone conversation I would like to advise:*
>
> 1. *You asked me for the reason for my appeal – As a result of me being made redundant I am in financial hardship and I am also in a position where I cannot go and get a new job due to COVID 19. I feel that the decision was unfair and discriminative against me due to my pregnancy. I am amazed that both you and Saima are both denying the fact that you that you knew I was pregnant and feel this solidifies the fact that everything that happened was due to my pregnancy. I can and will prove that Saima did know I was pregnant but first I will wait to see what your outcome of the appeal will be.*
>
> 2. *You keep saying that there is not enough demand and that there is no longer as many children, this again does not make any sense as you are a business and therefore if one child goes you will be trying to get more children to join. Possibly a few children could have left but how do you know more people will not join when you re-open. The whole time I have worked in the nursery staffing has always been an issue, staff and children have had to move between rooms to ensure the ratios of children to staff was kept correct as staff turnover is high. If I was made redundant once everything re-opened I would have been more understanding as at that point you would have known exactly what the numbers were going to be but at this point*

you are only going to have a rough idea and not an exact number even with emails from children's parents.

I really hope this matter can be resolved and I am looking forward to see what the outcome of the appeal is going to be.

Regards

Nadia"

(123) On 5 May 2020, the claimant still not having had any decision from her appeal heard on 24 April 2020, she emailed the respondents' Ms Kiyani, as per the copy email produced to the Tribunal at page 178 of the Bundle, reading as follows:

"Hi Saima/Aqeel

I would like to know if there has been a decision made after my appeal on 24.4.20.

According to your previous letter my employment was due to end on 22.4.20 however I have not received any further information regarding this. I have also not received a payment for April. Could you tell me why this is.

Could I also have a copy of my payslips for March and April.

Could you respond and provide me with an update.

Regards

Nadia"

(124) In his oral evidence to the Tribunal, Mr Amjad stated that, after the appeal meeting with the claimant, on 24 April 2020, he had further discussions with Ms Kiyani, and with Citation, and he issued the appeal outcome letter to the claimant on 7 May 2020, as per the copy letter of that date, produced to the Tribunal at pages 179 and 180 of the Bundle.

(125) That letter of 7 May 2020 which was issued under his name on the respondents' headed notepaper, and with the Citation stamp, was not signed off by him with the designation of Admin / Accounts Manager used in his earlier letters of 13 and 21 April 2020 to the claimant.

(126) Mr Amjad's appeal outcome letter to the claimant read as follows:

> *"Dear Ms Ghaffar*
>
> *Further to the redundancy appeal hearing held on 24th April I am writing to confirm my decision. At the meeting you chose not to be accompanied.*
>
> *The purpose of the hearing was to consider your appeal points regarding the termination of your employment on grounds of redundancy. I have considered the points you raised both in your written appeal, your oral submissions at the meeting and subsequent email. I respond to each of your points below:*
>
> - *Decline in occupancy level*
> - *Poor performance as a Practitioner*
> - *Redundancy placed you in financial hardship as you were unable to get a job due to COVID-19*
> - *The decision was unfair and discriminatory due to your pregnancy*
>
> *I have given very serious consideration to the points you raised in your appeal.*
>
> *I am satisfied that there is a genuine need for a workforce reduction in general and decline in numbers within the preschool room and that there is no longer a requirement for your position as a Nursery Practitioner.*

You were also aware that your performance was not satisfactory and had numerous meetings with Sam who had tried to address the issues. I consider that performance is a fair criterion when deciding on what should be taken into account for redundancy selection.

I am sorry that the redundancy has placed you in financial hardship but I don't see how this could have been avoided as the Nursery is losing money and needed to take action to safeguard the future of the business.

The decision to make you and another former colleague redundant was done for financial reasons and due to a decline in occupancy. The Company were not aware of your pregnancy and in spite of your claim that we were, you have failed to provide any documentation to support your pregnancy. I struggle to understand why you would not have formally advised us. There is a legal requirement for Employees to provide Employers with formal notification e.g. a MAT B1 form. This form is normally given to the expectant Mother at around 20 weeks of pregnancy and confirms the expected week of confinement. You advised in your appeal meeting that you didn't have a MAT B1 form as it is not given out until 24 weeks which is incorrect. I also took into account that you had not bought [sic] *any supporting pregnancy documentation for me to consider during or following the Appeal hearing. Therefore, I regret to inform you that having considered all of the information available to me I find that your appeal is denied.*

It is my conclusion that the original decision to dismiss you on the grounds of redundancy was the correct decision and that a fair, open and transparent consultation process was undertaken. My investigations have found that the evidence you

submitted after that decision was taken does not, in my opinion, alter the validity of that decision.

My own decision, therefore, is that I am unable to uphold your appeal and that your dismissal stands.

This decision ends the Company's appeal process and there is no further right to appeal.

Yours sincerely,

Aqeel Amjad"

(127) In his evidence to the Tribunal, Mr Amjad, in his written witness statement, and in his oral evidence, gave no evidence that he had carried out any investigations. He did say that, after his telephone call appeal hearing with the claimant, he had discussions with Ms Kiyani, and with Citation, but the nature and extent of those conversations were not explored in cross-examination at this Final Hearing.

(128) Further, while Mr Amjad's letter to the claimant on 7 May 2020 referred to "***a fair, open and transparent consultation process was undertaken***", in his evidence to the Tribunal, Mr Amjad, in his written witness statement, and in his oral evidence, gave no evidence as to what that consultation process involved.

(129) The meetings held by Ms Kiyani with staff, in particular the claimant, on 20 March 2020, were not described by her, in her evidence to the Tribunal, as being part of any consultation process. The letter of dismissal issued to the claimant by Ms Kiyani on 25 March 2020, after lockdown, and when the claimant was not at work, was presented as a fait accompli, and not as the outcome of any consultation process with affected staff.

(130) Indeed, contrary to the respondents' own "***Redundancy Policy***," copy produced to the Tribunal, at page 102 of the Bundle, the claimant was

not involved or consulted in any meetings to discuss selection criteria, any alternative posts, etc, nor given the opportunity to discuss the selection criteria (if any) drawn up by the respondents.

(131) There was produced to the Tribunal, at page 216 of the Bundle, a letter dated 10 May 2021, addressed "***to whom it may concern***", from a Dinesh Hallan, for and on behalf of DA Accountants, Glasgow, as accountants and tax advisers to the respondent company. In that letter, Mr Hallan stated : "***We can confirm that for the period 23rd March 2020 until 10th August 2020, the business was closed, culminating in a detrimental fall in turnover and hence profitability."***

(132) No business management accounts, or bank statements, etc, were produced by the respondents at this Final Hearing to vouch their financial standing as at March / May 2020.

(133) On the evidence before the Tribunal, as a result of the COVID-19 lockdown on 23 March 2020, the respondent's business operated that week, week commencing 23 March 2020, but at a reduced level, then closed, and the respondents furloughed some staff.

(134) The claimant was not offered the opportunity of furlough by the respondents. Staff then employed by the respondents, but not made redundant, or resigning, were placed on furlough under the UK Government Coronavirus job retention scheme introduced by HM Treasury. The respondents' business resumed operations again from August 2020, when the nursery re-opened.

(135) In these Tribunal proceedings, the claimant made claims for holiday pay and notice pay. In their evidence to this Tribunal, the respondents accepted that there was some confusion at the time over the claimant's final payments, under explanation that there was a lot going on in their business at that time due to COVID-19 and the associated restrictions. As a result, the respondents initially underpaid the claimant.

(136) The respondents' reply to those claims for holiday pay and notice pay were set out in an email from their representative, Mr Tom Muirhead of Citation Limited, to the claimant's representative, Mr Kayani, on 10 November 2020, a copy of which was produced to the Tribunal at pages 34 and 35 of the Bundle.

(137) The claimant was given one month's notice of termination of her employment, which the respondents' letter of 25 March 2020 stated ended on 22 April 2020. She was paid for the period 1 to 22 April 2020 on 5 June 2020. The respondents acknowledged that due to a processing error, the claimant's final payment was late, however it was paid on 5 June 2020.

(138) On 15 May 2020, the claimant emailed Ms Kiyani at the respondents as she had not heard back from her as regards her final pay that was due to her on 30 April 2020. She stated that Ms Kiyani was putting her "***in financial difficulty and this is not helping***."

(139) Ms Kiyani replied that same day, stating that : "***You were made redundant in March and you received your wages and holiday pay. You are not entitled to any further payment from us. I am not sure why you are under the impression that you should be receiving wages for April."*** Copy of these emails were produced to the Tribunal at pages 181 and 182 of the Bundle.

(140) Finally, the claimant, in turn, replied to Ms Kiyani yet later that same day, 15 May 2020, stating that :

> *"Yes I was made redundant in March but with one month's notice effective from the 22/04/20 so you are required to pay me for this time. I am shocked that you think this is not required. Why would you tell me your accountant is looking into it if I am not entitled to any money. Honestly you are not making any sense at all.*

Also in my March payslip there is no holiday pay included, it only includes the hours I worked. There was also no Statutory Guarantee pay of £29 per day for the first five workless days which was mentioned in the letter dated 20/03/20.

I also have not got my P45 which I do require and should already have been sent to me by now as well. Could you please forward me this."

(141) Further, as per the June 2020 payslip issued to the claimant, copy produced to the Tribunal at page 212 of the Bundle, she was paid for 7 days accrued holiday at the rate of 8 hours per day x £10.50 = £588 gross, and a cheque for the net sum due in respect of the claimant's accrued leave in the sum of £377.89 was issued to her by the respondents.

(142) As the first cheque issued to the claimant (dated 31 May 2020) was not received by her, it was cancelled by the respondents, and a fresh cheque issued as the claimant had changed address, and as she had received neither cheque, when matters came to light at a hearing before the Tribunal, the respondents cancelled that second cheque, and issued a third cheque to the claimant's new address, which cheque dated 23 March 2021 was subsequently received, and cashed, by the claimant.

(143) The Tribunal was provided, at page 183 of the Bundle, with a screenshot taken on 29 August 2020, showing copy advertisements dated August 2020 for a pre-school Room Leader vacancy in Innocence Nursery, and an Early Years Practitioners vacancy at Innocence Nursery.

(144) In her evidence to the Tribunal, Ms Kiyani explained that, after lockdown from March to August 2020, the respondents had to make operational plans to re-open the nursery, and that included seeking new

staff by advertising to meet the increased demands that were expected of the nursery from August 2020.

(145) In her evidence to the Tribunal, Ms Kiyani explained that she was not certain of the relevance of these advertisements to this Tribunal claim, given that she took the decision to dismiss the claimant in March 2020, and there was no way that she could predict what the nursery's staffing needs might have been five months later.

(146) Further, and in any event, Ms Kiyani advised the Tribunal that she would not have considered appointing the claimant to a Room Leader vacancy given the problems she had experienced with her performance in the more junior post of Nursery Practitioner.

(147) Also, Ms Kiyani stated, the claimant would not, in Ms Kiyani's view, have been capable of performing a Team Leader role, nor the third advertised role which was for the 1-2 year old (baby) room, where Ms Kiyani did not think that the claimant would have been suitable for that role as while she recalled that the claimant had spent a day at some point during her employment with Innocence Nursery in the baby room, Ms Kiyani's recollection was that did not work out and the claimant hated that role.

(148) On 18 May 2020, the claimant notified ACAS confirming, as a prospective claimant, that Innocence Nursery Limited was the prospective respondent, and an ACAS Early Conciliation certificate was issued to her on 18 June 2020, confirming that the claimant had complied with the requirement under the **Employment Tribunals Act 1996, section 18A**, to contact ACAS before instituting proceedings in the Employment Tribunal.

(149) She presented her ET1 claim form to the Employment Tribunal on 18 June 2020, a copy of which was produced to the Tribunal at pages 4 to 17 of the Bundle. Her ACAS EC certificate was produced at page 18 of the Bundle.

(150) After termination of her employment with the respondents, on 22 April 2020, the claimant did not secure any new employment until April 2021, when she obtained employment in her brother's shop. As such, when she presented her ET1 claim form to the Employment Tribunal, on 18 June 2020, the claimant's answer to section 6 was that she had not got another job.

(151) The claimant provided Further and Better Particulars of her claim on 13 May 2021, a copy of which were produced to the Tribunal at pages 41 and 42 of the Bundle. The respondents (who had presented a late ET3 response on 15 September 2020 defending the claim, and seeking an extension of time to present a late response – as per the copy ET3 produced at pages 19-31 of the Bundle) replied to the claimant's Further and Better Particulars, on 27 May 2021, as per the copy produced to the Tribunal at pages 43 and 44 of the Bundle.

(152) In the course of these Tribunal proceedings, the claimant has quantified her claim, and produced several Schedules of Loss. The Schedule of Loss, produced in the Bundle, at pages 218 and 219, totalling **£24,976.04**, was stated to be her losses as at 12 May 2021.

(153) As per another Schedule of Loss for the claimant, produced to the Tribunal on 17 June 2021, in the then total of **£24,976.04**, the following information was given in answer to Order 3(c) to (f) of Employment Judge O'Donnell's case management orders, as follows:

> *(c) The claimant was unsure about a pension scheme as she was never given any paperwork but after being dismissed, a pension deduction was made on her wage slips.*
>
> *(d) The claimant received:*
>
> *Jobseekers Allowance received 11th May until 22nd June.*

Maternity allowance received 30th June until 24th February.

Child benefit received from 30th September (backdated) until present.

(e) When the claimant was made redundant, this was end of MARCH 20. The UK was in a national lockdown and she was 5 months pregnant. She was left in no position to apply for jobs as she was in a vulnerable category. In July 20, once lockdown started to ease, she was 8 months pregnant and not in a state to start a new job. She has now managed to secure a job as she is at the end of her maternity period.

(f) Due to not having an income, the claimant reduced her costs by selling her house and moved back in with parents. She also applied for a mortgage holiday during the lockdown period before the house was sold."

(154) No supporting documentation was provided to the Tribunal, by the claimant, or on her behalf, along with that updated Schedule of Loss submitted on 17 June 2021, notwithstanding the terms of Employment Judge O'Donnell's case management orders.

(155) Despite the case management orders made by Employment Judge O'Donnell, on 24 May 2021, no updated Schedule of Loss was produced until after this Final Hearing had started on 1 March 2022, and the Tribunal sought to clarify the amount of compensation being sought by the claimant, and the basis for her calculations.

(156) Firstly, by email to the Tribunal, sent on 2 March 2022, at 09:04, the claimant's representative, Mr Danish Kiyani, submitted an updated Schedule of Loss, entitled "***Amended Loss of Earnings Schedule***", which was in the following terms:

SCHEDULE OF LOSS AS AT 1st March 2022:

1 BASIC AWARD

PAST LOSSES:

Loss of earnings

Effective date of redundancy- 22/04/2020

Effective date of maternity leave- 05/08/2020

Net pay: £1581 per month

Length of time out of work out of work: 15 weeks

Weekly pay- £395.25

15 weeks loss of pay- 15 x £395.25 = ***£5928.75***

2 COMPENSATORY AWARD

Injury to feelings:

Nadia was put under financial hardship due to being made redundant, she had a mortgage and bills to pay along with having to get organised for having a new baby. This caused her a great deal of stress and anxiety during her pregnancy. Nadia suffered panic attacks due to the amount of stress she was put under. She felt helpless as she was left in a situation where the country had gone into national lockdown due to covid19, she was around 5 months pregnant at this point, just been made redundant and not in a position to go and easily get a new job. She had to sell her house and pay early termination fees as she could not keep up with the payments. All this could have been avoided if Nadia was placed on Furlough leave instead of redundancy.

£14000

TOTAL ***£ 19928.75***

(157) Secondly, by further email to the Tribunal, sent on 2 March 2022, at 13:53, the claimant's representative, Mr Danish Kiyani, submitted a further updated Schedule of Loss, which was in the following terms:

SCHEDULE OF LOSS AS AT 1th [sic] *March 2022:*

1 BASIC AWARD

PAST LOSSES:

Loss of earnings

Effective date of redundancy- 22/04/2020

Effective date of maternity leave- 05/08/2020

Net pay: £1581 per month

Length of time out of work out of work: 15 weeks

Weekly pay- £364.85

15 weeks loss of pay- 15 x £364.85 = ***£5472.75***

LESS income received

Current Employment started 01/04/21 till 31/10/21 (£8000.00)

(8 months 1000 x 8)

Maternity allowance 01/04/20 – 01/12/20 (£604 x 9 months) (£5436.00)

Maternity allowance 01/11/21 – 01/03/21 (£604 x 5 months) (£3020.00)

Child benefit 15/08/20 to 01/03/22 (80 weeks x £21.15) (£1692.00)

Second child benefit 01/12/21 to 01/03/22 (13 weeks x £14) (£182.00)

2 COMPENSATORY AWARD

Injury to feelings:

Nadia was put under financial hardship due to being made redundant, she had a mortgage and bills to pay along with having to get organised for having a new baby. This caused her a great deal of stress and anxiety during her pregnancy. Nadia suffered panic attacks due to the amount of stress she was put under. She felt helpless as she was left in a situation where the country had gone into national lockdown due to covid19, she was around 5 months pregnant at this point, just been made redundant and not in a position to go and easily get a new job. She had to sell her house and pay early termination fees as she could not keep up with the payments. All this could have been avoided if Nadia was placed on Furlough leave instead of redundancy.

£24000

3 INTEREST

Past financial loss (£5472.75)

Interest at 8% per year on £5472.75 = £437.82 per year

From 22 APRIL 2020 to 05 AUGUST 2020 = 105 days

105 days ÷ 365 days x £437.82 = ***£125.95***

Injury to feelings (£14000)[sic]

Date of discrimination: 23 MARCH 2020

Date of calculation: 01/03/2022

Interest at 8% per year on £24000 = £1920 per year

From 23 MARCH 2020 to 1 MARCH 2022 = 752 days

752 days ÷ 365 days x £1920 = ***£3955.73***

TOTAL ***£ 15224.43***

(158) The weekly pay, previously stated as **£395.25** was restated as **£364.85,** and the injury to feelings, previously stated as **£14,000** was increased to **£24,000.** Deductions were included for income received, including **£8,000** for her current employment (April to October 2021), and interest calculations were added.

(159) The Tribunal further notes and records that in respect of the income received from current employment (started 1 April 2021 to 31 October 2021) in the sum of **£8,000**, the claimant provided copy payslips from Value Stores (Scotland) Limited, sent to the Tribunal by email from Mr Kiyani, her representative, on 3 March 2022 at 09:16, and copy bank statements emailed by him to the Tribunal on 4 March 2022 at 09:29.

(160) These additional documents, which were copied to Mr Ridgeway, the respondents' representative, by email, were added to the Bundle used by the Tribunal. The copy payslips, from Value Stores (Scotland) Limited, show 7 monthly payments of wages from that company to the claimant, dated 30 April 2021, May 2021, June 2021, July 2021, August 2021, September 2021 and October 2021, and each payment in the monthly sum of **£1,000** gross, less deductions for NI of £24.36, producing net monthly pay of **£975.64.**

(161) The bank statements, from the claimant's TSB spend & save account, show 7 monthly payments of wages from Value Stores (Scotland) Ltd paid in by faster payment on 29 April, 28 May, 28 June, 30 July, 30 August, 29 September, and 26 October, all 2021, and each payment in the sum of **£975.64**, and so totalling **£6,829.48**, and not the £8,000 stated in the Schedule of Loss.

(162) In her oral evidence to the Tribunal, the claimant confirmed her current circumstances, as at the date of this Final Hearing, to be that she is on maternity leave, from her job at her brother's shop in Glasgow, with

Value Stores (Scotland) Limited, following the birth of her second child in November 2021.

Tribunal's assessment of the evidence heard at the Final Hearing

49. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the agreed joint Bundle lodged and used at this Final Hearing, insofar as spoken to in evidence, which evidence and our assessment we now set out in the following sub-paragraphs:

(1) Mrs Nadia Ghaffar: Claimant

a. The claimant was the first witness to be heard by the Tribunal on Tuesday, 1 March 2022, and continued to the following day, giving her evidence from her family home, via CVP. She, and her husband, Mr Danish Kayani, were sharing the same device to join the Hearing by CVP.

b. After being sworn, Mrs Ghaffar spoke to the terms of her written witness statement, dated 13 September 2021, running to six pages, and across 14 separate paragraphs. She confirmed it was true to the best of her knowledge and belief, and that she had no amendments to make to its terms.

c. As both the claimant and her husband could be seen by the Tribunal on screen at the same time, the Tribunal was satisfied that there was no prompting or coaching of the claimant while she gave her evidence to the Tribunal.

d. She was thereafter subject to cross examination by the respondents' representative, Mr Ridgeway, and questions of clarification by the Tribunal. The Tribunal allowed Mr Ridgeway a 20 minute extension of time, on his timetabled time for questioning the claimant. The claimant was asked no further questions by her

husband, as her representative, by way of his re-examination of her evidence.

e. In the course of her cross-examination on day 1, Mr Ridgeway, the respondents' representative, objected, stating that it looked like Mr Kayani was taking notes, and prompting the claimant, as Mr Ridgeway had been informed by his client, Ms Saima Kiyani. He submitted that when he asked the claimant a question, Mr Kayani wrote something, and the claimant's eyes looked down.

f. When Mr Kayani stated that he was taking notes of the questions being asked, Mr Ridgeway stated that he did not think that Mr Kayani should be present, and that he should be in a different room from the claimant, and that he was not comfortable with him being there, stating that Mr Kayani's behaviour had changed.

g. Mr Ridgeway submitted that Mr Kayani should be in a different room, and on a different device. He recalled how, at the start of the Hearing, on hearing that the respondents' two witnesses, Caitlin Howie and Nicola Newman, were at work, and so they would be using Ms Saima Kayani's computer to give their evidence on CVP, the Judge had enquired if they could do so from a separate device, and apart from Ms Kiyani.

h. Mr Kayani stated that it was not feasible for him and his wife to be apart, as they only had one laptop, and the two children were in another room with a relative, but he did agree to sit away from his wife and observe proceedings. The Judge indicated that the Tribunal was content with that arrangement, and so cross-examination continued.

i. In giving her evidence in chief to the Tribunal, the claimant did so, reading from her written witness statement, and cross referring, when appropriate, to documents in the Bundle produced to the Tribunal, as and when the need arose, and answering questions of

clarification asked of her by the presiding Judge as she went through her evidence in chief.

j. Overall, the claimant gave her evidence clearly and confidently. She was adamant that the respondents were aware of her pregnancy before her dismissal. While subject to cross examination by the respondents' representative, where her evidence in chief was tested by Mr Ridgeway, she, at times, appeared to be hesitant, if not evasive, or equivocal, on certain points, in particular as regards her allegations of fabrication of documents by the respondents, and as regards the performance issues raised by the respondents in their evidence / documents in the Bundle..

k. That said, the claimant generally otherwise satisfied us that, by and large, she was giving the Tribunal a full and truthful recollection of events, as best she could remember them, some two years previously, and she came across to the Tribunal as a credible witness, even if there were some issues about the reliability of her sworn testimony.

l. On the afternoon of day 1, during Mr Ridgeway's cross-examination of the claimant, when he was putting to her that she was lying (which she denied), the Judge had to tell him to moderate his tone towards the claimant.

m. When Mr Ridgeway put it to the claimant, later on day 1, that she was not being honest in declaring his earnings, post-employment with the respondents, and that she was trying to get more money than she was entitled to from the respondents, the claimant explained that her Schedule of Loss had been prepared by her husband, and that they were not lawyers, and he had never prepared a Schedule of Loss before.

n. The claimant did, however, accept that her Schedule of Loss before the Tribunal was not accurate, as it did not disclose her earnings

from her brother's shop, and she agreed to submit a revised Schedule of Loss for the following morning, replacing pages 218 and 219 in the Bundle.

o. On day 2, when an updated Schedule of Loss was produced to the Tribunal, the claimant was asked by Mr Ridgeway why the compensatory award, for injury to feelings, had increased £10,000 to a new sum of £24,000. In reply, the claimant stated that after online research, she and her husband felt an increase was due, and when Mr Ridgeway put it to her, that this was about the money, the claimant stated it was not about the money, but about the principle.

p. She stated that she had been made redundant for no reason, she was pregnant, and she had lost her job, and this produces a great amount of stress, she had bills to pay, sell her house, and her hormones were everywhere with her first pregnancy.

q. While accepting Mr Ridgeway's point that she had produced no medical evidence to support her stress, or to support her injury to feelings claim, the claimant stated that while she did not have anything from her doctor, she had told her midwives about it. She also explained that, during lockdown, she could not get appointments to see her GP.

r. On Friday, 4 March 2022, the claimant gave some further sworn evidence related to her updated Schedule of Loss, and the supporting payslips and bank statements produced to the Tribunal, on 3 and 4 March 2022, and she was cross examined on that further evidence by the respondents' representative.

s. In the course of that cross-examination by Mr Ridgeway, the claimant stated that they had had a difficulty getting into the online banking system, and it was not reluctance on their part to produce the bank statements now provided to the Tribunal, and copied to the respondents' representative.

t. When the Judge made an aside remark, following the claimant's statement, that it was not only CVP technology that was not working (as evidenced several times during this Hearing), but the claimant's online banking too, Mr Ridgeway stated that the Judge's comment was ***"biased."***

u. When Mr Ridgeway then put to the claimant that her husband had become extremely agitated, the claimant replied saying that he answered the question put, and when Mr Ridgeway then asked her had she said she was paid cash in hand, she replied stating that she had not done so, she had never had a job where she was paid cash in hand, and that "***100% did not come out of my mouth"***.

v. Mr Ridgeway stated that he had a note that the claimant had said that, but "***the final arbiter is the Judge's notes."*** Having checked his notes, of the claimant's evidence on days 1 and 2, the Judge has no record of the claimant saying she was paid cash in hand by her brother. She spoke of receiving monthly earnings of **£1000 net**, which, in light of the payslips and bank statements subsequently produced, was clearly an error by the claimant, as it was £1000 **gross** per month.

w. Where there was a conflict between the evidence of the claimant, and that led on behalf of the respondents, about the respondents' state of knowledge of the claimant's pregnancy before her dismissal, in particular from Ms Saima Kayani, the Tribunal preferred the claimant's evidence.

x. It came across to the Tribunal as having the ring of truth to it, and, on balance of probability, her recollection of events was more likely than not, rather than the often repeated blanket denial made by Ms Kiyani, particularly when we considered the whole evidence led before us, where the claimant's account of her pregnancy being known to Ms Kiyani and other staff was spoken to by other

witnesses led on the claimant's behalf, although denied by other witnesses led on the respondents' behalf.

y. On the conflict of evidence about the claimant's performance issues, and fabrication of documents by the respondents, we are satisfied, having considered the whole evidence, oral and documentary, before us, that there were some minor performance issues relating to the claimant, but the claimant has not convinced us that the respondents fabricated documents in that respect.

(2) <u>Miss Jasmine Mannix: formerly Nursery Practitioner</u>

a. The claimant's first supporting witness was Miss Mannix, aged 22, currently a care assistant with Staff Carren, but formerly employed by the respondents as a Nursery Childcare Practitioner from January 2020 to April 2020.

b. She gave her evidence to the Tribunal on the morning of Wednesday, 2 March 2022, by CVP, but adjourned to later that afternoon, to allow her to pre-read the documents to be relied upon by the respondents' representative, Mr Ridgeway, in his cross examination of this witness, the witness advising the Tribunal that she is dyslexic, and she could not access the documents on her mobile phone, while using her laptop for the CVP video connection.

c. After being sworn, Miss Mannix spoke to the terms of her undated witness statement, running to three short paragraphs, on one undated, and unsigned, typed written witness statement, as produced to the Tribunal, and which she stated she had prepared on 11 September 2021.

d. She was thereafter subject to cross examination by the respondents' representative, Mr Ridgeway, and questions of clarification by the Tribunal. She was not asked any further

questions by the claimant's representative, Mr Kayani, by way of re-examination of her evidence.

e. In giving her evidence in chief to the Tribunal, Miss Mannix did so, reading from her written witness statement and, as required, answering questions of clarification asked of her by the presiding Judge.

f. While Miss Mannix was subject to cross examination by the respondents' representative, Mr Ridgeway, her evidence in chief on the respondents' state of knowledge of the claimant's pregnancy was not undermined, and she adhered to her stated position that the claimant's pregnancy was known to, and acknowledged by, the respondents' proprietor, Ms Saima Kiyani, and other staff, in the period leading up to the claimant's redundancy from the respondents' employment in April 2020, and she (Miss Mannix) was aware of the claimant's maternity appointments.

g. Further, Miss Mannix was clear in her recollection that, one morning in February 2020, as she was sitting with some children in the nursery, Ms Saima Kiyani, the nursery manager, came into the room and spoke to the children, and told them that the claimant was pregnant, and the children and some parents were excited by this news.

h. She was very clear that Ms Kiyani and other staff in the nursery were aware of the claimant's pregnancy. She denied Mr Ridgeway's comment that she was being dishonest in her evidence, and insisted that the statements made in her witness statement were true. She also denied having been coached, and told what to say.

i. Overall, we were satisfied that in those regards Miss Mannix was giving the Tribunal a true recollection of events, as best as she could remember them, from some two years ago, and she came

across to the Tribunal as a credible and reliable witness in that regard.

j. On the matter of the claimant's performance issues, and the allegation that the respondents had maybe fabricated some documents, we found that Miss Mannix's evidence was confused and confusing, as she while agreed that she had signed the document at page 134 of the Bundle, yet she was unable to account for her written comments about the claimant. It seemed to us that it was perhaps a case of "***selective amnesia***" where she did not want to acknowledge things in the presence of the claimant, who had called her as a witness.

k. On the whole evidence available to us, we were satisfied that there were some minor performance issues relating to the claimant, but the claimant has not convinced us that the respondents fabricated documents in that respect.

(3) <u>Miss Kelly Quail: formerly Deputy Nursery Manager</u>

a. The claimant's final supporting witness was Miss Quail, who gave her evidence to the Tribunal on the morning of Wednesday, 2 March 2020, by CVP, attending in terms of a Witness Order issued by the Tribunal on 1 March 2022, for her attendance as a witness for the claimant on 2/3 March 2022.

b. Aged 36, Miss Quail is currently a family support worker in a primary school, but she was formerly employed by the respondents as deputy nursery manager, until her resignation in March 2020, after about four months employment.

c. After being sworn, Miss Quail spoke to the terms of her witness statement, undated and unsigned, but extending to three short paragraphs, over one typewritten page. She confirmed it was true to the best of her knowledge and belief, and she had no

amendments to make to its terms, which she had prepared in September 2021.

d. She was thereafter subject to cross examination by the respondents' representative, Mr Ridgeway, and questions of clarification by the Tribunal. Finally, she was asked some further questions by the claimant's representative, in his re-examination of her evidence.

e. In giving her evidence in chief to the Tribunal, Miss Quail did so reading from her written witness statement, and, at the start of her evidence, she apologised for being unprepared, and stated that she had only found out the previous day that she was being called to give evidence for the claimant, although she had previously given her witness statement to the claimant around September 2021.

f. Miss Quail confirmed that she had nothing to change in her witness statement, and that she had access to the Joint Bundle although, given that she was giving evidence from her current place of work, at a primary school, she stated that she could only access documents on screen on a computer with restrictions. Time was allowed for her to confirm that she had located the document, and been able to read it, before she was further questioned.

g. Under cross examination by Mr Ridgeway, the respondents' representative, Miss Quail was emphatic that she had not given untruthful evidence, that she is a professional person, and the fact she admitted to not liking Ms Saima Kiyani's management style at the nursery did not mean she bore a grudge against the respondents. In replying to Mr Ridgeway, she stated that was a "***ridiculous statement."***

h. Miss Quail was robust and, at times, combative in her responses to Mr Ridgeway, and she advised him that she did not like his style. She was insistent that there were no performance issues with the

claimant, despite the respondents' assertions to the contrary. She recalled there being performance issues with Kirsty Wardlaw, but not the claimant.

i. While not wishing to accuse anybody, and while not saying that the performance notes relating to the claimant, as put to her in cross-examination, were fabricated, Miss Quail stated that she did not write these notes, and she did not recognise the documents, although it did look like her handwriting. She recalled Ms Kiyani telling parents and children that the claimant was pregnant.

j. In reply to a question from Mr Ridgeway, she explained that while her email resignation letter of 20 April 2020 did not give a reason, her view was that she did not like Ms Kiyani's management style, and she was not willing to have that, as she had been a manager previously, and she had been supportive and nurturing to her staff but that was not, in her evidence, Ms Kiyani's style at the Innocence Nursery, and she became uncomfortable with that style.

k. In his closing submissions for the respondents, Mr Ridgeway submitted that Miss Quail was being untruthful when she claimed that there were no performance issues with the claimant, and untruthful when she claimed that she knew of the claimant's pregnancy.

l. On the matter of the respondents' state of knowledge of the claimant's pregnancy, prior to her dismissal, the preponderance of evidence before us from the claimant and Miss Mannix, both of whose evidence we accepted, was that the respondents, and Ms Kiyani in particular, did know. We have preferred that evidence to the respondents' and Ms Kiyani's denial of knowing of the claimant's pregnancy, for the reasons already given by us earlier.

m. On the matter of the claimant's performance issues, and the allegation that the respondents had maybe fabricated some

documents, we found that Miss Quail's evidence was confused and confusing, as she while she conceded that page 132 was written by her, and she agreed that the handwriting on page 138 looked like hers, yet she denied the document was hers.

n. It seemed to us that, as we found was the case in this regard with Miss Mannix's evidence on this matter, it was perhaps another case of "***selective amnesia***" where Miss Quail similarly did not want to acknowledge things in the presence of the claimant, who had called her as a witness.

o. However, as we have already stated earlier, on the whole evidence available to us, we were satisfied that there were some minor performance issues relating to the claimant, but the claimant and Miss Quail have not convinced us that the respondents fabricated documents in that respect.

(4) <u>Ms Saima Kiyani: Respondents' proprietor and Nursery Manager</u>

a. The respondents' first and principal witness was Ms Kiyani, the nursery manager, and owner of the business known as Innocence Nursery. Aged 49, she is the respondent company's sole director, and sole shareholder.

b. In giving her evidence to the Tribunal, by CVP, from her office at the nursery, she did so by reading from her pre-prepared witness statement provided to the Tribunal on 4 February 2022, by Mr Muirhead, from Citation Limited, and running to eight typewritten pages, extending to 39 separate paragraphs, many cross referenced to documents in the Bundle produced to the Tribunal for use at this Final Hearing.

c. Ms Kiyani gave her evidence on the afternoon of Wednesday 2 March 2022, and continued to the following day. After being sworn, she spoke to the terms of her witness statement, confirming it to be

true to the best of her knowledge and belief, and that she had no amendments to make to its terms.

d. She was thereafter subject to cross examination by the claimant's representative, Mr Kayani, and questions of clarification by the Tribunal, following which she was not asked any further questions by the respondents' representative, Mr Ridgeway, by way of his re-examination of her evidence.

e. In giving her evidence in chief to the Tribunal, Ms Kiyani did so, reading from her written witness statement, and cross referring, when appropriate, to documents in the Bundle, as and when the need arose, and answering questions of clarification asked of her by the presiding Judge.

f. During her cross-examination by Mr Kayani, the claimant's representative, Ms Kiyani stated that for any employee to lose their job is not a nice thing, and it's not an easy decision to make. She spoke of a need to manage the claimant's performance, and how you just can't sack somebody after 3 months' probation, as you need to show evidence that you're supporting the employee, and not being punitive, and that she was following a "***protocol***."

g. She spoke of there being a probation review form, but stated that this was not in the Bundle produced to the Tribunal. She added that the claimant's performance was being managed, but that she had passed her probationary period. She insisted that she had no knowledge of the claimant's pregnancy, and stated that the evidence already heard by the Tribunal from the claimant and her 2 witnesses were not telling the truth in that regard.

h. In answer to a question from Mr Perriam, member of the Tribunal, Ms Kiyani agreed that, in paragraph 21 of her witness statement, she had referred to the claimant's performance being poor, yet the dismissal letter sent to the claimant on 25 March 2020 referred only

to redundancy. She agreed that there was no reference to the claimant's performance, and she further stated that the ***"template"*** letter was worded by Citation, not her, and that Citation had all the notes relating to the claimant.

i. When asked by Mr Perriam why Mr Amjad had heard the claimant's appeal, Ms Kiyani stated that that was on instructions from Citation, as she could not be part of it, nor any staff member, but he was "***totally and utterly neutral***."

j. When asked by the presiding Judge, Ms Kiyani stated that Citation had suggested getting somebody with no knowledge of the day to day running of the nursery, but that they did not suggest any experience or qualifications for the appeal hearer. She stated that Mr Amjad is not an employee of the business, in direct contradiction to paragraph 37 of her witness statement saying he as her Admin / Accounts Manager.

k. Overall, the Tribunal did not find Ms Kiyani to be a convincing or compelling witness. We had real issues with both her credibility and reliability. Her evidence was sometimes self-contradictory, and at other times appeared evasive.

l. Where there was a conflict between her evidence, and that of the claimant, Mrs Ghaffar, about the respondents' state of knowledge of the claimant's pregnancy, the Tribunal preferred the claimant's evidence. We regarded as disingenuous Ms Kiyani's repeated denial that she knew the claimant was pregnant before she dismissed her on 25 March 2020, effective from 22 April 2020.

m. While the respondents led evidence from two current members of staff at the Innocence Nursery, namely Caitlin Howie, and Nicola Newman, who both gave sworn evidence that they were not aware the claimant was pregnant, and nor did they hear anything to that effect from any other staff, and nor was there anything from the

claimant's physical appearance that that suggested the claimant might have been pregnant, the Tribunal was acutely aware of the fact that they are serving employees of the respondents, and they were giving their evidence in the presence of their employer, Ms Kiyani. They both had the appearance of giving evidence in the respondents' favour for that reason.

n. While they both denied collusion in preparation of their witness statements, and they both adhered to the terms of their witness statements, which were consistent with Ms Kiyani's witness statement, namely that she was not aware that the claimant was pregnant, until after she had been dismissed, the Tribunal had real and serious reservations about the evidence on these points given by the respondents' witnesses. We were left with the distinct impression that they were not being truthful in this regard.

o. On the matter of the claimant's performance issues, we preferred the evidence of Ms Kiyani. As we have already stated earlier, we were satisfied that there were some minor performance issues relating to the claimant, but the claimant has not convinced us that the respondents fabricated documents in that respect.

p. While performance was not mentioned in the dismissal letter issued by Ms Kiyani to the claimant on 25 March 2020, the fact remains that Mr Amjad, in his appeal outcome letter of 7 May 2020, addressed performance issues relating to the claimant, and that contemporary correspondence lends weight to the respondents' position that this was an issue at the time, and not something fabricated by the respondents for the purpose of assisting their defence of these Tribunal proceedings.

(5) <u>Mr Aqeel Amjad: Respondents' Appeal Hearer</u>

a. Mr Amjad appeared to give evidence for the respondents on Thursday, 3 March 2022 by CVP. He was on standby at home to

give evidence in criminal proceedings at Glasgow Sheriff Court, so he was interposed from the previous agreed running of witnesses, to be taken immediately after the respondents' proprietor, Ms Saima Kiyani.

b. He gave his evidence from Ms Kiyani's laptop in the respondents' offices and, in her presence, due to them having to share the same device to join the CVP Hearing. As both could be seen by the Tribunal on screen at the same time, the Tribunal was satisfied that there was no prompting or coaching of this witness while he gave his evidence to the Tribunal. At the Judge's direction, Ms Kiyani sat separate from the witness, and she did not interfere with the witness giving his evidence.

c. Aged 55, Mr Amjad described himself as a landlord and property developer, running his own business (which was not identified), but not an employer of staff, just subcontractors for his own business. He spoke to the terms of his two-page witness statement, running to 15 paragraphs, as submitted to the Tribunal with Mr Muirhead's email of 4 February 2022. He was cross-examined by Mr Kayani, the claimant's representative, asked some questions by the Tribunal, and briefly re-examined by Mr Ridgeway, the respondents' representative.

d. Mr Amjad's witness statement was unsigned and undated. Having been sworn by the Judge, Mr Amjad confirmed the witness statement as being true and accurate to the best of his knowledge and belief, and that it did not require to be amended, he having read it again recently for the purpose of giving his evidence to this Tribunal.

e. In the course of his evidence, he did not read out the words "***which I read this and took note of,"*** at the end of paragraph 13 of his witness statement referring to the claimant's email of 24 April 2020

(page 177 of the Bundle). He told us that his version of the witness statement did not have those words. It was not clear to the Tribunal why this witness appeared to have a differently worded witness statement than the Tribunal, and everybody else at this Final Hearing.

f. Later, when he did not read out paragraph 15 of his witness statement, as the Tribunal had it (saying ***"Before coming to my decision in respect of the appeal, I read all the paperwork and also spoke with Saima Kiyani."***), it again emerged that he had a different version of the witness statement to what we and the claimant's representative had.

g. Mr Amjad confirmed that that paragraph 15 was accurate, and that he had spoken with Ms Kiyani by phone call, after the appeal hearing telephone call with the claimant, and that he had ***"spoken to Sam throughout the whole process***".

h. Notwithstanding his statement that he did not need to amend his witness statement, and notwithstanding him reading it out aloud, without demur, from his statement at paragraph 1 that he is employed by the respondents as Admin / Accounts Manager, he departed from that evidence, saying he had never been an employee of the respondents, notwithstanding it is also averred by Ms Kiyani, at paragraph 37 of her witness statement. Mr Amjad sought to insist that he was ***"neutral"*** of the respondents' business, albeit acknowledging that he is Sam Kiyani's cousin.

i. When asked, in cross-examination, about his statement, at paragraph 8 of his witness statement, that the claimant's performance was not good, Mr Amjad stated that he knew that as Sam Kiyani had spoken to him about it, but she had not shown him any associated paperwork. He stated : ***"Of course, I took Sam's***

word for it." Later, he stated that he did not know that the claimant had passed her 3-month probationary period.

j. The Tribunal found Mr Amjad to be a very poor and unimpressive witness, his sworn testimony lacked both credibility and reliability, and he was unconvincing as an accurate and true historian of his involvement in the claimant's case. He departed from the appeal decision being "***my decision,"*** as per paragraph 14 of his witness statement, to being a decision made in discussion with Ms Kiyani, and after consultation with Citation.

k. While acknowledging that he had issued the appeal outcome letter, Mr Amjad sought to distance himself from its terms, stating that it was drafted by Citation, it was not his reasoning, it had his name at the bottom, but he did not sign it, and it was not his sole decision, as "***it was Sam's decision."***

l. In his closing submissions to the Tribunal, the respondents' representative, Mr Ridgeway, sought to argue that Mr Amjad's evidence was "***very honest***." In particular, in answer to issue (18), he stated that : "***In his evidence Mr Amjad stated that both he and Ms Kiyani made the decision, and whilst his evidence was sometimes confused, and lacked polish, but I submit that this shows it was very honest evidence and ask this is taken into account by the Tribunal."***

m. The Tribunal did not at the time, and still does not now, see Mr Amjad's evidence in the same was as Mr Ridgeway invites us to look at it. Mr Amjad was not a credible or reliable witness in the Tribunal's view.

n. His evidence at this Final Hearing demonstrated to the Tribunal that the claimant's appeal against dismissal, instead of being dealt with by a truly independent and objective decision maker, with no previous involvement in the decision to dismiss the claimant, was

instead dealt with by Mr Amjad as the puppet of Ms Kiyani, and for that reason the appeal process is best described, in industrial relations terms, as a "***sham*"**.

(6) <u>Miss Caitlin Howie: Respondents' Supervisor</u>

a. The respondents' next witness was Miss Howie. Aged 24, she is a supervisor at the Innocence Nursery, and she has four years employment with the respondent. She gave her evidence to the Tribunal, by CVP, on the afternoon of Thursday, 3 March 2022.

b. After being sworn, Miss Howie spoke to the terms of her written witness statement, undated and unsigned, extending to five paragraphs, over one typewritten page, and she confirmed the contents of her witness statement as true and accurate to the best of her knowledge and belief, and that she had no amendments to make to its terms.

c. She was thereafter subject to cross examination by the claimant's representative, and questions of clarification by the Tribunal. She was asked no further questions by the respondents' representative, by way of any re-examination of her evidence.

d. In giving her evidence in chief to the Tribunal, Miss Howie did so, reading from her written witness statement and she did so giving her evidence from Miss Saima Kiyani's laptop in the respondents' office and, in her presence, due to them having to share the same device to join the CVP Hearing.

e. As both could be seen by the Tribunal on screen at the same time, the Tribunal was satisfied that there was no prompting or coaching of this witness while she gave her evidence to the Tribunal. At the Judge's direction, Ms Kiyani sat separate from the witness, and she did not interfere with the witness giving her evidence.

f. Under cross examination by the claimant's representative, Miss Howie insisted that she wrote her witness statement, not Mr Muirhead from Citation, and that she had not been coached as to its content.

g. When asked, by Mr Kayani, to compare her witness statement, with that submitted by her colleague, Nicola Newman, Miss Howie insisted that her statement was all her own words, despite the obvious similarities between her witness statement, and that submitted in the name of Miss Newman.

h. She further insisted that it was only at this Final Hearing, when giving evidence, and the matter was put before her by the claimant's representative, that was the first time that had seen Miss Newman's witness statement, and that there had been no collusion between herself and Miss Newman at the time when they were giving their witness statements to Mr Muirhead from Citation, sometime last year.

i. Overall, the Tribunal found this witness to be very poor and unconvincing, and notwithstanding her denials, the Tribunal finds it difficult to believe that Miss Howie was unaware of her colleague, Miss Newman's witness statement. It seemed to the Tribunal that this witness, and Miss Newman, were both being less than truthful in their answers to questions by Mr Kayani, the claimant's representative.

j. We were then, and we remain now, concerned about likely collusion between the respondents' witnesses at this Final Hearing. We did not find Miss Howie to be a credible or reliable witness, and albeit Ms Kiyani, the nursery manager, and thus her employer, did not actively interfere while this witness gave her evidence to the Tribunal, the fact remains that she is a serving employee of the respondents, and she may well have been influenced by the fact of

that continuing employment relationship. Her demeanour when giving evidence to this Tribunal strongly suggested to us that this was a partisan witness.

(7) <u>Miss Nicola Newman: Respondents' Supervisor</u>

a. The final witness led for the respondents at the close of their evidence to the Tribunal was Miss Newman, aged 29, an Early Years Practitioner with the respondents, with eight years' service with them. She gave her evidence on the afternoon of Thursday, 3 March 2022, by CVP.

b. Like Miss Howie before her, she gave her evidence from Ms Saima Kiyani's laptop in the respondents' office, and in her presence, due to them having to share the same device to join the CVP Hearing.

c. As both could be seen by the Tribunal on screen at the same time, the Tribunal was satisfied that there was no prompting or coaching of this witness while she gave her evidence to the Tribunal. At the Judge's direction, Ms Kiyani sat separate from the witness, and she did not interfere with the witness giving her evidence.

d. After being sworn, Miss Newman spoke to the terms of her written witness statement, undated and unsigned, and running to three short paragraphs, on one typewritten page. She confirmed it was true to the best of her knowledge and belief, and that she had no amendments to make to its terms.

e. She was thereafter subject to cross examination by the claimant's representative, Mr Kayani, and questions of clarification by the Tribunal. She was asked no further questions by the respondents' representative, by way of any re-examination of her evidence.

f. In giving her evidence in chief to the Tribunal, Miss Newman did so, reading from her written witness statement, and under cross examination, she confirmed that she had prepared it on her own,

and it was written in all her own words and that nobody was with her when she wrote that witness statement.

g. She denied having any assistance in writing her witness statement, and stated that she was telling the truth, when she was cross examined by the claimant's representative, Mr Kayani, and he put to her the terms of the witness statement by her colleague, Caitlin Howie.

h. Miss Newman insisted that she had written the witness statement separately from Miss Howie, and she further stated that she had no awareness of the claimant's pregnancy until she was asked for the witness statement in this case, and that neither Sam Kiyani, nor other staff, had told her that the claimant was pregnant.

i. She insisted that she was not lying, and that what she said was the truth, and further stated that she was placed in furlough when the nursery closed at lockdown in March 2020, until it reopened in August 2020.

j. In answer to a question of clarification asked by a Tribunal member, Mr Perriam, where at paragraph 3 of her witness statement, she had stated that she had not heard anything to the effect that the claimant was pregnant from any other staff, Miss Newman stated that she had heard nothing at all from children, or parents, about the claimant being pregnant.

k. Given the other evidence we heard, from the claimant, and her 2 witnesses, we found Miss Newman's evidence to this effect curious. It seems to us very unlikely, in a small establishment, that other staff were unaware of the claimant's pregnancy.

l. Overall, the Tribunal found this witness also to be very poor and unconvincing, and notwithstanding her denials, the Tribunal finds it difficult to believe that she was unaware of her colleague, Miss

Howie's witness statement. It seemed to the Tribunal that this witness, like Miss Howie before her, were both being less than truthful in their answers to questions by Mr Kayani, the claimant's representative.

m. We were then, and we remain now, concerned about likely collusion between the respondents' witnesses at this Final Hearing. We did not find Miss Newman to be a credible or reliable witness, and albeit Ms Kiyani, the nursery manager, and thus her employer, did not actively interfere while this witness gave her evidence to the Tribunal, the fact remains that she is a serving employee of the respondents, and may well have been influenced by the fact of that continuing employment relationship.

n. Again, as with Miss Howie before her, Miss Newman's demeanour when giving evidence to this Tribunal strongly suggested to us that this was a partisan witness.

Parties' closing submissions

50. The Tribunal heard closing submissions from both parties' representatives on day 4 of this Final Hearing, being Friday, 4 March 2022.

51. On day 1, in discussing case management issues with both parties' representatives, the Tribunal made an order that the respondents' representative should prepare and intimate to the claimant's representative, by no later than 9.30am on day 4, Friday, 4 March 2022, a skeleton written argument setting out the factual and legal basis of the respondents' resistance to the claim.

52. It was specifically ordered that the respondents' skeleton written argument was to cite all and any statutory provisions being relied upon, and all and any relevant case law authority from the higher tribunals and courts, by proper citation, and paragraph/Judge reference to the applicable legal principle being relied upon, and to provide the claimant's representative and Tribunal with

hyperlinks to the free access Bailli website for any case law to be relied upon by the respondents.

53. The Tribunal made this order, in terms of **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** to try and put the claimant's representative, as a non-legally qualified, lay representative, on an equal footing with the respondents' representative, a professional representative from an employment consultancy firm.

54. Further, in terms of **Rule 45**, the Tribunal also ordered that each party's representative would have no more than 45 minutes to address the Tribunal on behalf of their party with their closing submissions. We ordered that the respondents' representative would be heard first, then the claimant's representative. After the Tribunal's questions, if any, we further ordered that each party's representative would be provided with a right of reply, not exceeding 15 minutes.

55. We directed that the claimant's representative might make his closing submissions orally, or in writing, speaking to a written note, as he might prefer. On the basis that evidence was expected to have concluded on day 3, Thursday, 3 March 2022, we ordered that the hearing on submissions would start on day 4 at 11:00am, and that was to allow the claimant's representative time to read, and digest, the respondents' representative's written submissions, prior to hearing them, and then being asked to make a reply on behalf of the claimant.

56. By email from Mr Ridgeway, on 4 March 2022, at 09:32, he submitted to the Glasgow Tribunal office, with copy to the claimant's representative, the respondents' written submissions comprising an 11-page, typewritten document, inviting the Tribunal to dismiss the claimant's claims. He did so using the agreed List of Issues as the basis of his submissions, and supplementing them with oral submissions.

57. He addressed each of the legal, and factual issues, in the agreed List of Issues, as well as making additional (written) submissions on his views on the

credibility and reliability of witnesses, for the claimant, and respondent respectively, before making a series of bullet pointed final supplementary points, and thereafter five general legal submissions.

58. His written submissions dated 3 March 2022 are held on the Tribunal's casefile, so it is not necessary to repeat their full terms *verbatim* here, but for present purposes, it will be sufficient to note that, within those written submissions, Mr Ridgeway made reference to the following case law authorities, being relied upon by the respondents:

- **Fyfe v Scientific Furnishings 1989 ICR 648 (EAT);**
- **Bessenden Properties Limited v Corness [1974] IRLR 338 (CA);**
- **Archbold Freightage Limited v Wilson [1974] IRLR 10 (NIRC);**
- **Ministry of Defence v Wheeler [1998] IRLR 23 (CA);**
- **Abbey National plc v Formoso [1999] IRLR 222 (EAT);**
- **A.Kinlay v Bronte Film Television Limited (case number 220025/2002);**
- **Y.Khimichiva v Key Promotions (UK) Limited (case number 2304738/29);**
- **Really Easy Car Credit Limited v Thompson [2018] UKEAT/0197/17;**
- **Onu v Akwiwiu & another [2014] ICR 571 (CA);**
- **Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] IRLR 306 (SC);**
- **Igen v Limited v Wall [2005] IRLR 258 (CA);**
- **Madarassy v Nomura International plc [2007] IRLR 246 (CA);**
- **X v Y [2013] UKEAT/0322/12.**

59. In intimating his written submissions for the respondents, Mr Ridgeway stated he could not provide hyperlinks for some cases cited, so copies were attached, and he apologised that he could not find a copy of the **Archbold** case referenced in his submissions. He also provided a substituted paragraph 4 at the end of his submissions under General Legal Submissions, having apologised that this particular part was cut and pasted from some previous submissions by him in another case, and so should be replaced. We have had regard to his revised paragraph 4.

60. In addition to the cases cited by Mr Ridgeway, the Judge had referred, during the course of the Final Hearing, on the matter of mitigation of loss, to the Employment Appeal Tribunal's judgment in **Cooper Contracting Limited v Lindsey [2015] UKEAT/0184/15** and, on the matter of injury to feelings, the Judge referred Mr Ridgeway to, and invited his comments upon, t**he ET Presidential Guidance on Vento**, and the judgments of the Employment Appeal Tribunal in **Komeng v Creative Support Limited [2019] UKEAT/0275/18**, at paragraphs 14-16, and **Base Childrenswear Limited v Otshudi [2019] UKEAT/0267/18**, at paragraphs 17-22, full citations and hyperlinks for those two latter EAT judgments, being placed by the Judge in the CVP chatroom facility, for access by both parties' representatives to the relevant judgments on the Bailli website.

61. When it came to closing submissions on behalf of the claimant, the claimant's representative, Mr Kayani, indicated that he would reply orally, and to facilitate that we allowed an extended lunchbreak, in order that he could reflect upon what he had read, and heard, from Mr Ridgeway, and gather his thoughts, with a view to making his own oral submissions on behalf of his wife, as the claimant.

Parties' Closing Submissions

62. As detailed above, the Tribunal had the benefit of written closing submissions made by Mr Ridgeway, the respondents' representative, which he augmented orally, and oral submissions from the claimant's representative, Mr Kayani,

who, at the Judge's suggestion, addressed us, as best he could, as a lay representative, point by point in reply to the respondents' written closing submissions.

63. In opening his closing submissions for the respondents, Mr Ridgeway stated that this was an extremely unusual case, as while the claimant claims she told the respondents that she was pregnant, there is no written evidence whatsoever to confirm that, and the Tribunal, as an industrial jury, will know that it is quite normal for pregnant women to send something in in writing. Further, he added, the claimant and her representative were not taking these proceedings seriously, and he described the claim as "***purely an opportunistic, money focussed claim."***

64. While Mr Ridgeway recognised that there needs to be a level playing field, he stated that it was a problem that the claimant had decided not to instruct professional representation. He added that there was a concern by the respondents that the claimant and her witnesses had had the opportunity to get their stories straight, and, while he could not prove it, there was a concern that the claimant may have coached her witnesses. He submitted that the respondents had shown that the claimant's dismissal was for redundancy, and that there was no evidence the respondents knew of the claimant's pregnancy at the time, and there was no evidence that the redundancy was not genuine, as the claimant was not the only person made redundant.

65. Looking at the documents, and the respondents' witnesses' evidence, Mr Ridgeway submitted that this clearly, and unambiguously, shows the reason for dismissal was redundancy, and that the claimant's pregnancy was not known, and it did not play any part in that decision to dismiss her from the respondents' employment. He invited the Tribunal to prefer the respondents' evidence, and stated that it had been clearly shown that the claimant was dismissed because of redundancy.

66. When Mr Kayani, the claimant's representative, came to deliver his oral submissions later, he stated that Mr Ridgeway had referred to his conduct,

and, if he was wrong in laughing, he apologised, but he is human, and he laughed. He added that, of course, money has an aspect in this case, but it's not the only thing, as he had seen his wife in tears, and very stressed about these things. Hence why they had taken this case to these lengths and to a Hearing.

67. When Mr Kayani stated that the respondents had been taken to a Tribunal before, Mr Ridgeway interjected to say that that was not true. The Judge stated that that was not relevant, and it had not been put to the respondents' witnesses at this Hearing.

68. In any event, and as an aside, the Tribunal notes and records, in writing up this Judgment, that when the respondents' ET3 was lodged on 15 September 2020, it was accompanied by a signed witness statement by Ms Saima Kiyani, dated 14 September 2020, stating, at paragraph 9 thereof, that she had dealt with a previous Tribunal claim and therefore she was aware of the time limit for submission of an ET3 response. While that witness statement was not in the Bundle before us, it is referred to at page 31 of the Bundle, as appendix 9 to that ET3 response, and we have had access to it in the Tribunal's casefile.

69. Further, Mr Kayani, replying to Mr Ridgeway's comment about the claimant not getting any legal representation, stated that they did get a quote of £6,000 to £8,000, but they are not able to pay for a legal representative for this Tribunal. Under reference to the Tribunal's overriding objective, in terms of **Rule 2**, the Judge stated, as he had done before, that there is a duty to try and achieve a level playing field, and the Tribunal is well used to unrepresented claimants, and claimants with lay representation.

70. Finally, where Mr Ridgeway had referred to this being an unusual case, as there was no written correspondence about the claimant's pregnancy, Mr Kayani accepted now, with hindsight, that the claimant should have put it in writing, but she had told Saima Kiyani verbally, and that had been taken on board, and there was no reason to put it in writing, email, or text message.

71. In recording both parties' closing submissions made to the Tribunal, we have decided that the best way to do so is to look at exactly what each party's representative said to us, having regard to the matters set forth in the finally agreed List of Issues, reproducing the written text as provided to us by Mr Ridgeway, as he wrote it (but, deleting, as unnecessary for this purpose, the full hyperlinks provided to cited cases relied upon by the respondents), followed by what Mr Kayani said to us in his oral submissions for the claimant, and all this we record now, as follows:

Legal Issues

1. **What was the reason for the Claimant's dismissal?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"The Respondents case is that the reason for dismissal was redundancy. Due to the Claimant's short service the Respondent will aver they were permitted to make the Claimant redundant in all the circumstances, specifically the fact the coronavirus pandemic placed the nursery in a very difficult and uncertain position. The Tribunal is also asked to please bear in mind that another employee, Fiona McTaggart was also made redundant. To the best of the Respondents knowledge she was not pregnant. Jasmine Mannix was also at risk but resigned before being made redundant. Also as the Claimant is short service her ability to claim unfair dismissal stands or falls on her being successful in her claim that the reason for her dismissal was her pregnancy, and only if this is decided in her favour do any procedural issues come into play."*

In his oral submissions for the claimant, Mr Kayani stated that registers had only been provided for the 3/5 room, but no other class registers.

He submitted that if the respondents admitted they knew of the claimant's pregnancy, it puts them in a different position, as that "***puts a spin on the case."*** The claimant, on the other hand, has no reason to lie about her pregnancy. It was her first pregnancy, and she was obviously cautious, and as maternity appointments are regular, you need the employer to be on board. The respondents' Staff Handbook says appointments need to be supported, and it is a blatant lie for Ms Kiyani to say she did not see the appointments.

2. **Was the reason or principal reason for the Claimant's dismissal her pregnancy, childbirth or maternity, contrary to section 99 of the Employment Rights Act 1996?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"I submit that the Respondent has made it clear via documentary and oral evidence that there is no evidence which suggests the Claimant was made redundant due to her pregnancy. It is denied that the Respondent had actual, or imputed knowledge of the Claimants pregnancy at all. It is averred there* [sic] *documentation is consistent with this, and indeed corroborates the fact that they did not know. Conversely, the Claimant has no such written evidence which supports her case in this regard. She has simply sought to mould her case on the fact the documentation was/is fabricated. When one looks at the documentation and the way the documents are written and the contents, it is submitted it would be extremely difficult and require a considerable amount of time and effort to fabricate handwritten documents. The Tribunal is reminded that the Claimants witnesses did not dispute these documents at all in their witness statements, and partially agreed with some of*

the contents (Jasmine Mannix) and also agreed the signatures were theirs (Jasmin Mannix and Kelly Quail) Kelly Quail was smirking when giving evidence and was clearly unable to explain why a signature would be present but the words above claiming to be fabricated. The Respondent maintains these documents are genuine and have not been fabricated. Quite frankly, the Respondent was trying to save its business and had more important things to do. It is noted in cross examination the contents of the notes was hardly challenged at all by the Claimant's Representative."

In his oral submissions for the claimant, Mr Kayani stated that while the respondents say it was a redundancy, Ms Kiyani knew the claimant was pregnant, and so she would have known roughly that the baby would be due in August 2020, and so, at the time of the redundancy, the respondents would have known that the claimant would be going on maternity leave.

Further, added Mr Kiyani, the majority of the documents produced by the respondents about the claimant's performance were dated before the end of her probation period, so why, if there were these issues, did the claimant pass, and not get her probationary period extended. Ms Kiyani had admitted that the claimant had passed her probationary period.

As regards evidence led before the Tribunal, and the questions he had asked of witnesses, Mr Kayani stated that he is not a solicitor, and he did the best he could have done, and maybe he should have asked for more time, but he did ask some questions.

3. **Did the Claimant's dismissal fall within the protected period defined by section 18 (6) of the Equality Act 2010?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"On the evidence provided by the Claimant it appears the Claimant was pregnant at the time of her dismissal, so would have been in the protected period, subject to the Tribunals findings on the knowledge of the Respondent."*

In his oral submissions for the claimant, Mr Kayani stated that he agreed the claimant was within the protected period, and he then added that that is why Saima Kiyani was denying all knowledge of the claimant's pregnancy.

4. **If so, was the Claimant's dismissal because of the Claimant's pregnancy/maternity, such that it amounted to unfavourable treatment in terms of section 18 of the Equality Act 2010?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"On behalf of the Respondent it is re-iterated that the dismissal was for Redundancy, as such it is averred there was no unfavourable treatment as the Claimant's dismissal was not connected with her pregnancy and therefore cannot amount to unfavourable treatment."*

In his oral submissions for the claimant, Mr Kayani stated that the reason given by the respondents was redundancy, and poor performance, but as only the register for the 3/5 year old class had been produced, that was not sufficient evidence to show a decline in

demand. Further, if he ran a business, he would not pass somebody's probation if there were performance issues.

5. **Was the Claimant subject to direct discrimination and was the dismissal due to her pregnancy?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"The Claimant was not subject to direct discrimination due to the fact the Respondent did not have knowledge of the Claimant's condition of Pregnancy."*

In his oral submissions for the claimant, Mr Kayani stated that the claimant was due to go on maternity leave, in a few months, and Ms Kiyani knew that, and that the claimant would not return for another 9 months. He felt it would have been easier for the respondents to furlough staff, and keep them, rather than take time and effort to recruit new staff later.

6. **Was the less favourable treatment done because of the pregnancy?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"No-It is submitted there is no less favourable treatment due to pregnancy as the Respondent has advanced a potentially fair reason for dismissal and did not have knowledge of the Claimant's pregnancy."*

In his oral submissions for the claimant, Mr Kayani stated that the answer here is "Yes". Ms Kiyani was aware of the claimant's pregnancy, and there was less favourable treatment because of the pregnancy. The claimant was made redundant first, before Fiona McTaggart, despite the fact she had passed her probation, and Fiona was still under probation.

7. **Are there facts from which the Tribunal could decide, in the absence of any other explanation that the Respondent discriminated against the Claimant?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"Again it is submitted no, the Respondent has provided an explanation for the dismissal namely redundancy, added to which the Respondent did not have knowledge of the pregnancy."*

In his oral submissions for the claimant, Mr Kayani stated that the appointment letters showed that the claimant was pregnant, and the respondents knew that.

He added that Mr Amjad's witness statement was not telling the truth, as he had said in his witness statement he was employed by the respondents, and he did not change that, and he then stated he was not employed, but he was there every day. He asked why would a landlord and property developer be at the nursery every day?

As regards the witness statements by Caitlin Howie and Nicola Newman, Mr Kayani stated that they were very similar in their wording, and he commented that he felt they had been created to back up Ms

Kiyani's statement that she did not know of the claimant's pregnancy, and as such that they were false and not true.

Further, Mr Kayani added, he felt Ms Kiyani sitting in the room with them, as they gave their evidence, put pressure on them, as they were doing it as employees of the respondents, and worried for their jobs there.

8. **If so has the Respondent proved that it did not discriminate against the Claimant?**

In his written submission for the respondents, Mr Ridgway stated as follows, the duplicate word "*employee*", appearing twice after "*pregnant"*, having been deleted:

> "*On behalf of the Respondent it is submitted that they have. There is no written documentation or so called "smoking gun" document which proves that the Respondent knew of the Claimant's pregnancy and as such played no part in the decision making process of the Respondent. The Claimant only has oral testimony that is not backed up with any documentary evidence, making this a very unusual case as there is normally some line of communication from a pregnant employee to inform the employer of the fact they are pregnant and this can be by letter, e-mail or even text, but such documentation is notable by its absence, which we respectfully submit shows that the Claimant's claims are without merit and opportunistic."*

In his oral submissions for the claimant, Mr Kayani stated that it was important to have the employer on board and supportive of the pregnant employee, and there was no need for the claimant to think

that she needed to put her pregnancy in writing to the respondents, when she had told Ms Kiyani.

As regards Mr Ridgeway's comment that the claimant's claims are "***without merit and opportunistic***," Mr Kayani stated that they do have evidence, and the written statements from the claimant, her 2 witnesses, and the maternity appointment letters. As such, he disagreed with Mr Ridgeway's observation, and he submitted that the claim does have merit.

9. **Has the Claimant's application to amend to include claims for holiday pay and notice been submitted outside of the relevant 3-month time limit?**

In his written submission for the respondents, Mr Ridgway made no reply, as the matter of holiday pay and notice pay had already been resolved between the parties, and there was no live issue remaining for our judicial determination.

In his oral submissions for the claimant, Mr Kayani made no reply on this paragraph.

10. **If so, would it have been reasonably practicable to submit the claims in time?**

In his written submission for the respondents, Mr Ridgway made no reply, for the reason stated by us above at (9).

Likewise, in his oral submissions for the claimant, Mr Kayani made no reply on this paragraph.

11. **If the amendment is permitted, has the Respondent made unlawful deductions contrary to section 13 of the Employment Rights Act 1996?**

Again, in his written submission for the respondents, Mr Ridgway made no reply, for the reason stated by us above at (9).

Likewise, in his oral submissions for the claimant, Mr Kayani made no reply on this paragraph.

12. **If the claims succeed, what remedy does the Claimant seek?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"The Respondent understands the Claimant has requested financial compensation only."*

In his oral submissions for the claimant, Mr Kayani stated that the claimant seeks a declaration from the Tribunal, as well as compensation, as per her final, revised Schedule of Loss. He explained that she had not asked for her old job back with the respondents, as she did not want to go back there given her treatment by the respondents.

13. **Has the Claimant taken reasonable steps to mitigate her losses?**

In his written submission for the respondents, Mr Ridgway stated as follows:

"The Respondent will state that the Claimant has not provided evidence of attempts to mitigate her loss prior to being employed by her brother on 1st April 2021. Importantly, the revelation that the Claimant has obtained another job, only became common knowledge during the first day of these proceedings. The Respondent is aware of the rule in Fyfe v Scientific Furnishings 1989 ICR 648, EAT (Copy attached) which states the onus is on the Respondent as the employer to prove that the Claimant has failed to mitigate her loss. We submit it is reasonable for the Tribunal to consider why the Claimant did not obtain a job in the 3 months after her maternity leave period expired, especially given she pleads financial hardship. It is submitted there is still a duty on the employee to properly mitigate as a matter of law. As Lord Justice Roskill observed in Bessenden Properties Ltd v Corness [1974] IRLR 338 (CA), (copy attached) questions of mitigation are questions of fact.

"It is the duty of an employee who has been dismissed to act reasonably and to act as a reasonable man would do if he had no hope of seeking compensation from his previous employer."

In Archbold Freightage Ltd v Wilson [1974] IRLR 10 (National Industrial Relations Court, Sir John Donaldson, President) (Not able to give copy or hyperlink). Before the Employment Tribunal it was argued on behalf of the Respondents that the Applicant had failed to mitigate his loss following dismissal:

(a) in failing to look for work during the first month of employment;

(b) by taking part-time work with Mr Shepherd over the seventeen week period between April – July, and

(c) in failing to take reasonable steps to obtain alternative employment between July and 11 October 2000, when he found full time employment with Flow Control Systems Ltd.

In Archbold The Tribunal, at paragraph 28 of their reasons, upheld that submission in part only, that is in respect of period (a); they were not satisfied that the Respondent had made out a failure to mitigate in respect of periods (b) and (c).

Therefore it is submitted that there is still a duty to look for other work."

When the Judge referred to the EAT's judgment in **Cooper Contracting Ltd**, Mr Ridgeway stated that he accepted that the respondents are under a duty to provide evidence of the claimant's failures to mitigate her losses, and he accepted that he had not produced, for example, job adverts at the time that the claimant could have applied for.

He stated that he understood the case law authorities he had cited were still current law, and that it was quite telling that the claimant did not look for other work, and she did not tell this Tribunal about her employment by her brother, until this Hearing, and that, he submitted, demonstrates that this case is "***money-motivated***", and while that might sound harsh, he did not say that lightly, as it was based on the claimant's evidence this week.

In his oral submissions for the claimant, Mr Kayani stated that it was a tough time for the claimant, with her first baby, and her maternity leave stopped in December 2020. She had had to sell her Glasgow house, and she was breastfeeding and could not go out to work. She got a job

with her brother in April 2021, when her grandmother looked after the child.

Mr Kayani denied that the claimant had ever said "***cash in hand***." The claimant had not denied this new job, and she was not hiding it, and she was not trying to get more money by not disclosing it earlier. He had not resisted the call for copy bank statements to be produced to the Tribunal, and while he accepted that the claimant's new employment had come as a surprise to the Tribunal and the respondents, it had slipped his mind, between May 2021 and March 2022, notwithstanding Judge O'Donnell's orders, and he stated that he had not had the time to spend on this case, as it should properly have got.

14. **What compensation should be awarded if the claims are successful?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"If the Claimant is successful it is wholly disputed an award of £24,000 injury to feelings is justifiable as claimed or at all.*
>
> *For claims presented on or after 6 April 2020, the Vento bands are as follows:*
>
> - *a lower band of £900 to £9,000 (less serious cases)*
> - *a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band), and*
> - *an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000*

£24,000 would put this case at the upper end of the middle vento band. In the absence of medical evidence it is submitted such an award would be excessive and would unjustly enrich the Claimant.

*In **Ministry of Defence v Wheeler [1998] IRLR 23 CA** (Link below) it was stated the general principle in assessing compensation is that, as far as possible, complainants should be placed in the same position as they would have been in but for the unlawful act.*

*In **Abbey National plc v Formoso [1999] IRLR 222 EAT** (link below) it was stated that in a discriminatory dismissal the correct approach is to ask what were the chances in percentage terms that the Respondent employer would have dismissed the Claimant had she not been pregnant and had a fair procedure been followed, rather than what a "reasonable employer" would have done as used in ordinary unfair dismissal cases.*

The following claims whilst not binding do offer an indication of awards made by other Tribunals in pregnancy cases.

*By way of example in the relatively recent Employment Tribunal case of A **Kinlay v Bronte Film Television Limited Case Number 220025/2020 (**Link Below) a woman was awarded £6000 injury to feelings in a pregnancy discrimination case where it was found a Respondent did not act maliciously.*

*Further, in the case of **Y Khimichiva v Key Promotions (UK) Limited 2304738/2019** Link below to both judgment with reasons and judgment on remedy the Employment Tribunal awarded £4500 injury to feelings.*

> *The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. It should be just to both parties.*
> *With this in mind and based on the paucity of evidence as to how the Claimant has been affected an award of £3000 to £4000 would be appropriate it is submitted, if the Claimant is successful and not £24,000 as claimed which is excessive we submit, especially in the absence of medical evidence."*

Further, added Mr Ridgeway orally, he hoped the Tribunal would agree that £24,000 is ***"totally, totally unrealistic"***, where there is no medical evidence provided, and no evidence that it is continuing to affect the claimant, or prevent her working again, or in the future, and all she had said was that it was "***stressful***".

In his oral submissions for the claimant, Mr Kayani stated that he disputed that £24,000 was excessive, saying it is **Vento** middle band, and he accepted that it had been increased from £14,000. Adding that he is not a legal representative, Mr Kayani stated that it was a fair amount to ask for, however it would be for the Tribunal to decide, and look at the cited cases.

On the matter of the absence of medical evidence, Mr Kayani stated that the claimant could not get a GP appointment during the early days of lockdown in March 2020, and while she had tried to get an appointment then, she could not do so, and he invited the Tribunal to rely upon the claimant's testimony to the Tribunal, accepting that there was no written medical evidence produced by her for the Tribunal.

Factual Issues

15. **Did the Respondent know that the Claimant was pregnant?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"As above it is submitted that it is quite clear that the Respondent did not know of the Claimant's pregnancy. The Respondent's evidence has been honest and consistent in this regard and not effectively challenged by the Claimant's Representative. In addition the Claimant has no written evidence such as letters, text messages or e-mails which support the contention the Respondent knew about the pregnancy.*
>
> *It is averred that the employment tribunal must focus on the reason or reasons why the employer dismissed the employee, provided the tribunal can be shown that the decision to dismiss was made before it had any knowledge of the employee's pregnancy even if the decision is communicated later, an employer can defend a pregnancy dismissal claim. There is no positive obligation on the employer to revisit its decision to dismiss after becoming aware of the pregnancy as per* ***Really Easy Car Credit Limited v Thompson [2018] UKEAT 0197 17 0301*** *(Link below)*
>
> *Therefore, this is authority that even where an employer becomes aware after they became aware e.g at the appeal stage to revisit the decision to dismiss."*

In his oral submissions for the claimant, Mr Kayani stated that they had no reason to lie about the claimant's pregnancy, as the claimant needed to have the employer on board. She had brought it to Ms

Kiyani's attention before she appealed against her dismissal. It was before Mr Amjad at the appeal stage, but he had not carried out the appeal with the correct guidance from ACAS. He submitted that the appeal was not properly carried out. He added that Mr Amjad was aware of the claimant's pregnancy, and that he was completely lying to say he did not know of it at the time of the claimant's employment.

16. **Was the decision to dismiss the Claimant taken within the protected period?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"As per 3 above On the evidence provided by the Claimant it appears the Claimant was pregnant at the time of her dismissal, so would have been in the protected period, subject to the Tribunals findings on the knowledge of the Respondent."*

In his oral submissions for the claimant, Mr Kayani stated that the decision to dismiss the claimant was taken within the protected period, and the respondents did know of her pregnancy.

17. **What was the reason for the Claimant's dismissal and was this a reason connected to the Claimant's pregnancy or maternity?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"It is submitted the reason for the dismissal was redundancy against the backdrop of huge uncertainty for the Respondent and in light of the coronavirus pandemic. The Respondent has*

given clear evidence on this, and we ask the Tribunal to bear in mind the immediate difficulties the Respondent faced at the time, in particular the sudden drop in fees, parents withdrawing children and the general uncertainty that the pandemic presented at the time."

In his oral submissions for the claimant, Mr Kayani stated that the reason given of redundancy was due to a decline in demand, and performance, but only the 3 / 5 year old class registers had been produced, and the claimant had passed her probationary period, and it was not extended by the respondents. 5 staff were kept on furlough, and he submitted it was easier to furlough, rather than re-employ later.

18. **In dismissing the Claimant, or in dealing with her appeal, did the Respondent follow a proper procedure? If not, was that failure for a reason connected to the Claimant's pregnancy or maternity?**

In his written submission for the respondents, Mr Ridgway stated as follows:

"The dismissal was for redundancy which is a potentially fair reason. It is submitted the documentarty [sic] *and oral evidence given by the Respondent supports the proposition that redundancy was the real and genuine reason. It is submitted that any procedural defects in the dismissal or the appeal this is only relevant in the event the claimant is successful in her discrimination claim due to her short service and inability to claim "ordinary unfair dismissal." In any event when the Claimant was dismissed she was given the right of appeal, which was dealt with by Mr Amjad.*

It is submitted there was an appeal and this was dealt with under difficult circumstances, namely the pandemic, hence why it was conducted over the telephone. The notes taken by Mr Amjad were not, I submit effectively challenged by the Claimant and should stand as evidence.

In his evidence Mr Amjad stated that both he and Ms Kiyani made the decision, and whilst his evidence was sometimes confused, and lacked polish, but I submit that this shows it was very honest evidence and ask this is taken into account by the Tribunal. It is submitted the Claimant has not shown that any procedural defects with the appeal were connected with the Claimant's pregnancy. It is submitted this is not made out."

In his oral submissions for the claimant, Mr Kayani stated that the appeal did not follow proper procedure, and it was connected to the claimant's pregnancy. He submitted that it should have been carried out by a "***neutral***", and that Aqeel Amjad was not neutral, and he believed that Mr Amjad was employed by the respondents, and that the respondents had not followed the ACAS Code. He observed that it was a characteristic of Mr Amjad that every answer was "***I spoke to Sam,"*** but he should have looked at the evidence presented in the appeal, and made a decision for himself.

19. **Has the Respondent discriminated against the Claimant by dismissing her?**

In his written submission for the respondents, Mr Ridgway stated as follows:

"No-please see the points above-the decision was due to a genuine redundancy situation, in which another short service

> *employee, Fiona McTaggert* [sic] *was dismissed for the same reason. Jasmine Mannix was also in line for dismissal, but resigned before hand."*

In his oral submissions for the claimant, Mr Kayani stated that the answer here should be "***yes***," as the respondents had discriminated against the claimant by dismissing her. He queried why the claimant was dismissed first, when she had passed her probation, but Fiona McTaggart had not passed, so he submitted that the claimant had been discriminated against by being the first person made redundant.

20. **Did the Respondent consider placing the Claimant on Furlough as an alternative to redundancy and if not, was that decision taken for a reason connected with the Claimant's pregnancy or maternity?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"The Respondent did not place the Claimant on furlough on the basis of advice received from their accountant that this would still incur a cost. It is submitted whether this is legally correct is irrelevant, it what the Respondent believed that matters. No evidence has been advanced that shows the decision to not furlough the Claimant was based on a reason connected with pregnancy of which the Respondent was not aware and in any event there were issues with the claimants performance which factored in the decision to make her redundant. It is submitted employers did not have to furlough as the Government gave employers the choice."*

In his oral submissions for the claimant, Mr Kayani stated that the claimant was not given furlough as an option, but he submitted that

this redundancy could have been avoided, but the respondents were not interested in avoiding it, as they saw no point in furloughing the claimant.

21. **Was there a genuine reduction or anticipated reduction in the need for employees of a particular kind, such that a redundancy situation arose?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"Yes both, it is submitted that there was a genuine reduction for the reasons already advanced, namely the reduction in numbers and the uncertainty of the pandemic an anticipated reduction was required."*

In his oral submissions for the claimant, Mr Kayani stated that he agreed that lockdown was difficult for everyone, but the respondents had not produced enough evidence to the Tribunal to show the total decrease in demand, as the staff did move between rooms. 5 staff had been furloughed, he stated, and after lockdown it would be easier to retrain existing staff, rather than have to employ new staff.

22. **Did the Respondent advertise for staff on the reopening of the Nursery, if so, what was the reason for this?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"Yes- the Respondent did advertise for staff nearly 5 months after the claimant was made redundant. The situation had changed as the Nursery re opened after lock down and measures had to be taken to recruit staff. The important*

timescale, it is submitted is the situation as at the date of redundancy, and not 5 months later."

In his oral submissions for the claimant, Mr Kayani stated that he understood this was 5 months after the redundancy in April 2020, and he submitted again that it would have been so much easier to furlough staff.

23. **Did the Respondent have issues with the Claimant's performance and conduct and was the Claimant subject to disciplinary warnings and informal discussions as a result of these?**

In his written submission for the respondents, Mr Ridgway stated as follows:

"Yes- the Respondent has provided clear evidence that there were performance issues. Other than a blanket suggestion this documentation has been fabricated and some witnesses have suggested only parts were fabricated, we submit that no evidence has been put forward to prove on the balance of probabilities that the documentation is fabricated. It is submitted this would be very difficult to do with so many handwritten documents without it being blindingly obvious. The Documents written by various people in different handwriting are consistent in the facts and have not, we submit been effectively challenged by the Claimant."

In his oral submissions for the claimant, Mr Kayani stated that if somebody has major performance issues, why pass their probationary period? He submitted that the claimant had not seen or signed the verbal warning shown at page 137 of the Bundle.

24. **Did the Respondent permit the Claimant to take time off for ante-natal appointments, if so, when were those appointments?**
In his written submission for the respondents, Mr Ridgway stated as follows:

"The Respondent did not know the Claimant was pregnant so this could not have been permitted. The Claimant was permitted dental appointments. The Claimant's own evidence suggests she was reluctant about asking for time off for her own reasons and this supports the fact she may have not been truthful about the reason for the appointments."

In his oral submissions for the claimant, Mr Kayani stated that the ante-natal appointment letters had been produced, showing appointments on 14 January 2020, 31 January 2020, and 25 February 2020, and that there was no chance Ms Kiyani would have let the claimant go to those appointments without questioning why.

25. **Did the Claimant show the Respondent her maternity file and appointment letters, if so, when did this take place?**

In his written submission for the respondents, Mr Ridgway stated as follows:

"No-the Respondent submits this did not happen."

In his oral submissions for the claimant, Mr Kayani stated that the claimant did show those appointment letters to Ms Kiyani, and she copied them, and put them in a cabinet, and that corresponds with the Staff Handbook.

26. **Did the Respondent advise other staff members and children attending the Nursery about the Claimant's pregnancy, if so, when did this occur?**

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"No-again this did not happen."*

In his oral submissions for the claimant, Mr Kayani stated that it did happen, and the statements from the claimant and her 2 witnesses refer to it.

27. Did the Respondent wrongly advise the Claimant that she was not due any outstanding wage payments?

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"It is conceded there was a delay and this was compounded by the failure of the Claimant to inform the Respondent of her change of address, and this was ultimately paid."*

In his oral submissions for the claimant, Mr Kayani stated that the Tribunal should look at the claimant's email to Ms Kiyani, on 15 May 2020, as produced at page 182 of the Bundle, and compare that with Ms Kiyani's letter of 1 April 2020 to Jasmine Mannix, who was to be paid on her final day, 28 April 2020, after her resignation intimated by text on 31 March 2020.

ADDITIONAL SUBMISSIONS

In his written submission for the respondents, Mr Ridgway stated as follows:

> *"The Claimants evidence was evasive and only seemed to provide information at a later date and when asked in the Tribunal, for example the Claimant never provided any information about having another job until the Tribunal.*
>
> *The evidence supports the proposition that the Claimant did not inform the Respondent about her pregnancy. The Claimant was even reluctant to state how many weeks pregnant she was at the appeal stage. The Claimant even seemed evasive at the appeal, and*
>
> *The Claimant states that the signature on the verbal warning is not hers. However if we look at page 48 of the bundle in particular the capital letters N and G I submit this is very similar to the N and G in the signature at page 137 which are both capital letters. If we look at page 49 there is some lower case examples of her writing and this is very similar to page 137 in particular the letters "f" at the bottom of the page where it talks about flights. In any event people can have a print signature and a quick "bank style" signature we submit.*
>
> *It is submitted that the Claimant was being untruthful when suggesting this signature for the verbal warning is not hers.*
>
> *It is also submitted that the Claimant would say the handwritten documentation which shows her performance was poor, as this does not support her case and is her only option in view of the overwhelming handwritten evidence which shows her performance was poor.*

This we submit is too much documentation to fabricate, especially when the Respondent is trying to keep its business afloat.

A substantial portion of the Claimant's case seems to rest on documentation being fabricated and it is suggested that her responses to evidence were uncertain and hesitant at times, and she even stormed off at one point when asked by the judge about the schedule of loss. The Claimant (and her husband) have also laughed inappropriately during the course of the trial, which shows a cock-sure and arrogant childish attitude and is not indicative of someone who genuinely feels they have been treated badly. It is submitted this claim is opportunistic and money motivated.

In Kelly Quail's evidence she admitted that 138 looks like her handwriting yet still denied the document was hers. She also conceded that Page 132 (except achieved date) was written by her.

Again we submit that Kelly Quail was being untruthful when she claimed that there were no performance issues and that she knew of the pregnancy. She mentioned risk assessments but said conveniently these were "verbal" only. Clearly this is not true as anyone knows that a risk assessment is a written document.

For the avoidance of doubt upon checking my notes Kelly Quail was challenged about her knowledge of her pregnancy.
To suggest that 138 to 141 are fabricated (although this was not in her statement) is clearly not true we submit as this would be

very difficult to do, and Kelly Quail did agree this "looks" like her handwriting.

She was also "cocky" and smirking when giving her evidence in response to questions even when under pressure. I submit this shows she was not telling the truth, thinking she had got "one over" on the Respondent, we submit for not agreeing to her request for furlough as per page 150 in the Bundle.
She also stated that she "did not like the management style" of the Respondent, and sought to justify this when it was suggested this showed she did not really like the Respondent.

It is submitted that she has a motive for giving untruthful evidence to "get back" at the Respondent and for this reason her evidence should be treated with extreme caution.

Finally, the statement did not dispute the contents of the notes, yet the claimants has disputed some (but not all). It is simply unrealistic to say that someone would not have told either Kelly Quail or Jasmine Mannix about the existence of the various notes.

Similarly, the evidence of Jasmine Mannix showed that she agreed with some of the contents, and agreed that the signature on 134 was hers yet was unable to account for the written contents where she made various disparaging remarks about the Claimant.

Again the notes at page 136-Jasmine Mannix agreed it was her signature and that some of the comments she agreed with, but conveniently suggested the section about her stating the Claimant was "extremely lazy" had been fabricated. Of

importance is Caitlin Howie was not challenged about these notes, and it seems none of the Respondent's witnesses were challenged on particular comments made. Caitlin Howie also confirmed that at the time Jasmine was in the 0-2 yrs room.

Also Ms Mannix was unsure when asked certain questions and it is submitted her evidence is also to be treated with caution, as we submit she was caught out on various points.

Therefore we invite the Tribunal to prefer the Respondent's evidence where there are factual disputes.

*As Caitlin Howie stated the timings of when Ms Mannix claims to have know [*sic] *about the pregnancy and her (Ms Mannix's) start date do not tie up with the dates the Claimant gave for the early appointments.*

Regards the points made about the similarity of the witness statements it would be submitted that these statements are the own statements, but the final preparation obviously came down to Mr Muirhead in terms of the headings and formatting. It is submitted the actual evidence is the witnesses own evidence and this was tested in cross examination and it is submitted stood up to the various suggestions by the Claimant's representative."

In speaking to his written submissions, Mr Ridgeway stated that he is not a handwriting expert, but his comments were common sense and general observations.

In his oral submissions for the claimant, Mr Kayani stated that Jasmine Mannix and Kelly Quail worked with the claimant at the nursery, but

they were not close friends, and they were shocked that Saima Kiyani was denying knowledge of the claimant's pregnancy at the time she was employed by the respondents.

While Mr Ridgeway had referred to Kelly Quail being "***cocky and smirking***," Mr Kayani stated that at that stage Mr Ridgeway was getting aggressive with the witness, and the Judge had to step in. As regards Jasmine Mannix, Mr Kayani stated that she is dyslexic, and an under confident person.

Final supplementary points

In his written submission for the respondents, Mr Ridgway stated as follows:

- *Mat B1 form never provided-excuse for not providing it is weak.*
- *There is a concern there may have been coaching of the claimants witnesses, yet they claimed not to have read the bundle.*
- *Aqeel made the decision and conducted the appeal and conveyed this to Sam Kiyani with discussion.*
- *The Claimant in her testimony admitting using mobile phone in cloak room*
- *The Claimant recognised the support plan with her signature but it seems only the last column was concentrated on.*
- *Kelly Quail's notes backed up review meeting for the development plan*
- *It is suggested that either during questioning it was not put to the Respondents witnesses where there was any proof the Claimant showed them she was pregnant. To*

this day the Respondent never even knew if the Claimant has children other than by the oral testimony provided.

- *There seems to be an extreme reluctance to provide bank statements-the Respondent believes the Claimant may be hiding her true income, and did state in her testimony that she was paid cash in hand, yet has been able to provide statements. Something does not ring true we submit.*
- *The Respondent instructs us that not all 9 staff were put on furlough. Two employees Robert and Ameena left in April. We appreciate this was not mentioned in evidence, but neither did the Claimant's Rep ask this.*
- *Staff on furlough were Caitlin, Nicola, Carol Ann, Val and Kirsty.*
- *All staff that returned as above in August were 2 years plus service.*
- *19 children were on the Registers when they re-opened-nursery can hold 63 children in total.*

Mr Ridgeway accepted that the last 4 of these bullet points were not given in evidence to the Tribunal.

In his oral submissions for the claimant, Mr Kayani stated that Saima Kiyani had said 6 staff were furloughed, but these were only 5 names listed here.

In his written submission for the respondents, Mr Ridgway further stated as follows:

GENERAL LEGAL SUBMISSIONS

1. *Section 18 Equality Act 2010 ("EA") defines pregnancy and maternity leave as a protected characteristic. It provides that a person discriminates against a woman if they treat her unfavourably either because of pregnancy (during the protected period) or because she is exercising, seeking to exercise or has exercised her right to ordinary or additional maternity leave. No comparator is required.*

2. The critical question for the Tribunal is whether, objectively considered in all of the circumstances, the treatment complained of was on the ground of pregnancy or maternity leave. The protected characteristic does not need to be the only factor, simply a significant influence and it does not need to be conscious as subconscious motivation is sufficient if proved, ***Onu v Akwiwu and anor [2014] ICR 571, CA.***

3. In ***Williams v. Trustees of Swansea University Pension and Assurance Scheme [2019] IRLR 306****, Link below the Supreme Court considered the definition of 'unfavourable treatment' and held that: (i) in most cases little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions; (ii) the determination of what is unfavourable is to be judged taking a broad view and by broad experience of life; and (iii) treatment which is advantageous cannot be said to be "unfavourable" merely because it could have been more advantageous.*

4. In considering the burden of proof, the Tribunal is referred to s.136 Equality Act 2010 and the guidance set out in the case of ***Igen Ltd v Wong [2005] IRLR 258, CA*** *(link below) as approved in* ***Madarassy v Nomura International Plc [2007]***

***IRLR 246, CA**. (Link Below. This guidance reminds the Tribunal that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination. It is submitted the Respondent has provided an explanation for their conduct which was specifically performance and Redundancy.*

[Note: this is reproduced after correction by Mr Ridgeway. Originally, the last sentence had read: "*It is submitted the Respondent has provided an explanation for their conduct which was specifically performance and an agreement for the Claimant to start her maternity leave early.*"]

5. *Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y [2013] UKEAT/0322/12**. Link Below. We must consider the totality of the evidence and decide the reason why the Claimant received any unfavourable treatment.*

72. When the Judge asked Mr Ridgeway to identify, from his cited cases, the legal proposition, and paragraph of the judgment being relied upon by him, he stated that he could not do that, he would need to look at the cases, and that detail was not normally asked for by other Judges. In reply, the Judge reminded him of the need to provide that detail, as per paragraph (2) of the written case management order sent to both parties by the Tribunal on Wednesday, 2 March 2022, confirming the Judge's oral order the previous day.

73. After an adjournment granted by the Tribunal to Mr Ridgeway, when the Hearing resumed, he advised the Tribunal that he wished to draw the Tribunal's attention to paragraph 75 by Lord Justice Ryder in **Onu** ; paragraphs 22 and 23 in **Williams** ; paragraph 76 in **Igen**, and paragraph 16 in **Madarassay**; while, as regards **X v Y**, he wished to refer to its citation of Lord Justice Sedley in **Anya v University of Oxford [2001] ICR 847**.

74. In his oral submissions for the claimant, replying to Mr Ridgeway's general legal submissions, Mr Kayani stated that he had nothing to say, and he would leave that for the Tribunal to deal with. He then commented that the claimant would not have come this far if she did not have a genuine case, and that the claimant had no reason to lie. The respondents had been made aware of her pregnancy, and he invited the Tribunal to find for the claimant, and award her appropriate compensation.

75. Mr Kayani having concluded his reply to Mr Ridgeway's submissions to the Tribunal, Mr Ridgeway was invited to reply. As regards the **ET Presidential Guidance**, he submitted that the Tribunal was not bound by it, but must have regard to it. Under reference to **Cooper Contracting Ltd**, he accepted that, with mitigation of loss, the burden of proof is on the alleged wrongdoer, the respondents, and that the respondents have to prove that the claimant acted unreasonably, and that the Tribunal has to take account of the claimant's views.

76. Mr Ridgeway stated that he was aware that the claimant was on maternity leave for some time, and he was not suggesting that she should have got a job while on maternity leave. He noted how, in her witness statement, and in her evidence to this Tribunal, the claimant had made great play on financial hardship, yet she had not, in his submission, adequately explained why she did not apply for other jobs in the 3-month window before April 2021 and the job with her brother.

77. On the matter of injury to feelings, and the EAT judgment in **Komeng**, Mr Ridgeway stated that it re-iterates established principles, but the frequency of discrimination is a factor. He also mentioned the lack of medical evidence, and whilst not saying that a claimant must have medical evidence, he submitted that, in its absence, "***the Tribunal is in the dark***," as there is no evidence produced to bolster, or show, what the claimant says in her oral testimony.

78. Mr Ridgeway submitted that the Tribunal must focus on actual injury to the claimant's feelings, and not on the acts of the respondents. If the Tribunal does find the claimant's dismissal was on the grounds of pregnancy, any award should not be punitive, but be just to both parties. £24,000 is near the top end of the middle **Vento** band, on the basis of the case law and **ET Presidential Guidance.**

79. When the Judge asked Mr Ridgeway if he had anything to say about the EAT judgment in **Baseline Childrenswear**, as cited by the Judge with hyperlink on the CVP chatroom facility, Mr Ridgeway stated he could not see that in the chatroom, and so the Judge agreed that he could have until 10:00am the following Monday, 7 March 2022, to make any written representations on that case.

80. Thereafter, Mr Ridgeway addressed the Tribunal on his reply to Mr Kiyani's oral submissions to the Tribunal. He submitted that if somebody genuinely believes the pandemic did not affect this nursery, then that is a ridiculous

suggestion to make, and its blindingly obvious that it did given the UK and Scottish Government guidance on Covid-19 pandemic, and that clearly affected this nursery. He also disputed that you can never make a pregnant employee redundant, and simply referred to his earlier written and oral submissions to the Tribunal.

Reserved Judgment

81. When proceedings concluded, on the afternoon of Friday, 4 March 2022, parties and their representatives were advised that judgment was being reserved, and it would be issued in writing, with reasons, in due course after private deliberation by the Tribunal.

82. With limited opportunity that afternoon, further private deliberation has only taken place recently, by remote discussion with lay members of the Tribunal on Microsoft Teams.

83. This unanimous judgment represents the final product from our private deliberations, and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

84. In addition to considering the evidence, and submissions, made in the course of the four days, we allowed Mr Ridgeway to make a further written representations, on the EAT authorities cited by the Judge, and we have taken into account his response, on 8 March 2022, by email sent at 10:13, as also the reply from the claimant's representative received on 9 March 2022, by email sent at 22:51, as we record later in these Reasons.

85. Finally, the Judge apologises to both parties and their representatives that finalising this Judgment has taken longer than the Tribunal administration's target of 28 days from the close of the Final Hearing.

86. This delay has been occasioned by a combination of factors, including other judicial business impacting on the Judge, and absence of the Judge from the office on annual leave. The Members' Meeting was held on the earliest date convenient for all 3 members of the full Tribunal.

Parties' Further Written Representations

87. Mr Ridgeway's further written representations of 8 March 2022 were as follows:

> *"My sincere apologies for not sending this yesterday.*
>
> *As requested I would wish to make the following submissions in relation to the effect of Base Childrenswear Ltd v Otshudi [2019] UKEAT0267/18:http://www.bailii.org/uk/cases/UKEAT/2019/0267_18_2802.html, at para 17/22 on the facts of this case.*
>
> *As stated at paras 17 to 22, this sets out very clearly the legal principles the Tribunal must apply. It reminds the fact that compensation should not be compensatory, and not punitive. It also reminds the Tribunal that any degree of indignation/disgust at the decision to dismiss should not inflate an award. In any event, we respectfully submit that the Claimants evidence in this regard has not demonstrated anything other than the level of upset one would expect if one lost their job, which is obviously unpleasant even when legally fair.*
>
> *The original ET decision was appealed by the Respondent as being excessive, in addition aggravated damages were award for a failure to deal with a grievance/appeal. On the facts of Mrs Ghaffar's case, this can be distinguished as there was an appeal, and due to covid requirements this took place over the telephone. The crucial point is that an appeal did take place and this is not disputed by the Claimant. Therefore, I would respectfully submit that in all the circumstances this particular case is not one where aggravated damages would be appropriate.*

Paragraph 20 is important from the Respondents perspective as it states:

> *20. It is also important for me to keep in mind that an award of compensation for injury to feelings is best judged by the ET that has had the benefit of hearing and seeing the Claimant give evidence. Given the wide discretion afforded to ETs in the assessment of compensation under this head, a challenge will only lie to the Employment Appeal Tribunal ("the EAT") if the award made is manifestly excessive or wrong in principle. That might mean, for example, where the facts of the case taken overall mean that it should be categorised as falling within a lower Vento band (see per HHJ McMullen QC at paragraph 46 Da'Bell v NSPCC [2010] IRLR 19). If this is so then a manifestly excessive award for injury to feelings can be overturned.*

Applying this to the current case, it was admitted this claim was "driven" by her husband, Mr Kayani. He stated quite clearly that he was the driving force behind this claim. This therefore raises the obvious question as to how did this actually affect the Claimant. I will not rehearse the evidence here, suffice to say it is clear that although undoubtedly affected in some way as is human nature, there is no compelling evidence she personally felt a sense of grievance about the situation, in short her sense of grievance was by proxy. The reason this is important is that Mr Kayani did not "live" through the events in the sense he was not the employee who was dismissed, therefore with respect he did not know what has actually transpired and has almost certainly (and we say wrongly) assumed his wife did tell the Respondent she was pregnant, when all the evidence suggests otherwise we submit.

Therefore, if the Tribunal is against the Respondent, on this basis we submit the lower vento band would be appropriate on the circumstances we are aware of.

On behalf of the Respondent, we still submit the lack of written/documentary evidence provided by the Claimant as to how this affected her makes it harder to determine how the dismissal really affected her.

Also, in respect of the Simmons v Castle uplift, the Presidential Guidance states that if the tribunal decide that the Simmons v Castle 10% uplift should not apply as a matter of Scots law, the award should be adjusted accordingly. If the Tribunal makes an award we ask the Tribunal not to apply the Simmons v Castle uplift.

In addition, as an appeal meeting was held, and the Claimant was given the opportunity to state her reasons, and in the event of a finding against the Respondent, the ACAS uplift should be nil to 5%, as a formal procedure within the confines of the Pandemic did take place and was not ignored as in the Baseline Case.

Also, we understand the EAT decision was subsequently appealed to the Court of Appeal.

This was connected with the shifting burden of proof.

The Court of Appeal held that the manager's persistence in lying about the real reason for Miss Otshudi's dismissal formed a prima facie case of race discrimination, and thus shifted the burden of proof to Base.

The Court of Appeal then held that Base failed to show that race had no implications in Miss Otshudi's dismissal. It was held that as Base

failed to show that race played no part in Miss Otshudi's dismissal, the Claimant's claim was right to succeed. Although the manager may have had a genuine belief that Miss Otshudi was stealing, this was based on a stereotypical prejudice he held against black people. The burden of proof had shifted and the burden was on the Respondent to evidence that no discrimination had occurred.

This can be distinguished on the current case as we submit the Respondent has shown the real reason for dismissal was redundancy and was not "dressed up" as something else as has been suggested. The performance played a part in the selection process but the reason for dismissal was redundancy as advanced, namely the effect of the coronavirus pandemic. The Respondent maintains they are being truthful, and I respectfully suggest that when looked at as a whole, the evidence supports this as others were made redundant and at risk. In addition, and of we say crucial importance, no evidence was advanced by the Claimant that her pregnancy actually affected her performance in any way, she has simply denied there was anything wrong with her performance at all.

Furthermore, and finally, when looking at the Claimant's CV at page 50 of the bundle before the Tribunal, the Claimant does not appear to stay in employment for very long in her previous employments, and although the reasons for this are unknown, we suggest it may be down to the concerns the Respondent has had with the Claimant during her employment with them.

This concludes these additional points in response to the Baseline case, and I thank the Tribunal for considering them."

88. On the claimant's behalf, Mr Kayani's further written representations of 9 March 2022 stated that :

"I would like to address a few points made by Mr Ridgeway. With regards to the case laws, I am afraid I do not understand these and will need to leave these to the Tribunal to deal with.

1. I feel aggravated damages for failure to deal with an appeal would apply to this case. Yes, an appeal was carried out but this was merely done to tick a box, it was not carried out by the guidelines in place and the person who carried out the appeal had no clue how it should be done. During cross examination it was discovered how badly this appeal was really carried out. Therefore, the claimant was in my opinion not heard at point of appeal and I would not consider this to have been a formal appeal procedure.

2. ***[blank]***

3. This case has been driven by myself but I have done this as I have been instructed by the claimant to do so, I have put forward all of the information provided to me by the claimant and I simply do not understand where Mr Ridgeway is going with this.

4. ***[blank]***

5. I strongly disagree that if the Tribunal is against the respondent that the lower Vento band is appropriate, the band I have selected I feel is more appropriate as this whole situation could have been avoided by using the furlough scheme. If the claimant was simply placed on furlough instead of being made redundant it would have made the last few months leading up to childbirth a lot easier. She was clearly discriminated against due to her pregnancy during her protected period, and had to deal with a great deal of stress and anxiety during her last few months of pregnancy. We have already explained the reason why there was no medical evidence attached and simply do not find it fair that due to the national lockdown that can be held against us.

*6. **[blank]***

7. I would like to request that the maximum amount of uplift should be applied for any procedures not followed and for the discrimination against a pregnant person in the protected period."

89. Following receipt of parties' further written representations, the clerk to the Tribunal wrote to both parties, on instructions from the Judge, by email sent on 10 March 2022 at 15:28 stating that:

"*Meantime, the Judge states that Mr Ridgeway's email of 8 March 2022 contains reference to a document in the Bundle, namely the claimant's CV at page 50, but not spoken to in evidence by any witness and, as per convention, the Tribunal does not consider that it is appropriate for Mr Ridgeway's further written representations to seek to adduce new evidence, when that was not the subject of questions and answers at the Final Hearing.*

The Judge is disappointed, given Mr Ridgeway's acceptance, on Friday, 4 March 2022, that 4 bullet points in his written submissions were an attempt to adduce evidence, on matters not spoken to in evidence, that he should have used the opportunity provided, to comment on the Base Childrenswear Ltd v Otshudi EAT judgment, and gone wider than that permitted remit, in that he has, as respondents' representative, sought impermissibly to seek to introduce new evidence, when the document now cited was in the Bundle, and he could and should have cross-examined the claimant upon its terms, if it was considered material to the respondents' defence of the claim.

Further, the Judge notes that Mr Ridgeway's further written representations of 8 March make reference to an ACAS uplift, but the claimant's updated Schedule of Loss, and indeed earlier versions thereof, have never submitted that the claimant is seeking any uplift in terms of Section 207A of the Trade Union & Labour Relations

(Consolidation) Act 1992. The claimant's quantification of compensation does not include any such head of compensation.

While Mr Ridgeway's email of 8 March, and also the claimant's representative's email of 9 March, refers at para 1, to "aggravated damages", the Judge states that aggravated damages do not apply in Scotland, and the aggravations relied upon by Mr Kayani will form part of the Tribunal's consideration of any injury to feelings award for the claimant, in the event that the Tribunal decides to find for the claimant.

The Tribunal does not require any further written representations from either party. It will proceed on the basis of the written and oral submissions made to date.

The Tribunal has yet to meet for private deliberation. After that Members' meeting, the date of which will be intimated to you, in due course, for information only, the Tribunal will write again to both parties to update you as to an expected date for issue of the Tribunal's reserved judgment & reasons."

Issues before the Tribunal

90. The case called before the full Tribunal for full disposal, including remedy if appropriate. The issues for determination was, as per the agreed List of Issues, as reproduced earlier in these Reasons at paragraph 44 above, and, in our Discussion and Deliberation below, we have had regard to the paragraphs of that agreed list, which we discuss later, taking account of the written and oral submissions from Mr Ridgeway, and the oral submissions, from Mr Kayani, as well as their further written representations of 8 and 9 March 2022.

Relevant Law

91. While the Tribunal received written submissions from Mr Ridgeway, with some case law references, the Judge has required to give the Tribunal a self-direction on the relevant law.

92. The respondents assert that the claimant was fairly dismissed on grounds of redundancy, and that she was not automatically unfairly dismissed, nor dismissed on discriminatory grounds related to pregnancy or maternity.

93. Under **Section 98(1) of the Employment Rights Act 1996**, it is for the employer to show the reason for the dismissal and that it is either for a reason falling within **Section 98(2)** or for some other substantial reason of kind such as to justify the dismissal of the employee holding the position she held. Redundancy is a potentially fair reason falling within **Section 98(2).**

94. **Section 139(1)(b)(i) of the Employment Rights Act 1996** provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish. **Section 139(6)** provides that "***cease***" and "***diminish***" mean cease or diminish either permanently or temporarily and for whatever reason.

95. The fact that the nursery was closing, to its usual, pre Covid clientele inevitably meant that there was a reduction in the number of employees that the respondents required to staff the nursery from March to August 2020.

96. On the minimal evidence led before us at this Final Hearing by the respondents, we have found the respondents' evidence of a redundancy situation to have been established. The nursery was closed for some 5 months. On this matter, we heard some evidence from Ms Kiyani, as owner of the respondents' business and, albeit to a lesser degree, from Mr Amjad.

97. Other than some room occupancy data, as produced to us in the nursery attendance records at pages 184 to 208 of the Bundle, no contemporary financial documents were, however, lodged by the respondents, in relation to their situation. We had a very generic letter dated 10 May 2021 lodged from their accountants, at page 216 of the Bundle, but no witness was led from DA Accountants, and no management / business accounts, and no bank

statements for the respondents' business, were lodged, or spoken to by Ms Kiyani, or any other witness on behalf of the respondents.

98. We would expect an employer, even a small employer such as the respondents in the present case, to have provided some further documentary evidence: (1) a proper narrative account of the nature of its business and work including the number of employees doing the relevant work; (2) where a fall in work is relied upon some statistical analysis and accounting evidence in the form of income and expenditure figures, and profit or loss figures; and (3) some discussion of the problem, maybe limited to correspondence / meeting notes of discussions with their accountants, and / or bankers. Neither Ms Kiyani, nor Mr Amjad's written witness statements, make any reference to any such background discussions with the business's financial advisers, and / or external accountants.

99. What is clear is that the nursery was closed for some 5 months. While we have decided that there is just enough sufficiency of evidence to show that there was a genuine redundancy situation, had we been dealing with this case as an unfair selection for redundancy case, in an ordinary unfair dismissal claim (which, of course, this claimant could not pursue, as she does not have 2 years' qualifying service) we would likely not have found that the respondents acted fairly and reasonably in treating redundancy as a reason to dismiss the claimant.

100. In **Williams v Compair Maxam Ltd [1982] ICR 156**, the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals: (1) Whether the selection criteria were objectively chosen and fairly applied; (2) Whether the employees were given as much warning as possible and consulted about the redundancy; (3) Whether, if there was a union, the union's view was sought; and (4) Whether any alternative work was available.

101. However, in determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should

have behaved differently. Instead it has to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out in **Williams v Compair Maxam** will not necessarily lead to the conclusion that a redundancy dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

102. In the present case, the selection criteria were not transparent. We are told that involved looking at employee performance, although that is not referred in the letters issued to the claimant, or Ms McTaggart, dismissing them for redundancy. It is referred to as part of the respondents' Redundancy Policy, at page 102 of the Bundle, but sight seems to have been lost as to adhering to its specific requirements.

103. There was no evidence of their being any trade union operating in the workplace. Further, there was no documentary evidence of any selection criteria having been used by the respondents to choose who should be dismissed for redundancy, and given the circumstances that the respondents found themselves in, in March 2020, it is perhaps understandable to the Tribunal why there was no warning and no consultation about redundancy. It was very much presented to the claimant as a *fait accompli* by Ms Kiyani on 25 March 2020.

104. Of course, in the present case, the claimant does not have two year's qualifying service with the respondents to complain of *"ordinary*" unfair dismissal contrary to the right not to be unfairly dismissed set forth in **Section 94 of the Employment Rights Act 1996**; **Section 108(1) of the Employment Rights Act 1996** refers. Similarly, under **Section 155**, an employee does not have any right to a redundancy payment unless continuously employed for a period of not less than two years ending with the relevant date.

105. However, instead, the claimant complains of having been automatically unfairly dismissed by the respondents, contrary to **Section 99 of the**

Employment Rights Act 1996. Section 108(3) says that the usual two years' qualifying period for employment does not apply if **Section 99(1)** applies. So far as relevant for present purposes, **Section 99** provides that:

> ***Leave for family reasons***.
>
> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—*
> *(a) the reason or principal reason for the dismissal is of a prescribed kind, or*
> *(b) the dismissal takes place in prescribed circumstances.*
>
> *(2) In this section " prescribed " means prescribed by regulations made by the Secretary of State.*
>
> *(3) A reason or set of circumstances prescribed under this section must relate to—*
> *(a) pregnancy, childbirth or maternity,*
> *…*
> *(b) ordinary, compulsory or additional maternity leave,*
> *… and it may also relate to redundancy or other factors.*

106. Further, in the present case, the claimant also brings her claim against the respondents under **Section 18 of the Equality Act 2010**, which, so as relevant for present purposes, provides that:

> ***Pregnancy and maternity discrimination: work cases***
>
> *(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
>
> *(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
> *(a) because of the pregnancy, or*

(b)because of illness suffered by her as a result of it.

(3) …

(4) …

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) …

107. Further, and also relevant for the purposes of the claim before this Tribunal, we note the terms of **Section 39 of the Equality Act 2010** which provides, so far as relevant for present purposes, that:

Employees and applicants

(1) …

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a)…

(b)…

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) …
(8) …

108. Finally, we also note the terms of **Section 136 of the Equality Act 2010** which sets out the burden of proof that applies in discrimination cases. **Section 136(2)** provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

109. At the first stage, the Tribunal has to make findings of primary fact based on the evidence from both the claimant and the respondents. It involves consideration of all material facts. The onus lies on the claimant to show potentially unfavourable treatment from which an inference of discrimination could properly be drawn. If the claimant does not prove such facts, her claim will fail.

110. It is important for Tribunals to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not have been an intention.

111. If, on the other hand, the claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed the act of discrimination, unless the employer is able to prove on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of her pregnancy, then the claimant will succeed.

Discussion and Deliberation

112. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn evidence, and within the various documents spoken to in evidence at the Final Hearing, and produced to us in the Bundle.

113. Having done so, and reflected on the whole evidence, and both parties' closing submissions, and further written representations, during our private deliberations, we have, after careful and anxious scrutiny, come to the view that the claimant's complaints are not well-founded, and we have made appropriate declarations to that effect in our Judgment above.

114. We are satisfied that the claimant was dismissed by the respondents on the grounds of redundancy, that that was a genuine redundancy, and that the claimant's pregnancy was not the reason for her dismissal. The respondents' reason for dismissing the claimant was not her pregnancy, but the redundancy situation that the respondents had to manage at that very difficult time at the first Covid-19 lockdown in March 2020. There was no evidence before us that the claimant was treated less favourably than other employees because of her pregnancy.

115. We are fortified in our view of this case by the fact that the claimant was not the only employee of the respondents to be dismissed for redundancy at around the same time, and for the same stated reason, albeit Fiona McTaggart was dismissed by letter two days after the claimant's dismissal letter was issued.

116. Further, the evidence we heard showed that Jasmine Mannix was also in line for dismissal for redundancy, but she resigned before she too had to be dismissed. Given the uncertainty for the respondents caused by the Covid-19 pandemic, and the reduction in child numbers using the nursery, affecting its income stream, we are satisfied that redundancy was the real and genuine reason for the claimant's dismissal by the respondents.

117. In these circumstances, as we have found the claimant's complaints against the respondents to be not well-founded, the inevitable consequence is that

we must dismiss the claim in its entirety, and this we have done in our Judgment above.

Closing Remarks

118. We are sure that, in reflecting upon this case, post the close of the Final Hearing, the respondents will already have recognised that there are areas of their HR and payroll practice that require improvement, including following due process, keeping accurate (and preferably dated and jointly signed) records of meetings, etc, and generally complying with their own internal employment policies and procedures, as well as general employment law.

119. Having dismissed the claim against the respondents, we do not, strictly speaking, need to go on and address the matter of remedy. However, as we had the benefit of detailed submissions from both parties on remedy, in the event that the claim was to be upheld, we have decided that it is appropriate to make some closing remarks, for the assistance of both parties.

120. As we noted earlier in these Reasons, the claimant did not make a complaint of "*ordinary*" unfair dismissal to this Tribunal as part of her ET1 claim form presented on 18 June 2020, and as such, there was no such head of complaint before this Tribunal. She has, however, pursued a complaint of automatically unfair dismissal under **Section 99 of the Employment Rights Act 1996**.

121. In the event of success with any unfair dismissal head of complaint, whether "ordinary", or "automatically unfair", the Tribunal requires to consider the matter of possible remedies, at **Sections 111 to 126**, **Section 126** providing that for acts which are both unfair dismissal and discrimination, a Tribunal shall not award compensation under either of the **Employment Rights Act 1996** or **Equality Act 2010** in respect of any loss which has been taken into account under the other Act in awarding compensation on the same or another complaint in respect of that act.

122. Had we found in favour of the claimant, the Tribunal would have had to proceed to make our remedy decisions based upon the options available to us under the **Equality Act 2010**, rather than the **Employment Rights Act 1996**. As such, we would not have addressed what, in an unfair dismissal case, would be basic award, and compensatory award (for past, and future loss of earnings, and including an amount for loss of statutory employment rights). Instead, we would have looked first at financial loss arising from the claimant's dismissal, and then we would have looked at injury to her feelings.

123. Before commenting on those specific matters, however, we deal first with parties' competing submissions to us on whether or not there should have been any statutory uplift to any claimant's compensation.

124. In Mr Ridgeway's further written representations for the respondents, intimated on 8 March 2022, he submitted that "***In addition, as an appeal meeting was held, and the Claimant was given the opportunity to state her reasons, and in the event of a finding against the Respondent, the ACAS uplift should be nil to 5%, as a formal procedure within the confines of the Pandemic did take place…"***

125. Had we found the claim successful, and had we thus given judgment in the claimant's favour, we can say here that we would have decided to make no uplift to the claimant.

126. Firstly, at no stage of these Tribunal proceedings, through various iterations of her Schedule of Loss, has the claimant ever sought a statutory uplift in terms of **Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992**. Her representative, Mr Kayani, only introduced it at paragraph 7 of his reply of 9 March 2022 to Mr Ridgeway's further written representations for the respondents intimated on 8 March 2022, where he sought the maximum uplift, which would be 25%. As such, it was raised after the close of evidence at this Final Hearing.

127. Secondly, even if we were satisfied that there were unreasonable failures by the respondents to comply with the ACAS Code (and, for the avoidance of doubt, we are not so satisfied, as the ACAS Code does not apply to redundancy dismissals, which is how the respondents categorised the claimant's dismissal, and redundancy is what we have found to be the reason for dismissal), any uplift is within the Tribunal's discretion, and ***"the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*** (**Section 207A(2)** refers.)

128. Even if the ACAS Code had been applicable, which we have found it is not given a redundancy dismissal, we would likely not have considered it just and equitable to uplift any compensation payable to the claimant. In coming to that decision, we would have taken into account the amount of any compensation that we would have decided to award to the claimant, and, having done so, we would not have considered it just and equitable to uplift that amount. We would have considered the amounts of compensation that we would have decided to award were fair and reasonable in all the circumstances of the present case, and so did not require to be uplifted to any extent.

129. As we have not found for the claimant, we have not required to look at the claimant's financial losses from 22 April 2020, when her employment terminated with her dismissal by the respondents, and that to the date of this Judgment, netting off her earnings from other employment with her brother, stated to be £8,000, which we find to be overstated (having regard to our findings in fact) and then looked forward as to when it is likely she will be able to obtain new employment paying her what she earned while employed at the respondents.

130. It is clear that the claimant took some time to obtain a new job, with her brother, but on the limited evidence provided to this Tribunal, we cannot fairly say that she unreasonable failed to mitigate her losses prior to being employed by her brother from 1 April 2021.

131. Further, we would have had to look at the claimant's injury to feelings. In her ET1 claim form, presented on 18 June 2020, the claimant originally sought **£8,000** for "***stress and inconvenience***"; increased to **£9,000** in her PH Agenda on 1 September 2020, and, in her Schedule of Loss, intimated on 13 May 2021, her "***injury to feelings***" were assessed at **£14,000.** It was only during the course of this Final Hearing that that amount was increased to **£24,000**, albeit with no change to the narrative provided in the Schedule of Loss.

132. In those circumstances, taken together with the disclosure, again only during the course of this Final Hearing, that the claimant had secured a new job with her brother in 2021, and production of a revised Schedule of Loss, copy payslips and bank statements from the claimant, the Tribunal can readily see why the respondents were perplexed by the **£10,000 increase** in claimed injury to feelings as being, perhaps, an attempt to mitigate for **£8,000** being netted off as deducted from past loss of earnings, in light of earnings from new employment.

133. It is regrettable that, despite clear case management orders made by other Judges earlier in these Tribunal proceedings, disclosure of those earnings from new employment was not flagged up by the claimant long before the start of this Final Hearing. Orders of the Tribunal are made for compliance, and the fact that the claimant has been represented by her husband, as a lay representative, does not excuse the failure to fully and openly disclose matters, given the clear and unequivocal terms of the Tribunal's orders.

134. Be that as it may, the claimant did raise it in her evidence, and she did produce the relevant vouching. The late production of this information does however give context to Mr Ridgeway's written closing submissions, and his statement there that the respondents believe that the claimant "***may be hiding her true income."***

135. The principles to be determined when assessing awards for injury to feelings for unlawful discrimination are summarised in **Armitage & Others v Johnson [1997] IRLR 162**. Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

136. We have reminded ourselves of the sage judicial guidance given to Tribunals in **Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 / [2003] IRLR 102**, that an award of injury to feelings is to compensate for "***subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression."***

137. Lord Justice Mummery said (when giving guidance in **Vento**) that "***the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise…… tribunals have to do their best that they can on the available material to make a sensible assessment." In carrying out this exercise, they should have in mind the summary of general principles of compensation for non pecuniary loss by given by Smith J in Armitage v Johnson."***

138. In **Vento**, the Court of Appeal went on to observe there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

139. The appropriate sum for each band has been up rated in cases subsequent to **Vento** to take account of inflation, and, until ET Presidential Guidance was issued, the amount appropriate for the lower band was then £660 to £6,600 and the amount appropriate to the middle band was then £6,600 to £19,800. The amount appropriate for the top band was then £19,800 to £33,000.

140. More recently, account has now to be taken of the position adopted by Judge Shona Simon, the Scottish ET President, when formulating Guidance published jointly with Judge Brian Doyle, then President of ET (England & Wales), originally first issued on 5 September 2017, and updated by annual addenda, most recently by the fifth addendum issued on 28 March 2022. However, for the purposes of the present case, where the claimant's effective date of termination of employment was 22 April 2020, we need to consider the rates set forth in the third addendum, as issued on 27 March 2020.

141. In respect of claims presented on or after 6 April 2020, such as this claim, presented on 18 June 2020, the **Vento** bands were revised as follows: a lower band of **£900 to £9,000** (less serious cases); a middle band of **£9,000 to £27,000** (cases that do not merit an award in the upper band); and an upper band of **£27,000 to £45,000** (the most serious cases), with the most exceptional cases capable of exceeding £45,000.

142. In deciding upon an appropriate amount, we would first of all have had to address the appropriate band as per **Vento**. The respondents, as per Mr Ridgeway's closing submissions to the Tribunal, had assessed it as being in the lower band, maybe **£3,000 to £4,000**, while Mr Kayani, for the claimant, says it should fall within the middle **Vento** band, at **£24,000**.

143. As per the EAT judgment in **Base Childrenswear Ltd v Miss N Lomana Otshudi**, a judgment by Her Honour Judge Eady QC, as she then was (now Mrs Justice Eady, a High Court judge, and the new President of the EAT), as reported at [**2019] UKEAT/0267/18**, we readily accept that our focus must be on the impact of the discriminatory acts on the claimant. Equally, as the EAT

observed, it is not uncommon for a victim of unlawful discrimination to suffer stress and anxiety.

144. In this, our Judgment, we have found that there was no discriminatory act, so injury to feelings does not arise. Had we found there was discrimination, and had we found in the claimant's favour, we would not have awarded her the sum sought of **£24,000**.

145. Mr Ridgeway regarded that sum as "***excessive, and would unjustly enrich the Claimant."*** We agree with him that, given the facts of this case, and on the evidence led before us, that sum would be excessive. Had the claimant been successful in her claim, we would have awarded her something in the lower band, likely around mid-way, say **£4,500** (plus interest), but we do not accept the premise made by the respondents' representative that the claimant would be unjustly enriched by such an award.

146. As his submissions righty recognised, the general principle in assessing compensation is that, as far as possible, claimants should be placed in the same position as they would have been but for the unlawful act, and that injury to feelings awards should be compensatory, and not punitive, but just to both parties.

147. Mr Ridgeway made much, in his closing submissions, of the fact that there was no medical evidence for the claimant. At this Final Hearing, we heard oral evidence from the claimant, as also her husband indirectly, when contributing his perspective as her lay representative in these Tribunal proceedings.

148. We have reminded ourselves of the unreported EAT judgment of His Honour Judge David Richardson, in **Esporta Health Clubs & Anor v Roget [2013] UKEAT 0591/12**, which makes it clear that a Tribunal has to have some material evidence on the question of injury to feelings.

149. Here, this Tribunal has had the claimant's own evidence, supported by the statement in her updated Schedule of Loss, but no GP or other medical report, nor any evidence from any other person with knowledge of the precise nature and extent of the claimant's injured feelings, such as her midwife.

150. As such, we feel that it would have been difficult for us to differentiate between any stressors caused by the respondents, any other stressors, such as the pregnancy itself, being a first pregnancy, and any stress that any family will suffer due to a lack of money coming into the household, and any additional stressors caused by the claimant's decision to prosecute her claim before the Tribunal, a feature common to all litigants.

151. In deciding this matter, had we required to do so, we would also have borne in mind the judicial guidance given by Her Honour Judge Stacey (as she then was, now Mrs Justice Stacey in the High Court) in the Employment Appeal Tribunal, in **Komeng v Creative Support Ltd [2019] UKEAT/0275/18**, that the Tribunal's focus should be on the actual injury to feelings suffered by the claimant and not the gravity of the acts of the respondent employer.

152. The claimant here, at this Final Hearing, provided first-hand evidence about her treatment by the respondents, and the manner of it, and how that had affected her, and we have no doubt , having heard the claimant's evidence, that she felt, and indeed she still feels, hurt about the respondents' treatment of her.

153. We close by stating that we recognise that our Judgment will not be well received by the claimant, because, even during the course of the Final Hearing, it was clear to us that she still bears a deep sense of grievance and injustice at the way she perceives that she was treated by the respondents.

154. We appreciate that that is her perception, and so her reality, but, as the independent and objective fact finding Tribunal, applying the relevant law to the facts of this case as we have found them to be, based on the evidence led before us from both parties, we hope that in reading our Judgment, and

these Reasons, the claimant will come to understand our reasons for dismissing her claim against the respondents.

5

Employment Judge: **G. Ian McPherson**
Date of Judgment: **15 June 2022**
10 **Entered in register:** **16 June 2022**
and copied to parties