THE INDUSTRIAL TRIBUNALS

CASE REF: 1160/15

CLAIMANT: **Lindsay Knox**

RESPONDENT: **Henderson Retail Limited**

DECISION ON REMEDY

The unanimous decision of the tribunal is that the claimant is entitled to a final award of £9,800.87 as set out in paragraph 19 of this decision.

Constitution of Tribunal:

Employment Judge: **Employment Judge Crothers**

Members: **Mr J Barbour**
Mrs L Torrans

Appearances:

The claimant was represented by Mr M Potter, Barrister-at-Law instructed, by Campbell Stafford, Solicitors.

The respondent was represented by Mr T Warnock, Barrister-at-Law, instructed by Pinsent Masons LLP, Solicitors.

BACKGROUND

1. The tribunal hearing on liability was held on 6 - 8 June 2016. The decision was issued on 6 July 2016 and subsequently appealed to the Northern Ireland Court of Appeal.

2. As recorded in the final paragraph of the tribunal's decision:-

> "The tribunal found the evidence in relation to remedy unsatisfactory in a number of respects. In the absence of a resolution between the parties in the meantime, the tribunal proposes to relist the hearing to consider remedy".

3. The claimant was successful in her claim of constructive dismissal before the tribunal. This decision was upheld by the Northern Ireland Court of Appeal on 10 March 2017.

4. Thereafter the tribunal sought to arrange a remedy hearing. The remedy hearing was postponed in the circumstances referred to in a record of a Case Management Discussion dated 24 May 2017, which is attached to this decision.

5. The parties submitted an agreed bundle of documents prior to the commencement of the hearing on 30 June 2017. However, it became apparent that the claimant was relying on medical factors to rebut the respondent's allegation that she had failed to mitigate her loss. Regrettably, the hearing had to be postponed pending receipt of relevant GP notes and records.

6. Although available in June 2017, necessary and relevant payslips in relation to the claimant's employment with the Card Factory were not discovered by the claimant's representative until the morning of the hearing. The tribunal had also made a Discovery Order dated 24 May 2017, which was to be complied with by both parties by not later than 2 June 2017. Furthermore, the claimant's representatives provided an amended Schedule of Loss, also on the morning of the hearing. This, together with the late provision of available payslips, meant that the respondent had to revise its approach to the Schedule of Loss incorporated in a bundle of documents for the earlier hearing on 30 June 2017. The figures in the Schedule of Loss were however agreed subject only to the calculations in respect of the claimant's work in the Card Factory, rounded off by agreement for a period of 52 weeks ending on 13 April 2016. It was common case that the claimant was unemployed from 13 April 2016 until 23 April 2016 when she accepted a job in the Post Office. The respondent resumed responsibility for the Post Office in Northern Ireland, by way of a Transfer of Undertaking in October 2016. The claimant is therefore currently in the employment of the respondent.

ISSUE

7. The issue before the tribunal was:-

> What compensation is the claimant entitled to pursuant to the tribunal's decision on liability?

SOURCES OF EVIDENCE

8. The tribunal heard evidence from the claimant and also received an agreed bundle of documentation together with an amended Schedule of Loss and relevant payslips from the claimant's representative.

FINDINGS OF FACT

9. Having considered the evidence insofar as same related to the issue before it, the tribunal made the following findings of fact, on the balance of probabilities:-

(i) It is common case that the claimant's effective date of termination of employment was 1 April 2015.

(ii) The claimant obtained employment with the Card Factory from 20 April 2015 until 13 April 2016. It was common case that she was unemployed from 13 April 2016 until 23 April 2016 before taking up a post in the Post Office on 25 April 2016, for which she had been "head-hunted". There is no evidence before the tribunal that the claimant made any other job application apart from those pertaining to the Card Factory and the Post Office.

(iii) The disputed area between the parties relates to her employment in the Card Factory and the respondent's contention, disputed by the claimant, that she was earning more in the Card Factory than in the Post Office. During her last two months of employment with the Card Factory, the claimant was ill and in receipt of SSP, together with an amount of wages from the Card Factory. She stated in evidence that she had no issues with the Card Factory, that she loved her job and that she left on good terms. The respondent contended that the claimant was earning more in the Card Factory than in the Post Office, that she ought to have continued her employment with the Card Factory, and that she should not be awarded anything by the tribunal after 13 April 2016.

(iv) An earlier agreed Schedule of Loss presented to the tribunal at the hearing on 30 June 2017 included the following:-

> **"<u>COMPENSATORY AWARD</u>**
>
> **The claimant immediately sought employment**
>
> **<u>Loss of Earnings (unemployment)</u>**
>
> Net pay (Henderson Retail Limited): £1,715.34 per month and £395.85 per week
>
> Length of time unemployed before taking up new post: 2.5 weeks
>
> 2.5 weeks @ £395.85 **£989.63**
>
> **<u>Loss of Earnings (net pay decrease- Card Factory)</u>**
>
> Net pay (Card Factory) = £1,452.90 per month
>
> (Difference in net pay between current position and old position per month)
>
> £1,715.34 - £1,452.90 = £262.44
>
> Length of time in Card Factory position (at 13th April 2016): 52 weeks 2 days
>
> <u>Loss of £60.56 net per week</u>
>
> 52 weeks x £60.56 up to 13th April 2016 **£3,149.12**

Loss of earnings (unemployment)

13th April 2016 – 23rd April 2016– unemployment before taking up new post –

1 week @ £395.85

2 days @ £56.55 per day = £113.10 for the 2 days

£508.95

Loss of earnings (net pay –Post Office)

Net pay at Post Office- £300.82

(Difference in net pay between current position and old position per week)

£395.85 - £300.82 = £95.03

Time in Post Office to hearing of 6th June 2016 – 6 weeks 25th April – 6th June 2016 @ £95.03 = **£570.18"**

(v) The amended Schedule of Loss, presented by the claimant's representative to the respondent and to the tribunal at the hearing on 9 August 2017, included the following in relation to employment at the Card Factory and Post Office:-

"Loss of earnings (net pay decrease)

Net pay (Card Factory) - £1,248.99 per month (based on salary for previous 12 months)

(Difference in net pay between current position and old position per month)

£1,715.34 - £1,248.99 = £466.35 per month

Length of time in Card Factory position (at 13th April 2016): 52 weeks 2 days

Loss of £116.59 net per week

52 weeks x £116.59 up to 13th April 2016 **£6,062.68**

"Loss of earnings (unemployment)

13th April 2016- 23rd April 2016 – unemployed before taking up new post –

1 week @ £395.85 per week

2 days @ £56.55 per day = £113.10 for the 2 days **£508.95**

Net pay (Post Office) - £300.82

(Difference in net pay between current position and old position per week)

£395.85 - £300.82 = £95.03

Current length of time in Post Office position – 6 weeks 25th April - 9th August 2017 @ £95.03 = 65 x 95.03 =

£6,176.95"

("Current position" and "old position" refer to the respondent and Post Office respectively).

(vi) An examination of the wage slips relating to the claimant's employment with the Card Factory reveals that she received the following net pay:-

29/05/15:	£ 1,302.66
26/06/15:	£ 1,247.22
31/07/15:	£ 1,552.37
28/08/15:	£ 1,335.77
25/09/15:	£ 1,309.48
30/10/15:	£ 1,641.58
27/11/15:	£ 1,237.65
23/12/15:	£ 1,479.46
29/01/16:	£ 1,726.00
26/02/16:	£ 1,147.28
25/03/16:	£ 521.15
29/04/16:	£ 487.28
	£14,987.90

Average monthly net pay over the entire period equals £1,248.99 net.

However, if the last two months are excluded, the total net pay for 10 months is £13,979.47 which is an average of £1,397.94 per month.

(vii) The tribunal was satisfied, had the claimant been medically fit to work in the Card Factory for the last two months of her employment, that she would have been earning at least the average monthly net salary of £1,397.94. Assuming this monthly net figure over a 12 month period her salary could have been £16,775.28. Taken over 52 weeks, this would equate to a net salary of £322.60 per week. The tribunal is satisfied that this is a just and equitable way of assessing what the claimant was earning on a weekly net basis in the Card Factory. She contended that the respondent was incorrect in its assertion that she was earning less in the Post Office than in the Card Factory. She also relied on the fact that she was being paid occasional bonuses by the Post Office but the tribunal was presented with no evidence in relation to any such payments and relied on the agreed amounts specified in the Schedule of Loss in relation to the Post Office. The agreed Schedule for the purposes of employment at the Post Office shows that the claimant's net weekly pay was £300.82.

(viii) Although the tribunal's date of assessment for the purposes of compensation is 9 August 2017, the claimant and the respondent clearly had radically different approaches regarding awarding compensation beyond 13 April 2016.

(ix) Counsel for the respondent also reserved the respondent's position regarding an application for costs in respect of the postponement of the hearing on 30 June 2017 until 9 August 2017, as being occasioned by the claimant and the issue of Discovery.

THE LAW

10. (1) Article 157(1) of the Employment Rights (NI) Order 1996 ("the 1996 Order") provides that the amount of the compensatory award shall be:-

> "Such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".

(2) The compensatory award should not be increased out of sympathy for the claimant or to express disapproval of the respondent (**Lifeguard Assurance Ltd v Zadrozny (1997) IRLR 56**).

(3) In ***Norton Tool Company Ltd v Tewson [1973] 1 ALL ER 183***, the NIRC said that compensation should be assessed under four main headings:-

(a) Immediate loss of earnings, ie loss of earnings between the date of dismissal and the date of the hearing.

(b) Future loss of earnings, ie anticipated loss of earnings in the period following the hearing.

(c) Loss arising from the manner of the dismissal.

(d) Loss of statutory rights, ie compensation for being unable to claim unfair dismissal for a period of at least one year.

In ***Tidman v Aveling Marshall Ltd [1977] IRLR 218***, the EAT held that it was the duty of each tribunal to raise and enquire into each of the four heads of compensation established by ***Norton Tool*** plus a fifth head of compensation – loss of pension rights. It should be noted that enquiring into a particular head of compensation does **not** mean that compensation has necessarily to be awarded under that head.

11. In the case of **Wardle v The Credit Agricole Corporate and Investment Bank [2001] EWCA Civ 545**, Lord Justice Elias stated at paragraphs 51 and 52 of his judgment as follows:-

> "51. However, in my view the usual approach, assessing the loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases - and they are likely to be the

vast majority - where it is at least possible to conclude that the employee will in time find such a job. In this case the Tribunal has in effect approached the case on the assumption that it must award damages until the point when it can be *sure* that the claimant would find an equivalent job.

52. In my judgment, that is the wrong approach. In the normal case if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The Tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice the speculative nature of the exercise means that the Tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide."

12. In the case of **NCP Services Ltd v Topliss UK EAT/0147/09/SM**, Lord Justice Langstaff stated in paragraphs 41 - 43 of his judgment as follows:-

"41. Here an interesting question arose which the parties might have but did not anticipate in advance of this hearing. That is if there is to be a remission to determine future loss which the Tribunal itself had recognised was necessarily uncertain in its estimation at the date of the original hearing, is the Tribunal on remission to consider the position in the light of what is now known? The passage of time will inevitably have shone light as a matter of fact upon what has in truth been the real loss after 11 December 2008. It may be, for instance, that the position is that the employee will have obtained a better paid job within a few months. It may be that he has obtained a less well-paid job in which he is still employed. It may be that he is still unemployed.

42. All these are matters of fact just as there will be a factual basis for an assessment of whether the employee has taken appropriate steps to mitigate his loss. We have to ask whether the Tribunal should conduct an exercise which has an element of unreality about it, in putting itself back into the position it was in December and reconsidering the evidence then before it in order to determine what the loss has been since 11 December. One view might suggest that is what it should do. We do not agree. We consider that the starting point here is that no proper decision has yet been made upon the claim insofar as it concerns future loss. It is as if the claim for future loss had simply been adjourned until the date it will be reconsidered.

43. It follows that for an award properly to be made in respect of the losses from 11 December, the Tribunal will be entitled to consider what has been the factual position since. It seems to us this has three main benefits: First, and generally, the purpose of an award is to compensate for a wrong which has been done. The figure to be awarded is one which is just and equitable in respect of that loss.

> Where part of the loss is better known than by a process of estimation conducted at the time, even though aspects of it still remain uncertain it is, in our view, fairer, or to use the words just and equitable, to take that situation into account. It has the result of substituting certainty for that which was uncertain though estimated on the best available evidence."

MITIGATION OF LOSS

13. The Court of Appeal in **Wilding v BT PLc [2002] IRLR 524** stated that a tribunal has to apply the following principles:-

    (i) it is the duty of the employee to act as a reasonable person unaffected by the prospect of compensation from their former employer;

    (ii) the onus is on the former employer, as the wrongdoer, to show that the employee has failed in his duty to mitigate his loss by unreasonably refusing an offer of re-employment;

    (iii) the test of reasonableness is an objective one based on the totality of the evidence;

    (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of the former employer, the way in which the employee had been treated, and all the surrounding circumstances, including the employee's state of mind, should be taken into account; and

    (v) the court of tribunal must not be too stringent in its expectation of the injured party.

    These principles will apply equally to situations where the tribunal is assessing whether a claimant has mitigated his loss by actively seeking alternative employment.

    In **Wilding**, Sedley LJ stated that:-

> *"It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed. He must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that there is more than one reasonable response open to the wronged party, the wrongdoer had not right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed".*

14. In the context of mitigation of loss therefore, the onus of proof is on the respondent. The respondent must show that the claimant has acted unreasonably in failing to seek alternative work or turning down a job offer. Furthermore, the test is objective in all the circumstances of the case.

15. The tribunal also considered the relevant section in **Harvey on Industrial Relations and Employment Practice at D1, paragraph 2269FF** insofar as relevant.

16. The tribunal was also referred to the case of **Bateman v British Leyland [1974] ICR 403 NIRC**, and to the Industrial Tribunal remedy decision in **Maria McKeith v Frank McCorry and Others (case reference: 1188/15)**.

SUBMISSIONS

17. Mr Potter, for the claimant, referred the tribunal to the relevant section in **Harvey** and to the principles in **Wilding**. He urged the tribunal to consider that the test in **Wilding** was an objective test based on the totality of the evidence and that the tribunal should not be too stringent in its expectations from an injured party. In referring the tribunal to its original decision, the claimant's credibility, and the severe adversity the claimant had experienced, he urged the tribunal to consider the fact that she had found another job and had significantly mitigated her loss. He also considered it relevant to refer to her strength of character in continuing to work for the respondent after October 2016, when the respondent took over the Post Office. In referring to the time period from the date of the tribunal's original decision and the material dates in the tribunal process prior to the hearing on 9 August 2017, Mr Potter urged the tribunal to calculate the loss until 9 August 2017, although acknowledging that the tribunal had a discretion in relation to the matter. He subsequently referred to the **McKeith** case as not having legal authority and, after referring to **Wardle**, urged the tribunal to consider the relevant section in **Harvey**, and paragraphs 42 - 43 of the judgment in the **Topliss** case. He urged the tribunal to proceed on normal principles and adopt a sensible view in approaching the issue of compensation. He submitted that the tribunal should proceed with reasonableness and discretion and not be over legalistic in its approach.

18. Mr Warnock who had provided written submissions for the hearing on 30 June 2017, which are appended to this decision, referred to the time-line in the case, to the fact that the tribunal decision was in excess of two years from the date of dismissal, and that the common approach to the calculation of loss to the date of hearing was not appropriate in this case. In referring to the various authorities of **Wardle**, **Topliss**, **Bateman v British Leyland**, and the decision of the tribunal in **McKeith**, he submitted that the claimant should not be compensated beyond 13 April 2016, that she was earning more in the Card Factory than in the Post Office, that she should properly have returned to the Card Factory after her two month period of sickness and that she had failed to mitigate her loss in accepting a job with the Post Office. He pointed out that the original Schedule of Loss which the claimant had produced prior to the hearing on 30 June 2017 referred to a loss of £60.56 in the context of the Card Factory which had been agreed by the respondent.

CONCLUSIONS

19. The tribunal having carefully considered the evidence before it and having applied the relevant principles of law to the findings of facts, concludes as follows:-

    (1) The tribunal is satisfied in circumstances where the claimant acknowledged before the tribunal that she had no issues with the Card Factory, that she loved her job, and that she left on good terms, that it was unreasonable for her not to mitigate her loss by returning to work in the Card Factory. She was earning an average of £322.60 per week in the Card Factory, whereas in the Post Office her net weekly pay was £300.82. Apart from the mitigation

argument, the tribunal was satisfied, having considered the relevant authorities and, in particular, Article 157(1) of the 1996 Order in relation to the compensatory award, that the claimant should be awarded the following:-

Basic award: 7 weeks x £490.00 per week	=	£3,430.00
2.5 weeks at £395.85 per week	=	£ 989.63
52 weeks x £73.25 (£395.85 - £322.60) (up to 13 April 2016)	=	£3,809.00
Loss of statutory rights	=	£ 500.00
Loss of pension prior to employment with the Card Factory (£22.88 x 2.5)	=	£ 57.20
Pension loss in Card Factory – £19.52 x 52 weeks	=	£1,015.04
	TOTAL	**£9,800.87**

20. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: **30 June 2017 and 9 August 2017, Belfast**

Date decision recorded in register and issued to parties:

THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION

CASE REF: 1160/15

CLAIMANT: **Lindsay Knox**

RESPONDENT: **Henderson Retail Limited**

DATE OF HEARING: **24 May 2017**

REPRESENTATIVES OF PARTIES:

CLAIMANT BY: **The claimant was represented by Mr T Campbell, Solicitor of Campbell Stafford Solicitors.**

RESPONDENT BY: **The respondent was represented by Mr T Warnock, Barrister-at-Law instructed by Pinsent Masons LLP Solicitors.**

Record of Proceedings

---

1. A Remedy Hearing was listed in this case for 24 May 2017. A difficulty arose in relation to the availability of the claimant's counsel and an application was made to postpone the Remedy Hearing, by consent. However, there was difficulty in establishing a new hearing date. This has now been agreed for **10.00 am on 30 June 2017**. I made clear to the parties that the hearing must proceed on that date.

2. Mr Campbell has lodged a bundle of documents with the tribunal. This bundle is agreed. However the respondent's Solicitors have requested further Discovery from the claimant. I pointed out that it was essential to have a final agreed bundle of documents to ensure, in terms, the efficiency of the hearing. I was therefore satisfied that a general **Order** for **Discovery** should be made against both parties for the discovery of:-

   > All documentation which is or has been in the possession, custody, care, control or power of the respondent, its servants or agents/claimant relevant to the issues in the Remedy Hearing, to be complied with by both parties **by not later than 2 June 2017**.

3. The substantive hearing was therefore postponed. In any event, owing to the deficiency in the bundle provided to the tribunal, certain issues would clearly have had to be addressed had the matter proceeded on 24 May 2017. This would have caused an inevitable delay in the tribunal commencing the case.

4. It appears that there is no prospect of a resolution to this case in advance of 30 June 2017.

Employment Judge: Ann Gemmell

Date: 24th **May 2017**

1160/15IT-DM

Note

1. If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.

2. Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.

3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 10(2)(d) of the Industrial Tribunals Rules of Procedure 2005 shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale - £1,000 at 3 September 2007, but subject to alteration from time to time.

4. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals Rules of Procedure 2005.

Case No: 1160/15 IT

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

LINDSAY KNOX

Claimant

- and –

HENDERSON RETAIL LIMITED

Respondent

RESPONDENT'S SKELETON SUBMISSIONS ON REMEDY

Introduction and Background

1. The original hearing took place between 6th and 8th June 2016 and the Tribunal's decision was issued in July 2015. Subsequent to the Tribunal's decision, there was an appeal by the Respondent to the Court of Appeal. The Court of Appeal gave its decision dismissing the Respondent's appeal on 10th March 2017.

2. The Claimant was successful in her claim of constructive dismissal and the decision of the Tribunal was upheld by the Court of Appeal. The Claimant is therefore entitled to be justly compensated by the Respondent.

3. It is common case that the Claimant's effective date of termination was the 1st April 2015. Due to the time that it took for the case to come to hearing and the time for the subsequent appellate process, it is now over two years from the effective date of termination and over a year from the original hearing date.

4. The need for a remedy hearing comes as a result of the Tribunal finding the evidence in relation to remedy unsatisfactory in a number of respects and the parties being able to agree quantum.

5. The basic award is agreed between the parties

6. The Claimant obtained employment with the Card Factory from 20th April 2015. The Claimant was headhunted by the Post Office and left her post in the Card Factory to take up her new position as from 25th April 2016.

7. The Claimant's weekly loss for the time she was unemployed before starting with the Card Factory was £395.85 per week; that is what her net pay was when working for the Respondent.

8. The weekly difference in pay for the period of employment with the Card Factory is £60.56 per week net.

9. The difference in pay for the period of unemployment between the Card Factory and the Post Office is £395.85 per week, that is what the net pay was when working for the Respondent.

10. The difference in pay during employment by the Post Office is £95.03 per week net.

11. Pension loss is £22.88 per week when unemployed, £19.52 per week at the Card Factory and £22.88 per week at the Post Office until 26th December 2016 when the loss changed to £19.62 per week.

12. Loss of statutory rights is agreed at £500 subject to the Tribunal.

13. The Claimant appears to have made no applications for jobs since starting with the Card Factory and her move to the Post Office came by way of "head-hunting".

Relevant Law

14. Article 157(1) of the **Employment Rights (NI) Order 1996** provides that the amount of the compensatory award shall be:

> "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

15. The award of compensation should compensate the Claimant for the financial loss sustained by the dismissal. According to Phillips J in *Lifeguard Assurance Co Ltd v Zadrozny [1977] IRLR 56, EAT*, the tribunal assessing compensation:

> "should not fall into the benevolent error of awarding compensation, not for some loss due to the unfair nature of the dismissal, but more out of sympathy for the predicament in which the employee finds himself".

16. The object is not to punish employers for their wrongdoing. An award should therefore not be increased either out of sympathy for the employee or as a means of expressing disapproval, *Lifeguard Assurance Limited v Zadrozny [1977] IRLR 56.*

17. As was made clear by the EAT in *Optimum Group Services PLC v Muir [2013] IRLR 339*, loss is the governing principle and considerations of justice and equity arise only when determining what, of the loss actually suffered, should be awarded in compensation. Lady Smith clarified that such considerations may operate so as to limit the award if (*inter alia*) a *novus actus interveniens* occurs.

18. The loss that must be awarded is the loss consequential to the dismissal and there is no right to loss of earnings preceding the dismissal, even in a constructive dismissal claim where there is claimed to be a series of acts leading to a repudiatory breach of contract, see *GAB Robins (UK) Ltd v Triggs* [2008] ICR 529.

19. Assessing future loss is a speculative exercise and the general approach is for the Tribunal to look at the point at which it assesses the employee ought to be able to get an equivalent job assuming proper mitigation efforts, *Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604* (EWCA).

20. In *Blackwell v GEC Elliott Process Automation Ltd [1976] IRLR 144, EAT*, Phillips J, in the course of giving general guidance about the way in which tribunals should explain and set out their awards, referred to the practice established in the *Norton Tool* case and observed:

> "That practice applies equally in the Employment Appeal Tribunal and is current in all [employment] tribunals now, and it is absolutely essential that [employment] tribunals, when determining the amount of compensation, should explain and set out, in the manner prescribed in that case, the details of the individual heads under which compensation is awarded and, briefly at all events, the manner and reasoning by which they have arrived at those figures. It is necessary to do that for a number of reasons. First of all, if it is not done, the parties cannot see whether the amounts awarded are correct. Secondly, if they wish to consider an appeal, they cannot decide whether it is an appropriate case in which to appeal. Thirdly, the appeal tribunal, if it is not done, cannot see whether the order appealed from was right. And there is perhaps a more important point than any of those: that, fourthly, the very discipline of having to set down in orderly manner the heads under which the compensation is awarded, and the brief reasons for it, ensures that the tribunal does not make a mistake, does not omit anything and arrives at a reasonable figure'.'

21. Interestingly in the recent case of *McKeith v Frank McCorry and others [2017] NIIT 01188_15IT (16 March 2017)*, a tribunal chaired by the Vice President considered the common approach of Claimants claiming loss to the date of the hearing and thereafter based on the Norton Tool approach.

22. At paragraphs 25 and 26 of the decision, the Tribunal commented as follows:

> *"25. The Norton Tool decision concerned a claimant who had found alternative and comparable employment four weeks after dismissal. It is not possible to discern from this decision any general proposition that an unfairly dismissed person should automatically, or presumptively, receive compensation for loss of wages up to the date of the remedy hearing, particularly where the relevant time period exceeds any statutory or contractual notice period in this case, and amounts to some 15 months.*

26. Therefore the issue in the present case and indeed in all such cases appears to be the speculative exercise of assessing when the claimant could be expected to obtain alternative equivalent employment and therefore fixing an appropriate point for future loss which should run from the date of dismissal and which should not depend in any way on the date on which the tribunal determined remedy .

As the Court of Appeal (GB) said in Wardle (see above), the tribunal should assess the loss up to the point at which the claimant would be likely to get another job, while recognising that this is a very speculative and unscientific exercise".

23. The Tribunal then went on to conclude at paragraph 112 that:

> "there is no automatic or presumptive entitlement to loss of earnings up to the date of the remedy hearing or the remedy calculation. For the reasons outlined earlier, such entitlement seems entirely illogical. The proper measure of loss is the loss of earnings until the point at which the claimant is likely to have obtained alternative employment".

24. The Tribunal concluded that despite suffering from a depressive illness for 3 months the Claimant ought to have found an alternative position by 52 weeks post dismissal.

25. How long the claimant will suffer the loss is to be estimated by reference to the tribunal members' knowledge of industrial relations in their area (*Bateman v British Leyland UK Ltd [1974] ICR 403, [1974] IRLR 101*)

26. Pursuant to Article 157(4) of the 1996 Order, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Northern Ireland.

27. As Sir John Donaldson asserted in *Archbold Freightage Ltd v Wilson [1974] IRLR 10:*

> '... 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'.

28. The employee must act reasonably but the burden is on the employer to show failure to mitigate. In determining whether the employee has mitigated his loss, the circumstances of the particular employee must be taken into account and the question is whether the particular employee has taken reasonable steps to find alternative employment, *Fougère v Phoenix Motor Co Ltd [1977] 1 All ER 267.*

Argument

29. The Respondent states that the Claimant has failed to mitigate her loss. The Claimant took a job with the Card Factory at a lower rate of pay than her job with the Respondent. The Respondent does not seek to argue that the Claimant acted unreasonably by taking this initial step however the Claimant by her own admission made no efforts to seek alternative employment at a higher rate after having taken the Card Factory job. There is no further searching for jobs or job applications. The Claimant then took a job she was offered with the Post Office by way of "headhunting" causing the Claimant to suffer a further decrease in net wages. Again, the Clamant made no efforts to seek alternative employment at a higher rate from taking that post in April 2016 to date. In these circumstances the Claimant has not mitigated her loss.

30. As was asserted in the *McKeith* case, there is no presumption that a Claimant is entitled to loss from the date of dismissal to the date of the remedy hearing. The Respondent says that it would not be just and equitable to award loss to the date of remedy hearing in the circumstances. That would be a loss running over two years in total.

31. The Tribunal is asked to use their industrial knowledge and experience; their assessment of the Claimant as a diligent and hardworking employee and the Claimant's circumstances and experience in employment in fixing the period of time that the Claimant ought to have found another job as Manager or Supervisor at the same rate of pay as the job she had with the Respondent. The Tribunal is referred to the assessment of 52 weeks from date of dismissal in the *McKeith* case by way of example approach. The Claimant in *McKeith* however suffered an incapacity for approximately 3 months after dismissal. The Tribunal will have their own knowledge and experience in fixing such a period.

Conclusion

32. For the reasons advanced herein and to be offered the Claimant ought not to be awarded loss from the date of her dismissal to the date of the remedy hearing. The Tribunal will need to assess the appropriate time for the relevant period of loss assessing the circumstances of the case and using its industrial knowledge and experience. The Respondent argues that the Claimant has not mitigated her loss and that this is established by her not searching for jobs and not making any job applications whilst in the employ of the Card Factory and then the Post Office.

Timothy Warnock
Bar Library

28th June 2017

THE INDUSTRIAL TRIBUNALS

CASE REF: 1188/15

CLAIMANT: **Maria McKeith**

RESPONDENTS: **Frank McCorry, Colin Caruth, Una McRoberts, Marie Coleman, Marian Kane, Carmel Holly, Arder McKeown, Joe Blair, Marie O'Neill, Doreen Gray and Ann Clarke, the Committee for the time being of Ardoyne Association, an unincorporated association**

REMEDY DECISION

The unanimous decision of the tribunal is that the claimant is awarded compensation of £18,886.31 made up as follows:-

£10,000.00 injury to feelings including psychiatric injury;

£ 1,578.00 interest;

£ 6,760.00 (approximately) loss of earnings; and

£ 548.31 interest

Constitution of Tribunal:

Vice President: **Mr N Kelly**

Members: **Mr R McKnight**
Ms F Cummins

Appearances:

The claimant was represented by Ms S Bradley, Barrister-at-Law, instructed by the Equality Commission for Northern Ireland.

The respondents were represented by Mr R Fee, Barrister-at-Law, instructed by Higgins Hollywood Deazley, Solicitors.

Background

1. The Ardoyne Association is a unincorporated body which provides advice services in the Ardoyne area of North Belfast.

2. The claimant had worked for the respondent organisation as a volunteer and then a paid adviser. She was dismissed on 27 March 2015.

3. In a decision dated 21 March 2016, the tribunal concluded that the respondents had automatically unfairly dismissed and substantively unfairly dismissed the claimant and that the dismissal was an act of direct associative disability discrimination contrary to the Disability Discrimination Act 1995.

4. On 29 April 2016, the respondents lodged a Notice of Appeal against the finding of substantive unfair dismissal and the finding of direct associative disability discrimination.

5. The grounds of the appeal were:-

> *"(1) the tribunal erred in its application of the burden of proof in respect of direct discrimination;*
>
> *(2) the tribunal erred in its application of the correct comparator in respect of direct discrimination;*
>
> *(3) the tribunal erred in finding a claim of associative discrimination pursuant to the Disability Discrimination Act 1995;*
>
> *(4) the tribunal erred in taking into account irrelevant considerations in respect of other individuals who were also made redundant;*
>
> *(5) in light of all the evidence, the tribunal's finding of direct discrimination was perverse; and*
>
> *(6) in light of all the evidence, the tribunal's finding of substantive unfair dismissal was perverse."*

6. As part of their preparation for this appeal the respondents sought a copy of the recording of the tribunal hearing and prepared a transcript.

7. Part of that electronic recording was missing. There had been a break in that recording. The respondents had intended to argue that part of the tribunal's decision was incorrect, in that it had wrongly recorded answers in cross-examination.

8. Following consideration of handwritten notes, taken during the tribunal hearing, the respondents did not proceed with that particular application. It would appear that the disputed answers in cross-examination had been given during the break in the recording and that they had, in fact, been correctly recorded in the tribunal decision.

9. On 29 November 2016, the Court of Appeal dismissed the appeal.

The matter was therefore re-listed before this tribunal for consideration of remedy. The claimant seeks a remedy under various headings:-

> *"(i) A basic award under the Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order') in respect of the substantive unfair dismissal. That would equate to the statutory redundancy pay already received and therefore can be disregarded.*
>
> *(ii) A compensatory award under the 1996 Order in respect of the substantive and automatically unfair dismissal.*
>
> *(iii) An uplift in the compensatory award in respect of the automatically unfair dismissal.*
>
> *(iv) An injury to feelings award in respect of the direct associative disability discrimination. As part of that injury to feelings award the claimant sought an amount by way of aggravated damages.*
>
> *(v) Psychiatric/personal injury damages.*

Relevant law

11. This decision on remedy raises several legal issues. If this results in another appeal to the Court of Appeal, the parties may, on reflection, regret not accepting the suggestion in Paragraph 157 of the original decision to deal with remedy at that stage. If they had done so all matters would have been resolved by now.

Mixed discrimination and unfair dismissal

12. Section 58(2) of the 1995 Act provides that a tribunal:-

> *"Shall take such of the following steps as it considers just and equitable –*
>
> *(a) making a declaration as to the rights of the complainant and the respondent in relation to the matters to which the complaint relates;*
>
> *(b) ordering the respondent to pay compensation to the complainant."*

13. In the present case no recommendation appears appropriate on the '*just and equitable*' test and therefore the remedy will be one of compensation only.

14. Where a dismissal is both unfair and an act of unlawful discrimination, the tribunal would ordinarily award compensation on the basis of discrimination. The provisions relating to recoupment and to the statutory cap would therefore not apply and '*restoring the claimant's position*' could produce a higher figure than the just and equitable test – see ***D'Souza v London Borough of Lambeth [1997] IRLR 677***.

However, in this case the claimant seeks an uplift of 50% to be applied to any compensatory award under the 1996 Order. In the circumstances of this case,

- although it was not specifically addressed by counsel, compensation for financial loss appears to be claimed under the 1996 Order as part of an unfair dismissal award in relation to financial loss (loss of wages).

  That provides the advantage of a statutory uplift; however, it also provides for recoupment and the statutory cap. The cap does not appear to be an issue in this case.

15. That the first issue raised by this case; whether financial loss should be assessed separately as a compensatory award, subject to a statutory uplift but also recoupment, in relation to an automatically unfair dismissal or as part of an award of compensation for unlawful discrimination. The answer should be whichever result gives the best result for the claimant who is entitled to both.

Future Loss

16. In unfair dismissal cases, the object of the compensatory award is to compensate employees for the financial loss caused by their dismissal. The object is not to punish employers for their wrongdoing. An award should therefore not be increased either out of sympathy for the employee or as a means of expressing disapproval – ***Lifeguard Assurance Limited v Zadrozny [1977] IRLR 56***.

17. In ***Dunnachie v Kingston-upon-Hull City Council [2004] IRLR 727***, the House of Lords determined that the power to award compensation in respect of unfair dismissal is limited to a financial loss attributable to that dismissal. It does not include non-economic loss such as injury to health or injury to feelings.

18. In the ***Zadrozny*** decision, Philips J stated:-

> *"The [employment] tribunal, in assessing compensation, should not fall into the benevolent error of awarding compensation, not for some loss due to the unfair nature of the dismissal, but more out of sympathy for the predicament in which the employee finds himself."*

19. In *Harvey on Industrial Relations and Employment Law, Volume 1, Division D1, at Paragraphs 2535 – 2540*, two questions are indicated for the tribunal when assessing future loss. Firstly, the tribunal must consider what would have happened but for the unfair dismissal. It has to determine whether the employee would have continued in employment indefinitely or only for a limited period. Secondly, the tribunal must calculate the actual loss for the period which is considered appropriate.

20. The fixing of a relevant period for calculating future loss is not an exercise which can be done with mathematical precision on empirical evidence. To use the term adopted in *Harvey, Volume 1, D1, Paragraph 2567*, it is a highly speculative exercise. In ***Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604***, the Court of Appeal (GB) concluded that an employment tribunal had been wrong to award compensation by considering loss over the claimant's entire remaining career, subject to a reduction to reflect the chance of the claimant leaving the respondent's employment in any event. The Court stated:-

"I agree with Mr Jeans that it will be a rare case where it is appropriate for a court to assess compensation over a career lifetime, but that is not because the exercise is in principle too speculative. If an employee suffers career loss, it is incumbent on the tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation. It cannot lie in the mouth of the employer to contend that because the exercise is speculative, the employee should be left with smaller compensation than the loss he actually suffers. Furthermore, the courts have to carry out similar exercises every day of the week when looking at the consequences of career shattering personal injuries. Nor do I accept a floodgates argument. The job of the courts is to compensate for loss actually suffered; if in fact the court were to conclude that this required an approach which departed from that hitherto adopted, then we would have to be willing to take that step.

However, in my view the usual approach, assessing the loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases - and they are likely to be the vast majority - where it is at least possible to conclude that the employee will in time find such a job. In this case the tribunal has in effect approached the case on the assumption that it must award damages until the point when it can be sure that the claimant would find an equivalent job.

In my judgment, that is the wrong approach. In the normal case if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice the speculative nature of the exercise means that the tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide."

21. The claimant in her statement of loss for the purposes of the remedy hearing has adopted the common practice of first claiming loss of net earnings to the date of hearing; in this case 15 months. That is the common practice in cases of this type and is based on the decision of the National Industrial Relations Court (NIRC) in ***Norton Tool Company Ltd v Tewson [1973] 1 All ER 183***.

22. The textbook in this area, *'Employment Tribunal Remedies' by Korn & Sethi 4th Edition* states at *Paragraph 6.38* that in this particular case, *'the NIRC said that compensation should be assessed under four headings'*. It continues that the first of those headings should be:

> *"Immediate loss of earnings – that is, the loss of earnings between the date of dismissal and the date of hearing."*

23. However the NIRC does not appear to have said that in terms in the ***Norton Tool*** decision. The NIRC when considering the correct manner for assessing compensation in relation to the loss of employment did not say that the first element in such compensation should be the loss of wages up to the date of the hearing;

whether that hearing is by an employment tribunal or by some other judicial body. The date of any such hearing is subject to considerable variation and is impacted upon by a range of matters such as the availability of parties, the availability of counsel, the availability of witnesses and the availability of listing time. In the present case there has been an intervening appeal to the Court of Appeal on liability with an inevitable and significant delay in determining remedy. In real terms there can on occasion be significant delays in concluding cases and equally cases can move exceptionally quickly on occasion. In the tribunal's view, it is highly unlikely that the NIRC, or anyone else, ever intended that a significant element of compensation should be determined by such a random event as the date of the remedy hearing. The statutory basis for assessing compensation is to assess actual loss. It is not appropriate to assess a significant portion of actual loss by fixing that proportion to the listing dates given in that case for the determination of remedy.

24. In the ***Norton Tool*** decision, the NIRC separated the component parts of appropriate compensation into four headings:-

(a) immediate loss of wages;

(b) manner of dismissal;

(c) future loss of wages;

(d) loss of protection in respect of unfair dismissal or dismissal by reason of redundancy.

In relation to the first category, ie '*immediate loss of wages*', the NIRC was not, as appears to be suggested in the textbooks and in the claimant's submission, stating that compensation should be awarded automatically or semi-automatically in relation to loss of earnings up to the date of hearing which determines remedy. It was in that context looking at the requirement then contained within the Contracts of Employment Act 1973 in relation to notice pay on the termination of employment. It was focusing therefore on the amount of notice pay that an unfairly dismissed employee would have received if he had been dismissed in the proper manner.

The NIRC stated:-

"*(a) Immediate loss of wages*

The Contracts of Employment Act 1963, as amended by the Industrial Relations Act 1971, entitles a worker with more than 10 years' continuous employment to not less than six weeks' notice to terminate his employment. Good industrial practice requires the employer to either give this notice or pay six weeks' wages in lieu. Mr Tewson was given neither. In an action for damages for 'wrongful' as opposed to 'unfair' dismissal he could have claimed this six weeks' wages but would have had to give credit for anything which he earned or could have earned during the notice period. In the event he would have had to give credit for what he earned in the last two weeks, thus reducing the claim to about four weeks' wages. But if he had been paid the wages in lieu of notice at the time of his

dismissal, he would not have had to make any repayment upon obtaining further employment during the notice period. In the context of compensation for unfair dismissal we think that it is appropriate and in accordance with the intentions of Parliament that we should treat an employee as having suffered a loss insofar as he receives less than he would have received in accordance with good industrial practice. Accordingly no deduction has been made from his earnings during the notice period."

25. The ***Norton Tool*** decision concerned a claimant who had found alternative and comparable employment four weeks after dismissal. It is not possible to discern from this decision any general proposition that an unfairly dismissed person should automatically, or presumptively, receive compensation for loss of wages up to the date of the remedy hearing, particularly where the relevant time period exceeds any statutory or contractual notice period in this case, and amounts to some 15 months.

26. Therefore the issue in the present case and indeed in all such cases appears to be the speculative exercise of assessing when the claimant could be expected to obtain alternative equivalent employment and therefore fixing an appropriate point for future loss which should run from the date of dismissal and which should not depend in any way on the date on which the tribunal determined remedy .

As the Court of Appeal (GB) said in ***Wardle*** (see above), the tribunal should assess the loss up to the point at which the claimant would be likely to get another job, while recognising that this is a very speculative and unscientific exercise.

27. That is the second issue raised in this case; whether the common practice (or at least the claimant's interpretation of common practice) is wrong and whether loss of wages from the date of dismissal to the date of the remedy hearing should automatically or presumptively form part of any compensation, with an assessment of the likelihood of alternative employment applying only to the period after the remedy hearing?

Injury to feelings

28. The starting point for assessing to injury to feelings awards is obviously the Court of Appeal decision in ***Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102***. It highlighted the difficulties in this area when it stated:-

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

"Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a

particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury."

29. The Court of Appeal in ***Vento*** approved the earlier decision in ***HM Prison Service v Johnson [1997] IRLR 162*** where the EAT had stated:-

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

30. ***Vento*** identified three broad bands of compensation for injury to feelings. The relevant compensatory bands have been upgraded for inflation in ***Da'Bell v NSPCC [2010] IRLR 19*** and the figure in the quotation from ***Vento*** below have been amended accordingly. Inflation has been relatively minimal in the period since 2010 and the Equality Commission did not argue for an inflation uprating at this stage. The Court in ***Vento*** stated:-

> *"Employment Tribunals and those who practice in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.* *[Tribunal's emphasis]*
>
> *(i) The top band should normally be within [£18,000 - £30,000]. Sums in this range should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of sex or race. Only the most exceptional case could justify an award of compensation for injury to feelings beyond the upper limit of this band.*

(ii) *The middle band, [£6,000 - £18,000] should be used for serious cases which do not merit an award in the highest band.*

(iii) *Awards of between [£500 - £6,000] are appropriate for the less serious cases such as where the act of discrimination is an isolated or a one-off occurrence. Awards of less £500 are to be avoided altogether as they risk being regarded as too low and therefore not a proper recognition of injury to feelings."*

31. The appropriate band of compensation for injury to feelings is a matter for each tribunal to determine on the basis of the evidence before it and on the basis of ***Vento***. However, some recent appeal cases are of assistance in applying the guidelines in ***Vento***.

32. In ***Governing Body of St Andrews Catholic Primary School and Others v Blundell [UKEAT/0330/09]***, the EAT considered a tribunal decision where the tribunal had concluded, in broad terms, that a teacher had been subjected to victimisation over a period of approximately six months after an earlier discrimination complaint. She had been subjected to unwarranted and negative feedback in a performance appraisal exercise and had suffered from a stress-related illness. She was subjected to disciplinary action after she had told parents, while she was off sick, that she was being bullied in the school. The tribunal, at first instance, fixed the injury to feelings compensation at £22,000, ie within the top ***Vento*** band.

The EAT concluded that this injury to feelings award was too high. While the victimisation had been serious and *'undoubtedly had deeply unpleasant consequences for the claimant, the tribunal could not properly have concluded that this case fell within the top band or that it merited an award of £22,000'.* The EAT concluded that it fell fairly and squarely within the middle band as being a serious case. They fixed the appropriate level of injury to feelings compensation at £14,000.

33. In the case of ***HM Prison Service v Salmon [2001] IRLR 425***, a female prison officer had been subjected to a humiliating working environment where male colleague had openly read pornographic magazines and engaged unacceptable sexual banter. This had culminated in a male colleague writing offensive and sexually degrading comments about the claimant in an official work record. The claimant was then off work for a period with moderate to severe depressive illness and eventually took medical retirement. The tribunal had awarded £20,000 for injury to feelings and £11,250 compensation for psychiatric damage. The figure of £20,000 for injury to feelings was expressed as including £5,000 aggravated damages. The EAT felt that this figure for injury to feelings was '*high*' but not so perverse as to be subject to appeal.

34. In the case of ***HM Prison Service v Johnson [1997] ICR 275***, a prison officer of Afro Caribbean origin who was ostracised by his colleagues and subjected to racist remarks and false accusations for a period of years had also been warned about sickness absence when a white officer with a poor record did not receive such a warning. The tribunal, at first instance, described this as '*campaign of appalling treatment*'. The tribunal awarded £20,000 for injury to feelings and a separate figure of £7,500 for aggravated damages on the grounds that his

complaints had been dismissed and put down to '*defects in personality*'. £500 for injury to feelings was also awarded against both of two individual respondents making a total award for injury to feelings of £21,000. The EAT held that the tribunal had not erred in awarding £21,000 for injury to feelings. The tribunal could not be said to have acted on a wrong principle of law, misapprehended the facts or have made a wholly erroneous estimate of the damage suffered so as to entitle the EAT to interfere with the award. While the award of £21,000 had been, at that stage, larger than any other reported award for injury to feelings, the case had been '*a very serious one*' and the award was not grossly or obviously out of line with the general range of personal injury awards. Nor, in the light of a prison officer's annual earnings, had the tribunal lost sight of the value of money in the real world.

35. In the case of ***Da'Bell v NSPCC [2010] IRLR 19***, the EAT considered the case of a fundraiser in the NSPCC where the NSPCC had failed to make reasonable adjustments for her disability leading to an eventual constructive dismissal. The tribunal, at first instance, made an award of £12,000 for injury to feelings on the basis that the case fell within the middle of the ***Vento*** guidelines. The EAT upheld that decision. It stated that:-

> *"As was made clear from our citation from **Vento** in the Court of Appeal, this is not an exact science. The tribunal here was entitled to place within the second band the events which it had criticised the respondent for. It was entitled to note how long it had taken and to notice the effect on the claimant of these matters through her stress, her sickness, her frustration and so on. It was entitled in the light of that to make the award. We do not consider it inadmissibly brought into account the matters which it had rejected. There was enough material here, in our judgment, for the tribunal to place within the middle band the injury in this case. Where in the middle band is a matter for it to decide.*
>
> *We indicated at the outset that appeals on the basis of inadequate or excessive compensation were more likely to succeed if the wrong band were chosen. Mr Dougan conceded the claim was worth £6,000 to £8,000. That is within the middle band. In our judgment, disputes about the placement within a band of an award are likely to be about fact and impression. They are more likely to raise questions of law if they are about placement in the wrong band or at the extremes. The difference here is between the midpoint and the lower end. Between the two poles are five steps. The respondent concedes the first (£8,000) and the Employment Tribunal chose the third (£12,000).*
>
> *The Employment Tribunal listened to the claimant tell her story and say what effect the failures of the employer had upon her; that is the unique advantage not bestowed upon us. We will not interfere with such findings unless they are manifestly wrong, which in this case they are not."*

36. That is the third issue raised by this case; the appropriate band in the ***Vento*** scale to reflect the claimant's injury to feelings as a result of the discriminatory dismissal.

37. Damages for personal injury are recoverable where they are caused by the discriminatory act and claimants are not required to show that the injury to health was reasonably foreseeable.

38. It can be difficult to separate psychiatric injury from injury to feelings. ***Vento*** refers to both anxiety and depression as forming part of injury to feelings. However, the Court specifically stated in that decision that the bands of compensation were '*distinct from compensation for psychiatric or similar personal injury*'.

The eventual award in ***Vento*** for non-pecuniary loss was '*a total of £32,000 made up as to £18,000 for injury to feelings, £5,000 aggravated damages and £9,000 for psychiatric damage, which took the form of clinical depression and adjustment disorder lasting for three years*'.

39. In ***HM Prison Service v Salmon*** (see above), the EAT upheld a separate award for personal injury but suggested that tribunals were allowed to make a single award to cover both injury to feelings, and stress and depression:-

> *"(29) We accept that there is a risk of double recovery in cases like the present. No doubt in principle 'injury to feelings' and psychiatric injury are distinct. In **Alexander [v Home Office [1988] ICR 665]** May LJ clearly distinguished them when he said:-*
>
> > *' ... injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or mind, which may persist for months, in many cases for life'*
>
> *Likewise in **Prison Service v Johnson (above)** Smith J accepted counsel's submissions that if the applicant had suffered 'injury to health' that would have been the subject of a separate head of compensation. However, neither of those were cases where awards were made under both heads; and in practice the two types of injury are not always easily separable. In a given case it may be impossible to say with any certainty or precision where the distress or humiliation that may be inflicted on the victim of discrimination becomes a recognised psychiatric illness such as depression. 'Injury to feelings' can cover a very wide range. At the lower end are comparatively minor instances of upset and distress, typically caused by one-off acts of discrimination; this appears to be the type May LJ had in mind. But at the upper end the victim is likely to be suffering from serious and prolonged feelings of humiliation, low self-esteem and depression; and in these cases it may be fairly arbitrary whether the symptoms are put before the tribunal as psychiatric injury, supported by a formal diagnosis and/or expert evidence."*
>
> *"Tribunals in such cases do sometimes treat 'stress and depression' as part of the injury to be compensated for under the heading 'injury to feelings'; and we can see nothing wrong in principle in a tribunal taking that course, provided it clearly identified the main elements in*

the victim's condition which the award is intended to reflect (including any psychiatric injury) and the findings in relation to them. But where separate awards are made, tribunals must be alert to the risk that what is essentially the same suffering may be compensated twice under different heads."

40. That is the fourth issue raised by this case; whether compensation for psychiatric injury suffered by the claimant as a result of the discriminatory dismissal should be a separate part of the award or a component part of the injury to feelings award? If it is the latter, what effect does that have on the selection of the appropriate ***Vento*** band and the figure selected within that band?

Aggravated damages

41. In ***Alexander v Home Office [1998] ICR 685***, the Court of Appeal considered a claim of race discrimination in a non-employment environment. A prisoner of Afro Caribbean origin had been described in his assessment:-

> *"He displays the usual traits associated with people of his ethnic background being arrogant, suspicious of staff, anti-authority, devious and possessing a very large chip on his shoulder."*

He was not allocated to the type of prison employment that would have been normal.

The Court stated:-

> *"As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referable to this can be readily calculated. For the injury to feelings, whoever, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend upon the experience and good sense of the judge and his assessors. Awards should not be minimal because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To awards sums which are generally felt to be excessive does almost as much harm for the policy and the results which it seeks to achieve as do nominal awards."*
>
> *"Further, even where exemplary or punitive damages are not sought, nevertheless compensatory damages may and in some instances should, include an element of aggravated damages where, for example, the defendant may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination."*
>
> *[Tribunal's emphasis]*
>
> *"On the other hand, if the plaintiff knows of the racial discrimination and that he has been thereby held up to hatred, ridicule or contempt, then the injury to feelings would be an important element in the damages. That the injury to feelings for which compensation is sought must have resulted from*

knowledge of the discrimination is clear from the decision of this Court in ***Skyrail Oceanic Ltd v Coleman [1991] ICR 864.***"

42. In ***Armitage, Marsden and HM Prison Service v Johnson [1997] ACR 275***, the EAT was considering, in this case, the situation of a Afro Caribbean prison officer who had been subjected to harassment. The EAT stated:-

> *"We consider that, as a matter of principle, aggravated damages ought to be available to plaintiffs or applicants for the statutory torts of sex and race discrimination. Damages are at large and, at least so far as direct discrimination is concerned, the torts may be sufficiently intentional as to enable the plaintiff to rely upon malice, or the defendant's manner of committing the tort, or other conduct, as aggravating the injury to feelings. Although there is as yet no direct authority to support this proposition, the Court of Appeal has assumed that aggravated damages are available in discrimination cases."*
>
> *"It seems to us that there were here factors which entitled the tribunal to make an award of aggravated damages. In particular, they identified the Prison Service's conduct of the investigation of the complaints of race discrimination. The tribunal described this as a travesty of what it should have been. Instead of providing the applicant with the remedy for the wrongs which he had suffered, they added to his injury by attributing all his problems to his own defects of personality. We think that this was a true case of aggravation; a case where the employer's actions rubbed salt in the applicant's wounds."* *[Tribunal's emphasis]*

43. In ***Zaiwalla & Company v Walia [2002] IRLR 697***, the EAT determined that aggravated damages could be awarded in respect of the conduct of tribunal litigation. Mr Justice Kay stated:-

> *"In our judgment, there is no reason in law why aggravated damages should not be awarded by reference to conduct in the defence of proceedings in a discrimination case such as the present case, which is very different from the context of non-intentional torts as exemplified in* ***AB v South West Water Services Ltd [1993] QB 507****. Indeed, there is a very good policy reason for allowing such a claim in an appropriate discrimination case. If a respondent misconducts himself in the defence of a discrimination case, it may amount to victimisation of the applicant in respect of the protected act of bringing the claim. It is easy to imagine cases in which the misconduct amounting to victimisation might only arise at a late stage of the proceedings, perhaps only during the hearing. It seems to us that it would be regrettable if such victimisation could only be compensated by the commencement of further proceedings. In the field of discrimination law there are already too many cases that give rise to multiple proceedings and satellite litigation. In the sort of case which we are considering here, it is preferable that, where there is misconduct of sufficient gravity, it is compensated by the tribunal which is seised of the matter and which has the feel for the aggravating material and its effect on the victim. In the present case, we are satisfied that the approach of the tribunal to aggravated damages was entirely appropriate and free from legal error."*

"We are sensitive to the possibility that overenthusiastic litigants and litigants in Employment Tribunals may be tempted to read our conclusions in a way which would give the green light to claims for aggravated damages in respect of alleged misconduct in the defence of proceedings almost as a matter of routine. They would be wrong to do so. The findings of fact in the present case (which were not challenged in the quantum appeal) were exceptional in their assessment of the litigation misconduct. We expect that cases attracting awards of aggravated damages for such behaviour will be few and far between. It saddens us that this exceptional case concerned the behaviour of a firm of solicitors."

44. The Employment Tribunal had concluded in respect of the conduct of litigation:-

"When she took tribunal proceedings a monumental amount of effort was put into defending those proceedings. That exercise was of the most inappropriate kind, attacking the applicant in relation to her personal standards of professional conduct and holding a series of threats over her head which would be daunting to any individual let alone to someone about to embark on a legal career having difficulty obtaining a training contract. The defence of these proceedings was deliberately designed by the respondents to be intimidatory and cause the maximum unease and distress to the applicant. There is no other way of describing it."

45. In ***Ministry of Defence v Fletcher [2010] IRLR 25***, the EAT stated:-

"If the manner of or malice in committing the acts of discrimination are not fully reflected in an award for injury to feelings, in our judgment it is not an error of law for an Employment Tribunal to do so by making an award of aggravated damages in respect of those acts. Duplication of compensation must be avoided but in our judgment, in the words of Mummery LJ, an Employment Tribunal would take 'appropriate account of the overlap between individual heads of damage' in awarding aggravated damages in respect of an act which forms the basis for an award for injury to feelings if the manner of or motive for the conduct is so extreme that it falls within Lord Devlin's explanation of the basis for an award of aggravated damages and is uncompensated for by other remedies."

46. In Northern Ireland, the law differs from that in England and Wales in respect of aggravated damages. In ***McConnell v Police Authority for Northern Ireland [1997] NI 244***, the Court of Appeal determined that in this jurisdiction aggravated damages should not form a separate head of compensation in addition to an award for injury to feelings.

47. The Court stated:-

"I agree with the summary of law and regard it as incorrect in principle to suggest, as the Law Commission does (Paragraphs 3.24 – 3.32, Pages 45 – 50) that aggravated damages may be partly punitive in character. It follows from these principles that an award of aggravated damages should not be an extra sum over and above the sum which the tribunal of fact considers appropriate compensation for the injury to the claimant's feelings. Any element of aggravation ought to be taken into

account in reckoning the extent of the injury to his feelings, for it is part of the cause of that injury. It should certainly not be treated as an extra award which reflects a degree of punishment of the respondent for his behaviour."

"A tribunal ought to tread very carefully in deciding whether to take such factors into account. It may be suggested in support of this approach adopted in this case that an analogy may be found in defamation cases. Damages may be awarded for injury to the plaintiff's feelings as well as his reputation, and where a defendant contests a claim by pleading justification it will involve a repetition of a defamatory statement and an attempt to say that it was true. It is well settled that that may be taken into account in aggravation of the damages ... . But that is not the same as a defence in a discrimination case in which the employer contends that there was no discrimination, because appointments were made on merit, which necessarily involves his claiming that the complainant was not as well qualified a candidate as those who were successful. Where such a defence is honestly put forward, and the complainant is treated with propriety in the proceedings, the fact that his case or his recollection may be challenged is an insufficient reason without more to regard the employer's conduct as aggravating the damages. There may be possibly be cases in which there is justification for taking this view, and I do not wish to limit their breadth by attempting to define them. But an honest, if unfounded or even misguided, attempt by an employer to defend his actions should not necessarily be so regarded. I do not consider, having considered the tribunal's decisions with great care, that there is any evidence in those decisions of conduct by the appellant which is capable of aggravating the damages."

48. This is the fifth issue raised by this case; whether the respondents' actions, as specified by the claimant, were '*high-handed, malicious, insulting or oppressive*' or '*whether they rubbed salt in the claimant's wounds*' so as to aggravate damages which would form part of a composite injury to feelings award.

Working tax credit

49. The claimant seeks compensation, not just for loss of wages, but for loss of working tax credits.

50. Both counsel for the claimant and counsel for the respondents in their initial submissions referred to one obiter remark in relation to working tax credits. That reference was in the Court of Appeal case of ***Morrow v Henderson***. The obiter remark by Campbell LJ was accepted as not being a binding authority. Both counsel stated words to the effect that it was '*a matter for the tribunal to satisfy itself as to whether it can make an award for loss of working tax credits*'.

51. The basic statutory provisions underline working tax credits were not opened or explained to this tribunal. The possibility of working tax credits being replaced or in some manner fully or partially substituted after dismissal from employment, by alternative social security benefits such as income support etc was not opened or properly explained to this tribunal. The basis on which the claim in respect of working time tax credits was made or indeed rebutted was not explained to this tribunal. On 21 February 2017 the tribunal requested a further written submissions from both sides in relation to working tax credit. That request stated:-

"*The tribunal has directed that a further written submission be obtained from* ***both*** *parties to be lodged in the Office of the Tribunals* ***no later than Thursday 2 March 2017*** *to address the claim in respect of Working Tax Credit in this case. The written submissions should address the following, in particular, but should set out in plain terms either the claim for Working Tax Credit or the rebuttal of any such claim citing,* ***in full***, ***all*** *statutory references and* ***all*** *references to case law and/or textbooks:-*

(1) Is working tax credit a social security benefit or is it a credit forming part of income tax generally?

(2) If it is the former, ie a social security benefit, how is this a matter which is properly compensatable by the former employer and how is it not too remote? If it is the latter, ie a part of the income tax system, can the rule in ***Gourley*** *be applied and, if so, how?*

(3) On what basis is it alleged, or disputed, that the loss of working tax credits is a matter which should be compensatable by a former employer in the same way as loss of wages?

(4) Has loss of working tax credits ever formed part of a pecuniary loss claim in any contract or tort case elsewhere in the judicial system? If so, provide a copy of that decision or a full reference. If not, is it surprising that this is the case if this is a proper head of compensation?

(5) Has the loss of working tax credits ever been described in a recognised textbook, eg McGregor on Damages [19th Edition], as a compensatable loss in any contract or tort (including statutory tort) case? If so, please provide a full reference.

(6) If the claimant has lost working tax credits, to what extent, if any, was this loss reduced or limited by alternative social security or other payments following dismissal? In other words, was there a loss and, if so, how much?

(7) In relation to future loss, to what extent, if any, is the claimed future loss in respect of working tax credits affected by either Universal Credit, welfare changes or the proposed amelioration of welfare changes within Northern Ireland?

(8) Given the case law in relation to the impact of social security benefits, or of income tax, on either recoupment by the state or on reducing compensation by all or part of any social security benefits or income tax rebates, where is the case law, legislation, or legal principle permitting the addition of a social security benefit or tax credit to pecuniary loss?

(9) Refer to:-

MBS Ltd v Calo [1983] IRLR 189

British Transport Commission v Gourley [1956] AC 183

McDaid v Clyde Navigation Trustees [1946] SC 462

Hartley v Sandholme Iron Co Ltd [1974] 3 ALL ER 475

Blackstones Employment Law Practice [2014] Paragraphs 32 – 90

Korn and Sethi Employment Tribunal Remedies (4th Edition) Paragraph 7.40"

52. Counsel for both parties provided further written submissions. Neither provided a clear answer (or any answer) to this problem. There appears to have been no decision in other jurisdictions which has found that loss of working tax credits is a loss which could be added to loss of earnings. In relation to employment tribunals there have been three decisions at first instance where the tribunals did add loss of working tax credits to loss of earnings. In the two Northern Ireland decisions the point does not appear to have been argued at all. In the sole English decision, ***Mosse***, the decision is unavailable and does not appear to have been followed elsewhere.

53. In particular, neither party could clarify whether the loss of working tax credits represented a loss to the claimant or whether, on the termination of her employment, that loss had been partly or totally ameliorated by the payment of income support and other benefits.

54. *The Employment Tribunal Remedies Handbook 2016 – 17 (Bath Publishing – foreword by Judge Brian Doyle, President, Employment Tribunals England and Wales)* does not say that loss of working tax credits should be a compensatable loss in relation to either unfair dismissal or unlawful discrimination . Working tax credits do not appear to be mentioned at all.

55. *Blackstone's Employment Law Practice (2014 Edition)*, states at *Paragraph 32.90*:-

> *"As the EAT points out in* ***Brownson v Hire Services Shop Ltd [1978] IRLR 73*** *–*
>
> > *'Other things being equal, the first thing you lose in consequence of being dismissed is what you would have got in your pay packet'.*
>
> *Pay for this purpose means all payments which are to be included in the pay packet whether payable under the contract of employment as of right or otherwise (ie overtime pay) excluding the payment of genuine tax free reimbursement of expenses. ... Pay is assessed on actual earnings as a net figure, ie after deduction of tax and national insurance. It has been held, at Employment Tribunal level, that a claimant may be compensated for the loss of working tax credits received in the course of employment (****Mosse v***

Hastings and Rother Voluntary Association for the Blind [ET Case No: 1103096/06/NW]."

56. In *Korn and Sethi 'Employment Tribunal Remedies' (4th Edition)*, it states, at *Paragraph 7.40*, that:-

> " ... *In* ***MBS Ltd v Calo [1983] IRLR 189,*** *the EAT said that tax implications should be ignored unless the sums involved are large. A similar approach was taken by an Employment Tribunal to the loss of working tax credit in* ***Mosse v Hastings and Rother Voluntary Association for the Blind [1103096/06/NW].***"

57. Until this year Employment Tribunal decisions in England were not available online and given that the decision in ***Mosse*** would be not in any sense binding and might indeed be barely persuasive, it would not be worth asking anyone to search in the archives in Bury St Edmonds to see if a copy of that decision can be located.

58. In ***Morrow v Henderson*** the FET decision in 2005 included compensation for the loss of working tax credits. That did not appear to be an issue of any particular debate before the tribunal or in the decision. The tribunal did not award compensation for injury to feelings.

In an appeal to the Court of Appeal, Campbell LJ referred to the compensatory award including sums in respect of '*loss of working tax credit*'. The appeal was in relation to the lack of any award in relation to injury to feelings. There was again no discussion about compensation in respect of the loss of working tax credits. That does not appear to have been discussed at all. The remarks of Campbell LJ must therefore be regarded as obiter and not in any sense establishing any precedent that such compensation is correct.

59. The amount of working tax credit in the present case was for various sums in excess of £100 per week for the first 96.5 weeks up to the date of the remedy hearing and thereafter. It was therefore not a sum which can be disregarded under the rule in the ***MBS*** case which allows such matters to be disregarded if they are of small amounts. The specific legislation and the conditions surrounding entitlement to working tax credit had not been opened to this tribunal.

60. This is the sixth issue raised by the case; whether compensation for loss of earnings should include compensation for loss of working tax credits?

Statutory uplift

61. Under Article 17 of the Employment (Northern Ireland) Order 2003, where a dismissal is automatically unfair because of the non-completion of the statutory dispute procedures, the compensatory award shall be increased by 10% and if it is just and equitable to do so by up to 50%.

62. That is the seventh issue raised in the present case; what level of statutory uplift should be awarded in the present case?

Relevant findings of fact

Medical history

63. The claimant has had a long history of psychiatric ill-health. She has been on antidepressants since 2006 and in that year she was a psychiatric inpatient for approximately two weeks.

64. She was the primary carer for a disabled daughter with significant physical and mental health difficulties.

65. Dr Philip McGarry FRCP, consultant psychiatrist, was instructed by the Equality Commission to prepare reports on the claimant. He met her on two occasions, ie on 3 April 2016 and 9 January 2017, and prepared reports on both occasions. Dr Mangan FRCP Consultant Psychiatrist was instructed by the respondents' solicitors to prepare a report on the claimant. He met her on one occasion and prepared a report.

66. Both consultant psychiatrists attended the hearing. Before the hearing commenced they met to reach an agreed position, insofar as was possible, in relation to the medical evidence.

67. Following that discussion, the claimant's representative, with the agreement of the respondent's representative, indicated that the two consultant psychiatrists agreed that the claimant had a longstanding and recurrent depressive illness and anxiety disorder.

68. Both consultant psychiatrists agreed that following her dismissal on 27 March 2015, the claimant suffered a recurrence of that depressive illness.

69. Dr McGarry described that recurrence as '*mild depressive disorder*' and Dr Mangan did not disagree.

70. Both consultant psychiatrists agreed that in the following months, April, May and June 2015, the claimant's condition deteriorated and that she was quite ill during that period.

71. Both consultant psychiatrists had recommended a course of cognitive behavioural therapy ('CBT'). The claimant had not taken advantage of that therapy and both consultant psychiatrists were critical of that failure on the part of the claimant.

72. Both consultant psychiatrists agreed that in 2016, after the claimant had been well for a period, she suffered another occurrence of the depressive condition in or around August 2016.

73. There therefore were two relevant recurrences of the depressive illness/anxiety disorder. The first was immediately after the dismissal at the end of March 2015; and the second was in or around August 2016.

74. In relation to the first recurrence, Dr Mangan was of the opinion that that recurrence had been 50% due to the dismissal and 50% due to concerns on the part of the

claimant about her disabled daughter. In relation to that first recurrence, Dr McGarry attributed the recurrence two-thirds to the dismissal and one-third to her concerns about her disabled daughter.

75. In relation to the second recurrence, in or around August 2016, Dr Mangan was of the opinion that it had been 90% due to concerns on the part of the claimant about her disabled daughter and only 10% due to the legal process. In relation to that second recurrence, Dr McGarry felt that a fairer proportion would be 50% due to the dismissal.

76. Both consultant psychiatrists agreed that while the claimant had not been fit to work in August 2016, she had been fit to work from January 2017.

Both consultant psychiatrists had been asked to look at the factors in the *Green Book* dealing with psychiatric injury to see where the psychiatric injury in this case would fall within the bands set out in that *Green Book*. Both felt that the psychiatric injury in this case would fall on the borderline between minor and moderate psychiatric injury and would therefore come in at approximately £10,000.

77. Both counsel agreed that matters would not be advanced by the cross-examination of either consultant psychiatrist. The medical reports were sufficiently detailed. Both consultant psychiatrists were released at that point.

Decision

Injury to feelings

78. This case raises issues of potential duplication (or triplication) between amounts of compensation which might be awarded, firstly, in respect of that part of an award for ordinary injury to feelings relating to the ***Vento*** bands, secondly, that part of an injury to feelings award relating to aggravated damages; and, thirdly, that part of any award which relates to psychiatric injury.

Aggravated Damages

79. The respondent defended the claim of unfair dismissal and associative direct disability discrimination in a three day conducted from 27 – 29 January 2016. In the decision of the tribunal issued on 21 March 2016, the tribunal criticised the conduct of the respondent during the interlocutory process. It stated that it was clear:-

> *"That the respondent failed to properly provide discovery of relevant documents as reasonably requested by the claimant, or as ordered by the tribunal."*

The tribunal set out examples of the conduct it criticised in *Paragraphs 31 – 43* of its decision. In *Paragraph 44* of its decision it stated:-

> *"There is a disturbing pattern of documentation, which on its face potentially lent some support to the claimant's case, being produced late, reluctantly and in a piecemeal fashion.".*

80. The tribunal stated in *Paragraph 45* of its decision that:-

> *"The manner in which discovery has been provided in this case by the respondent organisation which was legally represented throughout and the manner in which Mrs Burns responded to cross-examination is deeply concerning. It calls into question both the credibility of Mrs Burns and the attitude of the respondent organisation to both the claimant and to these proceedings."*

81. Late discovery or imperfect discovery in not unknown in the tribunal or in the civil courts, particularly where voluntary bodies are involved. As the ***Zaiwalla*** decision suggests, aggravated damages arise only in exceptional cases of litigation misconduct. The present case is not such a case. The way in which the respondents approached discovery, and indeed the tribunal proceedings as a whole, was careless, disinterested, and less than wholehearted. It can certainly be criticised and was criticised. However, it was not '*high-handed, malicious, insulting or oppressive*' to a degree that would justify an award of aggravated damages.

82. The respondents lodged a Notice for Appeal to the Court of Appeal on a point of law on 29 April 2016. Given that the original decision raised complicated legal issues regarding the shifting burden of proof and regarding associative disability discrimination it was in no sense surprising or unexpected that the respondents sought to appeal the decision of the tribunal.

83. The claimant, for the purposes of her aggravated damages claim, sought to criticise one aspect of this appeal in particular. The respondents had obtained a copy of the digital recording of the tribunal hearing. That was provided by the tribunal in accordance with the standard procedure in these matters.

84. On 17 October 2016, the respondents sought leave to refer to additional material which had not been available to it when the skeleton arguments and the book of appeal had been compiled in relation to the Court of Appeal proceedings. In short, the application referred to the transcript and sought to argue that the tribunal, *at Paragraph 60* of its decision had wrongly recorded evidence given by Mrs Burns on behalf of the respondents. The application stated:-

> *"The appellant says this is important material which identifies a significant error in the decision of the tribunal. This goes to the crux of the tribunal decision in respect of a finding of direct disability discrimination."*

85. It would appear that this application was withdrawn on the morning of the appeal hearing. It had emerged that there had been a break in the electronic recording which had led to the transcript and that the respondents had been incorrect to assert that the tribunal had wrongly recorded its evidence in *Paragraph 60* of its decision. Handwritten notes compiled by those present at the tribunal hearing demonstrated that the relevant remarks had in fact been made.

86. It is clear that the making and then the withdrawal of the application had attracted some adverse comment from the Court of Appeal.

87. It appears more likely than not that the claimant had not actually been present when the Court of Appeal criticised the respondents' application and the withdrawal of that application. She would have become aware of these events shortly thereafter. In any event, it would appear that the late application to make this argument had been a genuine mistake on the part of the respondents and not any form of a '*high-handed, malicious, insulting or oppressive*' tactic on their part. It had not been an attempt '*to rub salt in the wounds*'. If anything, it had been a criticism of the tribunal rather than a criticism of the claimant. After some passage of time, the respondents had simply chosen to rely on the transcript rather than double-checking their own handwritten notes to check whether matters had been said during the break in recording.

88. The claimant sought to raise another issue in relation to her claim for aggravated damages. That concerned a report of the tribunal decision which had appeared in the Sunday Life. The report included a picture of Mrs Burns. The claimant stated that:-

> *"To see the large heading 'boss got rid of worker over her disabled daughter' about my case accompanied by the picture of Elaine Burns apparently laughing was horrific. The more I read the article the worse I felt."*

89. It would appear clear that the picture in question was not a picture provided by the respondents or indeed by Mrs Burns for the purposes of this article. This had been a picture obtained by the newspaper in a Google search which in its original form had shown Mrs Burns meeting a local politician. When the photograph had been published for the purposes of this article in the Sunday Life, the part of the photograph including the local politician had been cut off. While the claimant may well have been upset at a picture of Mrs Burns apparently laughing in the context of this tribunal case, that can hardly be laid at the door of the respondents. It had been the choice of the Sunday Life to use that photograph in this context.

90. The contents of the article again cannot be laid at the door of the respondents. The wording of the article had been, in any event, fairly anodyne with a relatively accurate summary in layman's terms of the tribunal's decision. It included a statement allegedly made by Mrs Burns that she had '*denied a court's ruling*' and that she had said '*I'm a mammy too*'. Again none of this can be laid at the respondents' door. In any event, it cannot be argued that it is a proper ground for aggravated damages that a losing party disagrees with a tribunal's decision. Any losing party is entitled to do so. The claimant also referred to facebook entries indicating that the respondents '*do not accept the decision by the court on discrimination*'. There were also similar remarks and comments. Again, while individuals may feel upset that a tribunal's decision is not automatically and without equivocation fully accepted by a losing party, that is hardly a matter for aggravated damages. People are entitled to disagree with decisions of courts and tribunals. It is worth remembering that in a press release relating to a different decision of this tribunal which had found that the Equality Commission had indirectly discriminated against an employee on grounds of gender, the Equality Commission expressed itself '*disappointed*' at the decision of the tribunal and stated that it was '*currently giving careful consideration to the tribunal's decision*'. There really is no difference between an expression of disappointment on the one hand and on the other hand stating in plain terms that you disagree with the tribunal's decision. If it is permissible for the Equality Commission to express disappointment or

disagreement with a tribunal decision (and it is), it is difficult to see why the argument is mounted that it was not permissible for the Ardoyne Association and that it would justify an award of aggravated damages.

91. Another matter raised in the context of the claim for aggravated damages was the subject of evidence given by Mrs Gerardine McKeith, the mother of the claimant. She stated that she had been employed as a social security tribunal representative by Ligoniel Improvement Association who, at the relevant times, had been a partner of the Ardoyne Association. On 8 December 2016, she was asked to attend a meeting with her employer. Her employer had advised her that they felt they owed her a duty of care and that they were warning her that there was going to be a press release regarding the case. She stated that she been advised by her employer that the case could '*close Ardoyne Association down*'. She stated that she had been told there was no money for the case as it was '*wee pensioners*' who would have to pay for the case.

92. It seems more likely than not that this conversation did take place as described by Mrs McKeith. However, there is absolutely no evidence that any of the respondents had sought to put pressure on the claimant through Mrs McKeith in this manner. If there had been such evidence, it would clearly have been a matter which might have sounded in aggravated damages. However in the absence of any such evidence, the tribunal can only, on the balance of probabilities, conclude that the respondents were not involved.

93. There appears to be no basis on which aggravated damages could be awarded in this case.

Psychiatric injury

94. Two separate matters also arise for determination; firstly, the correct apportionment to be applied in relation to the first recurrence of the depressive/anxiety disorder following the dismissal as between the dismissal itself and the concerns held by the claimant about her daughter; and, secondly, the correct apportionment to be applied in relation to the second recurrence of depressive/anxiety disorder in or about August 2016, again between the dismissal of the claimant and the concerns of the claimant in relation to her daughter.

95. The fact that the two consultant psychiatrists disagree, despite attempts to reach agreement, on the correct level of apportionment in respect of the two recurrences indicates how difficult this particular task is. As indicated by Dr McGarry in his second report of 9 January 2017:-

> *"It is the case that individuals who present with non-psychotic recurrent depression are indeed vulnerable to significant life-stressors as aetiological factors in the recurrence of depressive symptoms. It is always difficult to come to a definitive opinion as to exactly what percentage of the causation can be attributed to one factor over another."*

96. There were clearly two causes which precipitated the two separate occurrences of the depressive/anxiety disorder. The first had been a dismissal with the consequent litigation. The second had been the concerns held by the claimant for her disabled daughter.

97. In relation to the first recurrence which followed the dismissal, Dr Mangan attributed the cause equally between the two factors at 50/50. Dr McGarry attributed the causation as to two-thirds to dismissal and one-third to the claimant's concerns about her disabled daughter. Converting that into percentages, the difference presented by the evidence of the two consultant psychiatrists is between 50% due to the dismissal and 66.66% due to the dismissal.

98. While recognising that it is always difficult, as indicated by Dr McGarry, to reach a definitive decision in these matters, it is clear that the claimant had experienced concerns about her daughter for some considerable time. There was no particular event in relation to her daughter at the end of March 2015 which could have had a particular or overwhelming impact on the claimant's mental state. On the balance of probabilities, it would seem that the dismissal was the more significant causative factor. Therefore the unanimous decision of the tribunal is that the first recurrence of the depressive/anxiety disorder was 66.66% due to the dismissal.

99. In relation to the second recurrence, in or about August 2016, there again does not appear to be any particular factor in relation to the claimant's daughter which would have on its own, or in the main, precipitated the recurrence of the depressive/anxiety disorder. On that basis it would appear, on the balance of probabilities, to the case that, as suggested by Dr McGarry, the correct apportionment would be 50% between the two potential causative factors.

100. Looking at the issue of psychiatric injury as a whole, encompassing the two recurrences of the underlying condition in March 2015 and August 2016, the tribunal concludes that the psychiatric injury was 60% due to the dismissal.

*Injury to feelings – **Vento***

101. The tribunal concludes that in all the circumstances of this case, it would be appropriate to award a single figure for injury to feelings incorporating psychiatric injury.

102. The two consultants agreed that the appropriate figure for psychiatric injury was circa £10,000. Of that, it would appear that £6,000 is attributable to the dismissal as 60%.

103. This was a case where there had been two relatively brief recurrences of a mild depression/anxiety disorder. It is impossible to completely distinguish the effects of those recurrences from '*ordinary*' injury to feelings. The tribunal has to be careful to avoid duplication while at the same time awarding sufficient compensation. The figure of £10K in total for injury to feelings, incorporating compensation of £6K for that part of psychiatric injury properly attributable to the dismissal appears to be appropriate.

104. In terms of ***Vento***, and avoiding duplication, this is an award at the lower end of the middle band.

105. Under Regulation 7 of the Industrial Tribunals (Interest on Awards on Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 interest at 8% is due on the injury to feelings compensation from the date of

the injury (the dismissal) to the date of calculation. No serious injustice which would require the use of a different period is evident.

106. The calculation is:-

Date of dismissal : 27 March 2015

Date of calculation : 17 March 2015

$^{720}/_{365}$ x 8% x £10,000.00 = £1,578.00

107. The claimant is therefore awarded £10,000.00 for injury to feelings incorporating psychiatric injury with £1,578.00 interest; totalling £11,578.00.

Working tax credits

108. The tribunal concludes, on the evidence and submission before us, that loss of working tax credits should not form part of compensation for financial loss in this case.

109. Working tax credits have been in operation for a considerable period and have been received by a significant proportion of the working population. Nevertheless, apart from three employment decisions at first instance, and one obiter remark, no court or tribunal appears to have added working tax credits to earnings to assess loss. No textbook on damages, apart from one reference in *Blackstone*, and one reference in *Korn & Sethi* deals with this issue. Both refer only to the decision in ***Mosse***.

110. No loss has been established on the evidence. It seems more likely than not that the loss of working tax credits has been compensated by another benefit. The tribunal, despite a specific invitation, has not been properly addressed on this point.

111. Working tax credits cannot properly be described as earnings. They are determined and paid for by the state. They appear to be a social security benefit. It cannot be right that an employer is required to pay more than it would have done if employment had continued; particularly since no actual loss has been established.

Financial loss

112. Given that there will be a statutory uplift in this case, it would seem appropriate to award compensation for financial loss under the 1996 Order as requested by the claimant. The tribunal also concludes that there is no automatic or presumptive entitlement to loss of earnings up to the date of the remedy hearing or the remedy calculation. For the reasons outlined earlier, such entitlement seems entirely illogical. The proper measure of loss is the loss of earnings until the point at which the claimant is likely to have obtained alternative employment.

113. The claimant was dismissed on 27 March 2015. As indicated above, it was clear that for the period of three months after that date she suffered a mild depressive episode.

114. She accepted, in the course of cross-examination, in the substantive hearing that there was no evidence from her of any application for a job until 6 October 2015, over six months later. She had already told her General Practitioner on 17 September 2015 that she could '*lose job if not seen to be actively seeking more*'. At the date of the substantive hearing, ie 27 – 29 January 2016, there had only been evidence of three job applications in total.

115. The claimant is a single parent with two children, one of whom is being home schooled. She accepts that she is greatly restricted in the hours that she is available to work and has stated in evidence to the substantive hearing that she had one friend who could help her in respect of caring for that daughter. As against that restricted availability, she states that '*her job to be financially viable and beneficial to my family I need to work 16 hours a week, any less offers nothing but hardship*'.

The requirement for 16 hours work per week appears to relate to working tax credit.

The claimant therefore has conflicting requirements; particular hours but at least 16 hours per week.

116. The claimant uploaded her CV with three different agencies in October 2015. There is no evidence of any earlier search for employment.

117. Following October 2015 up until January 2016, the claimant appears to have applied for only three jobs. None of those applications apparently resulted in an interview. The claimant accepted in cross-examination that her limited availability meant that other applications had not been made. She stated '*I am limited due to (name of daughter)*'.

118. Following the hearing on 27 – 29 January 2016 the claimant appears to have been looking for employment at least until the recurrence of her depressive/anxiety disorder in or about August 2016. She has produced a full Lever Arch folder full of photocopies of documentation relating to jobs. None of this was opened to the tribunal. She stated in her witness statement for the remedy hearing that she had been continually looking for work but that '*there is nothing suitable*'. She stated '*employers are often looking for flexibility in terms of hours or experience/skills I don't have*'.

'*As a result of this I am extremely limited as to the hours I am available to work*'.

119. The tribunal has concluded that the claimant could and should have been able to obtain part-time comparable employment within 52 weeks of the date of her dismissal, taking into account her initial incapacity for about 12 weeks after this dismissal. There can be no certainty about this matter. Nevertheless the tribunal, as an industrial jury, must assess the actual loss by estimating, on the basis of its own knowledge and experience, the likelihood (not the proven certainty) of obtaining alternative employment. Part-time working is increasingly common and the wages previously obtained by the claimant were not that high. Fifty-two weeks in total starting from the date of dismissal appears appropriate.

120. The loss of wages is therefore £104.00 x 52 weeks = £5,408.00

Statutory uplift

121. The potential statutory uplift ranges from 10% to 50%.

122. The respondent significantly failed to implement the statutory three step procedure. Those matters are set out fully in the liability decision.

123. The respondent appears to have acted carelessly rather than maliciously. Nevertheless the respondent's failures were significant.

124. The tribunal concludes that the appropriate statutory uplift is 25%.

125. The financial loss award is therefore:-

£5,408.00 x 25% = £6,760.00

126. Interest at 8% is due from the midpoint between the date of the dismissal and the date of calculation under of the Industrial Tribunals (Interest on Awards on Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996.

127. The calculation is:-

Date of dismissal : 27 March 2015

Date of calculation : 17 March 2017

Midpoint : 360 days

$^{360}/_{365}$ x 8% x £6,760.00 = £548.31

128. The interest payable on financial loss is therefore £548.31.

129. The total award is:-

(1) £10,000.00 – injury to feelings (including psychiatric injury)

(2) £ 1,578.00 – interest on injury to feelings

(3) £ 6,760.00 – financial loss

(4) £ 548.21 – interest on financial loss
Total £18,886.21

Recoupment

130. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations (Northern Ireland) 1996 as amended provides for the recoupment of income support and certain other benefits from the compensatory award under the 1996 Order. It provided that part of the award ('*the prescribed*

element') is held back by the respondent for a period to allow the Social Security Agency to recoup expenditure on relevant benefits.

131. The monetary award is £18,886.21.

132. The prescribed element is the compensatory award the 1996 Order from the date of dismissal, ie £6,760.00.

133. The dates to which the prescribed element is attributable is 27 March 2015 to 26 March 2016.

134. The amount by which the monetary award exceeds the prescribed element (ie the amount that should be paid immediately) is £12,126.21.

135. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Vice President

Date and place of hearing: **2 February 2017, at Belfast**

Date decision recorded in register and issued to parties: