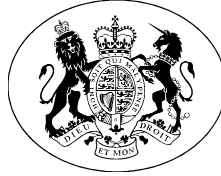

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Musilipah	**v**	**Mr Sylvian Dhennin**

Heard at: London Central
On: 26 – 29 June 2018

Before: Employment Judge Hodgson
Mr G Bishop
Mr S Soskin

Representation
For the Claimant: Ms A Kjaer, solicitor
For the Respondent: In person

JUDGMENT

1. **The claim of direct discrimination because of pregnancy succeeds.**
2. **The respondent shall pay damages of £6,500.00.**
3. **The respondent will pay interest of £497.20**
4. **The claim of unfair dismissal succeeds.**
5. **The respondent shall pay to the claimant a basic award of £nil.**
6. **The respondent shall pay to the claimant a compensatory award of £11,371.43**
7. **The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. For the purposes of those regulations:**
   (1) the grand total is £18,366.62;
   (2) the prescribed element is £11,371.43;
   (3) the period of the prescribed element is 29/9/2017to 6/4/2018; and
   (4) the excess of grand total over the prescribed element is £6,999.19.

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on the 19 December 2017, the claimant brought claims of direct discrimination, and unfair dismissal.

The Issues

2.1 On day 1, we read all the statements and documents; we did not see the parties as the tribunal had failed to book an interpreter.

2.2 At the commencement of the hearing on 27 June 2018 the issues to be considered were identified. The issues were refined during submissions.

2.3 It was accepted the claimant was dismissed on 22 September 2017. The claimant alleged the dismissal was direct discrimination because of pregnancy and was automatically unfair contrary to section 99 Employment Rights Act 1996.

2.4 The respondent alleged that the dismissal was by reason of redundancy and was not because of the claimant's pregnancy. The claimant alleged that if there was a redundancy, she was selected because she was pregnant.

Evidence

3.1 The claimant gave evidence, C1.

3.2 The respondent gave evidence, R2.

3.3 We received a bundle, R1.

Concessions/Applications

4.1 At the commencement of the hearing, the respondent made three concessions or contentions: first, he alleged that the decision to dismiss was taken on 14 September 2017; second, he stated the claimant had informed his wife on 18 September 2017 that she was pregnant; third, he confirmed that either on 18 or early 19 September 2017, his wife confirmed to him the claimant was pregnant.

4.2 The respondent acknowledged that of the three concessions or contentions set out above, none appeared in the response or in his witness statement. These are matters he was raising for the first time. The respondent did not seek to amend the response, or his statement.

The Facts

5.1 The claimant was employed by the respondent as a nanny-housekeeper from 30 January 2017 to 22 September 2017.

5.2 On 22 September 2017, Mr Dhennin dismissed the claimant summarily. He gave a week's notice and handed her a letter. He had not previously warned the claimant that she was at risk of redundancy, or that dismissal was contemplated.

5.3 The relevant part of the letter read:

> **Further to our recent discussions and following our meeting today, my wife, Orla O'Sullivan and I regret to confirm that your present role is now redundant due to our current personal circumstances. As anticipated for the past few months and as you know, our eldest son Patrick has been attending Bousfield nursery five days a week since 7 September 2017. Our youngest son Philip has been attending Cheyne Children's Centre two days a week since 4 September 2017. On 14 September 2017, my wife visited and received an offer for Philip to attend Kensington House Schools nursery for the remaining three days a week.**
>
> **You are entitled to one week notice, which as discussed, I would like to pay you in lieu of notice. Your last day with us will therefore be 22 September 2017.**
>
> **…**
>
> **We have much regret that it has become necessary to make you redundant and that you have been affected. We would like to thank you for your hard work and efforts during your employment with us and we extend to you our sincere best wishes for your future."**

5.4 The claimant's main duties revolved around caring for the respondent's two children. Patrick, the eldest, is autistic. When the claimant began work, Patrick was at home. On 6 March 2017, the respondent and his wife received an offer from Chelsea Open Air Nursery School for a nursery place five days a week (08:45 to 15:45) commencing September 2017.

5.5 The youngest son, Philip, was approximately 15 months old. The claimant initially cared just for him, but increasingly began to care for Patrick during the day.

5.6 The respondent and his wife decided to send Philip to nursery from September. Initially, they received an offer of a placement from Cheyne Children's Centre by letter of 24 July 2017. Philip was offered a placement on Mondays and Tuesdays (08:00 to 17:45). The week commencing 4 September 2017 was to be a settling in period. There was a monthly fee payable.

5.7 Mrs O'Sullivan accepted the place by email of 3 August 2017. She asked the nursery to bear in mind her desire for her son to attend an extra two days at nursery.

5.8 Both Patrick and Philip started at their respective nurseries from or around 4 September 2017.

5.9 On 14 September 2017, claimant and his wife completed a registration form for a different nursery, Kensington House Schools. The respondent's evidence is that this nursery had offered Philip a place for the remaining three week-days. The form does not make that clear. The respondent confirmed that there was other correspondence and emails setting out the position, but he failed to produce them. That place was never taken up. We received no details as to any fees payable, or whether any payment was made. We have seen no confirmation that any place was accepted or offered. The declaration required by the form states, "We request that the name of our child listed at the start of this form be registered as a prospective pupil." The form concludes by saying, "Early registration is recommended. Registrations are subject to availability and the admission required of the school at the time when places are offered."

5.10 It was the respondent's oral evidence that on 25 September 2017, Cheyne Children's Centre stated that Philip could now attend five days a week. We have seen no written confirmation of this. We have seen a letter from Cheyne Day Nursery of 9 February 2018 which states that Philip started nursery on 11 September 2017 and that he attends full-time Monday to Friday. It does not tell us when he started full-time at the nursery or when that full-time position was offered. The respondent has produced no documentation confirming or proving either the date the Cheyne Day Nursery offered the extra days, the circumstances in which acceptance was made, or the date on which full-time nursery commenced for Philip.

5.11 The claimant had enjoyed a happy working relationship with the respondent and his wife. She cared for both children and provided housekeeping services.

5.12 Toward the end of August 2017, the claimant suspected that she may be pregnant. However, she was concerned that she may have miscarried. She attended hospital on 29 August 2017. The hospital records record her bleeding on 22 August 2017. The scan revealed she was approximately eight weeks pregnant.

5.13 On 18 September 2017, the claimant told Mrs O'Sullivan of her pregnancy. She confirmed the following Monday she would have a scan. Mrs O'Sullivan neither reacted nor made any comment.

5.14 The week prior to the claimant's pregnancy, Mrs O'Sullivan had talked of her plans. She would give the claimant a garden key, so she could invite more of Philip's friends for play dates. She would take Philip to swimming lessons and music lessons. There were established arrangements, whereby they each would look after one boy. (For example, if Mrs O'Sullivan wished to pick up Patrick from his nursery and take him swimming or take him to the park, the claimant would look after Philip.) The claimant's evidence on this has not been challenged and is accepted. There was also discussion about the claimant's continuing role as a

housekeeper when Mrs O'Sullivan and a husband moved into a new house.

5.15 We find that at no time prior to 22 September 2017 was it ever suggested to the claimant that her role was redundant or that the nursery arrangements for Patrick and Philip would result in the claimant not being needed, or losing her job. We will consider the respondent's assertion that the claimant was informed that she was at risk of redundancy in more detail when we come to our conclusions. We have preferred the claimant's evidence.

5.16 On 22 September 2018, and without any warning, approximately an hour before she was due to finish for the day, Mr Dhennin told the claimant that he and his wife no longer needed her full-time because both children were going to nursery full-time. He handed her a letter of termination which confirmed that she was dismissed. She finished work that day.

5.17 Following her dismissal, the claimant did approach an agency and seek further employment. She confirmed to the agency that she was pregnant. She was unable to secure another role. The claimant has not yet secured any other employment. On 29 March 2018, the Department for Work and Pensions confirmed the claimant was entitled to maternity allowance of £140.98 a week from 21 January 2018 to 8 April 2018 and £145.18 a week from 9 April 2018 to 10 October 2018. Claimant is currently in receipt of maternity allowance. She received the allowance from 21 January 2018 to 27 March 2018 as a lump sum of £692.23 at that point, she had already received income support of £637.01 from 21 January 2018 to 27 March 2018. That sum is taken into account when giving the balance of maternity pay.

5.18 By a separate letter, Hackney benefit Centre, confirmed on 20 March 2018 that the claimant was entitled to income support of £52.22 from 26 January 2018 to 30 September 2018. From 31 January 2018 she would receive £73.10 p a week payable fortnightly.

5.19 It is the claimant's case that she would have worked for the respondent until 21 January 2018 when she would have commenced maternity leave. The expected date of birth was 14 April 2018. The claimant's boy was born early on 26 March 2018.

5.20 The claimant intends to return to work no earlier than October 2018, and she would not have returned to the respondent's employment prior to that date.

5.21 The claimant's gross pay was £638.18 per week. She paid tax and National Insurance and receive net pay of £495 per week.

5.22 The dismissal distressed the claimant. She asked if she had made a mistake. She was pregnant, and she was concerned how she would manage financially. She was generally upset, and she missed the children. She formed the view that the reason for her dismissal was

pregnancy. She found it upsetting. The tribunal observed the claimant appeared to be distressed and upset during the hearing when contentions were made, with which she disagreed. In particular, the respondent's contention that there had been some form of discussion about redundancy appeared to cause upset.

The law

6.1 Section 18 Employment Rights Act 1996, Pregnancy and maternity discrimination: work cases, in so far as it is material to the dispute, in this case states:

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

6.2 The burden of proof is found at section 136 Equality Act 2010.

> **Section 136 Equality Act 2010 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.…**

6.3 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Annex**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less[1] favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

[1] We note that section 18 is a case of unfavourable treatment and not less favourable treatment. No comparator is needed. The principles set out in the annex are applicable to unfavourable treatment.

6.4 Section 99 Employment Rights Act 1996 provides, in so far as it applicable:

> **(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if-**
>
> > **(a) the reason or principal reason for the dismissal is of a prescribed kind, or**
> > **(b) the dismissal takes place in prescribed circumstances.**
>
> **(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.**
>
> **(3) A reason or set of circumstances prescribed under this section must relate to -**
>
> **(a) pregnancy, childbirth or maternity,**
> **(b) ..**

6.5 Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999 provides, in so far as it is applicable:

> **(1) An employee who is dismissed shall be regarded for the purposes of part X of the 1996 act as an unfairly dismissed if –**
> > **(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3).**
>
> **(3) The kinds of reason referred to in paragraph (1) and (2) are reasons connected with –**
> > **(a) the pregnancy of the employee**

6.6 This is a case where the claimant does not have the requisite qualifying period (section 108 Employment Rights Act 1996) to claim what is commonly termed ordinary unfair dismissal, pursuant to section 98 Employment Rights Act 1996. This then leads to a consideration of whether it is the respondent or the claimant that has the burden of proving the reason for dismissal. We do not need to consider all the case law. It is said that **Maund v Penwith District Council** 1984 ICR 143, CA is authority for the general proposition that, where the employee has the requisite qualifying period for section 98 claims, the employee acquires the evidential burden to show, without having to prove, that there is an issue which warrants investigation, and should that evidential burden be discharged, the burden reverts to the respondent.

6.7 The Court of Appeal decision in **Smith v Hayle Town Council** 1978 ICR 996 is frequently cited as authority for the proposition that where an employee lacks the requisite continuous service to claim ordinary unfair dismissal he or she will acquire the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason. It is also argued that the case of **Ross v Eddie Stobart Ltd** EAT 68/13 supports **Hayle.**

6.8 It is possible that the question of the burden of proof is important in this case. The claimant does not have the two years' employment, pursuant to

section 108 needed to bring an ordinary (section 98) claim of unfair dismissal. In those circumstances, it may be argued that she acquires the burden of proving, on the balance of probability, that the reason for dismissal was for an automatically unfair reason.

6.9 We doubt that **Hayle** is still good authority. It is correct to say that **Ross** did consider **Hayle**. The appeal in that case was concerned with the assertion that the respondent maintained the burden of proof, even in cases where the claimant did not have the requisite qualifying period for a section 98 claim. HHJ Peter Clarke expressly stated that it was not open to the Employment Appeal Tribunal to depart from the majority opinion in **Hayle**. However, he concluded, (see paragraph 26) that the reference to the burden of proof was irrelevant, as it was not necessary to the employment tribunal's conclusion; the tribunal had not decided the case on the burden of proof.

6.10 It seems to us that there are two general questions which need to be addressed. First, in claims of automatic unfair dismissal, such as the section 99 claim, is there a difference in the burden of proof which depends on whether the claimant has the period of continuous employment required for all claims of unfair dismissal that are not specifically exempted by section 108?

6.11 Second, what is the actual, or potential, effect of the burden of proof falling on the employee rather than the employer?

6.12 It is helpful to set out, briefly, why it is said that having two years qualifying service, so as to satisfy section 108(1), makes a difference.

6.13 The general right not to be unfairly dismissed is contained in part X at section 94 Employment Rights Act 1996; it is not contained in section 98.

6.14 It is clear that having two years' service allows an employee to bring a claim under section 98. Section 98 (1) states, "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show… the reason (or if more than one the principal reason) for the dismissal…" This provides a clear burden of proof for the purposes of section 98.

6.15 Claims of automatic unfair dismissal – for example under section 103A(whistleblowing) or section 99 (leave for family reasons) – are silent as to the burden of proof. It appears there are, broadly, two possible interpretations. The first is that if a claimant cannot bring a claim of ordinary unfair dismissal, the burden as provided for in section 98, does not apply at all. The second is that a claimant who satisfies section 108(1), and who can bring a section 98 claim, may take benefit of the section 98 burden in relation to all other allegations of unfair dismissal.

6.16 Thus, it is argued that the length of service dictates the burden of proof. If this were only of academic interest, it would not be necessary to consider it. However, the burden may be of practical importance. In situations where the reason is unclear, if the burden falls on the claimant, the

claimant's case may fail, but if the burden falls on the respondent, the claimant's case may succeed.

6.17 It is necessary to consider the case of **Kuzel v Roche Products** [2008] ICR 799 in which LJ Mummery gave the leading decision and in so doing has considered the burden of proof.

> **50. An unfair dismissal claim has a number of aspects any or all of which may be disputed. In this case the dispute is about the reason for dismissal and where the burden of proof lies. The burden may differ according to the nature of the disputed issue. On the specific issue of dismissal, for example, the claimant employee must prove that he was dismissed. This will not usually be a difficult burden to discharge. The production of a letter of dismissal usually proves the point. There are, however, cases in which there is disputed evidence about whether the employee resigned or whether he was constructively dismissed.**
> **51. Similarly there may be an issue as to the claimant's status affecting his right not to be unfairly dismissed...**
> **52. Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
> **53. Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
> **54. Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.**
> **55. Sixthly, the burden of proof issue must be kept in proper perspective. As was observed in *Maund*, when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof.**
> **56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.**
> **57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
> **59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the**

> **satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
> **60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.**
> **61. I emphatically reject Roche's contention that the legal burden was on Dr Kuzel to prove that protected disclosure was the reason for her dismissal. The general language of section 98 (1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions. Section 98(1) is inconsistent with Mr Bowers's submission, as is the specific provision placing the burden of proof on the employer in case of detriment to the employee by reason of a protected disclosure. It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was.**

6.18 We accept that this case does not deal directly with the position of an individual who, by operation of section 108, cannot claim ordinary unfair dismissal. It follows that as the point was not in issue, it cannot be said to have directly addressed **Hayle**. However, the basis for the decision fundamentally undermines the notion that there can be a difference in the burden of proof which depends on whether section 108 is, or is, not satisfied.

6.19 Paragraph 61 does deal with the interrelationship between the burden as it is set out in section 98 and its effects on the burden for the remaining provisions covered by section 108(3), for which no specific burden is specified. It states, “The general language of section 98(1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions.” Mummery LJ goes on to say, “It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was.” In our view, this leaves little room for doubt as to the meaning. There is no suggestion that the position is different when section 98 is not engaged directly because there is not the two years’ service required by section 108. It is put forward as a general proposition that the burden provided in section 98 is of general applicability. It would seem to us that there would be a degree of arbitrariness or illogicality in changing the burden, depending upon the length of service. There is no express provision for that in the

Employment Rights Act 1996. Moreover, it would lead to difficulty where an individual has the two-year qualifying period, but chooses not to claim ordinary unfair dismissal. In that case, the tribunal would have to import the burden of proof from a provision which is not expressly relied on.

6.20 It follows that we doubt that **Hayle** remains good law. However, this case does not turn on the burden of proof and we do not have to finally conclude whether **Hayle** remains good law.

6.21 The burden of proof is of particular significance if one side or the other has the burden but fails to discharge it. The question is what is the result? **Kuzel** makes it absolutely clear that the result does not depend upon an application of the burden of proof. The respondent does not have to prove the reason it advances in order to defeat a claim of automatic unfair dismissal. Paragraph 60 makes it clear that deciding the reason is a matter of fact for the tribunal and it turns on the question of the evidence produced and the permissible inferences on that evidence. It is open to a tribunal to find the true reason was a reason advanced by neither party. It therefore follows that the failure to discharge the burden does not constrain the tribunal to find the alternative explanation advanced; the reason is simply a question of fact for the tribunal. As nothing turns on the burden, we do not need to come to a final conclusion as to the current status of **Hayle**.

6.22 We would add that an over emphasis on the burden could lead a tribunal into error. The section 99 claim only requires that the sole or principal reasons is “connected with” pregnancy (see regulation 20). It seems to us this falls short of saying the sole or principal reason must be the pregnancy. “Connected” implies something less than the pregnancy itself being the sole or principal reason. This means the respondent could establish its sole or principal reason (redundancy would be an obvious example) and yet could lose a section 99 claim if the relevant connection exists.

6.23 We should add that **Kuzel** is consistent with the suggestion that there is an evidential requirement placed on the claimant. We do not need to consider that in detail. The claimant may point to any evidence, whether advanced by the claimant or not, in support of the claimant’s case. An investigation as to whether that evidence exists will resolve the question of whether some evidence had been identified by the claimant.

6.24 Having regard to **Kuzel,** we think it is unsafe to now say that the claimant has the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason. We accept that an employer could argue that this is a misdirection in law which causes it disadvantage. There can be no disadvantage to the claimant. However, to direct ourselves that there is a burden on the claimant to establish the reason on the balance of probabilities, risks a clear conflict with the principles as set out in **Kuzel**. We will, therefore, consider the evidence as a whole and reach our view as to the reason, or reasons, for dismissal.

6.25 Whatever the position, we find that this case does not turn on a consideration of the burden of proof.

Conclusions

7.1 We first consider the claim of direct discrimination because of pregnancy.

7.2 An employer discriminates against an employee, if the employer treats the employee unfavourably because of pregnancy. We should first consider whether there are facts from which we could conclude that the alleged discrimination has occurred. The claimant may rely on any relevant facts in her or the respondent's evidence.

7.3 It is clear the claimant was dismissed. It is clear that the claimant was pregnant and that the respondent knew of her pregnancy. However, the fact that the treatment occurred, and the fact that the claimant was pregnant, is not sufficient to turn the burden.

7.4 In this case, there are facts from which we could conclude that the discrimination has occurred.

7.5 The fact that an employer knew of a pregnancy when dismissing may not be enough to turn a burden. However, any subsequent attempt to hide or obscure the fact of that knowledge may be sufficient to raise an inference.

7.6 The letter of dismissal, the ET3, and the respondent's statement, all fail to acknowledge that both the respondent and his wife knew, when dismissing the claimant, that she was pregnant.

7.7 The ET3 states at paragraph 8 "The respondent was never informed by the claimant during her employment that she was pregnant, even though she saw the respondent almost every morning before he went to work." It fails to set out the fact that the respondent knew of her pregnancy no later than 19 September 2017. It fails to set out the fact that the claimant told Mrs O'Sullivan of her pregnancy on 18 September 2017. Paragraph 6 of the respondent's statement states, "I was never informed by Ms Muslipah during her employment that she was pregnant, even though she saw me almost every morning before she went to work." This statement fails to set out the fact that his wife knew of the pregnancy on 18 September and that he knew of the pregnancy no later than 19 September 2017.

7.8 At the beginning of the hearing, Mr Dhennin stated, for the first time, that his wife had been informed of the pregnancy on 18 September and that she told him.

7.9 When questioned why the statement and the ET3 did not make plain the fact that he and his wife knew of the pregnancy, the respondent alleged that he did not believe that the date of knowledge was relevant. He was asked to explain paragraph 8 of his statement which records that "The nursery applications for both boys were made long before Ms Muslipah

was made redundant and both I and my wife learned of Ms Muslipah's pregnancy." He was unable to explain why he considered it relevant to cite the date of knowledge in paragraph 8 of his statement when he maintained that the date of knowledge was not relevant.

7.10 Mr Dhennin confirmed that when drafting paragraph 6 of his statement, he intentionally sought to separate the source of his knowledge from the fact of his knowledge. Paragraph 6 is, arguably, truthful in that it simply states that Ms Muslipah never told him. However, the omission of the fact of his knowledge he agreed was both deliberate and intentional. Moreover, it is difficult to read the words "even though she saw me almost every morning before she went to work," as anything other than an attempt to imply that he had no knowledge of the pregnancy.

7.11 We accept that the claimant is French and English is not his first language. The respondent is a lawyer. He has been in this country for fourteen years. He qualified as a lawyer in New York, where he studied in English. He drafted the ET3 and his statement. The standard of English in the ET3 and in his statement is exemplary. He has no difficulty constructing sentences which obscure the fact of his knowledge of the pregnancy, by selectively focusing on the claimant's failure to inform him directly. We have no doubt that his use of language is deliberate, careful, and sophisticated.

7.12 Mr Dhennin offered no explanation for why he volunteered at the beginning of the hearing that in fact he did know of the claimant's pregnancy. He gave no reasonable explanation for why he would obscure that fact in the response and in the claim form. The suggestion that he did not believe the date of knowledge was relevant is wholly unbelievable and entirely inconsistent with paragraph 8 of his statement. We have concluded that there was a deliberate attempt to obscure the fact of the knowledge of the pregnancy. That in itself would be enough to turn the burden.

7.13 The ET3 at paragraph 17 states:

> **The claimant even acknowledged during the final meeting on 22 September 2017 that she expected and understood the reasons why she was being made redundant and was not surprised.**

7.14 Paragraph 15 states:

> **The respondent and his wife had various discussions prior to and leading to the final meeting with the claimant on 22 of September 2017, where the claimant was informed and understood that her role as a nanny-housekeeper was at risk of redundancy**.

7.15 In his statement, he modified his position; he no longer asserted that he had had various discussions with the claimant. A paragraph 17 he stated:

> **My wife had various discussions prior to and leading to our final meeting with Ms Muslipah on 22 of September 2017, where Ms Muslipah was**

informed and understood that her role as nanny-housekeeper was at risk of redundancy.

7.16 Mr Dhennin accepted that on a plain reading of paragraph 17 it is asserted that Mrs O'Sullivan spoke to the claimant prior to 22 September 2017 and specifically told the claimant that she was at risk of redundancy. During the course of the hearing, on at least two occasions, the tribunal reminded Mr Dhennin that he had not put to the claimant that she had been informed by his wife that she was at risk of redundancy. Mr Dhennin accepted that he had been given that guidance, and he accepted that he had chosen not to make that allegation.

7.17 Mr Dhennin sought to suggest that because English was not his first language, paragraph 17 should not be given its plain and literal meaning. As to what meaning it should be given, he was silent: he did not explain how it should be read.

7.18 We have observed English is not Mr Dhennin's first language, nevertheless, he is skilled in the use of English, and uses it precisely. The ET3 asserts that both he and his wife specifically told the claimant she was at risk of redundancy (paragraph 15). That allegation is repeated at paragraph 17 of his statement, albeit it is alleged Mrs O'Sullivan had the conversations. The ET3 is inaccurate insofar as it states the respondent informed the claimant she was at risk of redundancy.

7.19 At no time was the claimant told that she was at risk of redundancy. We accept her evidence on this point. Mr Dhennin's evidence on this point was confused and confusing. He did not maintain that his wife had directly informed the claimant she was at risk of redundancy. Instead, he sought to prevaricate and suggest that his true meaning, whatever that was, had been literally lost in translation. We have concluded, on the balance of probability, that the statement the claimant was informed she was at risk of redundancy is untrue.

7.20 The respondent's untrue assertion that the claimant was warned of the redundancy is sufficient to turn the burden.

7.21 We have noted that there has been a failure to fully disclose relevant documentation concerning the nursery placement for Philip. It is reasonable to believe that such cogent documentation should exist. The respondent asserts that it exists. The failure to produce the cogent evidence that would prove this important element of the explanation is enough to turn the burden.

7.22 The failure to acknowledge he knew of the pregnancy until he made that admission at the beginning of the hearing may not be enough to turn the burden. However, the failure of any reasonable explanation for the omission, could be enough to torn the burden. That failure of explanation in the context of all the remaining evidence, does turn the burden.

7.23 The fact that there was no full-time nursery place at Cheyne prior to 25 September 2017, and there being insufficient evidence to demonstrate an acceptance of a place that any other nursery, fundamentally undermines the respondent's account, and that would be enough to turn the burden.

7.24 We must therefore go on to consider the explanation offered.

7.25 It is the respondent's contention that the claimant was dismissed by reason of redundancy. He acknowledges that the claimant was to undertake housekeeping duties, including cleaning. However, he contends that her main duties revolved around care of children and with Patrick already having secured a nursery place of five days a week, and Philip having secured by 14 September 2017 a nursery place for five days a week, the claimant was no longer required.

7.26 It can be seen that there are a number of aspects to this explanation which rely on a number of contentions. It is helpful to identify them. First, it is alleged there was a redundancy situation because there was a diminished need to directly care for both children. Second, it is alleged the decision was made on 14 September 2017. Third, it is alleged that the claimant had been made aware that she was at risk of redundancy from a number of conversations prior to the decision. Fourth, it is alleged Ms Muslipah acknowledged during the final meeting on 22 September 2017 that she expected the redundancy and understood the reasons why she was being made redundant and was not surprised."[2] Fifth, that the decision was taken when Philip was offered a placement at nursery from Wednesday to Friday.

7.27 It is contended that the pregnancy played no part in the decision.

7.28 We must consider each of those contentions.

7.29 We accept that there was a potential redundancy situation in that there was potentially a diminished need for work of a particular kind. It was part of the claimant's role to look after the children. Their being at nursery, there was a diminished need for her services. We do not accept that all her duties ceased. The children still need to be cared for when being taken to nursery, when picked up from nursery, when not at nursery (e.g., in post nursery activities). Moreover, the claimant had housekeeping duties. Nevertheless, it is for the employer to identify if there is a reduced need for work, and in this case, there was potentially a redundancy situation.

7.30 At the heart of this case is the contention that the decision to dismiss was made on 14 September 2017, when it was clear Philip would go to nursery full-time. The main evidence advanced in support of this contention is Mr Dhennin' oral evidence. Mrs O'Sullivan has given no evidence. There is no documentary evidence demonstrating when the decision was made. If a decision was made on 14 September 2017, it predated Mrs O'Sullivan's

[2] see paragraph 21 of Mr Dhennin's statement.

actual knowledge of the pregnancy. We are invited to assume that she had no constructive knowledge, although we have no evidence about this.

7.31 Viewed one way, determining the date of the decision is a simple factual question; however, this resolution of this factual question is an essential part of establishing the explanation, and it cannot be divorced from the operation of the reverse burden. The date of the decision is the key fact relied upon to establish the explanation that the true reason was redundancy, as it underpins the assertion that the decision was made before there was knowledge of the pregnancy. We are therefore entitled to ask whether this has been proven on the balance of probability. In asking that question, we must consider whether the respondent has provided cogent evidence.

7.32 The respondent should be produce such documentation and such cogent evidence as exists. A failure to produce sufficient relevant cogent evidence may result in the explanation not being established. The burden is placed squarley on the respondent. There are serious difficulties with the respondent's evidence. Neither the ET3, nor Mr Dhennin's statement states that the decision was made on 14 September 2017. Mr Dhennin's evidence concerning his knowledge of the pregnancy has, for the reasons we have already explored, been misleading. The ET3, drafted by Mr Dhennin maintains a false allegation that he informed the claimant of the risk of redundancy. We have found that the continuing assertion that the claimant was informed is also misleading.

7.33 Mr Dhennin has failed to give full or detailed evidence concerning the alleged decision-making process. Mrs O'Sullivan has given no evidence; cogent evidence can be the oral evidence of an individual.

7.34 It is clear there should be documentary evidence detailing any offers of placements made by Cheyne Children's Centre and Kensington House Schools. That evidence has not been provided, although there we are told that there are emails. The registration form from Kensington House Schools does not show an offer was made by Kensington House Schools, or that any offer was accepted. It would appear to be the respondent's case the offer was made to Mrs O'Sullivan, but she has failed to give any evidence in support.

7.35 There is an absence of documentation demonstrating when and how any further offer was made by Cheyne Children's Centre and when and how it was accepted. In any event, no such offer by Cheney Children's Centre was made prior to the date of dismissal. There was no offer by the time of the it is alleged the decision was taken on 14 September 2017.

7.36 We have previously noted that the third contention, that the claimant was made aware that she was at risk of redundancy, is untrue. We have already given reasons.

7.37 The fourth contention, concerning the claimant's alleged acknowledgement that she had in some manner expected redundancy we

find is without foundation. We have accepted the claimant's evidence on this point. She was shocked. We reject Mr Dhennin's evidence that she suggested in some manner she was not surprised. He has shown himself to be an inaccurate and incomplete historian. We find on the balance of possibility his evidence of this point is inaccurate, and without foundation, as it builds on an unfounded contention that the claimant had been warned.

7.38 The fifth contention is that the decision was taken when Philip was offered a placement at nursery from Wednesday to Friday. There is insufficient cogent evidence to establish that Philip had been offered a place on 14 September 2014. In any event it was not at Cheyne Children's Centre. If any such place was offered, there is no evidence of acceptance of the offer. The documentation we have seen refers to listing the child as a prospective pupil.

7.39 It is for the respondent to establish its explanation on the balance of probability. It is for the respondent to produce sufficient cogent evidence. For the reasons we have set out above, the respondent has failed to establish its explanation on the balance of probability. It is not enough to point to the fact that there is a potential redundancy situation.

7.40 The respondent alleges the claimant was warned she was at risk of redundancy, and thereby acknowledged the reasonableness of the decision. The fact that there were no such conversations, when it is alleged there were, would suggest that there was no set intention to dismiss the claimant should a nursery place be obtained. Moreover, the direct evidence we have from the claimant concerning what was said to her by Mrs O'Sullivan is entirely consistent with her continuing her employment, even though it was intended to send both children to nursery full time when both children secured nursery places.

7.41 In the circumstances we find the respondent has not established his explanation. It follows that we must find that the claimant was dismissed because she was pregnant.

7.42 As regards the unfair dismissal case, it is necessary to consider what was the sole or principal reason for dismissal. It was not until the claimant stated that she was pregnant that action was taken against her. Mrs O'Sullivan did not react to the news. Mrs O'Sullivan did not discuss the pregnancy. Prior to the dismissal on 22 September 2017, she did not discuss the claimant's continuing employment or maternity leave.

7.43 The pregnancy itself does not have to be the sole or principal reason for the dismissal; the sole or principal reason must be of a kind specified in regulation 20(3) Maternity and Parental Leave etc Regulations 1999. It will be such a reason if it is connected with the pregnancy of the employer.

7.44 The reason is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. As the reason for dismissal may be a complex mixture of fact and belief, care must be taken

in stating what is the sole or principal reason. In this case, there are background circumstances which may be technically viewed as a redundancy situation. However, we are satisfied that the trigger for the dismissal was the fact the claimant said she was pregnant. We cannot know the exact thought processes of Mr Dhennin. We are satisfied that he has not been frank in his evidence. The redundancy position was part of the factual matrix and the pregnancy was a material part of that decision. We reach the conclusion that there were a number of facts or beliefs which constituted the sole or principal reason they can be summarised as follows: there was a redundancy situation; the claimant had told the respondent's wife she was pregnant.

7.45 We are not satisfied that the claimant would have been made redundant at the same time had it not been for the fact she told the respondent of her pregnancy. Pregnancy was a material factor in that decision. It follows the dismissal was automatically unfair pursuant to section 99 Employment Rights Act 1996.

7.46 During submissions we discussed the fact that if an individual has been selected for redundancy because of pregnancy that will be discriminatory and will also lead to a finding of unfair dismissal. Neither party referred to, or addressed us on, section 105 Employment Rights Act 1996. That section is not directly relevant, as it requires a consideration of whether the circumstances constituting the redundancy applied equally to one or more other employees. It cannot apply here, as there was only one employee. However, the fact that section 105 is not applicable is not a defence. Section 105 illustrates that being selected for redundancy because of pregnancy is not permitted. When the selection for redundancy is connected with the pregnancy, that is sufficient and that is the position under Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999

7.47 Finally, we must consider the remedy in this case. We reject Mr Dhennin's suggestion that the claimant has failed to mitigate her loss. We accept the claimant would have had difficulty obtaining employment as a nanny during a period when she herself was pregnant.

7.48 We reject any assertion that the claimant would have been made redundant at the same time in any event. Prior to the claimant saying that she was pregnant, there was a clear indication that she would remain employed. That indication was given at a time when the respondent and his wife knew that Patrick was to be in nursery full-time and that Philip was to be in nursery for two days a week, with a request that he go five days a week. Had there been any true intention to make the claimant redundant, we are satisfied that there would have been discussions with her and that she would have been told. The fact that there was no discussion, and she was not told that she was at risk of redundancy is significant. On the balance of probability, she would have remained employed. The claimant should therefore receive a full loss of wages to the point when she would have started her maternity leave.

7.49 The claimant would have continued working until 21 January 2018. Thereafter she would have taken maternity leave and received maternity pay.

7.50 We have already set out the benefits the claimant has actually received.

7.51 In principle, the claimant will be compensated for loss of earnings from the date of dismissal until the start of her maternity pay (21 January 2018), she should then be compensated for any loss of maternity pay. There is no reason why the claimant cannot go back to work when she chooses, and so there is no ongoing loss. If the claimant wishes to obtain employment, we are satisfied that she should be able to do so at the same time she would have gone back to work for the respondent following any maternity leave.

7.52 We next consider what compensation should be awarded for the discrimination.

7.53 Injury to feelings should be assessed as any other claim in tort, subject to the qualification that it is enough that the damage or loss suffered by the complainant was a direct causal result of the discrimination.

7.54 The Court of Appeal in the leading case of **Vento v Chief Constable of West Yorkshire Police** (No 2) [2002] EWCA Civ 1871, identified three broad bands: (1) a top band between £15,000 and £25,000, for example where there had been a sustained campaign of harassment; (2) a middle band of £5,000 to £15,000 for serious cases falling short of the top band; (3) a lower band of up £500 to £5,000, for example for one-off incidents.

7.55 The question of the quantification of **Vento** damages was considered administratively by the Presidents of Employment Tribunals, leading to presidential guidance issued on 11 September 2017 (applying to cases issued on or after that date). This sets out the following bands:

Lower band £800 – £8,400
Middle band £8,400 – £25,200
Upper band £25,700 – £42,000
Exceptional cases over £42,000

7.56 The general 10% rise in the level of damages mandated for common law claims for personal injury in April 2013 (**Simons v Castle** [2012] EWCA Civ 1039) is to be applied to tribunal awards for injury to feelings, the Court of Appeal held that the increase is to be applied: **De Souza v Vinci Construction** (UK) Ltd [2017] EWCA Civ 879. We have taken this into account in reaching our final figure.[3]

7.57 In a discriminatory dismissal case, even if the tribunal takes the view that the person would have been properly dismissed (which we don't in this case), the applicant remains entitled to full injury to feelings because of the

[3] The 10% increase is included in the adjusted Vento bands, as set out in the Presidential guidance. We have not applied it in addition to the bands, as this would lead to double counting.

dismissal: **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615, CA.

7.58 Dismissal is a serious form of discrimination. Loss of a job is likely to lead to significant distress. It is important to bear this in mind when considering the relevant compensation for injury to feelings. Here we are satisfied that the claimant suffered significant distress and that there was serious damage to her feelings. The fact that she had been a valued employee adds to the distress in this case, as it was so unexpected.

7.59 We have taken into account the relevant bands, the guidance addressed above, and the 10% increase. This was a single incident and there is no specific reason in this case to take it outside the first band. However, it was a serious act of discrimination and led to significant injury to feeling. We consider the correct figure to be £6,500.

7.60 We have considered what compensation should be awarded for unfair dismissal.

7.61 There is no basic award because the claimant does not have the two years' employment.

7.62 We next consider the compensatory award.

7.63 We decline to make any award for loss of statutory rights as the claimant was employed for under two years.

7.64 The claimant seeks £250 for travel, but she has given no evidence in support and we decline to make any award.

7.65 It is unclear why the claimant needs to attend a first-aid course because of the discrimination or because of the dismissal. We make no award for this element.

7.66 We make an award for the past losses pursuant to the unfair dismissal case. There is no interest element payable. We have set out the calculation at appendix 1.

7.67 The only award made for discrimination is for injury to feelings in the sum of £6,500. Interest is payable on the award for injury to feelings. There is no reason for us not to award interest.

7.68 We have considered whether there should be any uplift pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992 In this case, we declined to make any award. The relevant code is the ACAS code of practice on disciplinary and grievance procedures. It is not applicable to redundancy dismissals. The central question in this case revolves around the interplay between a potential redundancy situation, and the reasons for the decision taken by the respondent. Whatever the position, there is no suggestion at all that the claimant had raised a grievance, or that the respondent treated this as a disciplinary matter. It

follows, the code did not directly apply. **Allma Construction Ltd v Laing** UKEATS/0041/11 (25 January 2012, unreported) Lady Smith suggests the general approach: 'Does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Was that failure unreasonable? If so, why? Is it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? By how much ought it to be increased? Why do we consider that that increase is appropriate?

7.69 This is a case which simply do not engage the code. It follows that section 207A is not engaged. There can be no award.

7.70 Finally, before coming to the calculation of figures, we should consider another point of principle. In an unfair dismissal case, where an award is made under section 123 (the compensatory award). It is necessary to consider recoupment. Recoupment occurs when the government reclaims from the damages benefits, such as jobseeker’s allowance.

7.71 The claimant should have received maternity pay. Whether that should be seen as a continuing right, and therefore wages, is a point we do not need to resolve. Had maternity pay been received, the respondent would have been entitled to reclaim some or all of it. We do not need to consider the exact proportion this employer would have recovered. The net result would have been the government would have paid for either all or the majority of the maternity pay. The claimant has, however, received a mix of income support, and maternity allowance.

7.72 We have to bear in mind the operation of the Employment Protection (Recoupment of Benefits) Regulations 1996 recoupment regulations. Pursuant to the regulation 8, the Secretary of State may serve a recoupment notice requiring the employer to pay total or partial recoupment of jobseeker’s allowance, income -related employment and support allowance, universal credit, or income support. There appears to be no provision for the recovery of maternity allowance. This would appear to accord with logic. The employer would be entitled to recovery of maternity pay from the government and so, it would seem illogical that something that can be recovered by the employer, but which is instead, effectively, paid directly by the government, should be recoverable.

7.73 The position is slightly complicated because receipt of benefits, such as income related employment and support allowance, diminishes, pound for pound, the former employee’s right to maternity allowance. Benefits such as jobseeker’s allowance, income -related employment and support allowance, and income support are definitely recoupable. Even though they are paid during a period when maternity pay should have been paid, a maternity allowance could have been paid.

7.74 We have taken the view that we should apply the following principles.

7.75 First, we should calculate the pay the claimant would have received up to the point she took maternity leave. We should then calculate the maternity

pay the claimant should have received. From that we should deduct the total maternity allowance paid. We should, in accordance with regulation 4(1) take no account of any sums paid for jobseeker's allowance, income - related employment and support allowance, universal credit, or any other income support. We take the view that maternity allowance is not a form of income support. The result is that, we ignore all but the specific sums attributable only to maternity allowance when calculating loss. We then make the award on that basis.

7.76 We are conscious that we are making a number of assumptions, and that we may be wrong about the treatment of maternity allowance. It appears to us that there are two possibilities which could lead to difficulty. First, the Secretary of State may choose not to seek to recoup benefits which stand in substitution for maternity allowance. If that is the case, there would potentially be a windfall for the claimant, as she may receive the pay twice. The second possibility is that the Secretary of State seeks to recoup all benefits, including maternity allowance, from the respondent. In the second case, the claimant may be under compensated.

7.77 Further, if there is recoupment of any benefits, the respondent may be out of pocket. If there is a recoupment of benefits, it will be for the respondent to reclaim any monies due from the Secretary of State, and it is not the concern of this tribunal whether that is, or is not, a possibility. We must make sure that the claimant is properly compensated. In doing so we must assume the income support will be recouped.

7.78 All that remains is to set out the relevant calculation. We have set this out in tabular form as appendix 1. Both parties should note that if we have made a false assumption in our approach to the recoupment of maternity allowance, or other benefit in this case, we would invite representations from both parties, and an application for reconsideration. We would seek to put right any error caused by an administrative misunderstanding.

Employment Judge Hodgson

Dated: …6 September 2018…..

Sent to the parties on:
11 September 2018

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For the Tribunal Office

Appendix 1

Head			**Sub total**
Injury to feelings			£6,500.00
Interest on injury to feeling	Period – 349 days to 6 September 2018 at 8%		£497.20
Basic award			nil
Compensatory award			
Loss of earnings	At £495 per week from 29 September to 21 January 2017 (114 days)		£8,061.42
Loss of earnings during maternity leave part 1	Maternity pay commenced 22/1/18 to 2/3/18 Six weeks at £495 x 90% = £2,673	Total payable is £2,673.00 as it was not paid and should have been paid for the period 22 January to 2 March.	£2,673.00
Loss of maternity pay Part 2	33 weeks total – 5weeks at 140.98 and 28 weeks at 145.18 (£4,769.94).	Of £4,769.94 only the element representing income support is recoverable as it will be recouped.	£637.01
Total			**£18,366.62**
Recoupment information			
	Total monetary award		£18,366.62
	Prescribed element		£11,371.43
	Period of prescribed element		29/9/2017 to 6/4/18
	Excess of monetary award over prescribed element.		£6,9997.19