IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

Case No.14/2003

MELODY LOPEZ

Complainant

- and -

OVERSEAS MOTORS (GIBRALTAR) LIMITED

Respondent

J U D G M E N T

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Respondent

Ms Amber Turner for the Complainant

Ms Fiona Young for the Respondent

Wednesday the 23rd day of June 2004

J U D G M E N T

PRELIMINARY APPLICATION

A preliminary application was made on behalf of the Respondent on two separate points.

The first application is to allow the Respondent to reply to the Complainant's affidavit filed on 8th June 2004 pursuant to an Order of this Tribunal dated 2nd June for, *inter alia,* further and better particulars to be provided by affidavit by the Complainant of her efforts to mitigate her loss following her dismissal.

My ruling is as follows. Although the said Order of 2nd June did not provide for such reply from the Respondent, it would, in my view, be unfair and wrong in principle to deprive the Respondent of an opportunity to reply to the additional or more detailed matters referred to by the Complainant in her said affidavit. I thus allow the Respondent's witness statement dated 15th June to stand and to be taken into account in the deliberations of the Tribunal. Any matters contained therein of an irrelevant or hearsay nature will be dealt with in the usual way.

The second application is to strike out the Complainant's second Originating Application on the ground that it merely repeats her first Originating Application in that she pleads "unfair dismissal" once again and in that she is out of time since the Originating Application, it is argued, was issued outside the 3 month period required by Section 70(4) of the Employment Ordinance from the date of termination of the employment.

My ruling is as follows. The second Originating Application was issued on 11th December 2003 and is sufficiently and adequately clear in establishing the reason given by the Complainant therein for her dismissal as *"contrary to the principle of equal treatment by discriminating against her on grounds of sex contrary to Section 52 of the Employment Ordinance."*

This ground of complaint has been, in my view, clear to the Respondent from the very beginning and appears from the correspondence to have been accepted without objection on behalf of the Respondent. It cannot thus be said to have taken anyone by surprise. The Respondent relies upon the words in the front page of the standard printed form of Originating Application available and supplied by the Industrial Tribunal Registry which has written on the front cover the words *"Originating Application – Unfair Dismissal".* At section 4 of the standard form there are printed words enquiring about "*the grounds on which it is claimed that the dismissal is unfair."*

For the Respondent, it is contended that these two offending references to *"unfair dismissal"* should have been omitted as they demonstrate that the ground on which it is claimed that the Claimant was dismissed suggests it was for unfair dismissal whereas this should have been shown as being on the ground of sex discrimination.

Such contention is, in my view, somewhat imaginative and without foundation. In any event, even if the second Originating Application were to be technically defective, which in my view it is not, the Tribunal has power under Rule 16 of the Industrial Tribunal Rules to regulate its own procedure and thus to allow it to stand in accordance with the principles set out in the case of *Cocking v Sandhurst (Stationers) Ltd & Anor (NIRC) (1974) ICR 650.* The alleged defect complained of by the Respondent is not such as to be misleading or cause reasonable doubt.

I therefore rule that the second Originating Application issued on behalf of the Complainant is valid and that she can proceed on the basis of both her Originating Applications.

WRITTEN EVIDENCE

On behalf of the Complainant two documents were introduced to be considered as part of her case; a Witness Statement dated 16 April 2004 and an Affidavit dated 8th June 2004.

On behalf of the Respondent two documents were also introduced to be considered as part of its case; a Witness Statement dated 26th April 2004 and a second Witness Statement dated 15th June 2004.

THE FACTS

The Complainant was employed by the Respondent on 13th May 2003 as a motor cycle messenger. She was required to ride a motor cycle since part of her duties required her to go one or more times a day from her place of work at the Respondent's showroom in Glacis Road to take documents to or collect them from such diverse and distant places as the Motor Vehicles Test Centre in Devil's Tower Road, Customs House by the frontier, the Respondent's workshop in Roger's Road and also to go to other places such as banks, the Post Office and other Government departments.

Between 14th and 18th July 2003 the Complainant was ill and did not go to work. On 25th July she went to see a doctor and was informed that she was pregnant. On 28th July Mr Benaim, a director of the Respondent, called her into his office to enquire about her absence during the previous week. The Complainant then informed him that she was pregnant. Her evidence is that Mr Benaim congratulated her and then gave her one week's notice. He told her that she could no longer carry out her duties as a motor cycle messenger because of her pregnancy.

The evidence of Mr Benaim on what was said during that conversation differs. He denies having dismissed her when she informed him that she was pregnant. He says she told him that she had had a miscarriage and that her doctor had told her she could not ride a motor cycle. He says the Complainant asked whether she could carry out her duties on foot and that he had asked her how she could do this whilst pregnant and in the heat of summer. He says he did not remember whether the Complainant asked him if she could be employed to do administrative work instead. Mr Benaim explained that he did not have any such work available at the time and that, in any event, she was not skilled to do such work.

He says he told her that if she obtained a certificate from a doctor that she could ride a motor cycle, he would keep her on as motor cycle messenger. There was also a discussion between them as to whether the Complainant could carry out part of her duties using the bus service. Mr Benaim explained to the Tribunal that the bus service available at the time was unreliable and that it would have been impossible for the Complainant to have carried out her duties in this manner.

The end result was that the Complainant was dismissed from her employment by Mr Benaim that same day, 28th July. This is not disputed by the Respondent. The Complainant says she took the dismissal badly. At paragraph 11 of her witness statement dated 16th April 2004 she states that *"The news of my impending dismissal caused me to be sick. I had to go to the toilet and vomit. I was in a state of panic and shock. My fellow colleagues could not believe that the Respondent had dismissed me on the spot on my informing him of my pregnancy. Despite being very ill, I carried on with my duties and carried out messenger work afoot and general office/administrative duties."*

The Complainant then goes on to say in the next paragraph that she worked her week's notice. At paragraph 14 of her said affidavit, the Complainant continues *"As a consequence of my dismissal I suffered from stress. I live with my parents and am unmarried. Though my boyfriend stood by me, I was most anxious about the fact that I had lost my employment and therefore my livelihood."*

In her oral evidence, the Complainant explained that she lived with her parents and that her mother had been unemployed for a number of years and that her father had recently suffered certain heart problems and had to leave for treatment to London. The only income which the family was receiving was her father's sick pay and her own supplementary benefits. She said she was worried at having lost her job and would have no income to maintain her baby.

Mr Benaim, in his evidence, explained that, although he was familiar with the Health and Safety Regulations, having been in the motor car business for the past 35 years, he was not aware that dismissing the Complainant because she was pregnant and therefore unable to perform the work for which she had been employed was against the law.

THE PLEADINGS

An Originating Application for unfair dismissal was issued on behalf of the Complainant on 29th October 2003 and a second Originating Application was issued on her behalf on the ground of sex discrimination under Section 52 of the Ordinance on 11th December 2003. In the Notice of Appearance dated 12th November 2003 and filed on behalf of the Respondent, the reason given for the dismissal of the Complainant was that she was no longer capable of performing the tasks required of her.

ADMISSIONS

Following the above rulings on the preliminary application, it was conceded on behalf of the Respondent that the dismissal by the Respondent of the Complainant on the ground that she was pregnant constituted an automatic unfair dismissal under Section 59(1) of the Employment Ordinance and sex discrimination under Part VA, Section 52 of that Ordinance.

THE RELEVANT LAW

There are two areas of law which need to be examined in connection with this case.

A. COMPENSATION

Where the Tribunal has determined that compensation shall be awarded to a person who has presented a complaint for unfair dismissal and for sex discrimination, compensation is payable under the Employment Ordinance under two separate heads, as follows :

1. For Unfair Dismissal

   Section 72(1) of the Employment Ordinance provides for a basic payment of what is termed "the prescribed amount" which is set by Regulation 2 of the Industrial Tribunal (Calculation of Compensation) Regulations 1992 at not less than £2,200.

   Section 72(2) of the Ordinance additionally provides for an amount in compensation to be paid for any loss suffered by the person unfairly dismissed and, in determining such amount, no account is to be taken by the Tribunal of any payment made by virtue of Section 72(1).

Section 72(3) provides that the maximum amount of compensation that may be awarded under sub-section (2) shall not exceed what is termed "the prescribed amount". This is set by Regulation 3 of the Industrial Tribunal (Calculation of Compensation) Regulations 1992 at (a) an amount representing 104 weeks' pay or (b) the amount which is 104 times twice the amount specified as weekly remuneration in the Schedule to the Conditions of Employment (Standard Minimum Wage) Order 1989, whichever is the lesser amount. The said Order of 1989 sets the weekly remuneration at £127.14.

2. <u>For sex discrimination</u>

Compensation here is payable under Section 52F(1)(b) and requires the Respondent, *inter alia,* to pay to the Complainant compensation of an amount corresponding to any damages he or she could have been ordered to pay by the Supreme Court. There is thus no limit set to the amount so payable.

Compensation in law is generally awarded by the Tribunal in an endeavour to place the Complainant in the position in which he or she would have been in but for the unfair dismissal. In cases of discrimination, whether this be sex discrimination or racial discrimination, (see *Alexander v Home Office (1988) ICR 685)* the object for damages or compensation is restitution, which in the end result and in practical terms is not very different from compensation.

However, since compensation cannot be paid twice, that is, under Section 72 and under Section 52F of the Ordinance, the compensation awarded under Section 72 will in practice merge into the compensation payable under Section 52F so that, in practice, only one award is made although it can also be said that two awards are made under the two separate sections but that these are paid jointly and severally.

<u>Injury to feelings</u>

Under the heading of Sex Discrimination, the Tribunal has power to make an award for injury to the feelings of the Complainant arising from the sex discrimination.

In considering, among other matters, the question of compensation payable under this particular head, the Employment Appeal Tribunal held in the case of *Orlando v Didcot Power Station Sports & Social Club EAT/95/95 (3 November 1995),* that ... *"What an Industrial Tribunal must do... is to weigh the evidence and form a view as to the level of*

distress and humiliation that the applicant has shown to have been caused to her by the acts of discrimination, having regard to all the circumstances of the case".

Aggravated damages

The Tribunal also has powers to grant aggravated damages to the Complainant in a proper case. In the case of *Alexander* referred to above, the Court of Appeal held that aggravated damages could be justifiable in cases where the behaviour (of an employer) is high-handed, malicious, insulting or oppressive in committing the act of discrimination.

B. MITIGATION OF LOSS

Section 71(2) of the Ordinance defines the loss sustained by the aggrieved party as including (a) *"any expense reasonably incurred by him in consequence of the matters to which the complaint relates"* and (b) *"loss of any benefit which he might reasonable be expected to have had but for those matters".*

The sub section also provides that such loss is subject to the *"application of the same rules concerning the duty of a person to mitigate his loss as applies in relation to damages recoverable under the common law".*

SUBMISSIONS BY COUNSEL

On behalf of the Complainant, the following submissions were made to the Tribunal.

Liability for both unfair dismissal and sex discrimination had been conceded on behalf of the Respondent, so that there were now only two matters to be considered and deliberated on by the Tribunal :

1. Quantum of compensation and

2. Mitigation of loss

QUANTUM

1. Unfair dismissal

The Complainant had received the following income from the date of termination of her employment on 28th July 2003 to the present date, which sums had to be deducted from any award made by the Tribunal.

Unemployment benefits	£ 385.25
Social Assistance payments	£ 762.30
Total income	£1147.55

The Complainant's net weekly wage was agreed between the parties at £79.50.

The Complainant is entitled to the basic award under Section 72(1) which is not less than £2200.

She is also entitled to an award for loss resulting from her unlawful dismissal provided by Section 72(2) & (3) which is 104 times her weekly wages of £79.50 which amounts to £8268.

The 104 weeks are divided into 47 weeks of *Past Loss* (from date of termination of employment on 28th July 2003 to the current date) and into 57 weeks of *Future Loss* to make up the total of the 104 weeks provided for by Section 72.

The total entitlement of the Complainant for unfair dismissal is thus :

Under Section 72(1)	£ 2,200.00
Under Section 72(2) & (3)	£ 8,268.00
Total	£10,468.00
Less income received	£ 1,147.55
Total award sought for unfair dismissal	£ 9,320.45

Sex Discrimination

Compensation is payable under this head by virtue of Section 52F(b) and corresponds to any damages which could be ordered by the Supreme Court.

Since an award under this heading is to compensate the Complainant and compensation is already provided for under Section 72, an additional and separate award under this heading is not appropriate. (See *Caroline Williams v Bodyworks Limited (1996) Gibraltar Industrial Tribunal Case No. 17/94 P.6)*

The fact that the period of employment in this case was a short one, a mere 11 weeks, was not to be taken into account to the detriment of the Complainant since it was well established by the authorities that the length of employment was not a determining factor in deciding whether an employee had suffered discrimination because of her sex and in determining the amount of compensation to which she was entitled.

The Tribunal was referred to the case of *Webb v EMO Air Cargo (UK) Limited (No.2) (1994) 3 All ER 115* which was concerned with the dismissal of an employee after only two weeks' employment because she was pregnant.

Injury to feelings

The Tribunal was once again referred to the passage in the judgment in the *Orlando* case and also to the case of *Caledonia Motor Group Limited v Reid* EAT/590/96 *(1976).*

It was argued for the Complainant that there was no limit to the amount which could be awarded under this heading and that the Tribunal, in determining the amount of the award, should have regard to how this particular Complainant was subjectively affected by the sex discrimination which she had suffered and that the matter should be considered subjectively.

On this particular point the Tribunal was referred to a further passage in the judgment in the case of *Orlando* where the Employment Appeal Tribunal said *"...A person who unlawfully loses an evening job may be expected to be less hurt and humiliated than a person who loses his entire professional career. That will not always be so, partly because of the principle that the wrongdoer must take the victim as he or she is".*

It was further argued on behalf of the Complainant that she was particularly vulnerable at the time of her dismissal for the reasons that she was pregnant, that her mother was ill and that her father had been very recently taken ill and had to be taken to England for specialised treatment. She had earlier suffered a miscarriage and was also on anti-depressant drugs. This last

fact was known to Mr Benaim as evidenced by his Witness Statement of 26 April 2004 at paragraph 14.

At paragraph 10 of the Complainant's second Witness Statement of 8 June 2004 she says ..."*...When I found out that I was pregnant I was very happy but as soon as I was told by Mr Benaim that I was dismissed because of my pregnancy, I panicked. It was a time in my life when I desperately needed an income more than ever. I knew that having a baby meant extra expenses such as buying a cot, a pram, baby clothes, nappies, food and so on*".

It was also argued that the manner in which the Complainant explained she had been dismissed by Mr Benaim was abrupt and would have been hurtful to the Complainant.

The point has also been made on behalf of the Complainant that the fact that the Respondent may have had to bear a loss if he had kept the Complainant in employment during the period of pregnancy is not a consideration which the Tribunal should take in considering its award. This point was succinctly put by the European Court in its judgment in the case of *Webb* when answering questions put to it by the House of Lords when it said at paragraph 11 "*...discrimination cannot be justified by the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her pregnancy*".

The Tribunal was referred to the case of *Ministry of Defence v Cannock (1995) 2 All ER 449 EAT* as to what its approach should be to the grant of awards. In its judgment and in considering the elements of estimate the Employment Appeal Tribunal said "*...They must be weighed not only with sympathy but with fairness for the interests of all concerned and at all times with a sense of proportion.*"

As to the amount of the award for injury to feelings, the Tribunal was referred to the case of *Caledonia*, referred to above, where an award for £4,500 had been made, which, at today's value would be about £5,500. In that case, in the words of the Employment Appeal Tribunal in its judgment at page 2 "*...the appellant was subjected by Mr Bennett to a particularly unpleasant campaign of sexual harassment which included unjustified criticism and unwillingness to teach her, as well as luridly unpleasant sexual remarks ....*" It was contended that the award in the present case for injury to feelings should be in excess of those awarded in the *Caledonia* case.

Reference was also made to the case of *Jauad v Gerrard & Ors EAT/1376/96* in which an award of £2,500 had been made which at today's value would amount to about £2,900. The

point of this case is that the complainant apparently suffered little, if any, Injury to her feelings upon being dismissed, since, when informed of this, her reaction was *"fine"*. The award in the present case should thus be in excess of that award since the Complainant had suffered considerable injury to her feelings as explained by her in both her written and oral evidence before the Tribunal.

Aggravated Damages

For the Complainant it is argued that the Complainant is entitled to aggravated damages. The Tribunal was referred to the case of *Alexander,* and to the following passage from the judgment of the Court of Appeal *"...Awards of general damages for injury to feelings should be restrained but not minimal, and where the defendant had behaved high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination, could include aggravated damages..."*

It was contended for the Complainant that the manner in which she had been dismissed as explained by her in her evidence, that is, that when she informed Mr Benaim that she was pregnant, he congratulated her and then gave her one week's notice of dismissal, was most distressing to her. The Complainant also relied upon the refusal on behalf of the Respondent to admit to sex discrimination during the interlocutory stages of the present case as another aspect which amounted to conduct which could give rise to the grant of aggravated damages since this had caused the Complainant stress and worry.

MITIGATION OF LOSS

On mitigation of loss, it was argued on behalf of the Complainant that she had done all in her power to find alternative employment since she had been dismissed 11 months earlier.

In her affidavit of 8th June and in the exhibits attached thereto, the Complainant sets out very full and detailed information as to the very considerable attempts she has made over these last 11 months to find alternative employment. The exhibits include numerous letters to and from prospective employers. In her oral evidence she explained to the Tribunal how she has been attending on a daily basis at the Job Centre to see what work was available and how she has been seeing an officer from the Government Employment department every Wednesday in this connection.

In cross examination, the Complainant explained that she had limited her search for work to jobs connected with administration or office work for which she was qualified and did not look for manual work such as cleaning or catering.

On behalf of the Respondent the following submissions were made to the Tribunal.

QUANTUM & MITIGATION OF LOSS

The Tribunal was referred to the case of *Cannock* at paragraph G under the heading "General Guidance" which deals with the approach which a Tribunal should have in dealing with the grant of awards in cases of sex discrimination. The following passage from the judgment of the Employment Appeal Tribunal was read, *"...A Tribunal should not make an award of a size which is more appropriate to compensate a person who has some kind of long term disability... The large awards running into many tens of thousands of pounds seem quite out of proportion to the wrong done."*

It was clear from the exhibits produced by the Complainant with her affidavit dated 8th June that she had had no intention of continuing in the employment of the Respondent since there were letters to show that the Complainant was seeking other employment whilst still employed by the Respondent.

The relevance of this as regards quantum is that the Complainant should not, by virtue of any award she might receive from the Tribunal, be placed in a better position than that which she would have been in had she remained in the Respondent's employment.

It was therefore argued that the award available under Section 72(2) & (3) for any loss suffered by the Complainant should not be for the whole of the period of the 104 weeks of wages provided therein since the Complainant clearly had had no intention to remain in the Respondent's employment and had been actively seeking alternative work.

It was thus contended that a proper and fair award would take into account the 47 weeks loss of wages over the period running from the date of dismissal on 28th July to the present date but that the Complainant should not receive any compensation for the next 57 weeks, bringing the total period up to the 104 weeks maximum contemplated under Section 72.

The Complainant had not adequately mitigated her loss since she had failed to widen the scope of work which she was

prepared to take. It was argued that, in cross examination, the Complainant had said that in her daily visits to the Job Centre looking for work, she had only consulted the board containing lists of administrative and office work available but had never consulted other boards with lists of jobs available of a different nature such as cleaning and restaurant work. At the very least, the Complainant would have earned more than she was receiving by way of supplementary benefits.

It was contended for the Respondent that as from now, the Respondent had a duty and obligation to widen the scope of her search for remunerative employment in order to mitigate her loss and that she should not be entitled to compensation for the remainder of the 104 weeks contemplated by Section 72.

If the Tribunal did decide to award compensation for the remaining 57 weeks, Social Insurance should be deducted since this was a benefit which would accrue to the Complainant in the long term by way of pension rights.

A proper award would be for the Complainant to receive an amount equal to her weekly wage of £79.50 for the first 6 months following dismissal, which would amount to £2067. The award for the next 21 weeks, bringing matters up to the present date, should be at the rate of 50% of her weekly wage. This would produce an amount of £834.75. No award should be made by the Tribunal for the remaining 57 weeks.

The proposed figures are thus as follows :

Basic award under Section 72(1)	£2200.00
Award for the first 6 months	£2067.00
Award for the next 21 weeks at 50% of wages	£ 834.75
Total	£5101.75
Less income received since dismissal	£1147.55
Total amount of award under Section 72	£3954.20

The Tribunal was then addressed on the matter of injury to feelings and the compensation which should be awarded for this. The Tribunal was referred to a passage in the judgment of the Court of Appeal in the case of *Alexander,* referred to above, at page 692, paragraphs C D E. *"As with any other awards of damages, the objective of an award for 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, however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on 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 award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards."

In the case of *Alexander* the award given was that of £500.

The Tribunal was urged not to grant any high or excessive award in order to punish the Respondent as this was not the object of an award but to compensate or provide restitution for the Respondent.

RULING

Awards under Section 72 and Section 52

On behalf of the Respondent it has been conceded that the dismissal of the Complainant by the Respondent because she was pregnant amounts to automatic unfair dismissal contrary to Section 59 and sex discrimination under Part VA Section 52 of the Employment Ordinance.

The only matter therefore for the Tribunal to consider and rule upon is whether an award should be made and, if so, under what headings and for what amounts.

Section 72(1) provides for a basic award set by Regulation 2 of the Industrial Tribunal (Calculation of Compensation) Regulations 1992 at not less than £2,200. This award is mandatory and the only discretion the Tribunal is given is as to the award of any amount in excess of that. Having looked at a number of local cases where awards have been made for unfair dismissal, I note that the basic sum awarded is always £2,200. In the circumstances, I allow the Complainant a basic award under this particular section in the sum of £2,200.

Section 72(2) & (3) gives the Tribunal a discretion to make an additional award to a Complainant by way of compensation for loss suffered. The maximum prescribed amount under

Regulation 3 of the above Regulations is either 104 times the Complainant's weekly wage or 104 times twice the amount specified as weekly remuneration in the Schedule to the Conditions of Employment (Standard Minimum Wage) Order 1989 which is set at £127.14, whichever is the lesser amount.

The Complainant's weekly wage was £79.50. Clearly, the former formula would apply in this case.

Section 52F(b) provides for the payment of compensation by an employer to an employee who has been unlawfully dismissed for sex discrimination of an amount which he could have been ordered to pay by the Supreme Court.

Before considering these additional awards, I would like to say a few words about the position of the law as it stands in circumstances where, as in the present case, there has been automatic unfair dismissal and sex discrimination as a result of the dismissal of the Complainant because of her pregnancy. This would activate the operation of Section 52 of the Ordinance.

The facts have been recited above. After 11 weeks in employment the Complainant informed the Respondent she was unable to continue performing the duties for which she had been employed, that is, those of motor cycle messenger.

One can feel sympathy for the position in which the Respondent was placed. In his written and oral evidence he explained that he was willing to keep the Complainant in her employment if she produced a doctor's certificate that she could ride a motor cycle. Her duties could not be properly performed on foot or using the bus service available at the time. The Complainant disagreed with this.

I prefer the argument of the Respondent on this point. With the best will in the world, it would have been impossible for the Complainant to have walked one or more times a day to the many different and wide spread locations she had to cover in her pregnant state and in the heat of summer; nor would the bus service available at the time have been of any realistic help to her.

So, what was the Respondent to do? He needed these duties to be carried out as an important part of his business affairs. His evidence was that he had no vacancies available which he could offer the Complainant nor was she, in any event, competent to carry out, in his view, administrative or other duties.

There is no practical answer other than that the Respondent should have kept the Complainant in remunerative employment in whatever capacity he could have devised, even if this was done to his loss. Indeed, this is precisely what the European Court of Justice said in its judgment in the case of *Webb* at paragraph 11 *"....discrimination cannot be justified by the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her pregnancy."*

Up to 1994 the plight of a Respondent employer in these circumstances was sympathetically viewed by English Tribunals and the situation was seen as dismissal, not because of pregnancy but because the employee was no longer able to perform the duties for which she had been employed.

This was the case in *Webb* where a woman was employed and after two weeks informed her employer that she was pregnant. She was dismissed. She made a complaint to an industrial Tribunal that the employer had unlawfully discriminated against her on the ground of her sex. The Tribunal dismissed her claim on the ground that the real reason for her dismissal was not her pregnancy but her anticipated inability to carry out the primary task for which she had been employed.

The Employment Appeal Tribunal and the Court of Appeal upheld the decision of the Tribunal. The appellant appealed to the House of Lords which inclined to the view that there had been no unlawful discrimination because it was the appellant's non-availability for work during the relevant period that was the crucial factor and not the fact of pregnancy and that if a man had been employed for the same purpose, he would have been similarly dismissed if he had told the employer that he would be absent for medical or other reasons. Notwithstanding, the House of Lords considered that it should construe domestic law with the interpretation of the European Court of Justice.

The House of Lords thus sought a preliminary ruling from the European Court in the following terms *"...Is it discrimination on grounds of sex for an employer to dismiss a female employee whom he engaged for a specific purpose and whom he later discovers is pregnant and the employer dismisses her because she is unable to continue with the duties for which she was employed and had the employer known of her pregnancy he would not have appointed her and the employer would have similarly dismissed a male employee who required to be away for the relevant period for medical or other reasons?"*

After careful and considered deliberations, the European Court of Justice came back with the answer that dismissal of an

employee because she was pregnant was unlawful sex discrimination notwithstanding the fact that she was unable to perform the duties for which she had been engaged. The following passages at page 11 from a carefully worded judgment sets out the reply to the House of Lords *"...dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract...the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed."*

The above is therefore the current position of the law in England and within the European Community.

It is right that the position of a pregnant woman should be protected notwithstanding that this may cause, in certain circumstances, hardship to an employer. Nonetheless, it is possible to understand, from a subjective point of view, the practical dilemma some employers find themselves in in certain circumstances.

The Complainant in this case worked for only 11 weeks. As has been said above, the case of *Webb* establishes that the right to compensation under our equivalent Section 72(2) & (3) is in no way curtailed or adversely affected by the length of the employment. However, in my view, the length of employment must be a relevant and important consideration in quantifying the amount of an award representing the compensation to which a dismissed employee is entitled. It would be both inequitable and contrary to good sense for an employee dismissed after ten years of employment to receive the same amount of compensation than an employee dismissed after only 3 months of employment.

In all of the circumstances, in my judgment, the proper amount of compensation under Section 72(2) & (3) which will adequately and fairly compensate the Complainant in this case should not be the maximum allowed under subsection (3) of 104 weeks times the Complainant's weekly wage, since that would not leave any margin to distinguish any future case where the period of employment is substantially in excess of the period in the present case.

In the case of *Caroline Williams v Bodyworks Limited (Gibraltar Industrial Tribunal Case No.17/94)* the Tribunal awarded 104 weeks' wages as compensation in a case where the employee had been unlawfully dismissed on grounds of sex discrimination after 2 years and nine months of employment.

In the case of *Lesley Dudley v Bodyworks Limited*, another Gibraltar Industrial Tribunal case, the reference number and date of which are not shown, the Tribunal awarded 52 weeks' wages as compensation in a case where the employee had also been unlawfully dismissed on grounds of sex discrimination after one year and seven months of employment.

In the present case, I consider it fair and proper that the Respondent pay the Complainant compensation jointly for unfair dismissal under Section 72(2) & (3) and also for sex discrimination under Section 52F(b) a sum representing 52 weeks' wages of £79.50 per week amounting to £4,134.

Injury to feelings

The evidence on this has been set out above. One important consideration is the manner in which the Complainant was informed that she had been dismissed since this can be a distressing and hurtful experience for an employee. There is a direct conflict between the evidence of the Complainant and that of the Respondent as to how exactly this took place.

The Complainant says that when she informed Mr Benaim of her pregnancy, he proceeded to congratulate her and, almost in the next breath, gave her one week's notice of termination of her employment. If this were to be the case, it would demonstrate an uncaring attitude and, indeed, insensitivity in Mr Benaim's manner and behaviour. Mr Benaim denies that he acted in this manner and explained to the Tribunal that, after congratulating her and considering the proposals made by the Complainant to him about carrying on her duties on foot or by bus, asked her how she could cope in her pregnant state and in the heat of the summer to carry out her onerous duties on foot. He told her that if she produced a doctor's certificate saying that she could continue riding her motorcycle, he would keep her on.

Having heard and seen both parties give their evidence before the Tribunal, I must say that Mr Benaim did not strike me as being an uncaring or insensitive person and I therefore prefer his recollection of what transpired at the meeting he had with the Complainant. I hasten to add that I do not, by implication or otherwise, hold that the Complainant was lying or in any manner or form seeking to mislead the Tribunal or trying to show Mr Benaim in a bad light.

It is some eleven months since that fateful day when the Complainant went through what was undoubtedly an unhappy and distressing experience for her of losing her job and

memories do fade in that time. It is also a fact that what endures in one's mind is often the extreme aspects of an experience, shutting out what is not so distressing or elating to the individual. The Complainant will have thus had imprinted in her mind the distressing fact of dismissal so that everything else will have faded.

It was argued for the Complainant that she was particularly vulnerable at that time in her life; she had recently had a miscarriage; she was pregnant; her mother was ill and unemployed; her father had recently suffered heart problems and was due to go to London for treatment; the family income was very limited; she was on anti-depressant drugs; having learnt of her dismissal she worried about her income and the effect on her baby.

There was evidence that Mr Benaim knew of her miscarriage and that she was on anti-depressant drugs. He must have realised that losing her job would be yet another serious and, indeed, probably devastating blow to the Complainant but, as he said, he did not know that it was against the law to dismiss an employee because she was pregnant nor did he seem to have any practical solution to the dilemma.

Injury to feelings is not easy to asses, even less easy to compensate in monetary terms. The approach must, of necessity, be subjective in that some people are more resilient than others and will thus suffer a greater or lesser degree of distress and humiliation and will be able to cope and reorganise their lives with varying degrees of success.

In the case of *Caledonia Motor Group Limited v Reid (EAT/590/96)* a young woman was employed as a mechanic by the appellant company. After 12 weeks she was dismissed and she claimed for unlawful dismissal and sex discrimination. In its judgment, the Tribunal said at page 2 *"...The Applicant was subjected by Mr Bennett to a particularly unpleasant campaign of sexual harassment which included unjustified criticism and unwillingness to teach her, as well as luridly unpleasant sexual remarks, all of which were aimed at undermining her confidence and making it impossible for her to stay in her employment."*

The Tribunal then went on to award the Complainant the sum of £8000 to compensate her for her injured feelings. On appeal by the employer, the Employment Appeal Tribunal reduced the award to £4,500.

In the 1997 case of *Jauad*, referred to above, the Appellant was dismissed after being in employment as a hairdresser for some

2 years and 9 months because she was pregnant. She took her dismissal very well and, when informed of this, she simply replied *"fine"*. The Tribunal commented that *"...although her dismissal was not sought by her, it would not have caused her the level of upset that it might have done for many others."* The Appellant was awarded £2,500 compensation for injury to her feelings.

In the 1995 case of *Orlando* referred to above, the Appellant was unlawfully dismissed on the grounds of her sex after being employed for some 14 years as a bar maid. She claimed compensation, *inter alia,* for injury to her feelings. The Tribunal awarded her £750. She appealed to the Employment Appeal Tribunal against such award. In dismissing her appeal and confirming the award made by the Industrial Tribunal of £750, the Employment Appeal Tribunal said at page 2 of its judgment, *"...What an Industrial Tribunal must do, and what it plainly did in this case, is to weigh the evidence and form a view as to the level of distress and humiliation that the applicant has shown to have been caused by the acts of discrimination..."*

In the case of *Alexander,* referred to above, which was a case of racial discrimination in criminal proceedings, the Court of Appeal allowed the defendant £500 compensation for injury to his feelings suffered as a result of the racial discrimination which he suffered whilst in prison because he was black.

In considering any award which a Tribunal might make under our laws in Gibraltar, it must always be borne in mind that, even before beginning to consider such awards, where the Tribunal has determined that compensation shall be awarded to a person who has presented a complaint, that person is immediately and automatically guaranteed an award under Section 72(1) of not less than £2,200.

In all of the circumstances of this case and considering all that has been stated in the written evidence presented on behalf of the parties and all that has been said orally before the Tribunal, it is my judgment that an amount of £1,500 will adequately compensate the Complainant for the injury to her feelings which she suffered as a direct result of her being unlawfully dismissed on the grounds of her sex.

Aggravated Damages

In my view, a case has not been made out on behalf of the Complainant for any award to be made by way of aggravated damages.

Interest

Interest is payable at the discretion of the Tribunal on any award made by the Tribunal under Section 52F(1)(b) by virtue of subsection (2) of that section and Section 52H.

I have awarded the Complainant the sum of £4,134 jointly under Section 72(2) & (3) and Section 52F(1)(b). Following the Gibraltar Industrial Tribunal case of *Caroline Williams* referred to above, I am awarding interest on the said sum of £4,134 for the period commencing with the date of the Complainant's unlawful dismissal on 28th July 2003 to the date of the hearing of her complaint by this Tribunal on 23rd June 2004 at the rate of 8% per annum.

This represents 331 days at £.91 per day amounting to £299.91.

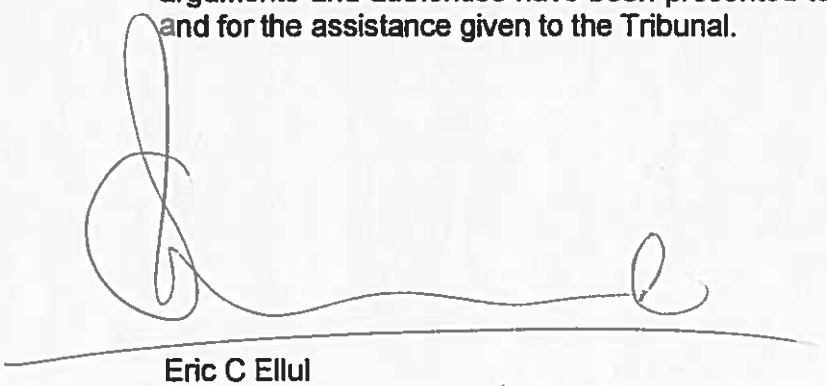
MITIGATION OF LOSS

In my judgment, the Complainant has more than adequately mitigated her loss and has acted in a most responsible manner in making every possible effort to find alternative employment. I therefore see no reason why any deductions should be made from the awards made by the Tribunal in respect of this heading.

SUMMARY OF AWARD

1.	Basic award under Section 72(1)	£2,200.00
2.	Compensation for unfair dismissal under Section 72(2) & (3) and sexual discrimination under Section 52F(1)(b)	£4,134.00
3.	Compensation for injury to feelings	£1,500.00
4.	Interest up to 23rd June 2004	£ 299.91
	Total	£8,133.91
	Less income received since date of dismissal on 28th July 2003	£1,147.55
		£6,986.36
		========
4.	Plus continuing interest at the rate of £.91 per day until date of payment	

I wish to thank both Counsel for the very thorough manner in which they have prepared for this case and in which their arguments and authorities have been presented to the Tribunal and for the assistance given to the Tribunal.



Eric C Ellul
Chairman

28 June 2004