Case Number: 3200506/2016

RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms Adeshree Annamallay**

Respondent: **Barclays Bank PLC**

Heard at: **East London Hearing Centre**

On: **26 – 29 June 2018 and (in chambers) 16 July 2018**

Before: **Employment Judge Goodrich**

Members: **Mr G Tomey**
Mrs G Everett

Representation

Claimant: Mr Bruce Gardiner (Counsel)

Respondent: Ms Yvette Genn (Counsel)

REMEDY JUDGMENT

The judgment and orders of the Tribunal is that:-

1. The Respondent to pay the Claimant's costs to be assessed on a standard basis to be taxed if not agreed.

2. By way of remedy the Respondent is ordered to pay the sums further set out below.

REASONS

Background and the Issues

1 The background to this remedy hearing is as follows.

2 The Claimant, Ms Annamallay, brought proceedings in the Employment Tribunal

against her employer, Barclays Bank PLC. She brought claims for sex and race discrimination.

3 The Tribunal conducted a liability hearing in April and May 2017. The judgment of the Tribunal was that:

3.1 The complaint of sex discrimination was not presented in time and it is not just and equitable to extend time and is dismissed.

3.2 The complaint of race discrimination succeeds, to the extent further set out below.

4 Additionally, the Tribunal conducted a reconsideration hearing in February 2018, reconsidering some aspects of its judgment; and varying or revoking the previous judgment to the extent set out in the reconsideration hearing judgment.

5 The Claimant has also issued new proceedings against the Respondent, which are listed for hearing in October 2018.

6 Judicial mediation took place earlier this year. It was unsuccessful. There was also some delay in the listing of this remedy hearing because of expert medical evidence the parties needed to obtain. Preliminary Hearings have been conducted both concerning the remedy hearing for these proceedings; and case management for the subsequent proceedings listed for hearing in October 2018.

7 The Claimant prepared a schedule of loss for this remedy hearing with a number of components, the total sum being claimed amounting to £483,545.46.

8 The Respondent prepared a counter schedule of loss amounting to £104,736.12.

9 Both parties were well represented. Both provided helpful skeleton arguments for the remedy hearing. A key area of dispute between the parties was as to causation for the Claimant's psychiatric and gynaecological conditions. Expert witnesses were required for both these aspects of her claim.

10 The issues to determined at this remedy hearing were summarised by Ms Genn, counsel for the Respondent, in her skeleton argument for the Tribunal, as being as follows:

10.1 Whether, and to what extent the psychiatric condition identified by the experts has been caused or contributed to by the unlawful conduct found by the Employment Tribunal?

10.2 Whether and to what extent the psychiatric condition identified by the experts has been caused or contributed to by the pre-existing and ongoing/recurrence of the Claimant's endometriosis?

10.3 Whether the Claimant has been caused chronic pelvic pain as a result of

the conduct found by the Employment Tribunal?

10.4 Whether the Claimant's chronic pelvic pain is a consequence of her pre-existing and ongoing/recurring endometriosis?

10.5 What should she recover by way of damages for injury to feelings?

10.6 What should she recover in respect of general damages for personal injury?

10.7 What if any apportionment should there be?

10.8 To what extent has the Claimant mitigated her loss?

11 The order of witnesses was tailored to the availability of the Claimant's gynaecological expert witness, Mr Morris. He was only available on the first day of the hearing. He was followed by Mr Barton-Smith, the Respondent's gynaecological expert witness, before the Claimant gave evidence.

12 On the second morning of the hearing, Ms Genn made an application for Mr Barton-Smith to produce handwritten notes of his interview with the Claimant (no such notes having previously been disclosed, although handwritten notes of Mr Morris were in the bundle of documents and on which he gave oral evidence).

13 Ms Genn's application was opposed by Mr Gardiner. His submissions included that he had only received notification of such an application being made this morning, he had not yet read the document and his client would be prejudiced by the document being introduced after Mr Morris had given his evidence, been released and was unavailable.

14 Ms Genn disputed that the Claimant would be prejudiced, although she accepted that perhaps the application should have been made earlier. Mr Gardiner was used to dealing with rough notes.

15 The Tribunal considered whether the document was relevant; whether it was necessary for the fair trial of the case for it to be disclosed; and the Tribunal's overriding objective.

16 The Tribunal refused the application including because:

16.1 As the Tribunal had not seen the document in question it was difficult to be clear whether it was relevant or not. It appeared to the Tribunal that it might be relevant, if shedding further light on Mr Barton-Smith medical reports.

16.2 The Tribunal was not convinced that the handwritten notes were necessary for a fair trail of the case. The Tribunal already had Mr Barton-Smith's reports and he was about to give evidence and be questioned on those reports.

16.3 There appeared no good reason why the handwritten notes could not have been disclosed at an earlier stage if the Respondent wished to introduce them. Mr Morris's notes formed part of the documents and the time for the Respondent to produce Mr Barton-Smith's notes was before the end of Mr Morris's evidence and before he became unavailable.

16.4 The Tribunal accepted Mr Gardiner's submissions about the balance of prejudice.

17 In the course of her typed closing submissions Mr Genn stated:

"Given the Claimant's responses during cross examination the tribunal has left itself without the means to weigh her reliability. It should therefore review its decision on the admissibility of Mr Barton-Smith's manuscript notes and admit them."

The judge informed the parties of the decision in the case of *Serco v Wells UKEAT/2016/0330/15*. Mr Gardiner objected to Ms Genn's application. He submitted that there was no new feature of the case; that he had not had the opportunity to question Mr Barton-Smith; and that reconsideration would delay things.

18 In the case of *Serco v Wells* it was held that the expression *"in the interests of justice"* in Rule 29 of the Employment Tribunal Rules of Procedure should be so interpreted; and variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement and there may be occasions, in which is unwise to attempt to define but these will be rare and out of the ordinary.

19 The Tribunal rejects Ms Genn's application made on behalf of the Respondent. There was no material change of circumstances since the Tribunal's decision. In any case, in view of the Tribunal's findings of fact as to the part of Mr Barton-Smith's evidence in question, the Respondent's application is unnecessary- the Tribunal accepted his evidence on the point without recourse to whatever handwritten notes he made at the time.

20 Mr Gardiner informed the Tribunal that the Respondent had not provided all the necessary documents to deal with her bonus claim. The Claimant's schedule of loss also included a claim for salary increases. Helpfully, the parties' representatives reached the following agreement between themselves, as follows.

21 By agreement with the parties the issues of the bonus the Claimant says she should have received, or would receive, for the period from 2014 – 2019; and the salary increases the Claimant says that she should have received, or would receive, from 2014 – 2019 is deferred to be resolved as part of the Claimant's proceedings for case number 3200541/2017.

22 Part of the Claimant's closing submissions were submissions as to costs. In the course of her closing submissions, Ms Genn informed the Tribunal that the parties had agreed an order in the following terms:

"The Respondent to pay the Claimant's costs to be assessed on a standard basis to be taxed if not agreed."

23 For all sums claimed that were agreed between the parties, the Tribunal adopts their agreement. The issues the Tribunal has needed to decide, after removing the issues on which the parties either were agreed, or which they agreed to defer, are as described in the schedule and counter schedule of loss; and the skeleton argument presented by the representatives at the outset of this hearing; and are as follows:

23.1 Injury to feelings was claimed at near the top of the band of the updated *Vento* guidelines, at £40,000. The counter-schedule figure was near the top of the middle band, £25,000 being conceded.

23.2 Psychiatric damage was claimed as being in the moderately severe band of the Judicial College guidelines of between £16,720-£48,080. £15,000 was conceded in the counter-schedule.

23.3 Exacerbation of chronic physical pain was claimed under the heading of moderate other pain disorders, at the rate of £18,480-£33,750. No sum was accepted in the counter-schedule.

23.4 The Claimant's case was that there should be no apportionment of her award. The Respondent's case was that the Respondent's wrongdoing and psychiatric consequences attributable to that constituted no more than 20%; and that the Claimant's endometriosis and her "ovarian accident" in June 2016 were the dominant cause.

23.5 The Claimant claimed £5,000 for aggravated damages; the Respondent's case was that no separate award should be made.

23.6 Additional travel costs were claimed at £4005.04; £1627.50 was conceded (subject to their case that only 20% should be awarded because of apportionment).

23.7 Loss of earnings for most of the period between 3 June 2016 and 28 June 2018 (the exact dates being specified) was claimed at the sum of £15,743.63. £11,094.98 was conceded, the difference between them being that the Claimant had received 50 days holiday pay amounting to £4,648.65.

23.8 Interest was claimed on the award for injury to feelings and PSLA at the rate of 8% from the mid point between April 2013 to June 2016 (November 2014) to the date of this hearing. The Respondent accepted the figure of 8%, although the period claimed was not agreed- the Respondent did not, however, give an alternative proposal as to what period they proposed.

23.9 A claim was made for future medical treatment. This comprised £5,000.00-£6,000.00 ovary stimulation; endometriosis operation £9,5000.00-£30,000.00; £2,400.00-£3,600.00; £960.00-£2,160.00 CBT; pain management and psychosexual therapy £3,000.00 and £6,400.00-

£8,000.00. These were mainly disputed by the Respondent.

23.10 The Claimant claimed future loss of earnings for 15 months. The Respondent accepted future loss of earnings for 12 months.

23.11 Handicap on the labour market was claimed for three years at £22,399 amounting to £67,197.00, pursuant to the *Smith v Manchester* case. The Respondent disputed that any such award should be made.

23.12 An uplift of award was claimed pursuant to section 207A TULCRA, for unreasonable failure to comply with the ACAS Code of Practice on Grievance Procedures. In the Respondent's counter-schedule 15% was conceded. In the closing submissions the Respondent's primary case was that no uplift should be made and fallback position that no more than 15% should be awarded.

The Relevant Law

24 Section 124(2)(b) Equality Act 2010 ("EqA") provides that a Tribunal may order the Respondent to pay compensation to the Claimant.

25 Section 124(6) EqA provides that the amount of compensation which may be awarded under subsection 2(b) corresponds to the amount which could be awarded by the County Court or the Sherriff under section 119.

26 The general principle in assessing compensation is that, as far as possible, complainants should be placed in the same position as they would have been in but for the unlawful act. The burden of proof is on the Claimant to establish the cause or connection between any loss that he/she relies on and the Respondent's wrongdoing; and the compensation to be awarded overall must be just and appropriate, paying attention to the size of the overall award.

Injury to Feelings

27 Guidance was given in the case of *Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102 CA* as to the three bands of compensation to be awarded for injury to feelings.

28 The top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. The middle band should be for less serious cases, which do not merit an award in the highest band.

29 Awards of the lowest band are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.

30 The levels of compensation to be awarded for injury to feelings have been adjusted from time to time with inflation.

31 The parties agreed that the applicable figures were those set out in the presidential guidance issued on 7 September 2017, where the *Vento* bands were revised as being:

31.1 The lower band should be £800 - £8,400.

31.2 The middle band should be from £8,400 - £25,200.

31.3 The upper band should be between the figures of £25,200 - £42,000.

Aggravated Damages

32 Aggravated damages are compensatory, not to be awarded in order to punish the Respondent for their conduct. They are an aspect of injury to feelings. Whether a Tribunal makes a single award for injury to feelings, reflecting any aggravating features, or splits out aggravated damages as a separate head should be a matter of form rather than substance.

33 Guidance has been given in a number of cases, including *Commissioner of Police of the Metropolis v Shaw [2012] IRLR 291 EAT* that the circumstances attracting an award of aggravated damages fall into three categories namely:

33.1 The manner in which the wrong was committed. The phrase "high handed, malicious, insulting or oppressive" gives a good general idea of a kind of behaviour which may justify an award, but should not be treated as an exhaustive definition.

33.2 By motive. Discriminatory conduct which is evidently based on prejudice or animosity for which is spiteful or vindictiveness or intended to wound is, as a matter of common sense and common experience, likely to cause more distress than the same acts would cause if evidently done without such a motive – say, as a result of ignorance or insensitivity.

33.3 By subsequent conduct. For example, where a case is conducted at trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise.

Psychiatric Injury

34 In the case of *Sheriff v Klyne Tugs (Lowestoft) LCD [1999] IRLR 481 CA* it was held that an Employment Tribunal has jurisdiction to award compensation by way of damages for personal injury, including both physical and psychiatric injury, caused by the statutory tort of unlawful discrimination.

35 The Judicial College publishes guidelines on quantum to be awarded. The parties agreed that the 14th addition of these guidelines were the ones to which the Tribunal should refer.

36 The factors cited in the guidelines as factors to be taken into account when valuing claims of psychiatric damage included:

36.1 The injured persons ability to cope with life, education and work;

36.2 The effect on the injured persons relationships with family, friends and those with whom he/she comes into contact;

36.3 The extent to which treatment would be successful;

36.4 Future vulnerability;

36.5 Prognosis;

36.6 Whether medical help has been sought;

36.7 (The next subparagraph relates to sexual and physical abuse which is not relevant in this case).

37 The guidelines classified as moderately severe cases with significant problems associated with the first four factors above but the prognosis will be more optimistic than for severe psychiatric damage (where the prognosis will be very poor). While there are awards which support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases of work related stress resulting in a permanent or long standing disability preventing a return to comparable employment would appear to come within this category.

38 The guidelines referred to moderate psychiatric damage as being while there may have been the sort of problems associated with the first four factors above there will have been marked improvement by trial and the prognosis will be good.

Chronic Pain

39 As regards chronic pain Chapter 8 of the Judicial College Guidelines set out the factors to be taken into account in valuing the claims for pain disorders namely:

39.1 The degree of pain experienced;

39.2 The overall impact of the symptoms (which may include fatigue, associated impairments of cognitive function, muscle weakness, headaches etc and taking account of any fluctuation in symptoms) on mobility, ability to function in daily life and the need for care/assistance;

39.3 The effect of the condition on the injured person's ability to work;

39.4 The need to take medication to control symptoms of pain and the effect of such medication on the person's ability to function in normal daily life;

39.5 The extent to which treatment has been undertaken and its effect (or its predicted effect in respect of future treatment);

39.6 Whether the condition is limited to one anatomical site or is widespread;

39.7 The presence of any separately identifiable psychiatric disorder and its impact on the perception of pain;

39.8 The age of the Claimant;

39.9 Prognosis.

40 Moderate pain (the category the Claimant was asserting) is described as having at the top end of the bracket cases where symptoms are ongoing, albeit of a lesser degree then severe and the impact on ability to work/function in daily life is less marked. At the bottom end are cases where full, or near complete recovery has been made (or is anticipated) after symptoms have persisted for a number of years. Cases involving significant symptoms but where the Claimant was vulnerable to the development of a pain disorder within a few years (or 'acceleration' cases) will also fall in this bracket.

Interest on Discrimination Awards

41 The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 make provision for interest on such awards.

42 Interest on awards for injury to feelings and for pain suffering and loss of amenity runs from the mid point of the period over which the discrimination has occurred. Interest at the relevant times runs at 8% per annum.

Apportionment

43 Guidance on the issue of apportionment of awards was given in the case of *BAE Systems (Operations) Ltd v Konczak [2017] IRLR 893 CA.*

44 In the *Konczak* case it was held that the Tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer is wrong and a part which is not so caused. The exercise concerned not with the divisibility of the causative contribution but with the divisibility of the harm. The question is whether the Tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.

45 That distinction is easier to apply in the case of a physical injury. It is less easy in the case of a psychiatric injury, but such harm may well be divisible. It may, for example, be possible to conclude that a pre-existing illness, for which the employer is not responsible, has been materially aggravated by the wrong (in terms of severity of symptoms and/or duration), and to award compensation reflecting the extent of that aggravation. Even in a case where the Claimant tipped over from being under stress to

being ill, the Tribunal should seek to find a rational basis for distinguishing between a part of the illness that is due to the employer's wrong and a part that is due to other causes; but whether that is possible will depend on the facts and the evidence, if there is no such basis, the injury will be truly indivisible, and principle requires that the Claimant is compensated for the whole of the injury (although if the Claimant has a vulnerable personality, a discount may be required on that basis).

Smith v Manchester Awards

46 In *Smith v Manchester Corporation [1974] 70 KIR1* the plaintiff's award of damages was increased for future loss of earning capacity. The Court explained that this sum was to compensate the plaintiff from the fact that, if she became unemployed, she would find it more difficult than uninjured persons to obtain employment.

47 A plaintiff's loss of earning capacity arises where as a result of injury his/her chances in the future of getting in the labour market work (or workers well paid as before the accident) have been diminished by the injury.

48 The first question to consider is whether there was a real or substantial risk that the Claimant would lose their current job before the end of their working life. If the answer to that question is yes, the starting point should be the amount which a plaintiff is earning at the time of the trial and an estimate of the length of the rest of their working life. Consideration should be given to how great the risk is that the plaintiff will lose their present job at sometime before the end of their working life; when it may materialise – remembering that they may lose a job and be thrown on the labour market more than once. The next stage is to consider how far they will be handicapped by their disability if thrown on the labour market – that is what would be their chances of getting a job, and an equally well paid job. All sorts of variable factors will, or may, be relevant in particular cases – for example, a plaintiff's age; their skills; the nature of their disability; whether capable of one type of work, or whether they are, or could become, capable of others; whether they are tied to working in a particular area; the general employment situation in their trade or area, or both. The court will have to make the usual discounts for the immediate receipt of a lump sum and the general chances of life. In practice such awards usually range between six months and two years earnings.

*Uplift of Award*s

49 Section 207A Trade Union and Labour Relations (Consolidation Act) 1992 provides that awards of compensation may be adjusted because of failure to comply with a relevant code.

50 Section 207A(2) provides that:

> "If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that –
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies;

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in the circumstances to do so, increase any away it makes to the employee by not more than 25%."

The Evidence

51 On behalf of the Claimant the Tribunal heard evidence from:

51.1 Mr Morris, Consultant Obstetrician and Gynaecologist expert witness.

51.2 Dr Dhar, Consultant Forensic Psychiatrist and Barrister (non practising) and psychiatric expert witness.

51.3 The Claimant herself.

52 On behalf of the Respondent the Tribunal heard evidence from:

52.1 Mr Barton-Smith Consultant Gynaecological Surgeon and Endometriosis Specialist Expert witness.

52.2 Dr Turner, Consultant Psychiatrist with specialist involvement in field Trauma and Adversity expert witness.

53 In addition the parties' original intention was for the Tribunal to hear evidence from Mr Moore and Ms Jeffries. However, as referred to above, the evidence with which they were dealing has been "parked" for the Claimant's second claim.

54 In addition the Tribunal considered the documents to which it was referred in two lever arch bundles of documents comprising over 900 pages.

Findings of Fact

55 This is the third hearing the Tribunal has convened in order to determine various aspects of the Claimant's claims (as opposed to Preliminary Hearings dealing mainly with case management matters).

56 The first of these full merits hearings, conducted in April and May 2017, we refer to as "The Liability Hearing", or "The Liability Judgment".

57 The second of these, in February 2018, we referred to as "The Reconsideration Hearing" or "The Reconsideration Judgment".

58 This hearing has been in order to determine remedy.

59 This judgment needs to be read in conjunction with The Tribunal's Liability Judgment; and The Tribunal's Reconsideration Judgment. We do not repeat, for example, findings of fact made in those previous hearings, although we make references to that judgment from time to time.

60 Nor does the Tribunal seek to record every detail provided to us in the extensive documentation provided to us in the remedy hearing, or details elicited through extensive evidence from the witnesses. We have, however, considered all the evidence provided to us and we have borne it all in mind.

61 Helpfully, included in the bundle of documents was a summary of the judgment findings setting out which of the Claimant's allegations of race and sex discrimination were upheld. We attach this, for ease of reference, to this judgment.

62 A key issue for this Tribunal was the issue of causation. The expert evidence provided by four witnesses was directed at this issue.

63 This is not a case where the expert witnesses have taken completely opposite stances to each other, although there are important differences between their evidence.

64 There was a large degree of agreement between the gynaecological experts as to the Claimant's physical symptoms. In so far as both gynaecological experts gave opinions as to the causes of those physical symptoms they were in disagreement.

65 There was a considerable measure of agreement between the psychiatric experts. Both Dr Dhar and Dr Turner agreed that the Claimant's psychiatric ill health from 2016 onwards was contributed to by her gynaecological issues; and both agreed that it was contributed to by the discrimination to which she was subjected by the Respondent. Where they disagreed was as to which was predominant.

66 We have, therefore, considered the quality of all of the evidence of all the witnesses before us at this remedy hearing.

67 In the case of the Claimant this Tribunal has, of course, already heard extensively from the Claimant at the liability hearing. At paragraph 53 of the liability judgment we set out our assessment of the Claimant's evidence. In summary, we found the Claimant's evidence to be reasonably plausible and convincing; albeit with some qualifications, as given in paragraph 53 of The Liability Judgment.

68 The Tribunal has in mind that it is now over a year since the Tribunal heard evidence from the Claimant at the liability judgment. Since then she has continued to be off work sick because of continued physical and mental ill health. The psychiatric experts agree that the prolongation of litigation is having an adverse effect on the Claimant's mental health; and that her mental health is likely to improve, together with her prospects of successfully returning to work, when her litigation against the Respondent has been completed.

69 Taking these factors together, although our assessment of the Claimant's evidence did not differ greatly from that given at paragraph 53 of The Liability Judgment, her evidence for this remedy hearing appeared slightly less reliable. In the context, of her prolonged absence from work and prolonged mental illness, this was not surprising to the Tribunal. She appeared, in particular, to have underplayed some of the evidence presented to the Tribunal of references in her medical records to the extent which she was complaining of symptoms from endometriosis between 2013 and 2016, as opposed to complaining about her treatment at work.

70 As regards the quality of expert evidence, there were aspects of the evidence of each where we prefer one over the other, as is our job to do. We were impressed, however, with the expertise and quality of evidence given by all the expert witnesses. Some had more specialist expertise in some areas than the other. For example, Mr Barton-Smith's expertise in endometriosis was particularly impressive, whereas Mr Morris described endometriosis as being a specialist interest of his, rather than a specialism. Mr Morris had a longer period of qualification than Mr Barton-Smith as a doctor. Ms Genn made a more "head on" attack on the impartiality of Mr Morris and Dr Dhar; Mr Gardiner's approach was more subtle. The Tribunal accepts that the experts were all doing their best to assist the court, although in some respects there were differences in their opinions.

Gynaecological History

71 The Claimant suffered symptoms of endometriosis in 2008. This caused her severe pain.

72 In January 2009 the Claimant had a major operation to treat her endometriosis. This operation was successful in that her symptoms of pain were much reduced at the time. She was able to return to work quickly.

73 In 2009 the Claimant was recommended to have a hysterectomy to treat her endometriosis. They were advised that if they wanted to have a child this would be the best time to try for it.

74 After about two months of trying to have a child they sought further advice. They discovered that the Claimant's husband's sperm count was found to be azoospermiatic.

75 In 2011 the Claimant had IVF treatment which was unsuccessful. The Claimant explained that she abandoned IVF at that time because of her condition; and that doctors advised her to think about adoption.

76 Although the Claimant's endometriosis was under control in the years between having the operation and starting work at the Respondent's Chelmsford office 2013, she was not entirely symptom free. For example, the Claimant's GP notes refer to her wanting to try acupuncture for endometriosis in November 2012.

77 The Tribunal was taken to references in medical notes to the Claimant experiencing pain during sexual intercourse and suffering from vaginismus.

78 There was a dispute between the gynaecological experts as to when the Claimant

suffered pelvic pain, Mr Morris stating that it started and continued following the recurrence in 2009; and Mr Barton-Smith stating that there was no evidence to suggest she had a recurrence of pain until symptoms developing from April 2013 leading to her admission in June 2016.

79 There are also a number of references in medical notes to the Claimant being anxious about having speculum internal investigations, to the extent of declining to have them; and also being too tense to have smear tests and certain injections.

80 We prefer Mr Morris's evidence as to when the Claimant first experienced pelvic pain, as there were references in letters from Ms Matthews, Consultant Gynaecologist, in May and November 2009, referring to the Claimant having "had problems with pelvic pain recently"; and to the Claimant being "crippled with pain once again from her endometriosis".

81 Both Mr Morris and Mr Barton-Smith agreed in their joint report that chronic pelvic pain is a possible symptom of endometriosis and that chronic pain, and in particular pelvic pain, can be caused by psychological problems. In view of this response and having heard the evidence of the two gynaecological experts, the Tribunal prefers to view the pelvic pain experienced by the Claimant as part of the picture of her endometriosis, rather than an entirely separate condition in its own right. In either case, however, the issue for the Tribunal is whether, or the extent to which, the discrimination the Tribunal upheld was responsible for aggravating the physical pain she would otherwise have experienced.

82 The dates of the Claimant's GP visits were blocked out and in most cases indecipherable to the Tribunal in the copies of records provided to the Tribunal, although the representatives did clarify a few of the dates recorded.

83 In dispute between the parties is whether the Claimant was suffering significant symptoms from endometriosis between 2013 and 2016 (when she had an ovarian cyst, to which we will refer later); whether, in her interview with Mr Barton-Smith for his expert report, he failed to ask her specific questions about pain she experienced between 2013 and 2016; and whether, as the Claimant says and Mr Barton-Smith disputes, he failed to ask the Claimant specific questions about endometriosis.

84 Our findings of fact on these disputes are as follows.

85 In 2012 the Claimant had a trial for acupuncture treatment to help her endometriosis. She found this helpful and, shortly after she started work in the Respondent's Chelmsford office, she was able to have acupuncture treatment under the NHS as a place near to work. She found this helpful in managing her symptoms.

86 As regards the dispute as to what Mr Barton-Smith asked the Claimant we accept that, during the course of a one and a half hour interview, Mr Barton-Smith asked the Claimant general questions about the pain that she was suffering from. We accept that he did ask her questions about pain during sexual intercourse, bowel movement, urination and period pain. We do not doubt that Mr Barton-Smith was conscientious, and that he is experienced in providing medical reports and we do not doubt the evidence he gave that he did ask such questions. To the extent that what there were inconsistencies between

what the Claimant said to Mr Morris and Mr Barton-Smith, we have taken these inconsistencies into account in our assessment of the reliability of the Claimant's evidence.

87 In her interview with Mr Morris, the Claimant referred to sexual problems arising from her endometriosis, causing her and her husband to gradually stop having sex from 2013 onwards due to severe pelvic pain which she has continued to experience from then. The Claimant also reported to Dr Morris that she had endometriosis symptoms five to twelve months into work, that she felt harassed at work, and he noticed that when she cried the paid worsened.

88 The Claimant's explanation for not having spoken to her GP between 2013 and 2016 about harassment at work or about endometriosis to any great extent was that she did not have confidence that they would be able to help. This was not entirely convincing to the Tribunal.

89 Nevertheless, the gynaecological experts agree that the Claimant continued to have endometriosis in the years following her operation in 2009, even although the symptoms were less apparent (according to Mr Morris); or more or less symptom free (according to Mr Barton-Smith).

90 The Claimant was working without any significant sickness absence between 2013 and 2016. The Tribunal also finds that she was not reporting endometriosis symptoms because she was relatively symptom free at the time.

91 The Tribunal accepts that the Claimant's evidence at this hearing and The Liability Hearing that she was deeply upset at the unlawful discrimination she was experiencing from the Respondent at the Chelmsford office between 2013 and 2016. This was evidence that she gave during the liability hearing, as well as at this hearing and was convincing. It must have been and we accept was extremely upsetting for the Claimant to be experiencing bullying and harassment and discriminatory behaviour from her colleagues and managers that were mishandled in the ways to which we have referred in The Liability Judgment. Her feelings of upset over the discrimination she experienced from the Respondent persisted, therefore, for some years before the onset of the Claimant becoming mentally ill.

92 It should also be borne in mind that the Claimant had a lot of stresses in her life during this period as well as the discriminatory treatment. Having the knowledge of a life long condition of endometriosis, which can be managed but not cured, not having been able to conceive at times when she wanted to start a family; together with having sexual problems caused by her endometriosis were all stressful for her.

93 In 2016 the Claimant was planning to have fertility treatment. She and her husband went to South Africa in March 2016 to search for a suitable IVF clinic for treatment. Their plan was to return to South Africa in December 2016 for a month.

94 In June 2016 events took place which led the Claimant and her husband to postpone their attempts to start a family.

95 On 3 June 2016 the Claimant felt such sharp stabbing pains in her stomach as to need hospital admission.

96 The cause of the Claimant's sharp pain transpired to be a haemorrhagic cyst. Here was a dispute between Mr Morris and Mr Barton-Smith as to whether the cyst developed from about April 2016 (Mr Barton-Smith's opinion); or that there was no evidence before June 2016 that this was occurring (Mr Morris's opinion). It is unnecessary for the Tribunal to make a finding on this dispute, as both the experts agree that the Claimant's ongoing endometriosis became severely symptomatic in 2016; and their differing opinions on this point makes no difference to the Tribunal's findings on causation.

97 The Claimant was treated at hospital with a combination of antibiotics, painkiller and non-steroidal drugs. The Claimant discharged herself from hospital on 5 June 2016.

98 The Claimant was readmitted to hospital from 7 – 9 June due to pain, clots and heavy vaginal bleeding.

99 The Claimant returned to work after an absence of about a week and remained at work until going off work sick on 23 September 2016. The Claimant has remained off work sick from that date onwards. The initial fitness certificates from her GP practice gave the reasons for her absence from work as being "endometriosis, anxiety, harassment at work"; and "endometriosis, emotional distress".

100 The Claimant was prescribed with monthly injections.

101 The Claimant anticipates having further surgery for her endometriosis. Both Mr Morris and Mr Barton-Smith agree about the treatment involved and the prognosis. They summarised their advice as follows. Their expert opinion was that the Claimant will need to undergo major treatment for the endometriosis including a full diagnostic trans-vaginal scan or MRI, assessment of ovarian reserve under the care of an endometriosis expert with full discussion to allow the patient to be a reasonable patient so that she has all the information possible to come to a decision about her future care.

102 Mr Barton-Smith's opinion (with which, so far as the Tribunal is aware Mr Morris did not disagree) was that the evidence was that the surgical excision of endometriosis by an expert and carried out approximately gave an 80% chance of significant pain reduction at one year post surgery and that medical management may also play a role as an adjuvant therapy, or even a stand alone therapy if the surgical risks were not accepted by the Claimant. They advised that the Claimant would likely benefit from the input of other specialists as appropriate, which may involve pain specialists, physical therapists and psychological specialists.

103 The experts advice that there is an 80% chance that the Claimant would have pain reduction at one year; however, there would be a 10 – 50% chance of recurrence over the next three to five years. Their advice was that, from the fertility perspective, there is an approximately 29% chance of spontaneous conception following surgery and an approximate 29% chance of IVF success with no surgery. Because the Claimant's husband has azoospermia would be reliant on IVF to achieve a successful pregnancy.

104 The advice as to the costs of the operation is approximately £9,500; however, if the Claimant had complications and required bowel resection, the price could rise to approximately £30,000.

105 Both experts agreed that it would be reasonable to allow the Claimant back to work within two months. They also agreed that, if the Claimant decided on surgery and suffered a major complication then the period of time can be extended from two months to four months.

Psychiatric illness

106 As referred to above the Claimant has been off work sick since 23 September 2016. The Tribunal was not made aware of the up to date fitness notes certificates given reasons for his sickness absence, other than the ones to which we have referred to above.

107 Dr Dhar and Dr Turner agree, however, that the Claimant has had a recognised psychiatric disorder with an onset in June 2016. They agree that the reasonable range of diagnosis include adjustment disorder with mixed anxiety and depressed mood (DSM – 5), major depression with prominent anxiety (DSM – 5) and mixed anxiety and depressive disorder (ICD – 10). They agree that there is a substantial overlap between these diagnoses; and that the onset of psychiatric disorder was in June 2016.

108 The Claimant was referred for psychology therapy and had eight sessions of cognitive behavioural therapy from Ms Jacqui Farrants from August to November 2016.

109 Ms Farrants's notes of the Claimant's sessions with her made references both to work place issues; to health issues (endometriosis, painful sex, fear or injections; and to IVF issues and adoption considerations.

110 By session 6 the Claimant was referring to feeling stronger and confident about returning to work in a new team; although by session 7 she was referring to her endometriosis being painful and dehabilitating, together with anxiety following contact with her employer.

111 By session 8, on 28 November 2016, Ms Farrants referred to the Claimant losing confidence socially. Ms Farrants also referred to the Claimant prioritising her needs, wishing to end psychological therapy sessions at present and make time to work with physical health specialist to deal with pain, the mobility and surgery. She referred to the Claimant arranging to see a psychiatrist for mediation to help with pain in preparation for surgery and injections.

112 The Claimant was assessed in December 2016 by Dr Grant, a consultant psychiatrist.

113 Dr Grant prepared a report in which the Claimant's account of the treatment she had received at work between August 2015 and going off work sick. Dr Grant's report refers predominantly to the Claimant's description of her treatment at work; and relatively little on her endometriosis condition or desire for a family. She commenced the Claimant

on sertraline, a form of antidepressants, and also explained to the Claimant that she would need CBT in due course and would be reviewed again in December.

114 In December Dr Grant described the Claimant as feeling very low, made reference to operations needed for endometriosis; and advised that there had been no change in her mental state since last seeing her. She reviewed her in January 2017, by which time the Claimant was taking sertraline. Dr Grant continued to treat the Claimant during the course of 2017 and the Claimant continues to experience mental illness.

115 So far as the Claimant's prognosis for mental illness is concerned Dr Dhar and Dr Turner agreed to a certain extent.

116 Both agreed that the Claimant should be treated with medication, psychological treatment and with a rehabilitative focus. They advised that she should be encouraged to look for a small part-time volunteer role, gradually increasing as she gains confidence again. They agree that she should be provided with 16 – 20 psychologist sessions, including behavioural activation and that it might be helpful to include some elements of interpersonal psychotherapy.

117 There was a disagreement between Dr Dhar and Dr Turner as to whether or not the Claimant would also benefit from what Dr Dhar described as some more meaningful day time activity and would support through a day therapy programme. Dr Dhar recommended group therapy sessions to help the Claimant with isolation and trust the issues following harassment and discrimination. Dr Turner disagreed; he did not consider that day therapy or group therapy would be required.

118 Both Dr Turner and Dr Dhar considered that the Claimant is more vulnerable to psychiatric ill health than before the events that gave rise to her current mental illness. Dr Turner estimated future risk as being about 10%; Dr Dhar has been 50%.

119 Both Dr Dhar and Dr Turner agreed that the Claimant should be able to return to her employment with the Respondent, provided that it was to a different team.

120 Dr Turner considered that, assuming that litigation runs to spring 2019, her psychiatric disorder would be likely to recover by mid 2019 she should be fit to return to full-time paid employment from mid 2019. Dr Dhar considered that once the litigation is over she will be able to complete her recovery and return to full-time paid employment after an initial phased return.

Causation of the Claimant's psychiatric illness

121 The key dispute between the parties is whether the Claimant's psychiatric illness has been caused by the unlawful discrimination she experienced from the Respondent, as is her case; or whether it is largely caused by a multi factorial combination of prior anxiety symptoms, prior endometriosis and prior problems with vaginismus and infertility, as is the Respondent's case, based on Dr Turner's evidence with some supporting opinion from Mr Barton-Smith, to the extent that Mr Barton-Smith gave an opinion on this issue, rather than deferring to the opinions of the psychiatric experts.

122 As regards prior anxiety symptoms, both Dr Turner and Dr Dhar agree that the onset of psychiatric disorder was in June 2016. Dr Turner accepts that she had no diagnosable psychiatric illness before that date, although the two of them disagree as to whether there was some prior vulnerability demonstrated by prior anxieties.

123 On the dispute as to prior anxiety, the Tribunal preferred to a greater extent Dr Dhar's evidence. The Claimant was cross-examined on the number of issues in the years leading up to and after her onset of mental illness on matters such as having a fear of injections, speculum examination and an occasion relatively recently when she had a check up for possible tuberculosis following her sister having been previously in receipt of such a diagnosis. As regards earlier anxiety issues Dr Turner referred in his report to events during the Claimant's childhood, such as the death of her father when she was young and her mother's style of parenting. The Tribunal preferred Dr Dhar's evidence on this point- it appeared to us to be the more plausible that these were events to which the Claimant's responses appeared to be in line with what would be expected in the circumstances and were one off descriptions based on short GP consultations, rather than symptomatic of generalised anxiety disorder.

124 When giving his first expert report Dr Turner advised as to whether the proven acts of racial harassment from April 2013 to February 2016 were the cause of her condition, or whether those acts contributed to or exacerbated it at all. He advised at that point that but for the endometriosis she would probably not have developed her psychiatric disorder when she did; and that similarly, but for the stress arising from the proven harassment, she would probably have experienced marked distress with the return of endometriosis symptoms but she would probably have derived support from her work and probably not had developed a formal psychiatric disorder. He concluded, overall, that probably both aspects were of equal significance, about 50% each.

125 Subsequently, in Dr Turner's joint report he changed his opinion to being that more important to the fact as in June 2016 was the physical condition and that stress at work was probably a secondary but still substantial contributory factory. He explained this change in his opinion as being the result of having read the expert gynaecology evidence and that he had underestimated the impact and severity of the endometriosis – both the effect of the acute episode and the impact of her ongoing condition.

126 Dr Dhar, on the other hand, had the opinion that although the acute episode of endometriosis did contribute to the psychiatric ill health both the Claimant's account and treating clinicians involved in the assessment in treatment of the Claimant's psychiatric disorder from 2016 have repeatedly attributed it to work related issues. He also referred to the gynaecological opinion supporting the possibility that the pelvic pain itself can be caused by psychological problems. His opinion was that the acts of harassment and discrimination were of more importance than the acute episode of endometriosis, namely the haemorrhagic cyst experienced by the Claimant.

127 When asked during cross-examination as to what percentages Dr Turner would now ascribed to each cause, he declined to give an opinion, stating that he would rather give a range of figures (but did not give any range that he might have had in mind).

128 The Claimant's case was that the Claimant's injury was indivisible and that no deduction should be made. The interrelationship, it was submitted on behalf of the

Claimant, between the Respondent's conduct, the psychiatric consequences, the impact of her psychiatric illness on her perception of physical pain, and that additional physical pain on her psychiatric illness was too complex for the injury to be divisible. The Respondent submitted that the Claimant could not establish on the medical evidence that she can attribute more than a modest proportion (20%) of her future losses to the Respondent's conduct.

129 Can we, the Tribunal, identify, however broadly the particular part of the suffering which is due to the Respondent's wrong?

130 The Tribunal considers that we can do this.

131 The Claimant's expert psychiatric witness, Dr Dhar, agreed with Dr Turner's view that the causes of the Claimant's psychiatric ill health were multifactorial. We accepted that the Claimant's endometriosis and haemorrhagic cyst were a causative factor of her psychiatric illness, although he considered the Respondent's discriminatory treatment towards the Claimant as being the predominant cause. The Tribunal accepts that the respective experts did not give precise percentages as to causation, although Dr Turner did in his first report. Both agreed that the harm in question (the Claimant psychiatric illness) was caused both by the Respondent's discrimination and by other factors and the Tribunal considers, in these circumstances, that it is appropriate to divide the two.

132 The Tribunal considers that 50% of the Claimant's psychiatric illness was caused by the Respondent's unlawful discrimination; and 50% by the other causative factors to which the experts have referred. We so find because:

132.1 The Claimant coped with the condition of endometriosis for many years with minimal time off work and managing her symptoms.

132.2 The Claimant was also, undoubtedly, had stresses caused by other associated problems on her endometriosis, such as sexual difficulties.

132.3 Although the Claimant has had the disappointment of not being able to conceive to date, she remains optimistic that she will be able to do so in future. The medical evidence confirms that she has a realistic prospect of being able to have a child, although this is far from certain (we set out earlier above their estimates as to the percentage chances).

132.4 The Claimant returned to work promptly, after the absence of about a week, following her hospital visits and treatment for her unexpected haemorrhagic cyst in June 2016. She remained at work for over two months before going off work sick. The cyst was not therefore, at least, an immediate cause of her sickness absence in September.

132.5 Equally, although distressed at the Respondent's discriminatory treatment over a period of years from 2013 to 2016, she remained at work with minimal sickness absence.

132.6 When the Claimant first went off work sick in September 2016 her

sickness certificates gave endometriosis, anxiety and work harassment as the causes of her sickness absence. This, we find, was an accurate reflection of the causes that tipped her into psychiatric illness. Both were equally present.

132.7 In the Claimant's treatment for her psychiatric illness, from Ms Farrants and Dr Grant, the Claimant refers both to the problems associated with the harassment she suffered at work and to other factors, particularly endometriosis. We have in mind that we need to consider the Claimant's own self descriptions with care. We have given our assessment of the quality of her evidence both at the liability hearing and this remedy hearing. As stated above, the Tribunal finds that the Claimant has underplayed the effect of her endometriosis on her psychiatric ill health, although we have accepted that it was an equal factor.

133 For all elements of the Claimant's claim for which 50% needs to be deducted because of the Tribunal's decision on apportionment, the Tribunal expects the parties to do this.

Psychiatric illness-pain Suffering and Loss of Amenity ("PSLA")

134 Here the difference between the two parties was that the Claimant placed her award in the moderately severe bracket, from £16,720 to £48,080; whereas the Respondent placed it at the moderate level of between £5,130 - £16,720; placing the correct figure as £15,000 (to which, according to their case, there should be an 80% reduction for causation).

135 The Tribunal has considered the factors set out in Chapter 4 of 14th edition of the Judicial College Guidelines provided to us. We derived less assistance from the cases to which we have referred, although we have considered them.

136 The Tribunal awards £30,000 under this heading (reduced by 50% because of our findings upon causation- as with other elements of her personal injury claim) because:

136.1 There are significant problems associated with factors (i) to (iv) on psychiatric damage generally. They have had a substantial effect on her ability to cope with life, and work. She has become more socially isolated (as described in Dr Dhar's report). She has been off work with sickness absence. It has had effects on her relationship with family and friends. So far as the extent to which treatment would be successful, the Claimant's psychiatric illness, by the date of this hearing, had persisted since September 2016 so that to date the treatment has been unsuccessful in that her mental illness has persisted. Both experts agreed that she is more vulnerable to future psychiatric illness, although the Tribunal will place the vulnerability as slightly closer to Dr Turner's assessment of 10%, rather than 50% given by Dr Dhar. She has had expert advice on the best treatment she needs to recover from mental illness, we expect her to follow the advice given and, helped by the award being made by the Tribunal, she should have the funds to

get the treatment advised. There have not been marked improvements in the Claimant's psychiatric illness by the date of this remedy hearing, although the longer term prognosis is reasonably hopeful. We place the vulnerability at 25%.

136.2 The Judicial College Guidance advices that majority of moderately severe awards are somewhere near the middle of the bracket and that is where we place it.

Whether to make an award for exacerbation of physical symptoms

137 The Tribunal was provided with considerable amount of evidence, in the gynaecological expert reports, the psychiatric expert reports and the cross-examination of the witnesses as to whether, or the extent of which, the Respondent's discrimination was responsible for aggravating the underlying pain the Claimant would otherwise have experienced from her recurring endometriosis, which became severely symptomatic in 2016. We were provided with a number of medical papers on which the different experts placed varying degrees of reliance.

138 The Tribunal makes an award for exacerbation of the Claimant's physical injury for the following reasons.

139 The Tribunal finds that the Claimant's psychiatric illness, to which, as above, we apportioned as above did aggravate the underlying pain to some extent. The joint expert psychiatric report contained a statement that the Claimant's psychiatric symptoms "were probably impacting on her perception of pain". Dr Turner stated, when examined in chief, that he accepted that someone depressed can affect their perception of pain and that is well recognised. Both gynaecological experts agreed that chronic pelvic pain is a possible symptom of endometriosis and that chronic pain, and in particular pelvic pain, can be caused by psychological problems. Dr Dhar and Dr Turner agreed in their joint expert report that the Claimant's psychiatric symptoms were probably impacting on her perception of pain. The Tribunal also has in mind that the Claimant was able to work, with minimal time off work, in spite of endometriosis that had been present for many years, until September 2016; and had returned to work promptly after the occurrence of a haemorrhagic cyst to which we referred in our findings of fact. Her sickness absence in September 2016, which has transpired to be a long term and continuing absence, was triggered in part to her endometriosis, according to the contemporaneous medical certificate produced.

140 Having found that the discrimination committed by the Respondent did aggravate the underlying pain from her physical injuries, the Tribunal has considered to what level of award it would be appropriate to make. We have been referred to chapter 8 of the Judicial College guidelines, the Claimant placing the aggravation of her physical injury in 8(b)(ii), namely the band from £18,480 to £33,750. The relationship between the Claimant's increased experience of chronic pain due to her psychiatric condition, the aftermath of the Claimant's cyst, her ongoing condition of endometriosis is a complex interrelationship and difficult to differentiate. Different considerations arise from those of the psychiatric injury. As regards psychiatric injury, the Claimant went from not having a psychiatric disorder to having one. As regards physical injury, the Claimant already had endometriosis before she started working at the workplace in which she suffered discrimination; and was not

symptom free, although she managed her symptoms well. We have also preferred the analysis of the Claimant's chronic pelvic pain as forming part of the overall picture of the Claimant's endometriosis, rather than being a discrete disorder. Having all these factors in mind, we place the exacerbation as falling below the starting point of the moderate bracket referred to in the Judicial Guidelines.

141 We consider it appropriate to award £10,000 for physical injury, from which, as with the psychiatric injury, there should be a reduction of 50%.

Aggravated damages claim

142 The parties dispute whether an award should be made for aggravated damages in addition to an injury to feelings award. The Tribunal also to have in mind that, if minded to make such an award, we need to avoid double counting with the injury to feelings award made by us.

143 In the circumstances of this case, the Tribunal considers that it is appropriate to make an award. There was a refusal on the part of two senior managers (Mr Falkingham and Mr McDonald) to whom the Claimant complained to recognise that her complaints included complaints of race discrimination, in spite of their organisation having good policies designed to deal with discrimination, such as those described as "The Barclays Way" to which we referred in The Liability Judgment. To use an expression, this added insult to injury. She not only experienced unlawful discrimination from her colleagues and manager, but the more senior managers to whom she complained refused to recognise that she was making complaints of discrimination. Additionally, no apology has been made to the Claimant, who remains an employee of the Respondent and will need, when returning to work, to be able to work in an environment in which she does not experience further unlawful discrimination.

144 The Tribunal considers an award of £2500 to be appropriate, slightly less than that sought on behalf of the Claimant.

Injury to feelings claim

145 The Tribunal makes an award for the acts of discrimination that were successful, not those for which the Tribunal would have upheld if they had not been out of time. We accept Ms Genn's submissions that it would be inappropriate to make an award for complaints that the Tribunal held that it did not have jurisdiction.

146 The representatives disagree as to the level of award to be made. The Claimant seeks £40,000; the Respondent allows for £25,000.

147 The Tribunal awards £30,000. We find this sum to be appropriate including for the following reasons.

148 The discrimination was prolonged, lasting for about three years. Her manager failed to protect the Claimant from some of her colleagues' discriminatory treatment and committed acts of discrimination herself. The Claimant experienced hostility and discrimination from some of her colleagues for years. The Claimant's attempts to resolve

her complaints internally were made worse by further acts of discrimination being committed towards her. There were numerous complaints of discrimination that were upheld- the Tribunal is not dealing with isolated, or a few incidents, or a short time span. There were acts of discriminatory harassment.

149 The Tribunal places the award above the lowest point of the top band, although towards the lower end, having in mind that we are making a separate award for aggravated damages.

Additional travel costs to date

150 The Claimant did not produce much evidence to substantiate the past travel costs she has undertaken, claiming £4005.24. The Respondent has accepted (subject to apportionment) £1627.50, stating that they have removed costs of gynaecological appointments, consultation fees, and travel to the ET for the trial. In the absence of having a more specific understanding of what all the travel was for and justification for the specific elements claimed, the Tribunal prefers the Respondent's figure of £1627.50; and we award this sum (subject, as in other appropriate instances, to the 50% apportionment we have found in our findings above).

Loss of basic earnings to date

151 The difference between the two parties' figures is, we understand, that the Claimant has received 50 days holiday pay, paid at full pay. We understand that the Claimant's contractual sick pay has been exhausted, so that the Claimant would otherwise have been on nil pay.

152 The Tribunal accepts the Respondent's submissions on this issue. If the Claimant had been at work, she would have received, we understand, the figure set out by the Respondent, so this is what she has lost. Additionally, the Tribunal bears in mind that caselaw on sickness and holiday pay indicates that an employee cannot claim back holiday pay indefinitely for past sickness absence, so that if the Claimant does not use her holiday pay, she may risk losing it altogether beyond a cut off date.

Interest

153 The period of time, the dates from which, and until which, and the rate at which interest is awarded are governed by the Employment Tribunal (Interest on awards in discrimination cases) 1996. The Tribunal adopts the relevant provisions.

154 Interest on the award for injury to feelings and pain suffering and loss of amenity runs from the midpoint of the period for which the discrimination has occurred, namely between April 2013 and 1 June 2016, as submitted on behalf of the Claimant. The Respondent agreed in principle with interest being awarded and did not, so far as the Tribunal is aware, propose different dates for calculation of this sum. We accept, therefore, the Claimant's figure of 28.67%.

155 So far as financial losses are concerned, the Tribunal is unclear as to whether, with some of the calculations for financial loss having been deferred to the Claimant's next

claim listed for hearing in October, whether we are in a position to make such an award at present. The closing submissions, for which we were time limited, did not address this point.

156 The Tribunal invites the parties, therefore, to agree the sum for interest on loss of earnings if it is appropriate to do so at this stage; or defer the issue, if it needs to be deferred.

Costs of medical treatment

157 There are a number of elements to this claim. As with other aspects of the Claimant's claims, where the parties are agreed we adopt their agreement and only make findings on areas in dispute between the parties.

158 The Tribunal makes no award for the sums claimed for ovary stimulation and for the endometriosis operation that is envisaged for her. We are not satisfied that absent the discrimination the Claimant would not have needed such treatment. We are not satisfied that, in order to become pregnant the Claimant would not have been recommended to have ovary stimulation in any event. Although the Tribunal has accepted that the Claimant's pain from endometriosis has been exacerbated to some extent by the discrimination committed by the Respondent, we consider it more likely than not that she would have needed an operation in any event. Nor, so far as we are aware from the medical reports to which our attention was drawn, were opinions given that the discrimination suffered by the Claimant is a causative factor in needing these future treatments.

159 There was a claim in the schedule of loss for £3000 for future medical treatment, broken down to £1500 for seeing a pain specialist for treatment and £1500 for psychosexual therapy. These sums were based on a recommendation in Dr Morris's medical report, although not followed up in the joint report of him and Dr Barton-Smith. Little was provided on these claims in the skeleton arguments or closing submissions of the representatives and they are relatively incidental sums in the many elements of the schedule and counter schedules of loss. It is not easy to make decision on these elements. For similar reasons to those given above, the Tribunal finds that it is more likely than not that these would have been needed absent the Respondent's discrimination towards the Claimant.

160 In paragraph 10 of the joint psychiatric report, the experts agreed that the Claimant should be provided with 16-20 psychology sessions, which we understand to be further CBT sessions at a cost of £150-£180 per session. In Dr Dhar's report, however, he recommended 12-18 CBT sessions, giving the cost as being about £80-120 per session. Ms Genn, on the other hand, stated in her skeleton arguments and closing submissions that it did not appear to have been included in the joint statement (although our understanding (as above) is that it was. Neither expert, so far as we are aware, was asked questions on this point. With some hesitation, therefore, the Tribunal finds as follows. The Claimant appears to have found the CBT sessions she had with Ms Farrants to be helpful and we consider that, in view of the joint recommendation would benefit from the further treatment. We accept 18 future sessions, the mid point of what was recommended and at £165 each, again the mid point of the figure given.

161 The Tribunal accepts the Claimant's claim for a day and group therapy programme accepting the mid point in the range of costs envisaged between £6400 and £8000. We accept Dr Dhar's evidence that this would be of benefit to her in helping with isolation and trust issues. Ms Farrants also referred to the Claimant being socially isolated. The Tribunal is satisfied that this would support the Claimant's rehabilitation towards being able to return to work for the Respondent as, we were informed, is the aim of both parties. We award the mid point between these sums, namely £7200.

Handicap on the labour market- "Smith v Manchester award"

162 The Claimant's case on this was that a lump sum should be awarded because of the Claimant's increased vulnerability to suffer psychiatric injury in the future and how much of her working life she potentially has left.

163 The Respondent's case by contrast is that no award should be made, as there are continuing efforts to create a post for her so that she can continue to work for them, her earning capacity has not been impaired and her vulnerability to future psychiatric injury does not result in an inability to continue in employment, notwithstanding some possible impact on her ability to work from time to time.

164 The Tribunal is satisfied that it would be appropriate to make an award, having in mind the guidance given in the *Smith v Manchester* case, as explained in the case of *Billett v Ministry of Defence (2015) EWCA Civ 773*. The Claimant is relatively young, with many years of potential career ahead. We are pleased to understand that the Respondent is committed to have the Claimant return to work following her lengthy sickness absence; and we bear this in mind in the level of award we make. Until, however, the Claimant is back at work, in a position that has been offered and accepted by her, the Claimant's return to work is less than certain. The Claimant's greater vulnerability to future mental illness, be it at the level advised by Dr Dhar, or that by Dr Turner, places a greater risk of losing her job in future, as well as other uncertainties in retaining a job with a particular employer generally. We place that vulnerability at some point between the two experts' respective figures of 10% and 50% increase. We consider, therefore, that there is a "real risk" that the Claimant could lose her job and be thrown onto the labour market at a time not of her choosing, either through a return to work not having been accomplished successfully, or at some point in the future. We also consider that her greater vulnerability to mental illness creates some degree of handicap in finding and retaining future employment, although we also recognise that she is an intelligent, able individual. We note that, in practice, awards range between six months and two years earnings. We would place the award at the lower end of this range and award six months.

Whether to make an increase of award pursuant to section 207A TULR(C)A

165 The submissions on behalf of the Claimant were that an award of 25% would be appropriate, for failure to comply with the ACAS Code of Conduct on Grievance Procedures. He referred to the Tribunal's findings that Mr Aldred relied on the responses given by Messrs Farmer, Falkingham and McDonald, rather than carrying out an independent investigation of his own. He pointed to the deficiencies in the grievance process identified by the Tribunal in paragraph 164 of its judgment, submitting that it effectively rendered that process worthless and the deficiencies had not been cured to any extent on appeal.

166 The submissions on behalf of the Respondent were that there primary submission was that there should be no uplift or, if the Tribunal was against them, the uplift should be no more than 15%. No analysis was given in opposition to the submissions of Mr Gardiner on behalf of the Claimant.

167 The Tribunal considers that there was a failure to comply with the Code. It is true that there were meetings and written outcomes to the Claimant's grievances and appeal. We accept, however, Mr Gardiner's submissions to the effect that compliance with the code was a matter of form rather than substance. There was a refusal to grasp that the Claimant was making complaints of race discrimination and the manner in which Mr McDonald dealt with the Claimant's grievance was discriminatory.

168 We consider that it would be appropriate to make an increase of award and make an increase of fifteen percent to the award.

Grossing up

169 We leave it to the parties representatives to do the necessary mathematical calculations, including the fifty percent deductions that flow from our decision on apportionment and whatever grossing up may be required.

Closing submissions

170 Both parties' representatives gave written skeleton arguments at the outset of the remedy hearing and Ms Genn, additionally, gave written arguments as part of her closing submissions. Both gave oral closing submissions.

171 We have given the submissions close attention and make various references to them above. We do not, however, set them out in detail here.

Conclusions

172 For the reasons set out in our findings of fact, we make the awards set out above by way of remedy.

Next steps

173 The Tribunal expects the parties to agree the figures for compensation that follow from this judgment, so as for it to be unnecessary for another hearing to be needed. If a further hearing is needed an application can be made to the Tribunal.

174 We are also conscious that the Claimant's second proceedings against the Respondent are listed in October. We hope that, in the light of this judgment, renewed efforts can be made to settle this case and, if the parties consider that judicial mediation might be a helpful way of achieving this, a joint application may be made.

175 The judge will assume also, unless informed to the contrary by the parties, that the case management orders for the second case are in place; and there is no need for any

further case management or further Preliminary Hearing required.

Employment Judge Goodrich

20 August 2018