



EMPLOYMENT TRIBUNALS

REMEDY JUDGMENT

BETWEEN

CLAIMANT

MS R HARLEY

V

RESPONDENT

UNIVERSITY COLLEGE LONDON

HELD AT: LONDON CENTRAL
(BY VIDEO)

ON: 24 & 25 OCTOBER 2022

EMPLOYMENT JUDGE: MR M EMERY

MEMBERS:

MR D SHAW

MR P DE CHAUMONT-RAMBERT

REPRESENTATION:

For the claimant: Mr. D Piddington (Counsel)

For the respondent: Ms. H Patterson (Counsel)

REMEDY JUDGMENT

The claimant is awarded the sum of

£157,500.76

- | | |
|---------------------------------------|------------|
| 1. Total award for loss of earnings | £65,021.76 |
| 2. Pain suffering and loss of amenity | £79,702.00 |
| 3. Injury to feelings: | £12,777.00 |

The above sums include grossed up elements and interest at 8% on relevant awards.
The calculation is set out below.

REASONS

1. The award was made, and reasons were given at the Hearing, written reasons were requested.
2. Following the hearing, the parties wrote to the Employment Tribunal to agree that there was an error in the calculation for grossing up. The parties did not agree the position on how much of the award should be grossed-up. For the reasons set out below, we concluded that the compensation for post-dismissal earnings should be grossed-up, that the loss of income for pre-dismissal loss of earnings do not fall within the s.401 Income Tax (Earnings and Pensions) Act 2003.

Preliminary issue

3. The respondent sought a postponement prior to the hearing, and I made a decision that the hearing should go ahead. The respondent accepts this decision but wished to highlight the prejudice to its position. The claimant has served a revised schedule of loss a week before this hearing which triples the loss claimed.
4. Ms Patterson said that there are three new points on causation in the claimant's witness evidence – for example the claimant now argues that the respondent's actions towards her caused her fistulas; that the reason for a stoma in August 2022 was the respondent's conduct. These are new allegations, and the respondent has not had time to prepare for them.
5. Ms Patterson accepted that these are issues of causation in the claim, that these were potentially issues evidence in the case. But she highlighted the unfairness of not being able to produce evidence relating to what she considered to be new claims. This issue is considered in the conclusions section below.

The evidence

6. We heard witness evidence from the claimant. The parties jointly instructed two medical experts to address issues of medical causation. The experts are:
 - Dr M J Glynn, Consultant Physician and Gastroenterologist/ Hepatologist
 - Professor T Fahy, Professor of Forensic Mental Health, who had also provided a report for the liability hearing.
7. Dr Glynn's report states he was asked to prepare a report addressing issues of causation and prognosis, if there is a causative link between the discriminatory actions and any deterioration or exacerbation of Crohn's Disease and/or IBS.
8. Dr Glynn's report details "*facts gleaned from the medical records*". These include reference to surgery in 2021 for fistulas (276). The report records the claimant "*detailing the timeline*" of her Crohn's disease, as follows:-
 - Crohn's Disease diagnosed July 2003
 - ... [several other entries]
 - November 2020 – new perianal fistula

- June 2021 - surgery for perianal fistular and placement of Seton
- On waiting list for Ileostomy formation and more surgery for the fistula

9. Dr Glynn answered questions having interviewed the claimant and considered medical records, his answers in summary are:

- Question 1: A failure to undertake pre-employment health checks likely had a *“direct causative effect of increasing her stress levels at work, which in turn tended to aggravate her Crohn’s Disease. Therefore in my opinion, the failure to undertake pre-employment health-checks... caused or contributed to the deterioration of and/or exacerbation of the claimant’s Crohn’s Disease to an extent greater than would have occurred in any event.”*
- Question 2: A failure to allow the claimant to leave early one day a week to attend psychotherapy: the claimant has more Crohn’s Disease symptoms when she is under increased stress *“It would seem to me likely that [this failure] had a direct causative effect of increasing her stress levels at work, which in turn tended to aggravate her Crohn’s disease ... to an extent greater than would have occurred in any event”.*
- Question 3: a failure to allow her to work from home when not fit to travel *“had a direct causative effect of increasing her stress levels at work, which in turn tended to aggravate her Chron’s disease. Therefore, in my opinion, the failure to allow the claimant flexibility to work from home if she was not fit enough to travel to the office caused or contributed to the deterioration of and/or exacerbation of the claimant’s Crohn’s Disease to an extent greater than would have occurred in any event”*
- Question 4: On the failure to allow a phased return to work or to work from home for a period *“it would seem likely ... that the failure to allow the claimant flexibility to return to work on a phased return or allowing her to work from home for a period “had a direct causative effect of increasing her stress levels at work, which in turn tended to aggravate her Chron’s disease. Therefore, in my opinion, the failure to allow the claimant [this flexibility] caused or contributed to the deterioration of and/or exacerbation of the claimant’s Crohn’s Disease to an extent greater than would have occurred in any event”*
- Question 5: Being contacted at home with work related issues when in sick leave had a direct causative effect of increasing her stress levels at work, which in turn tended to aggravate her Chron’s disease. *“Therefore, in my opinion, contacting the claimant during sick leave ... caused or contributed to the deterioration of and/or exacerbation of the claimant’s Crohn’s Disease to an extent greater than would have occurred in any event.”*
- Question 6: Asking the claimant to attend medical treatment outside of the working day *“... had a direct causative effect of increasing her stress levels at work, which in turn tended to aggravate her Crohn’s disease. Therefore, in my opinion, requiring / requesting that the claimant attend medical appointments outside working hours ... caused or contributed to the*

deterioration of and/or exacerbation of the claimant's Crohn's Disease to an extent greater than would have occurred in any event"

- Question 7: Did the discrimination as found cause or contribute to the deterioration of the claimant's Crohn's Disease and/or IBS, or would any deterioration have occurred in any event: *"... it is more likely that this treatment caused or contributed to the deterioration ... to a greater extent than would have occurred in any event."*
 - Question 8: Did the claimant stop medication for Crohn's disease: *"In my opinion Ms Harley did not stop any of the medically advised medication for her Crohn's disease, at any stage"*.
 - Question 9: Are there any other reasons which may have caused or contributed to the deterioration of Crohn's disease or IBS. Or would there have been a deterioration and/or exacerbation at some point in any event: The claimant would have experienced some improvement and deterioration of her symptoms, *"however it is the expectation of treatment ... that these symptomatic fluctuations would be much less or abolished altogether. I have not identified any other factors or reasons for the fluctuations ... other than the increased stress that she suffered during the period in question, which in turn tended to aggravate her Crohn's disease."*
 - Question 10: what was the period of any deterioration caused by or materially contributed to by the acts of discrimination, and what is the prognoses for recovery: the deterioration *"which may have been caused by or materially contributed to by the conduct of the respondent ... in my opinion this deterioration began in July 2019 and has lasted until the present time ... it will last until the matters of the Tribunal are fully settled and for a period of 3-6 months after that time."* Thereafter the symptoms *"will be the same as they would have been but for the events in question"*.
10. Professor Fahy's report states he was instructed to consider whether but for the acts of discrimination found, the claimant would not have suffered an exacerbation of her mental health, to be assessed on the balance of probabilities; alternatively whether the discriminatory conduct made a material contribution to the injury. He answered questions having considered some but not all the claimant's medical records, and an interview with the claimant, as follows:
- Question 1: A failure to undertake pre-employment health checks meant there was a failure to consider whether adjustments could be made prior to starting employment. This chance was lost, which *"did lead to an exacerbation of her psychiatric disorder that would not otherwise have occurred."*
 - Question 2: A failure to allow the claimant to leave work early one day a week to attend psychotherapy when the claimant understood a failure to accept this would entail a long delay for *treatment "caused her to experience stress that exacerbated her psychiatric disorder"*.

- Question 3: To allow her to work from home when not fit to travel would have alleviated stress and apprehension *“her reaction to this lack of this adjustment was to increase her stress and to exacerbate her psychiatric disorder”*.
 - Question 4: On the failure to allow a phased return to work or to work from home for a period *“I conclude that the lack of this adjustment had a clinically significant effect on Ms Harley’s psychiatric condition”*. In an answer to a supplemental question, Professor Fahy clarified his statement: this lack of adjustment did not cause a deterioration of her condition *“as she was already deteriorated and also because she did not achieve sufficient recovery to make returning to work on a phased basis a relevant or potentially useful adjustment”*. (328).
 - Question 5: Being contacted at home with work related issues when in sick leave did not have a clinically significant impact on her psychiatric condition; this sensitivity *“reflected her deteriorated psychiatric condition rather than being a cause of or significant contributor to these symptoms.”*
 - Question 6: Asking the claimant to attend medical treatment outside of the working day exacerbated her illness – the same answer as to question 2.
 - Question 7: Did the discrimination as found cause or contribute to the deterioration of the claimant’s bi-polar disorder, or would any deterioration have occurred in any event, the answer is the former – that the failure to provide a pre-employment health check, flexibility to work from home on occasions, or accommodate her psychotherapy appointments *“contributed to the deterioration and exacerbation of her psychiatric condition.”*
 - Question 8: Stopping medication in August 2019 would have exacerbated her conditions of depression and anxiety.
 - Question 9: There was a probability she would have experienced further clinically significant episodes of bipolar, depression and anxiety in any event. *“However, the timing of her relapse in 2018 indicates that the problems she encountered in her new job where the cause of the deterioration of her psychiatric symptoms at that time.”*
 - Question 10: On how long any exacerbation of her condition caused by the respondent’s conduct may last, the report states that many of the symptoms *“also represent a continuation of long-standing vulnerabilities”*. His opinion was a there was a *“moderate exacerbation”* of her conditions because of the respondent’s discriminatory conduct lasting until her new role in February 2021, and a mild exacerbation until conclusion of the Tribunal claim.
11. The claimant’s case is that her physical and mental health conditions were exacerbated by the discrimination she experienced. She was off work on grounds of ill-health from June 2019, she received SSP from July to December 2019, and nil pay to the date of her resignation in July 2020.

12. The respondent's case is that because of the claimant's underlying health there was always the possibility of a flare-up of her symptoms of Crohn's, she may well have suffered a relapse in any event.
13. The claimant was diagnosed with Crohn's disease in 2003, she accepted in her evidence that it is an unpredictable illness which can flare at different times, as accepted by Dr Glyn "*it is highly variable over time and in each patient*" (267).
14. The claimant's evidence was that this condition has impacted her throughout her life but that she always managed to get it under control. She argued that through the years she had found support and coping mechanisms to deal with the disease. Her case is that her condition was stable until the issues she experienced at work, that "*the last couple of years have had a huge impact*".
15. In 2015-6, as outlined in the liability judgment, the claimant had medical complications and surgery (507). She argued that the issues in 2016 were not as severe as those she suffered in 2022 – an email to her doctor in May 2022 describes the fistula as "*destroying my life*" (444), in her evidence she described being bedbound at this time and unable to move. Her witness statement describes her condition at this time.
16. The claimant was asked about Fistulas, she said that they became a medical issue in July 2020, that she had surgery in November 2020, June and August 2021. The respondent argues that the medical experts do not mention these in their reports, and that there is no suggestion that fistulas or the other symptoms were caused by the respondent's conduct.
17. The claimant's evidence is that fistulas are a symptom of Crohn's Disease, that she had operative-complications and needed further surgery in July 2022, and she had post-operative complications following this surgery. This had an impact on her wellbeing and mental health. As a consequence she continues to have what she described as a "*constant reliance*" on her family; prior to these flare-ups in 2020 she says she needed help from family much less frequently.
18. The claimant was asked about other conditions she refers to in her statement – erythema nodosum lumps (447) . The respondent's position is that these are not referred to in the experts' reports. The claimant said that this is a condition linked to Crohn's Disease, an inflammation of fat cells causing painful patches and lumps. Similarly Sweet Syndrome, which the claimant described as smaller lumps on the skin which can blister and ulcerate.
19. The claimant's witness evidence on the effect of Crohn's Disease complications were not challenged. At paragraph 29-31 she describes a relatively normal social life prior to her issues at work, albeit that she was careful to manage her physical condition. Following the deterioration of her condition, her statement describes being in "*so much pain ... so bad that I can't walk.*" She describes having to walk with a stick post-surgery, having symptoms of arthritis, muscle cramps, and limited movement. After having a stoma having to "defecate into a bag". The fistulas are "*complex and branching*" and are "*difficult to treat*". Multiple surgeries are required. She describes being humiliated and distressed by some of her symptoms. She often goes to the bathroom over 24 times in a 24-

hour *period* “*I have stomach pain, joint pain, nausea and vomiting and I pass blood. The pain medication doesn’t work...*”. She describes the medical treatment, for example post-operative care as “*painful and humiliating*”. She describes the adverse effect of vaginal fistulas on her sex life. She describes not being able to receive hugs from family and friends because of the pain she is in. She describes suicidal feelings and self-harm as a consequence of this condition.

20. The claimant’s bipolar disorder was diagnosed in 2016, after her surgery that year. She describes her symptoms as longer periods of depression, less periods of mania and that she tends to have “*good and bad periods*”, the condition does not fluctuate significantly between periods of mania and depression.
21. The claimant’s witness evidence describes the effect on her of her worsening mental health, including being sent “*spiralling*” by the simplest of questions, having panic attacks, not being able to relax, being on edge, finding it “*too painful, I can’t face it*” when talking about her treatment by the respondent. She describes deteriorating so badly that she was diagnosed with agoraphobia and PTSD. She said in her evidence at tribunal that she did not agree with the diagnosis of agoraphobia, while accepting that she had difficulty leaving the house at times; she described this as in part caused by Crohn’s symptoms, for example not being able to leave the house when ready to go out because of the physical symptoms, this caused her additional stress meaning the impact was worsened.
22. The claimant describes not being able to go out on her own, to the shops or for a walk; “*I can’t sleep most nights. I’ve struggled with self-harm, suicidal thoughts and have caused my family and partner great stress when these situations occur. I feel so tired, I feel empty, I feel lost. I don’t see this ever ending*”. She describes being in a state of “*hypervigilance*” because of what happened at the respondent, a form of PTSD. “*I have tried everything to alleviate my physical and mental symptoms and deterioration of my health, and nothing is working.*”
23. Professor Fahy refers to the claimant stopping her medication for bi-polar disorder in August 2019. The claimant accepted that this may have had an adverse effect on this condition at this time. In her evidence she described the reasons for this, including that the medication made her feel like a Zombie, and very vulnerable, that she was fearful of not being able to defend herself if attacked. She said she could not cope with the side effects: “*I felt very sleepy, and I felt vulnerable ... I felt I was not fully there. One of the side effects was I was awake, but I could not move my body, and I was worried about needing to go to bathroom in night and not being able to because of the medication.*”
24. The claimant’s case is that she was prevented from working because of ill-health from July 2019 to July 2020. After she resigned, she applied for roles starting end-July 2020. There are acknowledgements of applications from various companies and the civil service in the bundle from July to October 2020, for roles including Personal Assistant, Project Support Officer, and paralegal.
25. The claimant was made a provisional offer of employment on 12 August 2020 as a Higher Executive Officer – Administrator in the Home Office. The claimant’s start date was 15 February 2021. Her statement describes the delay between

the provisional offer and the formal offer was because of security checks required for this role. This role is a homeworking role, and in her evidence to Tribunal she described flexibility in the role, including starting work early, and taking breaks when needed.

26. The claimant continued to apply for roles after the provisional offer because she was unsure she would pass the security checks. She described an initial start date in October, but the Home Office put this back to November, December then mid-February. As a result she did not carry on looking for roles after the formal offer had been made, as she had a job offer, a new start date, the security checks had been done, *“and I had seen OH and I had been promised adjustments, so I did not continue looking for a role”*.
27. The claimant accepted that her skills were transferrable, she would work in any industry sector, she also said that she needed to get a role within a reasonable commute, near a station to enable her to manage her condition, and this did affect the number of applications she made.
28. The claimant has been off work on grounds of ill-health in her new role since 14 June 2022, and she claims her loss of salary from this job as part of her financial loss claim. The reason was a flare up of fistulas. She has an agreed return to work date of 1 November 2022.
29. The claimant argues that the flare up of fistulas was because of the stress of what had happened at UCL and her tribunal claim, her evidence was that *“this situation had caused stress and I was upset continuously from June 2019”*. She described liking her new role *“but I am constantly impacted, scared it will happen again, and I doubt myself and capabilities - even though my colleagues are very happy with my work.”*
30. The claimant also claims a continuing loss of earnings in her new role as her salary is less than her salary with the respondent.
31. The claimant also claims for the loss of promotion she says she would have gained within 18 months with her new employer but for the continuing health issues caused by the discrimination. The claimant accepted that she had no evidence of the prospect of a promotion.
32. The claimant accepted that she had no evidence about her gratuitous care claim, no family statements and neither of the experts are asked questions about this requirement.
33. The claimant claims £20,000 for the cost of private surgery for fistulas. She says that there is a significant waiting list for NHS surgery, that the fistulas are still causing her difficulties, despite the stoma. She argued that this surgery was necessary and was a consequence of the Crohn's and the stress that she experienced.
34. The claimant submitted a grievance in September 2019; this was after she had engaged in ACAS early conciliation (8 – 12 August 2019). The claimant described receiving a lawyer's letter while on sick leave *“I got scared and upset*

and I was not in the right frame of mind; and did not know the process". She sought advice was told she should put in a grievance.

35. The claimant was asked why she did not engage with the respondent to discuss reasonable adjustments after the recommendations of the grievance panel. She says that after she went to OH she was "*shut down*" by the respondent, she also did not trust the respondent at this stage, her manager never approached her, and she did not engage thereafter.

Closing submissions

The respondent's arguments

36. Ms Patterson spoke, and on the 2nd day handed up a written closing argument which we carefully considered.
37. On the claim for loss of pay during her employment with the respondent, Ms Patterson argued that from September 2019 the claimant "*is unwilling or unable to engage*", the absences from September 2019 were not the respondent's failure, and the claimant is not entitled to compensation for loss of pay for this period.
38. Ms Patterson argued that Professor Fahey at page 315 shows there is a "*probability*" that the claimant would have experienced clinically significant episodes of bipolar, depression and anxiety in any event, that the claimant would "*likely to have been absent in any event*" during this period.
39. Ms Patterson accepted that Professor Fahey's further comment, the issues she experienced at work were the cause of her deterioration in 2019 was "*persuasive*", but bipolar is a lifelong condition, the tribunal *can "take into account"* the prospect that she would be off work in any event, "*it is highly probable*". This is particularly given she was not taking bipolar medication in 2019. She argued that there was a causative link that the claimant would have had a relapse around September 2019, when the respondent was trying to resolve the situation and the claimant was "*unwilling or unable to engage*".
40. The claimant refers to the effect of the solicitor's letter sent to her while off sick, Ms Patterson argued that this was a "*non-tortious*" act, and this is not a discriminatory act which should be compensated for.
41. On the loss of earnings post-dating resignation, the reason for resignation (page 912 liability bundle) only show one issue relating to disability, the failure to put in place adjustments before starting work, but the other issues are not related to the claim, "this affects losses".
42. The claimant was able to look for work from July 2020 and has a high-level experience. She wanted to work from home and from March 2020 she would have been able to work from home because of the Covid pandemic. She got a role within 3 weeks of starting to look, "*so it is reasonable to expect her to look for roles from September 2019.*" The new role was on a lower salary, so even after she had gained this role it was reasonable for her to explore other options.

43. There is no evidence that the claimant would be promoted in new role but for discrimination; there is no evidence of such a role or its salary.
44. Ms Patterson argued that the claimant's sickness absence from July 2022 in her new role was not relevant to the respondent's actions, as the claimant had been able to maintain the role for a year before her absence. This illness occurred after the ET judgment in liability, there is no evidence this is linked to issues at the respondent.
45. Ms Patterson continued her submission on day 2 after she had put in a written submission. She argued that while the medical report does mention fistulas, there is no evidence that there is a causal link with the acts of discrimination, *"it's what injury and harm was caused to the claimant by the respondent, and there needs to be evidence of a causal link"*. Dr Glynn's clarifications at page 326 do not mention fistulas, *"he does not say her condition has been exacerbated by fistulas"*.
46. Ms Patterson argued that there is a significant case management issue – that the respondent *"was not on notice"* the claimant would be arguing the fistulas were part of the claim against it. *"If the claimant wanted to advance this argument, it needed to be put to the expert."*
47. Ms Patterson accepted that page 290 states Dr Glynn has not identified any other facts or reasons for the *"fluctuations [the claimant] has suffered, other than the increased stress..."*, but argued that *"the key question"* is that there is no reference to fistulas in the report, instead Dr Glynn refers only to the effects of the worsening symptoms – see 325/6 and his answers to supplementary questions.
48. Ms Patterson argued that it was not known whether fistulas would have occurred in any event, the claimant has never raised this as attributable to the respondent, it was for her to advance evidence that the fistulas were only because of the respondent's conduct *"this is serious and the case has not been put this way at all"*, it is *"too big a leap"* to argue the fistulas were caused by the respondent.
49. On the JSB Guidelines, Ms Patterson accepted that the relevant chapter is 4AD, but that the harm falls into the lower bracket - £500 - £1,500.
50. On the exacerbation of Crohn's disease, Ms Patterson accepted that the relevant JSB chapter is 'injury to digestive system - non traumatic'. She argued that after apportionment to account for injury not caused by the respondent, an award is within Band (3) - £3950 - £9540.
51. Ms Patterson argued an award for pain, suffering and loss of amenity at £5,000.
52. Ms Patterson argued there should be a discount to her award, because the claimant did not put in a grievance until very late in the process. The claimant would have been aware of how to do so as her employment contract refers to the grievance process.

53. Ms Patterson argued that there was no evidence of PTSD as a condition, and no award should be made for this. Ms Patterson also cautioned against double recovery for an award for personal injury and injury to feelings.
54. Ms Patterson reiterated that the reason why it is “essential” for a specific question on fistulas to be put to Dr Glynn is that there is no definitive medical evidence to Chron’s Disease, and no evidence that a general exacerbation of Crohn’s Disease caused the fistulas. *“This is the reason for the request for a postponement, further evidence could have been introduced, but we were not on notice of this very significant point.”* The claimant also argues that the fistulas impacted her mental health, see page 444 that the fistulas were destroying her life, the consequent impact on her bipolar disorder. There is no sound evidence which supports this causation link, there is no link in the medical report between Crohn’s Disease and fistulas.

The claimant’s arguments

55. Mr Piddington argued evidence including documents, expert opinion and the claimant’s evidence all establishes the claim. The claimant provided clear and compelling, honest and reliable evidence and it would be wrong to discount it.
56. The legal position: to put the claimant in the position she would have been in but for discrimination. The eggshell skull principle – the respondent must take the claimant as they find her; even if the claimant was impacted because of a pre-existing vulnerability this is irrelevant to remedy, it’s the actual impact on the claimant.
57. To establish injury, the causation test: Mr Piddington referred to BAE Systems and “two distinguishing propositions”:
 - firstly where harm has more than one cause – the respondent should only pay for the harm attributable to it – it is for the respondent to raise this issue
 - secondly, the assessment will take into account the pre-existing disorder and the chances the claimant would have suffered the injury in any event
58. This leads to two questions: what harm the claimant has established, and who is responsible for that harm; and would the claimant have suffered this harm in any event at some point in the future. The burden is on the respondent to produce a positive case that the claimant would have suffered the same harm absent discrimination.
59. Medical evidence on causation shows two distinct injuries (i) Crohn’s Disease exacerbation and/or deterioration (ii) mental health exacerbation/deterioration.
60. The medical evidence shows that Professor Fahy considered all the evidence and concludes that all the claimant’s deterioration is caused by the discrimination. He was explicitly invited to consider whether there was any other factor which could have contributed to the exacerbation, and he concludes not. The same for prognosis, that the discrimination will continue for up to six months after the ET

proceedings have ended. The harm is *“indivisible harm”* there is no evidence of any additional cause of the exacerbation.

61. Mr Piddington disagreed with the respondent’s contention that a specific question to Dr Glynn on fistulas was required. The Tribunal simply must ask whether it can be satisfied that the harm experienced by the claimant was caused by the discrimination. Fistulas are referenced in the medical evidence to the expert, the respondent asked a question about what else could have impacted the condition, he did not say that the fistulas are not linked to Crohn’s; in fact he said that all symptoms were worse.
62. There is evidence that Crohn’s are linked to fistulas – see page 280 – Dr Glynn clearly links fistulas and Crohn’s and uncontrolled inflammation caused by stress. See also page 290 – there is no other factor which gave rise to the fluctuations in the illness the claimant has suffered other than the increased stress she suffered at work. Dr Glynn says that there is an *“expectation”* that with treatment these symptoms would be much less or abolished. This says that the fluctuations, including fistulas, were caused solely because of the discriminatory acts. *“Dr Glynn is emphatic, there is no competing act”*.
63. On the claim for Psychiatric injury – there is evidence of agoraphobia and PTSD – see page 441 the 22 January Sloane Clinic letter: a diagnosis of agoraphobia. Even though this was not in front of the expert, Hampshire CC v Wyatt states that the tribunal is entitled to make findings on personal injury even in the absence of a report. The fact that here is a report, the claimant has established causation as she has a diagnosis which shows this is caused by the respondent’s conduct. It is for the respondent to dispute this causal link.
64. On the short notice of this and the claim for PSLA for fistulas, *“the arguments of prejudice are misconceived, as the experts and the respondent had all this evidence”*. There is no prejudice to the respondent, it is for the claimant to prove her case, and the respondent is entitled to say that she has failed to do so. If the respondent is to assert an intervening act, they need to advance this evidence.
65. Professor Fahy is saying that this period of mental health deterioration was caused by the discriminatory acts. If the respondent wants to say the claimant would have been in similar mental health in any event, this is for the respondent to show.
66. The report says that harm may have occurred in any event, it is for the respondent to establish on the balance of probabilities that the claimant would have suffered a similar level of harm at some point, and the percentage likelihood that this would have happened. Unless the respondent can demonstrate both, the Tribunal must treat this argument with caution.
67. If the harm is not divisible, the Tribunal can’t identify a rational basis that the claimant may have suffered the same harm in any event and there should not be any reduction in the compensation. If the tribunal finds there would have been some symptoms, the Tribunal needs to consider what these symptoms would be and what effect this would have on the claims.

68. Mr Piddington argued that the expert has already factored in the impact of the claimant's underlying vulnerability, page 316 - the reductions of levels of harm from moderate to mild and ending after this case - takes account the fact of long-term vulnerabilities.
69. There is no basis to say that the claimant's symptoms were worsened by some other cause. There is not even a probability, the respondent cannot say that the claimant would have been in this position absent discrimination.
70. If the claimant stopping bipolar medication is an issue, it's an issue of mitigation, not causation: if she had taken medication would her symptoms have been different? To make this finding the Tribunal would have to conclude that it was unreasonable for the claimant to stop taking her medication. The claimant's evidence is that in the months prior to the discrimination she had not been taking medication because she had not needed it. In this circumstance the respondent must take the claimant as they find her - the eggshell skull principle applies (see Kemp & Kemp declining treatment is an issue of mitigation). A failure to take medication is a pre-existing vulnerability of that individual. The Tribunal must consider if this was unreasonable, at the point when symptoms got worse, and it must consider if so is there evidence that taking medication would have lessened the impact.
71. The medical reports does not suggest that stopping medication was an intervening act; there is no evidence this is the case. There is no evidence that the claimant was suffering significant medical symptoms prior to acts of discrimination. And but for discrimination, the claimant would have had adjustments in place and would not have had a letter written to her by lawyers. There is no evidence that absent the acts of discrimination, the claimant would be in the same condition in any event. The medical evidence shows that all the claimant's absence from work was as a result of discrimination.
72. Mitigation. The claimant acted reasonably – she had to deal with medical conditions while seeking a role; she continued to apply after a provisional offer of employment; the Home Office then changed her start date.
73. Her resignation letter – it's clear that all her complaints were related to discrimination and her attempts to address this – *"no discrimination, no resignation"*.
74. Pain suffering and loss and amenity: *"It's a rare case to find such an adverse effect which impacted every area of her life"*. Mr Piddington argued that the claim for deterioration in her mental health falls within the Judicial Studies Guidelines – 'moderately severe' bracket - £19,000 to £45,000. Within this bracket the claimant suffered moderate harm from July 2019 and minor harm from February 2021. He argued that an award of £20,000 was appropriate.
75. Injury of feelings: Mt Piddington made it clear that the award for injury to feelings and any award for psychiatric harm cannot overlap, there cannot be double compensation for the same injury. Mr Piddington argued that an additional award discrete of an award for psychiatric injury, Mr Piddington argued that a £10,000 award would be reasonable.

76. Physical harm: Mr Piddington referred to the Judicial Studies Board Guidelines, arguing that this was an equivalent injury to a severe abdominal injury often necessitating a total colostomy, incontinence, IBS, severe impact on enjoyment, a bracket of £44 - £70,000. Mr Piddington argued that it was clear that prior to discrimination her condition was well managed, that all the symptoms since including fistulas were a consequence of discrimination, an award of £50,000 was appropriate for this injury.
77. Gratuitous care: Mr Piddington said that the claimant made a claim for personal injury over 12 months ago, the medical reports show an impact, that the claimant had to live with her parents and received care. The claimant received approximately 15 hours per week of care, she is claiming only 5 hours per week. Mr Piddington accepted that this loss appeared for the first time in a schedule of loss on 12 October 2022.
78. Therapy: there is evidence that this is needed. The receipts were disclosed on disclosure for remedy, so the respondent was on notice of this claim even if it is not mentioned in the Schedule of Loss.
79. VAAFT: This is an operation that the claimant requires and there is a long waiting list on the NHS. As long as the Tribunal is satisfied that this operation is required as a result of discrimination, it is open for ET to provide treatment costs. There is evidence of amount of surgery required. Mr Piddington accepted that the respondent was put on notice of this claim on 12 October 2022.
80. Deduction from award: the respondent argues that the claimant has failed to comply with the ACAS Code on grievance processes. But the claimant did lodge a grievance and an appeal against the grievance decision, so does not follow that there was a failure to follow Code. Even if there was, there is no basis to show that the claimant acted 'culpably'; and it is not just and equitable to reduce the award. The respondent "*robustly asserted*" that the claimant did not have a disability; disability was only conceded at the Tribunal hearing, and the respondent accepted they should have been aware. It is not just and equitable to reduce the award.
81. On the alleged prejudice to the respondent: there is none – it is for the claimant to establish on the evidence her claim, the same for the respondent. There is no prejudice; the respondent knew that there was a claim for personal injury.

Response to claimant's submission

82. Causation: the claimant's arguments are "unsafe and problematic". This is not a low value claim, and it is unreasonable to put the Tribunal in a position where it has to "*guess or make links*" on the evidence. It is not for the respondent to put these points to the expert.
83. Ms Patterson accepted that there is "*some evidence*" about fistulas, this does not show any causative link between the respondent's actions and the claimant's symptoms. No question was put to the expert on this point. The expert says that they '*may occur*'; there is no reference to the cause of the claimant's fistulas, or

their effect. All the report says is that they may occur. At best this is a conditional view. *“It is not safe for the Tribunal to put its own gloss and substitute this view”* for its own.

84. Agoraphobia and PTSD: the respondent only found out about these conditions on 12 October, they were not disclosed to the expert; it is a *“stretch”* for these claims to be brought.

Case law

85. We considered the cases provided by the parties. We also had regard to the following general principles:
- a. Ministry of Defence v Cannock [1994] IRLR 509, EAT: Where compensation is awarded, it is on the basis that 'as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer]'. 'Tribunals [should] ... not simply make calculations under different heads, and then add them up. A sense of due proportion and look at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed.'
 - b. Olayemi v Athena Medical Centre [2016] ICR 1074, EAT: The 'eggshell skull' principle of the law of tort also applies in cases of unlawful discrimination: a discriminator must take their victim as they are. That means that the wrong doer takes the risk that the wronged may be very much affected by an act of sexual harassment, say, by reason of their own character and psychological temperament. Provided the losses claimed can be shown to be causally linked with the unlawful act, the respondent must meet them, even if the claimant is predisposed to the disorder. If the employer's acts were a material cause of the claimant's psychiatric condition, it was no defence for the respondent to show that she would not have suffered as she did but for a vulnerability to that condition. The Tribunal can discount the compensation to take account of the risk that she might have suffered from the condition in any event. If there is a material cause, which goes beyond mere vulnerability, and the resultant harm was truly divisible, the tribunal should estimate the degree of the respondent's responsibility and make an award for that.
 - c. Ministry of Defence v Hunt [1996] ICR 554: It is for the respondent to adduce evidence to demonstrate that the loss could have been mitigated. The employer must provide the evidence to support the argument that the complainant could have mitigated their loss; vague assertions of a failure to mitigate, unsupported by any evidence is unlikely to succeed. If there is such evidence then the question for the employment tribunal is not simply whether the complainant acted reasonably but whether by taking the course they did, they took all reasonable steps to mitigate their losses.
 - d. BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188. The case confirmed the following propositions:

- (1) Where the harm has more than one cause, a respondent should only pay for the proportion attributable to their wrongdoing unless the harm is truly indivisible.
 - (2) The burden is on the employer to raise the issue of apportionment. Tribunals should try to 'identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong, and a part which is not so caused.' The Tribunal should see if it 'can identify, however broadly, a particular part of the suffering which is due to the wrong'.
 - (3) Where such a 'rational basis' can be found, the Tribunal should apportion accordingly, even if the basis for doing so is 'rough and ready'.
 - (4) Any such assessment must consider any pre-existing disorder or vulnerability, and account for the chance that the claimant would have succumbed to the harm in any event, either at that point or in the future.
 - (5) In cases of psychiatric injury, careful evidence should be obtained from experts, particularly in relation to the likelihood of suffering the harm in any event.
- e. *Sadler v Filipiak* [2011] EWCA Civ 1728: The tribunal must consider totality of the pain, suffering and loss of amenity experienced.
 - f. *De Souza v Vinci Construction UK Ltd* [2017] EWCA Civ 879: The *Simmons v Castle* 10% uplift should apply to employment tribunal awards in respect of non-pecuniary losses.
 - g. *Essa v Laing Ltd* [2004] EWCA Civ 02: There is no need to show that the personal injury in respect of which the claim is made was reasonably foreseeable, provided a direct causal link between the act of discrimination and the loss can be made out.
 - h. *Scott v Comrs of Inland Revenue* [2004] IRLR 713: When looking at non-pecuniary loss, whilst the total sum awarded must be borne in mind, it remains important not to conflate different types of awards for the purposes of the *Vento* guidelines.
 - i. 'Vento' Presidential Guidance for awards after 6 April 2022:
 - a lower band of £990 to £9,900, for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;
 - a middle band of £9,900 to £29,600, for cases that do not merit an award in the upper band; and

- an upper band of £29,600 to £49,300, for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race;
 - the most exceptional cases might be capable of exceeding £49,300.
- j. Alexander v Home Office [1988] IRLR 190: "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. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or mind which may persist for months, in many cases for life."
86. We also considered the cases provided by the parties, including awards made in what the parties say are analogous cases.
87. Judicial College Guidance – physical injury

The claimant relies on the following:

(1) Chapter 6: Injuries to Internal Organs

(G) Digestive System

(b) Illness/Damage Resulting from Non-traumatic Injury. (e.g. food poisoning):

- (i) Severe toxicosis causing serious acute pain, vomiting, diarrhoea and fever, requiring hospital admission for some days or weeks and some continuing incontinence, haemorrhoids, and irritable bowel syndrome, having a significant impact on ability to work and enjoyment of life. £38,430 to £52,500
- (ii) Serious but short-lived food poisoning, diarrhoea, and vomiting diminishing over two to four weeks with some remaining discomfort and disturbance of bowel function and impact on sex life and enjoyment of food over a few years. Any such symptoms having these consequences and lasting for longer, even indefinitely, are likely to merit an award between the top of this bracket and the bottom of the bracket in (i) above. £9,540 to £19,200
- (iii) Food poisoning causing significant discomfort, stomach cramps, alteration of bowel function and fatigue. Hospital admission for some days with symptoms lasting for a few weeks but complete recovery within a year or two. £3,950 to £9,540

- (iv) Varying degrees of disabling pain, cramps, and diarrhoea continuing for some days or weeks. £910 to £3,950

(l) Bowels

- (a) Cases involving double incontinence namely total loss of natural bowel function and complete loss of urinary function and control, together with other medical complications. Up to £184,200
- (b) Total loss of natural function and dependence on colostomy, depending on age. Up to £150,110
- (c) Faecal urgency and passive incontinence persisting after surgery and causing embarrassment and distress, typically following injury giving birth. In the region of £79,920
- (d) Severe abdominal injury causing impairment of function and often necessitating temporary colostomy (leaving disfiguring scars) and/or restriction on employment and on diet. £44,590 to £69,730
- (e) Penetrating injuries causing some permanent damage but with an eventual return to natural function and control. £12,590 to £24,480

88. Judicial College Guidance – psychiatric and psychological damage

(A) Psychiatric Damage Generally

The factors to be considered in valuing claims of this nature are as follows:

- (i) the injured person's ability to cope with life, education and work;
 - (ii) the effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;
 - (iii) the extent to which treatment would be successful;
 - (iv) future vulnerability;
 - (v) prognosis;
 - (vi) whether medical help has been sought.
- (a) Severe - In these cases the injured person will have marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor. £54,830 to £115,730
 - (b) Moderately Severe - In these cases there will be significant problems associated with factors (i) to (iv) above, but the prognosis will be much more optimistic than in (a) above. 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. £19,070 to £54,830

- (c) Moderate - While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good. £5,860 to £19,070
- (d) Less Severe - The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected. Cases falling short of a specific phobia or disorder such as travel anxiety when associated with minor physical symptoms may be found in the Minor Injuries chapter. £1,540 - £5,860

89.s.401 Income Tax (Earnings and Pensions) Act 2003:

- (1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with
 - (a) the termination of a person's employment

Conclusions on the evidence and law

- 90. We accepted that the medical evidence shows fistulas are a symptom of the claimant's Crohn's Disease, this is apparent from the medical records which show the claimant had fistulas in 2015. Dr Glynn's report states that Crohn's can lead to "*specific perianal problems such as fistula and abscess...*" (280). Dr Glynn refers to the claimant's symptoms from 2019 onwards including fistulas, and her surgery in 2021, that she was hospitalised in November 2020 and required surgery. The timeline shows he considered all relevant medical evidence in his assessment when he prepared his medical report in June 2022.
- 91. We are not persuaded by the respondent's argument that fistulas should be considered a separate condition. The respondent was on notice from medical disclosure prior to the liability hearing that the claimant suffered from fistulas. The medical records show that the claimant's fistulas were a symptom of Crohn's Disease. Dr Glynn's report is quite specific about the fact the fistulas the claimant suffered from (and continued to do so) were a symptom of Crohn's Disease. It follows that the claimant's symptoms, medical treatment and prognosis should not be an issue of surprise to the respondent.
- 92. Dr Glynn concluded that all the claimant's Crohn's related ill-health from July 2019 onwards was attributable to the stress brought on by acts of discrimination. This included all the deterioration in her health associated with Crohn's disease from 2019 onwards, including fistulas the claimant suffered from 2020 onwards. His medical report is clear that all fluctuations of her Crohn's disease and associated symptoms were caused by the discrimination she suffered at work. He expected her condition to remain relatively stable but for the acts of discrimination.
- 93. The respondent argues that as the claimant was not taking her medication for bipolar, it is highly likely that in any event she would have had a deterioration of this condition in 2019. On the evidence we concluded that a significant reason why the claimant was not taking her bipolar medication was because her Crohn's symptoms were so bad she felt she could not take it. This was, we concluded, a

reasonable decision to take, she did not feel able to take this medication, and it was a decision she took in the unfortunate knowledge that she would suffer worse mental health as a result.

94. The claimant was in an invidious situation. We do not consider her conduct to break the chain of causation of harm even though it may have led to worse symptoms of bipolar and depression. To restate the legal maxim – the respondent is liable for the harm which flows from its discriminatory actions. We concluded that the claimant should not be penalised for the invidious choice she felt forced to make. She is entitled to be awarded a sum to reflect the damage to her mental health, with no discount for her decision not to take medication.
95. Professor Fahy's report states that the relapse in the claimant's mental health in 2019 was caused by the discrimination she suffered at work. He was asked whether there is any other cause of the deterioration in her health other than the discrimination she experienced, and he says no. He does not say that the symptoms she experienced were caused by her stopping her medication, he says that her symptoms were likely worse as a consequence.
96. We therefore did not accept that there was any other cause of her mental health deterioration. The claimant is vulnerable, she has a debilitating physical condition, but there was no other trigger for the deterioration other than the respondent's actions.
97. The respondent argues that the claimant's PTSD and agoraphobia are new conditions, there has been no evidence on them apart from her witness statement and these are new financial claims which it has not had an opportunity to challenge. Given the claimant's evidence, we concluded that these symptoms are manifestations of her Crohn's Disease, bipolar and depression. The claimant felt less able to go out, and experienced significant difficulties when she did; her physical symptoms made going out difficult. We concluded that these symptoms are a result of her treatment.
98. We also accepted that the claimant suffered symptoms such as flashbacks and panic attacks as a direct result of the treatment she experienced while employed by the respondent, her statement paints a vivid picture of the effect on her mental health at work and during the proceedings.
99. We accept that Professor Fahy considers the claimant will experience clinically significant episodes of bipolar, depression and anxiety in the future. But this clinically significant episode of bipolar, depression and anxiety was caused by the respondent, and it is liable for this harm.
100. Professor Fahy concluded that the discrimination experienced by the claimant from mid-2019 caused the exacerbation of her psychiatric disorder. He says discrimination caused a moderate exacerbation of her mental health symptoms of bipolar disorder, depression, and anxiety from mid 2019 to the Tribunal hearing, and mild symptoms to approximately April 2023.

Claim for loss of past earnings

101. We concluded based on the medical reports that the discriminatory acts and omissions of the respondent were the reason why the claimant was off work from June 2019 to her date of resignation in July 2020. The failure to take medication for bipolar disorder during this period did not affect this period of loss – we concluded that even if she had taken this medication the severity of her symptoms of Crohn’s disease meant she would have been off work for this period in any event.
102. We therefore concluded that the claimant should receive an award for her loss of net earnings for this period June 2019 to 21 July 2020: this sum was agreed between the parties - **£28,146.55**.
103. We did not accept that there was a failure to engage by the claimant from September 2019 such that compensation should be reduced. The claimant went to a solicitor and was advised to put in a grievance, she received a solicitor’s letter from the respondent denying disability. There was no proper engagement from the respondent to the claimant about her health or the issues she had experienced at work, no attempt to offer her an OH appointment, no direct engagement with her about reasonable adjustments which may enable her to return to work. We consider that the claimant was not acting unreasonably in determining by late 2019 she had lost enough faith in the respondent to believe proactive engagement from her would make any positive change.
104. We did not accept the respondent’s contention that the claimant had failed to mitigate her losses. She started looking for work when her health allowed her to do so, and we do not accept that she was able to do so before July 2020 because of her ill-health. She quickly obtained a role, and we considered the claimant acted reasonably in continuing to look for work while the offer was still conditional, and in then stopping looking for work when she was told the offer was unconditional. The start-date of this role was pushed back, the claimant cannot have known this in advance. We concluded that the claimant acted reasonably in her search for work and in attempting to mitigate her losses.
105. We agreed that the claimant should be compensated for her loss of earnings while out of work from 22 July 2020 to 15 February 2021: the sum agreed by the parties - **£16,568.86**.

Claim for losses while employed in new role

106. The claimant claims losses from the start of her new role to August 2023. This comprises (i) the difference in salary between her old and new role, a total of £4,680.07 (ii) for loss of salary due to time off work for ill-health from 14 June 2022 to 12 October 2022, a total of £766.93.
107. We accept that such an award can be made in principle, the difference between old and new salary, if the claimant has reasonably mitigated her loss. We accept that she mitigated her loss. We accept also that it is reasonable for her to receive compensation for a period until she has, or should have reasonably, regained her prior salary (including cost of living increases). While it is difficult to

forecast when this loss will end, we consider August 2023 to be appropriate, that the claimant will or should have made up her salary loss by this date.

108. We accept the principle that the claimant is entitled to claim her losses which flow from acts of discrimination. Dr Glynn is clear that the symptoms the claimant experienced to the date of his consultation with her were attributable to the acts of discrimination, that it is more likely than not that she would not have had significant health problems absent these acts. We did not accept that there was any break in the chain of causation in relation to her sickness absence in her new role. This ill-health was as a direct consequence of the respondent's actions, but for the acts of the respondent she would not have had the severe complications and operations and time off work in her new role.
109. We therefore concluded that the claimant should be compensated for loss of salary in her new role, both the difference in salary, and the losses attributable to her sick leave to October 2022, because these losses flow from the acts of discrimination. The sum awarded for loss of earnings since starting her new role, plus anticipated future losses is agreed by the parties - **£4,312.72**

Gratuitous care and therapy

110. Gratuitous care was not a claim until it appeared in the claimant's schedule of loss sent to the respondent on 12 October 2022. The need for this care is referred to in Dr Glynn's report (279) and in the claimant's witness statement. We accept that the claimant needed this assistance.
111. But we received no reason why it was claimed so late. Also, there was no indication prior to the Schedule that this was a potential financial claim. Just because it is in the report does not mean the respondent was on notice of this claim. This claim should have been apparent and claimed earlier.
112. The respondent has had no chance to challenge the rationale for this claim or the sums claimed, we did not consider it was reasonable for the claimant to submit a claim so late when there is no good reason why it could not have been made earlier. The claim for gratuitous care fails.
113. Similarly with the claim for therapy at a cost of £300 a session. We accept that Professor Fahy refers to private psychotherapy. We accept also that potentially the claimant's need for psychotherapy may be attributable to the acts of the respondent. But it was not submitted as a claim until 12 October 2022 with not reason why. Again, the respondent has had no chance to challenge this as a separate claim, as it is entitled to do. The claim for therapy fails.

VAAFT Operations

114. The claimant seeks private medical treatment. Because of the significant delay for NHS treatment she will likely have adverse symptoms for a longer period, and these procedures sooner will assist her recovery.
115. The respondent makes the same point as for gratuitous care – this issue was raised late, and the respondent has not had time to comment on this issue. But,

unlike the claim for gratuitous care, the ongoing delay in getting NHS treatment and the effect this would have on the claimant would not have been so clear to the claimant significantly earlier – we note for example paragraph 25 of her statement in which she says that she was told on 5 October 2022 that further surgery would be required.

116. Dr Fahy is clear that this treatment is required. Given the causation findings, we concluded that the operations is required because of the acts of the respondent which caused the deterioration of the claimant's symptoms.
117. This treatment is needed, and to delay the treatment will prolong claimant's ill-health. We considered, notwithstanding the late notice of this claim that the need for this treatment is included in Dr Fahy's report. In principle, private medical treatment can be claimed, if reasonable to do so.
118. On very careful consideration, we decided not to award a sum for this operation. The reason is not because of late notice to the respondent, because the respondent is on notice this treatment is required as a consequence of its acts.
119. We concluded instead that the sum we are awarding for pain suffering and loss and amenity is an award which encompasses all harm past and anticipated the claimant has and will experience. We did not feel it just and equitable to make a further award for the cost of this operation, as this will, we consider, amount to an element of double-recovery.
120. To put it another way a sum to reflect the cost of a private operation may have been awarded had we decided to make a smaller award for PSLA. But we considered this award overall takes into account the need for this treatment and the pain and complications which will occur until the operation, whenever it takes place and however it is funded.

Pain, Suffering and Loss of Amenity

Physical injury

121. All the consequences of the deterioration of the claimant's Crohn's Disease are attributable to the respondent, including her ongoing symptoms and need for a further operation. We accept in full the claimant's witness evidence of the incapacity she has suffered and the impact it has had on her life as set out above.
122. We carefully considered the Judicial College Guidelines on the quantum awards of the injuries suffered by the claimant. We concluded that the deterioration of Crohn's Disease and the associated complications and her prognosis, which is improving symptoms in the foreseeable future.
123. We considered that the physical complications, including fistulas, were severe: the claimant has suffered continuing acute pain and needed several surgeries and particularly painful and distressing after-care. She has severe ongoing issues associated with her surgery and will require several further procedures. This has had a significant impact on her ability to enjoy life. It has had an effect

on her employment, she has had several months off work. We concluded her symptoms were similar those of a severe abdominal injury (£44,590 to £69,730).

124. We considered that the symptoms and issues experienced by the claimant, whose evidence we accepted in full, merited an award at the top end of this bracket. We bore in mind the need to consider the totality of the award, including the award of sums for psychiatric injury and injury to feelings. Bearing this in mind we concluded that an award of £50,000 should be made. To be clear, this encompasses a *De Souza* uplift of 10% - the award is therefore £45,500 plus a 10% uplift to **£50,000**.

Mental health injury

125. We concluded that the claimant's mental health symptoms were such that an award in at the top end of the moderately severe bracket would be appropriate. We concluded that the symptoms are serious and have lasted several years. The claimant describes a significant and continuing mental health deterioration, one which has now lasted several years. We concluded that this was long-standing disability. Professor Fahy describes the exacerbation of her mental health of moderate severity for several years and mild thereafter.
126. All symptoms are attributable to acts of discrimination. We do not consider that PTSD and agoraphobia are discrete conditions; we accepted that these symptoms all flow from the claimant's mental health vulnerabilities. They are all attributable to the acts of the respondent.
127. We concluded that an award at the bottom end of the moderately severe bracket would be appropriate. Had this been the only injury the award would have been over £25,000. But, in determining an award of **£20,000**, including the *De Souza* uplift, we took into account the overall totality of the PSLA award.

Injury to feelings

128. We noted the guidance in *Alexander*, also the need to ensure that there is not double recovery, particularly given an award of £20,000 has been made for a personal injury.
129. Given the injury suffered, we concluded that an award at the upper end of the middle *Vento* bracket would be appropriate. The claimant has suffered a very significant injury to feelings with long-term mental health effects. While the discrimination was not deliberate, it was beyond the one-off or less serious acts envisaged in *Vento*; we accepted also that it is not an injury of the most serious type meriting an upper hand award.
130. If there was no personal injury claim, we concluded that the award would be £25,000. We discounted this to **£10,000**, to reflect the overall harm to the claimant's mental health; we felt that an overall award of £30,000 for the injury to the claimant's mental health (injury to feelings and PSLA) fairly reflected the level of harm to her.

Discount

131. We did not accept that it was appropriate to reduce the level of the award. We did not accept that there was a failure of the claimant to engage with internal processes – in fact she submitted a grievance.

Interest

132. The parties accepted interest was payable on the sums. The dispute was the level of interest, the respondent contends 2%, a sum awarded in the county court, the claimant contends that the rate of interest is set at 8%.

133. We concluded that interest is invariably awarded at the rate of 8% and the parties undertook the calculations and agreed the following figures :

- Loss of earnings – interest from mid-point on past earnings (no interest on future earnings):

Pre-termination	£3,908.13
Post-termination	£2,612.76

- Injury to feelings: interest for the period to this hearing - £2,776.99
- PSLA: including interest from midpoint - £9,719.45

Grossing up

134. Following the hearing Mr Piddington wrote to the Tribunal and parties saying that there is an error in the grossing-up calculation undertaken during the hearing. It had been agreed at the hearing that the whole of the loss of earnings following dismissal may fall within the s.401 IT(E&P) Act 2003 tax exemption, that only pre-termination losses should be taxed up. The parties agree that at the hearing a wrong figure was used to gross-up the award.

135. The respondent accepts a wrong calculation was undertaken but contends that the whole of the loss of earnings, pre-and post-dismissal potentially fall within the s.401 IT(E&P)A as they are losses which are paid 'otherwise in connection' with loss of employment. We did not consider that this was a payment 'in connection' with the claimant's loss of employment – we concluded that what is required is a causal link between the fact of dismissal and financial losses thereafter. While. While the claim for pre-termination losses is made following dismissal, it is not a payment made in connection to or because of dismissal; it is a claim for pre-termination losses. We accepted the claimant's revised calculation as correct

136. Because the claimant is working, she has used up her tax personal allowances in this tax year. The parties now agree that the sum to be grossed up is the post-dismissal earnings plus interest - £32,054.68.

Available income at 29% tax rate:	$£28,552.93 / 0.8 =$	£35,691.17
Balance at 40% rate:	$£3,501.75 / 0.6 =$	£5,836.25
Total post-loss of earnings		£41,527.42

TOTAL AWARD

4. Total award for loss of earnings	£65,021.76	
5. Pain suffering and loss of amenity	£79,702.00	
6. Injury to feelings:	£12,777.00	
		£157,500.76.

EMPLOYMENT JUDGE EMERY

Dated: 19 February 2023

Judgment sent to the parties
On

20th March 2023

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For the staff of the Tribunal office

Notes

Public access to employment tribunal decisions

Judgments are published online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.