EMPLOYMENT TRIBUNALS

Claimant: **Ms Anca Lacatus**

Respondents: **(1) Barclays Execution Services Limited**
(2) James Kinghorn

Heard At: **East London Employment Tribunal**

Before: **Employment Judge Crosfill**
Members: **Ms G Forrest**
Dr L Rylah

On: **26 and 27 March 2024 and on 18 June 2024 (in chambers).**

Representation

Claimant: **Ms Emma Sole of Counsel (Direct Access)**

Respondent: **Mr Jamie Susskind of Counsel instructed by Dentons LLP**

REMEDY JUDGMENT

1. In respect of the First Respondent's failure to make reasonable adjustments for the Claimant by reducing her hours the Tribunal makes the following awards of compensation:

    1.1. **£7599.81** as damages for personal injury namely an exacerbation of the symptoms of an existing illness - endometriosis

    1.2. **£13,333.33** as damages for personal injury namely an exacerbation of an existing psychiatric injury - anxiety

    1.3. **£10.000** for injury to feelings

2. The Tribunal awards interest on the said sums of £7,599.81, £13,333.33 and £10,000 being a total of **£30,893.14** from 3 November 2017 to the date of this judgment at a rate of 8% being a total of **£17,309.00.**

3. In respect of the sex discrimination by the Second Respondent for which the First and Second Respondents are jointly and severally liable the Tribunal makes an award of **£1,000.00** for injury to feelings

4. The Tribunal awards interest on the said sum of £1,000.00 from 1 April 2018 to the date of this judgment at a rate of 8% being a total of **£526.90**

5. The First Respondent is ORDERED to pay the following sums to the Claimant:

   5.1. **£30,893.14 (paragraph 1)**

   5.2. **£17,309.00 (paragraph 2)**

   A total sum of **£48,202.14**

6. The First Respondent and Second Respondent are ORDERED to pay the following sums to the Claimant:

   6.1. **£1000 (paragraph 3)**

   6.2. **£526.90 (paragraph 4)**

   A total sum of **£1,526.90**

7. The following claims for loss and damage are dismissed on the basis that the Tribunal found that the Claimant's future prognosis from 15 January 2019 in respect of her mental and physical health (and hence her ability to work) would have been the same without any unlawful conduct:

   7.1. the claim for past loss of earnings; and

   7.2. the claim for future loss of earnings; and

   7.3. the claim for the cost of medical treatment; and

   7.4. the claim for gratuitous care.

8. The claim for aggravated damages fails.

9. The Tribunal concluded that there was no breach of the relevant ACAS code of practice and makes no uplift to any compensation.

10. The Tribunal makes a recommendation that upon reasonable request by the Claimant or any actual or prospective employer within a reasonable time the First Respondent provides a reference in its standard form which shall give the dates that the Claimant was engaged by the First Respondent either directly or as an agency worker and state the roles that were held and, if requested by the Claimant details of her salary and giving the reason for her dismissal as redundancy following a reorganisation.

11. The parties have liberty to apply for the matter to be restored to the Tribunal if it is contended that some or all the sums that we have ordered the Respondents to pay would fall to be taxed in the Claimant's hands either in the UK or in Romania.

REASONS

Introduction

1. After studying for a master's degree the Claimant obtained her first job in the financial services sector working for the First Respondent ('Barclays'). During her engagement she began to experience the effects of endometriosis and poor mental health.

2. There came a point where these impairments amounted to disabilities for the purpose of the Equality Act 2010. The team in which the Claimant worked as an Analyst ("ROST IB MO") had to complete its work at the end of the business day. The expectations placed on the Claimant, on occasions, required her to work late into the evening. She struggled with this but the situation persisted until January 2019 when she commenced a period of sick leave. Much later she was dismissed because of a decision to make redundancies in the ROST IB MO team. She did not actively participate in a search for alternative employment because she was unfit for work.

3. Due to financial constraints the Claimant returned home to Romania to live with her parents. She remains unfit to work and relies heavily on the care of her parents. She is not receiving an appropriate level of treatment for the conditions she has and sees no prospect of a return to her future career.

4. In our liability decision the Tribunal dismissed a very large number of complaints by the Claimant but accepted that: (1) Barclays had failed to ensure that the Claimant worked no longer than her contracted hours which we found would have been a reasonable adjustment in the light of her disabilities and; (2) that the Second Respondent had, on some occasions, referred to female employees as 'birds' which the Claimant found offensive and which we held amounted to direct sex discrimination.

5. A full explanation of the claims we upheld and those we rejected is found in our liability decision. That decision needs to be read alongside these reasons if our reasons are to be fully understood.

6. There has been a great deal of delay in dealing with the issue of remedy. This delay was caused in part by delay in sending out the liability judgment. The large number of claims contributed to that delay. The matter was listed for a remedy hearing much earlier. The Claimant indicated that, in addition to an injury to feelings award (anticipated by

the Respondent) she was making a claim for personal injury including a suggestion that there was a career loss of earnings caused by that injury.

7. Directions were made to ensure that issues of remedy could be dealt with fairly. When the Claimant set out the basis of her claim a dispute arose when the Claimant indicated that she would argue that the unlawful conduct found by the Tribunal prevented her from obtaining early medical treatment for endometriosis. The Respondents argued that that argument was precluded by findings of fact made in the liability judgment. The matter was listed before EJ Moor who agreed with the Respondents and struck out that basis of claim. The Claimant has appealed but at the time of writing has not satisfied the Employment Appeal Tribunal that the appeal was lodged in time.

8. There was further delay whilst the parties identified and instructed experts to comment on the issues raised by the Claimant's personal injury claim.

9. The position before us was stark. It is the Claimant's position that the unlawful treatment by Barclays had led her physical and mental health to decline to a point where she had lost all hope of renewing her career in financial services. She argued that the Respondents should be held entirely responsible for that decline in her health. As that decline had left her unable to work she said that she could recover loss of wages both past and into the future. She claimed other consequential losses such as the cost of care and medical treatment. The Claimant's most recent schedule of loss claimed over £1.3M before any considerations of taxation are taken into account. The Respondents' primary position was that the Claimant's health had declined as a consequence of a combination of life events and treatment held to be lawful by the tribunal. They suggested that at worst they were only responsible for a small proportion of any injury to the Claimant and any award needed to reflect that. The counter schedule of loss prepared on behalf of the Respondents suggested a total award of just over £16,000.

10. The parties had prepared a list of issues which set out the very broad questions we needed to address. Within these issues were other questions which were addressed by Counsel in their skeleton arguments and in their oral submissions before us. Below we deal with the broad issues together with the finer points developed in argument. We shall not endeavour to set out the submissions of the parties separately but deal with them below.

The hearing

11. The Claimant had been ordered to and had provided 'particulars of loss and causation'. Directions were made for the joint instruction of two experts. The parties first instructed Mr Hirsh, a Consultant Gynaecologist specializing in Endometriosis to give his opinion in

respect of a number of questions posed by the parties. Once Mr Hirsh had completed his report the parties instructed Dr Ornstein, a Consultant Psychiatrist, to give his opinion in respect of further questions agreed by the parties. We shall return to their evidence below.

12. Neither party had posed any additional questions of Dr Ornstein and neither party sought to cross examine him. The Claimant had sought to pose questions of Mr Hirsh but, because of some confusion about whether the questions needed to be put through the Respondents' solicitors, they were not answered. The Claimant asked for an order that Mr Hirsh gave evidence which was granted. He attended and gave oral evidence on the first day of the hearing. We express our gratitude to him for the assistance he gave to the parties and the tribunal.

13. The Claimant had wanted to give evidence from Romania. She had done so for the liability hearing at a point when it had not been recognised that taking evidence from abroad without the consent of the foreign state might put the United Kingdom in breach of its international obligations. Romania does not permit its citizens to give evidence abroad. As a consequence, and at great inconvenience to herself, the Claimant travelled to the UK. To assist the Claimant she was permitted to attend the hearing and give evidence by CVP. The Claimant had indicated that she needed breaks and may have emergencies she needed to deal with. We were able to accommodate these adjustments without any difficulty.

14. The parties had agreed a bundle of documents that ran to 738 pages. The Claimant had prepared a further supplementary bundle. In addition, the Claimant had identified a paper dealing with the causes of Endometriosis and Ms Sole was able to question Mr Hirsh on the contents of that paper.

15. The Claimant had prepared a statement which dealt with the issues raised by her particulars of loss and causation. Mr Susskind was able to ask her questions about that statement.

16. On the second day of the hearing we invited submissions from the parties. Both Counsel had prepared written skeleton arguments. We were provided with a bundle running to some 410 pages of authorities which included 18 law reports together with extracts from textbooks and other guidance. Counsel made oral submissions and we were able to ask them to explain their respective positions. Unfortunately, that left insufficient time for our deliberations, and we reserved our decision. We had hoped to meet in chambers in April, but the Employment Judge was unavailable due to the ill health of a close relative. We finally reconvened on 18 June 2024 when we were able to reach a decision.

Our approach to the expert evidence

17. The Tribunal had already decided that it was necessary to permit the

parties to adduce expert evidence. Having regard to the principles set out in ***Kennedy v Cordia (Services) LLP*** **2016 ICR 325, SC** we acknowledged that we would be unable to form a sound judgment as to the diagnosis, prognosis and causes of the Claimant's ill health without the assistance of witnesses possessing special knowledge or experience in those areas. We were satisfied that the experts instructed had sufficient knowledge to render their opinion of value to the Tribunal.

18. In his submissions to the Tribunal Mr Susskind said that we should take care not to regard the evidence of an expert as usurping our role as the ultimate arbitrators of fact and law. We agree. Those submissions are supported by the judgment of Lord Hodge in ***TUI UK Limited v Griffiths*** **[2023] UKSC 48** see para 36:

'It is trite law that the role of an expert is to assist the court in relation to matters of scientific, technical or other specialised knowledge which are outside the judge's expertise by giving evidence of fact or opinion; but the expert must not usurp the functions of the judge as the ultimate decision-maker on matters that are central to the outcome of the case. Thus, as a general rule, the judge has the task of assessing the evidence of an expert for its adequacy and persuasiveness. But it is trite law that English law operates an adversarial system, and the parties frame the issues for the judge to decide in their pleadings and their conduct in the trial. It is also trite law that, in that context, it is an important part of a judge's role to make sure that the proceedings are fair.'

19. ***TUI UK Limited v Griffiths*** provides authority for the proposition that it would ordinarily be unfair of a court to accept criticism of the reasoning, or conclusions drawn by an expert unless the expert was given a reasonable opportunity to answer those criticisms. Exceptions to that general rule are identified by Lord Hodge at paragraphs 61 to 69. It follows that where a tribunal departs from the opinions expressed by an uncontroverted expert it is incumbent on the tribunal to explain why it has done so and how it has ensured the fairness of the proceedings.

20. An issue which we return to below is the approach that we need to take where there are gaps in the expert evidence (as opposed to gaps in the reasoning). An expert's report might be accepted in full and yet not include an opinion on some matter that the Tribunal ultimately determines is a matter that a party needs to prove. Where a party identifies and relies upon a gap in the evidence fairness demands that the other party is on notice of that and has the opportunity to seek a postponement to fill that gap. If that opportunity is not sought then the Tribunal will need to do its best with the expert evidence that has been placed before it.

The law to be applied – causation and apportionment

21. The power(and duty) to provide a remedy for any breach of the Equality Act 2010 brought before an employment Tribunal is found in Section 124 of that act and says:

124 Remedies: general

(1)This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2)The tribunal may—

(a)make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b)order the respondent to pay compensation to the complainant;

(c)make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate—

(4)Subsection (5) applies if the tribunal—

(a)finds that a contravention is established by virtue of section 19 or 19A, but

(b)is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

(6) 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 sheriff under section 119.

(7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendationF5..., the tribunal may—

(a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;

(b) if no such order was made, make one.

22. ***Edward v Tavistock and Portman NHS Foundation Trust*** **[2023] EAT 33, [2023] IRLR 463** at paragraphs 18 to 26. Compensation is to be awarded for losses that flow directly and naturally from the tort. The Employment Tribunal should seek to ensure that as best as money can do it, the claimant is put into the position she would have been in but for

the unlawful conduct of the respondent.

23. Compensation for unlawful conduct contrary to the Equality Act 2010 may include damages for personal injury - ***Sheriff v Klyne Tugs (Lowestoft) Ltd*** **1999 ICR 1170, CA**.

24. Where a tortfeasor injures a person they cannot rely upon the fact that the person had a predisposition to injury to escape liability ('the eggshell skull rule') ***Owens v Liverpool Corp*** **[1939] 1KB 394**. However, a predisposition to injury needs to be distinguished from a pre-existing injury.

25. Guidance (which was strictly not binding but was endorsed by the Supreme Court) was given about the proper approach to liability for psychiatric injury in ***Sutherland v Hatton*** **[2002] ICR 613** by Hale LJ (as she was). The material propositions for the purpose of this case are summarised in paragraph 43. These are:

'(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm (para 35)

(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (paras 36 and 39).

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event (para 42)'

26. In ***Dickins v O2 plc*** **2009 IRLR 58, CA** in remarks which were not part of the binding reasons of the court Smith LJ and Sedley LJ expressed some disagreement with the suggestion made by Hale LJ that there were some instances of psychiatric harm that would be divisible. In ***Thaine v London School of Economics*** **[2010] ICR 1422** the EAT followed the guidance given by Hale LJ and reached a conclusion that psychiatric injury with a number of causes was susceptible to apportionment. The issue has been resolved (for our purposes) by the Court of Appeal in ***BAE Systems (Operations) Ltd v Marion*** **Konczak [2017] EWCA Civ 1188** the following propositions emerge from that case:

    26.1. An injury is to be regarded as indivisible where there is simply no rational basis for an objective apportionment of causative responsibility [para 56]; and

    26.2. The fact that an employee has a pre-existing injury which has been made worse by a breach of duty will often provide a rational basis for an apportionment [see para 58 and the example given in para 72]

26.3. That psychiatric harm does not have to be regarded as indivisible (Hatton preferred over Dickson) [paragraphs 70 and 92]

26.4. And in identifying the proper approach per Underhill LJ at Paragraph 71:

'What is therefore required in any case of this character is 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's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, 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.'

26.5. On the same point per Irwin LJ at paragraph 92:

'As a matter of principle, and supporting the fundamental approach that compensation should never become windfall, where an injury is divisible, even if on a rough and ready approach to the division, recompense must be limited to the consequences of identified injury attributable to the tort in question'

26.6. The question of any predisposition to injury even it should be disregarded at the stage of applying Hatton proposition 15 may still justify a discount to any compensation when applying Hatton Proposition 16 [see paragraph 72] per Underhill LJ. And at paragraph 92 per Irwin LJ:

'I further support the proposition that it will often be appropriate to look closely, particularly in a case where psychiatric injury proves indivisible, to establish whether the pre-existing state may not nevertheless demonstrate a high degree of vulnerability to, and the probability of, future injury: if not today, then tomorrow.

93. In my view, the problem exposed here, properly analysed, is not so much a problem of law as a problem of medicine or science. The territory between the non-pathological but sensitised and vulnerable individual and the person with a defined pathology constitutes highly debatable land. It should be closely and carefully mapped by the relevant experts, and it is imperative that they should bring to bear as much clinical and diagnostic precision as possible, paying close attention to one or both of the internationally recognised psychiatric diagnostic systems. In particular, it is necessary to consider whether a less serious but nevertheless established and defined disorder may not have been achieved before progression to the diagnostic end-state. In

addition, it should be routine for the experts to assess the level of risk of crossing the borderland between non-pathology and pathology through some other stimulus than the tortious act or omission. It will be recognised that exercise is often difficult and uncertain, but it will often be possible to give such advice within reasonable parameters of time and to the level of probability. Such an exercise is necessary in order to address proposition 16 in Hatton.'

The key disputes and our approach in this decision

27. The advocates were in broad agreement as to the legal principles set out above but were diametrically opposed when it came to the application of those principles to the facts of this case.

28. There was no material dispute about the tragic circumstances that the Claimant finds herself in today. She has returned to Romania and lives with her parents. Her endometriosis and psychiatric illnesses have been broadly untreated (or at least the sort of treatments proposed by Mr Hirsh and Dr Ornstein have not been made available). The Claimant explains that she has no access to any state treatment other than emergencies and cannot afford private treatment. She is unable to work and cannot see any way to resume her career.

29. The Claimant's position, reflected in her schedule of loss, is that Barclays is responsible for the entirety of any pain suffering and loss of amenity from the point when the duty to make adjustments arose. She claims a loss of wages from the point that her sick pay expired and claims what is essentially financial compensation for the loss of her career. In addition, she claims the cost of treatment and care.

30. A point taken by the Claimant and duly pursued on her instructions by Ms Sole was a suggestion that Barclay's breach of duty caused stress which in turn caused the physical progression of the endometriosis. An alternative position was also advanced that the unlawful stress meant that the Claimant had a heightened experience of the symptoms of endometriosis.

31. The Claimant's main argument in support of her stance that Barclays are responsible for the circumstances she finds herself in today is that the injuries that she has suffered are indivisible both as to degree and as to duration. Ms Sole accepted that Barclays could not be held legally responsible for the Claimant's health before its breach of duty. She said that the Claimant might have been unwell but, in comparison to her present circumstances, she was able to work. She argued that the Barclays had to compensate the Claimant in full to redress the dire circumstances that she finds herself in.

32. Mr Susskind argued that the tribunal was obliged to apportion any damages. His most important points can be summarised as follows:

32.1. That the Respondent could not be liable for the Claimant's pre-existing injuries/health;

32.2. That the part played in any breach of duty in any aggravation of the Claimant's pre-existing injuries in comparison to the large number non tortious causes was so small that its contribution was not material or, if it was, it was minimal. Even then:

32.3. the injuries were divisible and the contribution to harm minimal; and

32.4. that the Barclays could not be responsible for any injury or loss once the Claimant was no longer exposed to its' breach of duty.

33. We shall deal with these broad issues of principle before dealing with the issue of quantification of loss. We have dealt with the injuries relied upon by the Claimant separately although we acknowledge that the evidence shows that the psychiatric injury is aggravated by the endometriosis (or any aggravation of the symptoms of that disease) and vice versa.

Has the Claimant shown that the unlawful conduct was a material cause of any physical progression of her endometriosis?

34. The Claimant's case is that the excess hours that she was required to work caused her to suffer from stress (or increase her levels of stress) and that this had the effect of accelerating the physical progression of her endometriosis which has in turn affected her mental health. She says that through his route Barclays should be liable to compensate her for the entirety of the present state of her health.

35. Barclays' position is that it was not open to the Tribunal to conclude that any stress associated with the excess hours worked by the Claimant had any material effect on her physical condition.

36. We need to make it clear that in this section of our reasons we are not dealing with the question of whether the excess stress caused by Barclays' breach of duty caused the Claimant to have a heightened response to her physical illness. The question here is whether that physical illness was accelerated by the excess stress.

37. It is necessary for us to evaluate the evidence before us in order to decide that question. There were three key sources of evidence that shed some light on that question. There was the evidence of the Claimant herself together with our findings in the liability decision based upon her evidence and the contemporaneous medical records. There was the evidence of Mr Hirsh who was asked for his expert opinion on this question. Finally, the Claimant provided the Tribunal with a paper entitled *'Is Stress a Cause or Consequence of Endometriosis*' written by Reis, Coutinho, Vannuccini, Luisi and Petraglia and published in 2019

('the Reis Paper').

38. As we have set out in our liability decision we accepted that the Claimant's pre-existing anxiety and depression became more acute during the period where we have found that the Barclays owed her a duty to ensure that she did not work in excess of her contracted hours. The evidence that the Claimant gave in her statement for this remedy hearing was entirely consistent with the conclusions that we reached in this respect. We deal with this in more detail elsewhere but here it is sufficient to say that the Claimant was exposed to and experienced a greater level of stress as a consequence of the Barclays' failure to make a reasonable adjustment to her hours. In our liability decision we record that the Claimant experienced increasing symptoms of endometriosis from the point where the duty to make adjustments arose up to the point when she was no longer able to work. That corresponds with the period when the Barclays was in breach of its duty.

39. The Claimant was able to say that during the period that Barclays was in breach of its duty her experience of the symptoms of endometriosis increased. However, whatever her beliefs and feelings may be about any correlation between the stress she was exposed to and the physical manifestation of endometriosis she does not profess to have any medical expertise that would allow the Tribunal to put any weight on her beliefs. The fact that there was some correlation between the putative cause and effect does require the Tribunal to take that into account. Having accepted that there was some correlation between the Claimant's experience of her physical symptoms and the stress she was experiencing we needed to draw on the expert evidence in order to address the question of whether the Claimant can show that the additional stress caused her physical disease to progress.

40. Mr Hirsh dealt with this matter in his report and in particular when responding to the Specific Question 10. He refers to the Reis paper and states his opinion. He said: *'There is no human data, that I am aware of, suggesting that stressful environments exacerbate the severity of endometriosis as a disease'*.

41. Ms Sole had asked us to read the Reis paper in advance of the evidence and we had done so. She took Mr Hirsh to various passages in that paper. Mr Hirsh agreed with Ms Sole that there was some evidence that there was a correlation between stress and physical progression of endometriosis in rats and mice. He explained that it was those passages in the Reis paper that had led him to restrict his opinion to 'human data'. He remained resolute in his opinion that there was no data that suggested that stress exacerbated the severity of the physical disease.

42. We read the Reis paper with some care. The paper is not based on any original study by the authors but is a literature review. It deals with two questions pertinent in this case. The first is whether endometriosis causes stress (and potentially consequential injuries to mental health).

We deal with that part of the paper elsewhere. The second question that the authors address is whether stress is a cause of the physical symptoms. A number of studies are reviewed. Two human studies are referred to. The first of these showed a possible link between childhood abuse and endometriosis. The other examined the possibility of a link between low BMI in childhood and the emergence or severity of endometriosis. Some correlation was found but the authors of the Reis paper say that this link remains unexplained. It is further noted by the authors that other inflammatory or auto immune diseases had been linked to high levels of perceived stress.

43. The conclusions drawn by the authors of the Reis are that chronic stress 'may' represent a primary cause of endometriosis. They go on to say *'However, many questions remain to be addressed, in order to clarify the causal link between endometriosis and stress and to assess whether stress reducing therapies are effective to mitigate symptoms'*.

44. Mr Hirsh did not dissent from the opinions expressed in the Reis paper. Indeed, he relied upon them. His evidence was not that stress as a cause of the physical disease could be ruled out entirely as a possibility but only that the state of medical knowledge is inadequate to demonstrate that causative link.

45. Taking into account all the evidence we had before us; we find that on the balance of probabilities the Claimant has not shown that the stress caused by Barclays' breach of duty had any effect on the progression of her physical symptoms. The evidence of Mr Hirsh and the opinions expressed in the Reis paper are compelling and sufficient in our view to outweigh the experience of the Claimant. This is s particularly where, as here, that experience can be explained by other mechanisms discussed below that are not dependent on the suggestion that stress exacerbates the physical disease.

46. We have therefore reached the conclusion that the Claimant has failed to establish that the unlawful conduct we have found was a material cause of any acceleration of any physical progression of the endometriosis. This is a conclusion we have reached on the basis of the medical evidence available to us. It may be that in future medical science recognises the link that the Claimant contends for but the test we must apply to this question is whether she has shown that it is more likely than not that the unlawful conduct made a material contribution to the progression of her endometriosis. On the present state of medical knowledge she has not done so.

Was the unlawful conduct a material cause of the Claimant having a heightened experience of the symptoms of endometriosis?

47. This issue was quite properly conceded by Mr Susskind in his written submissions in respect of the period whilst the Claimant was exposed to being required to work excessive hours (see paragraph 4.3 and 4.9).

We believe that that concession was rightly made for the reasons below.

48. Mr Hirsh explained in his experts report that it was important to note that the severity of the endometriosis would not always correlate with the symptoms experienced. A person with severe endometriosis may experience few symptoms whereas a person with mild endometriosis might suffer badly. Drawing on a paper entitled *'Stressful experiences impact clinical symptoms in people with endometriosis'* by Demetriou and Others and published in 2022, Mr Hirsh gave his opinion that stress was a known environmental trigger for the deterioration in endometriosis -related pain symptoms.

49. Mr Hirsh was asked (SPQ7) whether the Claimant's endometriosis was exacerbated or accelerated by the fact that she worked in excess of the 35 hours per week that the tribunal has held would have been a reasonable adjustment. In his response to that question Mr Hirsh notes that there were multiple factors that resulted in a stressful environment in the workplace but ultimately responds that it was *'his opinion that the long hours were a contributory factor in workplace stress which is likely to exacerbated the symptoms [the claimant] experienced'*. He goes on to put that in plain language and say that her symptoms were made worse by the failure to reduce her hours to 35 hours per week.

50. In addition to Mr Hirsh's expert evidence the tribunal had the evidence of the Claimant herself both during the liability hearing and at the remedy hearing. Her evidence is supported to some extent by text messages. The Claimant had complained in text messages to her father about the long hours she was working and complained of the stress. She had raised the issues of working long hours in the workplace and had protested about being expected to start work at 9am after a late finish. Our findings in our liability decision included a conclusion that the Claimant found working in excess of 35 hours difficult due to the stress, anxiety, pain and discomfort she was experiencing. We find that the Claimant's evidence is consistent with Mr Hirsh's opinion. We are satisfied that working in excess of 35 hours per week was a material cause in the Claimant experiencing an exacerbation of the symptoms of endometriosis. As carefully noted by Mr Hirsh there were other causes, and we shall return to that below.

Was Barclay's failure to make a reasonable adjustment a material cause of any exacerbation to the Generalised Anxiety Disorder that the Claimant has?

51. Ms Sole on behalf of the Claimant accepted that this was not a case where the Claimant could properly argue that the unlawful conduct of the Respondent caused the entirety of the personal injury to the Claimant's mental health. The breach of duty only arose when the Claimant's mental health amounted to an impairment that satisfied the definition of disability. It was therefore accepted by Ms Sole that we

could only compensate the Claimant for losses attributable to any exacerbation of that pre-existing condition (see her written submissions paragraph 23). A claim in the civil courts may have allowed the Claimant greater scope for recovery but would have faced the difficulties of showing a breach of some duty and more importantly that a personal injury was foreseeable.

52. It was Mr Susskind's primary position in his written submissions that the unlawful conduct did not cause the onset of the psychiatric injury (see paragraph 4.16). That point was conceded. He then went further and suggested that the unlawful conduct was not a material cause of any further psychiatric harm (see paragraph 4.20). The thrust of his written submissions was essentially that there were so many other causes of the exacerbation to any psychiatric injury that the unlawful conduct established cannot be said to be a 'material' cause.

53. In his oral submissions Mr Susskind did not depart from his written submissions but he spent the greater part of those submissions in seeking to persuade the tribunal that if we found that the unlawful conduct was a material cause of the exacerbation of the psychiatric injury we should conclude that the unlawful conduct was a cause of only a very small proportion of any injury. We shall deal with that second string to Mr Susskind's bow below.

54. The principle that a claimant need only establish that a breach of duty was a material cause of any injury is found at paragraph 14 of Hale LJ's principles in ***Sutherland v Hatton*** and derives from, in particular, ***Bonnington Castings Ltd v Wardlaw*** **[1956] AC 613**.Whilst that case concerned the onset of Pneumoconiosis and not its exacerbation we do not understand either party before us to dispute that the same approach should apply where a pre-existing injury becomes worse. In Lord Reid explained what is ment by 'material' he said:

'What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material'.

55. Dr Ornstein was asked to comment upon the issue of causation, and we have summarised passages of his report above. In particular, at paragraph 200 he opines that the absence of 'this support' had a material contribution to the Claimant's anxiety. When read in the context of the section headed 'Causation' which commences with the question identified by the parties at paragraph 196 it is clear that 'this support' is a reference to working hours. Barclays did not seek to challenge this conclusion. As we have indicated above we would need some good reason to depart from uncontroverted expert evidence. Whilst we have identified some parts of Dr Ornstein's report which stray outside his expertise and others which are based on a misunderstanding of the

findings of the tribunal (time off for medical appointments) neither of these matters undermine his opinion on this particular point.

56. Dr Ornstein's opinion is consistent with our own findings. In our liability decision when dealing with the issue of 'substantial disadvantage we have found that:

(575)…We accept that, particularly as her illness progressed the Claimant became progressively more exhausted until she was ultimately signed of sick in January 2019. We would accept that working as hard as the team did was tough on everybody but doing so whilst coping with endometriosis and stress and anxiety would make it very much harder. We shall not repeat at length all of our findings above but taken together we are satisfied that the Claimant has established that being required to work for the long hours did place her at a substantial disadvantage compared to others without a disability. We find that she satisfied this condition by no later than 1 October 2017 when she first met the statutory definition of disability by reason of her then undiagnosed endometriosis.

(576) The nature of the disadvantage suffered by the Claimant was principally that she became fatigued. However, her text messages to her father show that this added to her anxiety. Her fatigue together with her anxiety contributed to her being unwilling or unable to socialise or, at times, go out shopping.

57. Whilst our findings were made without the benefit of expert evidence and were aimed at examining whether the Claimant was 'disadvantaged' as opposed to her mental health being made worse in any clinical sense our conclusions are entirely consistent with the opinion of Dr Ornstein.

58. We do not need to draw on the Claimant's witness evidence prepared for this hearing in order for us to say that we are satisfied that the failure to make the adjustments that we have held were reasonable were a more than de-minimus and therefor material cause of the Claimant's pre-existing anxiety becoming worse. The issue of just how much worse and whether the exacerbation is divisible is dealt with elsewhere. It is apparent from our findings elsewhere that we regard the extent of the exacerbation caused by the unlawful conduct to substantially exceed any threshold of 'material' at all times during which the Claimant was exposed to the unlawful conduct.

Did the Respondent's failure to make adjustments cease to be a material cause of any exacerbation the Claimant's experience of her symptoms of endometriosis?

59. We are dealing here with what is essentially a temporal question. Over what period should Barclays be held responsible for all or some part of the Claimant's injuries. This is the exercise required in part by ***Hatton*** proposition 16 (at least in respect of the issue of if liability for the injuries should cease). We deal with this point (and the same issue in respect of

the Claimant's mental health) out of turn (if following a linear path through ***Hatton***) because it seems to us that it is artificial to apportion an injury which we are certain would have occurred at some point in time as opposed to circumstances where we are assessing a chance that it would do so. We return to that below.

60. As we have noted above Ms Sole broadly accepted that we were dealing with a case of an exacerbated illness/injury. Her position was that the pre-existing condition was at a low base in comparison with the present day. We return to issues of quantification below. Here we simply record a conclusion that it must be correct that the Respondent is not liable to compensate the Claimant for the fact that she fell ill in the first place.

61. We have accepted in our liability decision that the failure to moderate the hours that the Claimant was expected to work caused her experience of her physical symptoms to be heightened (we return to this below). We need to make a finding as to whether that unlawful conduct continued to be a material cause of the symptoms experienced by the Claimant after the Claimant stopped working those excessive hours.

62. There will clearly be some cases where an injury is exacerbated by unlawful conduct and the effects of that unlawfully conduct may continue to have an effect for years if not permanently. There will be other cases where, once the unlawful conduct ceases there comes a point where it is no longer a material cause of any symptoms because the symptoms would have been the same even if there had been no unlawful conduct at all. This is the exercise required under ***Hatton*** proposition 16. It is an issue where the Tribunal will need to look to the expert evidence together with the evidence of the Claimant in order to reach any conclusion.

63. Mr Hirsh deals with the question of whether the unlawful conduct of the Respondent had a long-term effect on the Claimant when responding to SPQ 9 and SPQ 10.

64. In his response to SPQ 10 Mr Hirsh says: '*It is likely that the hours worked were a contributor to the pain experienced during the employment at Barclays however I do not believe that this can be extrapolated to long-term prognosis once the Claimant had been removed from the stressful environment. Based on the testimonial of AL, and on the balance of probabilities, an adjustment in working hours is unlikely to have resulted in a significant alteration in her long-term prognosis due to the multifactorial nature of the stress experienced and pain'.* In his response to SPQ12 he repeats his opinion that there is insufficient information for him to give an opinion on the extent to which the hours worked were responsible for the prognosis.

65. Mr Hirsh acknowledged the possibility of chronic pain progressing from being caused by a peripheral stimulus to becoming centralised. He explained that in that situation there would be a continued sensation of

pain irrespective of a stimulus. He used the symptoms experienced by amputees, 'phantom limb syndrome', to illustrate this to the tribunal. In his report he referred to the physical effect of endometriosis as the peripheral stimulus, but we understood him to say in his oral evidence that the heightened symptoms, of which the unlawful conduct was a material cause, might have become centralised. In his response to SPQ9 he concludes that there was insufficient information for him to conclude that the Claimant's employment with Barclays had altered the long-term progress of the Claimant's endometriosis and her symptoms.

66. In his response to SPQ10 Mr Hirsh returns to the same point. He says that: *'Patients with endometriosis and co-existing mental health conditions, including catastrophising, have a lower likelihood of pain improvement. It is likely that the hours worked were a contributor to the pain experienced during the employment at Barclays however I do not believe this can be extrapolated to long-term prognosis once the Claimant has been removed from the stressful environment. Based on the testimonial of AL, and on the balance of probabilities, an adjustment to the working hours is unlikely to have resulted in a significant alteration of her long-term prognosis due to the multifactorial nature of the stress experienced and pain. The opinion of a Pain Specialist of Psychiatrist may be of value'.*

67. Whilst Ms Sole asked Mr Hirsh questions about this part of his report he did not depart in any material way from the conclusions he had set out. In short he maintained his position that he was unable to say that the unlawful conduct continued to have any material effect on the Claimant's symptoms once she was removed from the stimulus (the excessive hours). The thrust of his evidence was that, within his area of expertise, he was of the opinion that ordinarily he would have expected that, exacerbated symptoms due to a stimulus, would no longer be attributable to that stimulus once it was removed.

68. We did not have the benefit of any report from a chronic pain specialist. We did have the report of Dr Ornstein. We are at this stage asking whether the Claimant's experience of her symptoms of endometriosis had become centralised, as Mr Hirsh accepted was a possibility, and therefore continued to be attributable in a material sense to the unlawful conduct. We are not examining here whether any exacerbation to the Claimant's mental health continued to be affected by the unlawful conduct although the two questions are, we accept, interrelated.

69. A difficulty, which we identified during submissions, is that Dr Ornstein does not take up the possibility raised by Mr Hirsh that the Claimant's experience of her physical symptoms has become centralised or at least he does not expressly deal with the question of whether any ongoing symptoms of endometriosis experienced by the Claimant were materially caused by the unlawful conduct through that mechanism.

70. What Dr Ornstein does say is that by the time he examined the Claimant he was able to diagnose two recognised mental health conditions, Generalised Anxiety Disorder and Bodily Distress Disorder. He describes the symptoms of Bodily Distress Disorder in paragraph 168 of his report as including *'the presence of bodily symptoms that are distressing to the individual and excessive attention directed towards the symptoms, the degree of attention is clearly excessive in relation to its nature and progression…Bodily symptoms are persistent, being present on most days at least for several months. Typically bodily distress disorder involves multiple bodily symptoms that may vary over time. Occasionally there is a single symptom – usually pain of fatigue – that is associated with the other features of the disorder…'*

71. What we take from the diagnosis of Bodily Distress Disorder is that the Claimant has had an adverse reaction to the bodily symptoms she has experienced. What Dr Ornstein does not tell us is the extent if at all to which that condition was caused by the unlawful treatment. What we have taken from his description is that this disorder is a response to the physical disease rather than a response to any other stimulus. The thrust of the remainder of Dr Ornstein's report is consistent with this view as his passages dealing with causation deal only with the condition of anxiety.

72. At paragraph 197 Dr Ornstein says that had the Claimant felt *'well supported at work in general'* this would have lessened the anxiety. We would readily accept that proposition, but it is a very general statement and of little assistance in dealing with the correct question identified at paragraph 196 which is whether the Claimant's existing condition was made worse by the hours she was required to work. Paragraph 198 strays into a non-medical question or whether it would have been reasonable to adjust the hours of work – one which we as a tribunal have answered in favour of the Claimant.

73. Paragraph 199 is more useful as Dr Ornstein says that it would have had a positive effect on the Claimant's mental health had the working hours been reduced. That opinion is consistent with our own findings in the liability decision.

74. At paragraph 201 Dr Ornstein expresses a view that had the Claimant been given extended (paid) sick leave her anxiety would have been reduced. We would not disagree, but the Claimant did not advance any claim that the failure to extend the period during which she received full pay whilst off sick was contrary to the Equality Act 2010.

75. At paragraph 202 Dr Ornstein repeats a statement made by the Claimant that the pressure of working hours reduced her capacity to care for herself and seek appropriate medical help for her disabilities. He appears to have accepted that statement in full at paragraph 204. The Claimant had sought to argue that the effect of the Respondents conduct prevented her from accessing medical help. The question of

whether that argument was sustainable was dealt with by EJ Moor who, by a judgment dated 26 October 2022 held that it was not and struck out that allegation. That decision was based on the findings of fact that this tribunal made during the liability decision. EJ Moor held that:

'in the light of these binding findings the Claimant has absolutely no prospect of persuading the Tribunal that she was prevented from seeking medical advice and treatment sooner because of the failure to adjust her hours. This is because, even while working the longer hours, the Tribunal has found that the Respondent always accommodated medical appointments in the working day. Thus, the hours themselves did not prevent attendance at medical appointments. The flexibility it showed as to working at home is less relevant but supports this finding: in any day where there was a medical appointment the Claimant could arrange to work at home more easily to accommodate it. Similarly the finding that the Claimant was provided with the benefit of private medical insurance shows she could call on the help of private doctors in addition to her GP.'

76. This Tribunal cannot consider an argument that the Claimant was prevented from accessing medical help by reason of the unlawful conduct we are considering. That allegation has been struck out. We should say that as a tribunal had we been considering the matter for ourselves within this hearing we would have reached exactly the same conclusion as EJ Moor for exactly the same reasons although applying a lesser evidential test – the balance of probabilities.

77. We do not suggest that Dr Ornstein has based his opinion on incorrect facts where he says that the excessive hours reduced the capacity of the Claimant to care for herself in respect of issues of day to day living which he does at paragraph 202. However, insofar as he has accepted that the unlawful conduct interfered with the Claimant's ability to seek medical assistance he has reached a conclusion that conflicts with the findings of the tribunal and the judgment that such a factual argument had no prospects of success.

78. At paragraph 206 Dr Ornstein declines to express any opinion on the question of whether the physical health issues would have made continuing at work impossible and defers to the opinion of Mr Hirsh.

79. Dr Ornstein's opinion in relation to questions of causation appear to be restricted to the question of whether the excessive hours worked by the Claimant caused her to suffer from increased anxiety. He clearly concludes that those excessive hours were a material factor although he identifies other matters which at paragraph 200 he refers to as 'the absence of this support'. It is tolerably clear that at least an aspect of *'this support'* is the adjustment to the working hours.

80. Having reviewed those opinions we have concluded that Dr Ornstein does not deal with the question of whether the Claimant's experience of her physical symptoms has become centralised in the matter postulated by Mr Hirsh. We do not criticise Dr Ornstein for that. He was asked to comment upon causes of any exacerbation and acceleration of the Claimant's anxiety (see the letter of instruction Annex B Annex B paragraphs 10 and 11). He was not asked directly to comment on the question of whether any heightened experience of pain had become centralised and therefore continued even when removed from the stimulus of the excessive hours. That said he did have Mr Hirsh's opinion available to him.

81. We turn then to the evidence from the Claimant. She tells us that she experienced symptoms of pain and discomfort before during and after the period where we have found reasonable adjustments ought to have been made. Her evidence was that these got progressively worse. Without in any way seeking to diminish the lived experience of the Claimant we consider that the question of whether her experience of the heightened symptoms of her endometriosis continued to be attributable to working excessive hours after her exposure to that stimulus was removed is something upon which the Claimant is unqualified to comment.

82. Where we may be assisted by the Claimant's evidence is by looking at the evidence surrounding other potential causes of stress. We should explain why. Mr Hirsh (and the Claimant) has said that it is well established that stress can lead to a person with endometriosis experiencing a higher level of symptoms. We have accepted that. In assessing whether any source of stress and hence heightened symptoms continues to be a material cause of heightened symptoms when removed from the source of stress the existence or absence of other sources of stress may assist with that question of causation. If all sources of stress were removed but the heightened experience of symptoms continued than that may support a conclusion that the sources of stress have a continuing effect on the experience of symptoms (It might also support a conclusion that the experience of symptoms is entirely independent of stress). If on the other hand there are alternative causes of stress that continue after the unlawful cause of stress has been removed then it is possible that the heightened experience of symptoms is attributable to those other causes. The following paragraphs deal with our analysis of that issue.

83. We have identified in our decision on liability a number of significant events that could potentially at least be a significant cause of stress that post-dated the Claimant no longer being exposed to working excessive hours. It is not necessary in our view to give an exhaustive list, but we mention some of the most important below.

84. The Claimant had attended appointments with her NHS GP in December 2018 (see the liability decision paragraph 130). These

appointments confirmed a diagnosis of endometriosis first postulated in the summer of that year. The Claimant was unable to work from 15 January 2019. The initial diagnosis placed on the Med3 was stress. In January 2019 the Claimant consulted both her NHS GP and a private specialist about her endometriosis. On 15 February 2019 she received what was plainly shocking news. We have made findings about that at paragraph 159 of our liability decision but need to expand them here. The Claimant was seeing a consultant Mr Tsepov. On 9 February 2019 she met with him to discuss the results of an MRI scan. The Claimant was told that she had Stage IV endometriosis and that there was evidence both ovaries being tethered to the uterine wall and of deep rectal muscular infiltration.

85. In his letter Mr Tsepov said '*Given the extent of the disease and young age, there is a considerable chance that it is going to continue to progress and may start having more impact on the bowel and cause more pain and potentially lead to more bowel dysfunction if untreated.* The treatment he recommended was radical. He proposed the excision of the endometriosis from the Pouch of Douglas/recto-vaginal septum. That would involve the removal of a short section of bowel and risk the need for a temporary ileostomy for 3-4 months. It is clear that during the consultation the Claimant had raised her concerns about her future fertility. A further note of the consultation includes the information that the news had come as a shock to the Claimant and that she was anxious about making a decision. The note records that following the consultation the Claimant was very emotional and needed lots of reassurance. She was discharged when stable.

86. We find that the news given to the Claimant and the details of the proposed treatment were devastating for her. She was unsurprisingly anxious about her health but also about her future fertility. That conclusion is bolstered by the fact that when the Claimant visited her GP on 20 February 2019 she was provided with a further Med3 that gave a diagnosis of Anxiety/Endometriosis.

87. The Claimant continued to have consultations regarding her treatment in March. She decided against the radical treatment proposed by Mr Tsepov (a decision Mr Hirsh described as entirely understandable). She looked for a second opinion at another endometriosis clinic. On 28 July 2019 the Claimant had surgery to address her endometriosis. That surgery was performed by Professor Janice Rymer and was far less radical that that proposed by Mr Tsepov.

88. The Claimant was referred to a pain clinic and was seen by Professor Roman Cregg on 23 December 2019. He refers to her as suffering from chronic pain and proscribed medication including up to 100mg of Tramadol per day and a Lidocaine infusion combined with ketamine. His letter to the Claimant refers to a medical history of endometriosis. His report does not cast any light on whether any particular stimulus was a cause of the ongoing pain that the Claimant experienced.

89. We were provided with a letter to the Claimant's GP dated 23 January 2020 from Professor Rymer who had seen the Claimant on 19 January 2020 when she had been in a lot of pain and was unable to pass urine. In a further letter of 23 February 2020 Professor Rymer refers to the Claimant as having a chronic condition which gives her significant pain. Neither of those letters deal with the issue of whether a particular stimulus is causing pain, but it is quite clear that there were physical symptoms such as an inability to pass urine which would be painful regardless of any past stimulus or centralised pain.

90. The conclusions that we reach from the medical records during this period which spans the first year after the Claimant stopped work are that the fact that the Claimant had endometriosis was of itself a source of considerable stress for her. Her reaction to being informed of her diagnosis is documented. We find that her concerns about treatment and the threat to her fertility caused her considerable anxiety. The cycle of endometriosis causing stress and the stress causing women to experience the symptoms of endometriosis is reported in the Reiss paper. In plain English the more worried a person becomes the worse they feel.

91. There were other events that we find were stressful for the Claimant. On 22 March 2019 the Claimant was informed that she was at risk of being made redundant (see paragraph 189 of the liability judgment and the surrounding paragraphs). The Claimant's response which we have summarised at paragraph 190 included her concern that if she lost her job she would also lose her private health insurance. A threat of redundancy is often a stressful event but in the circumstances the Claimant found herself in we find that it caused her particular concern.

92. In our liability judgment we make findings that the Claimant felt that the scores she had been given in the redundancy selection exercise were wholly unfair. Those feelings were exacerbated when she learned that Ivet Draganova had obtained a higher score than her in the redundancy scoring exercise. We find that these matters were a further source of stress for the Claimant.

93. The Claimant's entitlement to company sick pay expired on 12 March 2019. The Claimant tells us, and we accept that this placed her under considerable financial pressure,

94. We have set out in our liability Judgment the fact that the Claimant brought a grievance in April 2019 and commenced the first of her claims in the present proceedings on 9 May 2019. Those complaints did include reference to working excessive hours.

95. Given that we have accepted, as the Claimant invited us to, that the symptoms of endometriosis can be exacerbated by stress we find that there were a series of events from early 2019 which caused the Claimant a very high level of stress.

96. We conclude that in those circumstances, it is not possible for us to simply infer that the stress caused by working excessive hours remained a material cause of any heightened symptoms of endometriosis once the Claimant was removed from that stimulus on the basis that there was no other cause. Unfortunately there were other significant causes of stress. In plain terms the Claimant's physical health coupled with the devastating diagnosis and the prospect of radical treatment would we find totally have eclipsed any residual stress that was a consequence of working long hours.

97. This lacuna in the evidence in respect of the possibility of centralised pain was raised both during the evidence and in submissions. Mr Hirsh was careful to point to the possibility of pain becoming centralised, but he was equally careful to say that whether or not that was the case it was out with his expertise. He maintained his stance, set out in his report, that on the basis of the facts he had considered, he could not say that the unlawful conduct had any continuing effect on the Claimant's experience of the symptoms of her endometriosis.

98. We were told that neither party had sought to ask any additional questions of Dr Ornstein. Mr Susskind's position was that it was not for the Respondents to make good any omission in the expert evidence. Ms Sole may not have been instructed at that time. Neither party suggested that an adjournment was necessary or proportionate.

99. We must do what we can with the evidence we have. We cannot identify any evidential basis for a conclusion that the stress caused by working excessive hours continued to have a material effect on the Claimant's experience of the symptoms of her endometriosis beyond 15 January 2019 the date that she stopped work. We have accepted Mr Hirsh's opinion that it is more likely than not that the Claimant would, by reason of the underlying disease, have experienced the same symptoms after 15 January 2019, had she not been exposed to working excessive hours prior to that date.

100. In undertaking the exercise required by proposition 16 of ***Hatton*** the conclusion we have reached is that in terms of her experience of the physical experience of endometriosis from 15 January 2019 onwards the Claimant was in the same position as she would have been had the Respondent acted lawfully. The progression of her physical symptoms and the knowledge that the Claimant had of these together with the other multifactorial issues contributing to the Claimant's experience of her endometriosis ment that at that stage the Claimant was no worse off than she would have been had the Respondent acted lawfully.

101. In ***Hatton*** the suggestion is that it will be the duty of a court or tribunal to evaluate the chance that the future prognosis of an injury might result in the same outcome had the tortious event not occurred. Here we are not dealing with the future, or at least not exclusively so. We have evidence of what had already happened. As such we can make a finding

as to the point at which we are able to say that the Claimant was no worse off than had the unlawful never occurred. We consider that given this we can make a finding about past events and are no longer able to speculate on the future. If we are wrong in our approach then our finding is that there from 15 January there was a 100% chance that the Claimant's experience of her physical health was no worse than it would have been had the unlawful conduct not occurred.

Did the unlawful conduct cease to be a material cause of any exacerbation to the Claimant's Anxiety and if so when?

102. We have accepted that the Claimant's pre-existing anxiety was made worse by working excessive hours. That conclusion does not necessarily mean that the unlawful conduct remains a material cause of the Claimant's ill health up to the date of the hearing and beyond. As in the case of the Claimant's experience of her symptoms of endometriosis, the Tribunal need to ask whether the unlawful cause remained operative or whether it was either or both superseded by other unfortunate but nevertheless lawful causes some of which we have identified above. Again the need to address this question is identified in ***Hatton*** principle 16.

103. Whilst we acknowledge that it would be wrong to regard the Claimant's endometriosis and her anxiety as completely independent we do need to consider the questions separately. We acknowledge the possibility that the Claimant's symptoms of anxiety might continue to be affected by the unlawful treatment despite the effect on her experience of the physical symptoms of endometriosis no longer being attributable to that cause.

104. The same question can be answered by considering the asking whether the prognosis of any disease was altered by the unlawful treatment and if so how. Dr Ornstein was asked to comment upon that question in the joint letter of instruction in particular at questions 10 and 11 of annex B.

105. In contrast to Mr Hirsh Dr Ornstein does not in his report indicate where passages of his report relate to the specific questions he was asked. That is unfortunate as it left the tribunal having to do its best to interpret the report for itself.

106. We have commented above on the fact that Dr Ornstein appears to have accepted that a consequence of the failure to reduce the Claimant's hours was that she did not have time to seek medical assistance. That is inconsistent with our findings. The Claimant was permitted time off in working hours for medical appointments. She did as a matter of fact make and attend medical appointments. The vast majority of the 'excessive hours' were a consequence of having to work in the evenings – a time when most medical advice would not have been available in any event. The Claimant was permitted to take annual leave. Insofar as

it is raised we would reject any suggestion that the Claimant's anxiety so clouded her judgment that she was unable or felt unable to avail herself of medical assistance. Our reasons in this respect mirror those of EJ Moor who struck out this allegation. We did find that the Claimant ultimately began to neglect her personal care – a point made by Dr Ornstein at paragraph 202.

107. We had no difficult discerning Dr Ornstein's opinion that the unlawful hours made a material contribution to the Claimant's anxiety. What was far less clear was his opinion on the effect of that on the Claimant's prognosis. Dr Ornstein does set out his opinions on what treatment the Claimant would benefit from and the likely effect of such treatment (see paragraphs 177 – 194). Unfortunately, those paragraphs do not directly address the question of the extent to which the unlawful conduct had any continuing effect on her mental health.

108. One reading of paragraph 200 is that it is Dr Ornstein's opinion that, as the unlawful treatment was a material cause of the Claimant being too ill to work, it follows that this remained and remains an operative cause. If that was his conclusion it would have been useful if it had been more clearly expressed. This is a complex case. There were numerous factors which caused the Claimant to become unable to work. At the point that the Claimant stopped working she learned of the extent of the physical damage to her body and was faced with very difficult choices about her treatment. Shortly after he was faced with a threat of redundancy, and she was upset to learn of the scores she was allocated in the redundancy scoring exercise. The Tribunal need to consider what the ongoing effect of the unlawful treatment was – would the Claimant have been any better had the unlawful treatment not occurred? We consider that Dr Ornstein's evidence does not provide as much assistance as we would have hoped for in looking at these matters. In the light of our conclusions below this has not had any bearing on the outcome.

109. At paragraph 206 of his report Dr Ornstein says that in addressing the question of whether the Claimant's physical health would have resulted in her being unable to work he defers to the opinion of Mr Hirsh. He says that had the Claimant been prevented from working by her physical health then this would on the balance of probabilities have led her to become as *'well'* as she became. We understand Dr Ornstein to be using 'well' as a descriptor of the Claimant's health rather than using unwell because of the negative connotations that word has. However, he uses the word 'well' to describe the Claimant's current condition.

110. Dr Ornstein appears to be in full agreement with Dr Hirsh that the presence of endometriosis causes stress and anxiety which in turn affects the experience of endometriosis – see his paragraph 182 in particular. It follows that when looking at the question of whether the endometriosis caused the Claimant to have to stop working the Tribunal needs to consider both the physical and mental effects of the disease.

111. The Claimant describes her health in the weeks leading up to her being unable to work in her witness statement prepared for the remedy hearing. We did not consider those parts of her statement to be challenged. She describes the onset of faecal urgency then incontinence in December 2018. She describes collapsing at home through blood loss on 24 December 2018. We have had to the fact that the reason given by the Claimant's GP for signing her off work initially is 'anxiety'.

112. The Tribunal was provided with two Occupational Health reports. The first is dated 14 February 2019. The Occupational Health Advisor gives her opinion that the Claimant is unfit to work with *'both physical and psychological symptoms'*. She went on to say that it was difficult to advise on a likely return to work. The next report is dated 9 April 2019. In that report the Occupational Health Advisor says that the Claimant was unfit to return to work due to the 'significant symptoms'. On our reading of the report that is a reference to the physical symptoms of endometriosis. In a section headed 'Key medical Information' the Claimant gave a description of her physical symptoms. The report records her as experiencing *'severe pain most days however she advised that she can have a good few days within the month and at such times she will prepare by getting in extra food shopping etc as she is unable to do this when the pain increases. She often requires assistance from a close friend . She mostly spends her time in the house as she is in too much discomfort whether sitting, standing, walking. She often has to lie flat for relief of the pain'.*

113. The conclusion we have come to is that the Claimant stopped work due to the progression of her endometriosis and the consequential effects on her mental health. Whilst the occupational health reports we have referred to above are shortly after the Claimant stopped work they paint a stark picture of the Claimant's predicament. On her own account the Claimant had significant issues with continence by April 2019 the effects of the disease are that she is hardly leaving home.

114. We have referred above to the fact that in early January the Claimant had to cope with the devastating news about the progression of her endometriosis, the prospect of radical treatment and fears about her fertility. We find that the state of the Claimant's physical health made it inevitable that she would have stopped work on 15 January 2019 or as near to that date as would make no difference to our decisions. We find that she stopped work because of the effects of the endometriosis coupled with the effect that physical disease had on her mental health. She was quite simply physically unable to go to work at that stage.

115. The loss of her salary and the knock-on effects of that on the Claimant's mental health would have happened even if the Respondent had made the adjustments that we found they should have. We accept Dr Ornstein's opinion at paragraph 206 of his report that, once the Claimant had to stop work by reason of her physical ill health, the decline in her

mental health was a sad inevitability.

116. Taking into account all the evidence we have heard and read we have concluded that the unlawful conduct that we have found had no impact on the Claimant's physical health (or her experience of it) or her mental health after she found herself too unwell to work.

117. We have come to the same conclusions in respect of the Claimant's mental health as we have done for the Claimant's experience of her physical health. Again we are dealing with past events. We do not need to make an assessment of future prognosis by assessing what might happen. We can make clear findings about what happened. We have accepted the expert evidence that the Claimant's prognosis in respect of her mental health was unaffected by the unlawful conduct once her physical health, or her experience of it, declined to the extent that she could no longer work. Sadly, her decline would have happened anyway. Put a different way we find that if the unlawful conduct had not occurred there is a 100% chance that from 15 January 2019 the prognosis for the Claimant would have been the same as it is.

118. It follows that Barclays ought not be ordered to compensation for any pain suffering or loss of amenity after that point. It follows that the pecuniary claims must fail in their entirety. This includes:

    118.1. the Claimant's claims for past and future loss of earnings; and

    118.2. the Claimant's claims for gratuitous care given by her parents; and

    118.3. the Claimant's claims for the cost of medical treatment.

Is the aggravation of the injuries to the Claimant's experience of her physical health and her mental health divisible?

119. Having come to the conclusion that the Claimant is limited to a claim for pain suffering and loss of amenity from 3 November 2017 through to 15 January 2017 we have to decide whether Barclays should be responsible for the entirety of any injury during that period or whether it is possible to attribute some part of the Claimant's suffering to the unlawful act. This is the question posed by ***Hatton*** in proposition14.

120. Our conclusions above make it inevitable that we need to apportion the harm caused to the Claimant. It would be wrong for us not to recognise that the Claimant was already unwell at the point that Barclays duty to make adjustments arose. It follows that we need to at least attempt to ascertain the extent of the aggravation of the Claimant's injuries from that point onwards. We then need to consider whether given the variety of causes of the Claimant's health deteriorating we can make any rational distinction between the harm caused by the unlawful conduct and that which, however unfortunate, was not unlawful. Our

identification of the point of 'no difference' means that we are looking only at the period ending on 15 January 2019.

121. It is necessary for us to make findings about the state of the Claimant's health prior to the unlawful conduct that we have found occurred. Whatever the causes of her health prior to that conduct Barclays cannot be responsible in these proceedings for any pre-existing injury or condition. The Claimant can only recover to the extent that any unlawful conduct has made any pre-existing worse or delayed any recovery.

122. We need to assess the state of the Claimant's health at the point where the duty to make reasonable adjustments first arose. On our findings above, that was 3 November 2017.

123. In our liability decision between paragraphs 469 and 477 we set out our conclusions about when the Claimant's anxiety and depression and her endometriosis first started to have a 'substantial' effect on her ability to carry out ordinary day to day activities. At paragraph 478 we concluded that the mental health impairment substantially interfered with day-to-day activities from August 2017 and the endometriosis from April 2017. Our findings about Barclays' knowledge of those disabilities are set out in paragraphs 497 and 498. We held that Barclays ought to have known that the physical impairment (endometriosis) amounted to a disability by 3 November 2017 and that it ought to have known that the mental health impairment amounted to a disability by 1 January 2018. At paragraph 577 we set out our findings about the point in time when Barclays ought to have known that the Claimant was placed at a substantial disadvantage by the PCP of requiring her to work hours in excess of her contracted hours. We found that Barclays had constructive knowledge of that on 1 October 2017 (even before it ought to have known that the disadvantage was long term).

124. Our findings about how the Claimant's endometriosis initially affected her are set out at paragraphs 440 to 444. We have accepted the Claimant's case that the symptoms of what was later diagnosed as endometriosis got progressively worse from April 2017. The same paragraphs contain our findings about the physical manifestation of the disease. At paragraph 447 we find that there was a link between the physical impact of the endometriosis and the Claimant's mental health. Our conclusions in that regard are strongly reinforced by the report of Dr Ornstein (paragraph 182 in particular).

125. We shall deal with the effect of the Claimant's endometriosis and anxiety together. We need to make a finding as to how those combined conditions affected her just before the point that Barclays first breached its duty to make reasonable adjustments. Our focus is on the symptoms the Claimant experienced. We draw on our findings in the liability decision and conclude that:

    125.1. In September 2017 the Claimant is reporting feeling so stressed

that she thought her hair was going to fall out and she was having panic attacks [Liability decision 451]

125.2. By October 2017 the Claimant's experience of her periods was sufficiently painful and difficult that she occasionally sought permission to work from home [liability decision paragraph 87]; and

125.3. That she had a week off work due to fatigue, panic and being unable to sleep in October 2017 [Liability Decision 89]

125.4. That the Claimant's health was troubling her enough that she felt she needed to raise it with James Kinghorn [Liability decision paragraph 88]

126. We find that, whilst the Claimant had been unwell, and was by November 2017 getting progressively worse, she only took time off work once and was just about coping with the symptoms she experienced from what she later learned was her endometriosis and her anxiety. She was not well but she was not at that stage seriously ill.

127. We then turn to the situation between 3 November 2017 and 19 January 2019.

127.1. We find that the Claimant did continue to have panic attacks [Liability Decision paragraph 455] The Claimant fainted after one such attack in December 2017 in Romania.

127.2. We find that the Claimant's anxiety did cause the Claimant to refrain from going out and had some impact on her ability to cope with issue of personal care [Liability Decision paragraph 454]

127.3. The Claimant continued to complain to her father of stress [Liability Decision paragraph 457]

127.4. In July 2018 the Claimant had a provisional diagnosis of endometriosis from a hospital in Romania.

127.5. The Claimant continued to have an inability to sleep and constant fatigue [Liability Decision paragraph 458]. Those effects became progressively worse towards late 2018

127.6. By Late 2018 the Claimant had a number of visits to her GP which focused on issues of workplace stress.

127.7. By December 2018 the physical symptoms of endometriosis included significant blood loss and incontinence.

128. What we have set out above is a brief summary of some points of the evidence. What we draw from the findings of fact we have already made

and from the evidence during the remedy hearing is that the symptoms that existed by 3 November 2017 became progressively worse. In particular there was an acceleration of symptoms from the summer of 2018 to the 15 January 2019. By that stage the Claimant was very unwell indeed. She was unable to work and was virtually housebound.

129. We turn to the question of whether and if so to what extent the harm that the Claimant has suffered can be properly apportioned. The first question is whether the harm is properly divisible. We remind ourselves that if there is a rational basis for dividing the harm attributable to the unlawful conduct from that attributable to other causes then we should do so.

130. In his written submissions Mr Susskind reminds the Tribunal that the process of assessing damages may often be rough and ready. A process *'shot through with imprecision'* per Mustill J (as he was) in ***Thompson v Ship Repairers (North Shields) Limited*** **[1984] ICR 236**. We agree but that does not relieve us of having to approach the remaining questions in a principled way doing what we can to ascertain the proper measure of compensation. No more but no less.

131. We find that there is no difficulty discerning a rational basis for discounting any compensation for pain suffering and loss of amenity attributable to the pre-existing and progressive endometriosis. To hold otherwise would be to make Barclays compensate the Claimant for a physical disease for which it bears no responsibility.

132. We have accepted the evidence of both Mr Hirsh and Dr Ornstein that endometriosis can interfere with mental health and that stress and/or poor mental health can make the effects of endometriosis worse. They describe a vicious cycle. If we are to avoid overcompensating the Claimant then we need to do our best to make an assessment of how much better the Claimant would have been had the Respondent complied with its duties.

133. The mechanisms for the symptoms experienced by the Claimant are not straightforward. We have found that the stress caused by the failure to make reasonable adjustments exacerbated the Claimant's experience of her physical symptoms – she felt physically worse. In parallel with that the failure to make reasonable adjustments made a material contribution to the Claimant's anxiety. Anxiety in turn magnified the Claimant's experience of her symptoms – noted by Mr Hirsh at SPQ10 *'Patients with endometriosis and co-existent mental health conditions, including catastrophising, have a lower likelihood of pain improvement'.*

134. Adding to this complex picture is the fact that the failure to make reasonable adjustments was only one of a large number of complaints that the Claimant made about her treatment at work during this period. Our findings in respect of these other matters are set out in our liability decision. They are also curated in fine detail by Mr Susskind at

paragraphs 4.23.2, 4.24, 4.28 and 4.30 of his written submissions. It is a very long list that we shall not seek to reproduce here.

135. Mr Susskind's primary position was that there were so many concurrent causes of the Claimant's condition(s) that the unlawful cause fell below the threshold of being a material cause of the Claimant's anxiety. We have rejected that primary contention above. His secondary contention is that the harm caused by the unlawful conduct should be limited to 5% of the total harm sustained.

136. Ms Sole acknowledged the fact that there might be other matters of which the Claimant has complained. Her primary position was that the harm was indivisible. Her secondary position was summarised when she said that the issues of the hours worked was and always had been *'at the heart of the Claimant's case'* picking up on our conclusion to that effect in paragraph 591 of the liability decision.

137. Ms Sole makes submissions on the extent to which the excessive hours caused the harm complained of at paragraph 21 of her written submissions. We regard each of the points that she makes in the four sub paragraphs as being well made. The evidence and findings referred to all point to the excessive hours being a significant source of stress.

138. Doing the best we can we consider it necessary to attempt to strip out the pain, suffering and loss of amenity caused by the physical disease from any awards we might make. We accept that this is a rough and ready exercise. We are trying at this stage to assess how much worse all the stressors other than the endometriosis made the Claimant feel. What we take from the expert evidence is that these external stressors would have made a bad situation worse. Neither expert has been able to quantify how much worse. We need to strip the inherent from the environmental.

139. We have come to the conclusion that the inherent effects on the Claimant's endometriosis would by themselves have had the most significant effect on the Claimant's physical experience of the symptoms of her endometriosis. That said we recognise that environmental factors can make a significant contribution to a person's experience of disease. Doing the best that we can we have made an assessment that 60% of the physical pain and suffering by the Claimant is attributable to the progression of her endometriosis alone. This discount needs to be applied to any award for pain and suffering and loss of amenity in respect of the enhanced physical symptoms of endometriosis. Put more plainly we find that 40% of the pain the Claimant experienced can be explained by stress and anxiety rather than the mere physical progression of her disease. We do not say that this was constant throughout the period we are looking at. On the contrary the impacts of the physical disease were clearly increasing as evidenced by, for example, the onset of incontinence. Our figure of 60% is a rough and ready average.

140. We do not consider that this particular reduction needs to be made to any award in respect of the Claimant's mental health or at least not in quite the same way. A lower level of pain would not necessarily cause a lower level of anxiety. The blunt discount to account for the physical disease that we have applied to the physical pain is far less apt to deal with any apportionment of anxiety.

141. We then need to consider how to approach what we have described as the environmental factors including the unlawful conduct.

142. We did not understand Mr Susskind to say we should just count up all of the other matters that had may have contributed to the Claimant feeling stressed and ill during this period and divide any harm by that total to arrive at a result. His impressively detailed list of other factors might provide a temptation to take that approach.

143. We find that such a quantitative approach makes insufficient allowance for the cumulative effects of a difficult environment. To illustrate that on a day when a person is not tired after a hard day at work they might cheerfully tolerate some poor behaviour by others. If tired that poor behaviour might become a focus and be blown out of all proportion. On the facts of this case the Claimant has focused a great deal of resentment towards being asked to assist with training Ivet Draganova. She was at that time unwell and was still expected to work long hours. A purely quantitative approach fails to take account of the fact that the Claimant's health was impacted to a material extent by the excessive hours. This was likely to, and we find did, affect her tolerance of the conduct of others at work and her tolerance of being asked to do things at work that we have found were not unlawful. That finding is based not only on our impression of the Claimant but also in our experience as an employment tribunal.

144. We have placed weight on our findings about the situation towards the latter part of 2018. By November 2018 the Claimant is focused on the amount of time she was spending at work. She made a request to be paid for overtime [See paragraph 124 of the liability decision]. We find that this was for the Claimant less a matter of money and more a matter of principle. She objected to working in excess of her contractual hours. She believed that she was being overworked and might not cope.

145. We accept Ms Sole's submission that the Claimant's complaints about hours were at the heart of her grievance and were at the heart of her first complaint made to the employment tribunal. A review of the Claimant's first ET1 shows that she mentioned long hours on numerous occasions.

146. At paragraph 4.24 of his written submissions Mr Susskind identifies other complaints of 'overwork'. He suggests that these were matters which were lawful and therefore should be considered as innocent causes of the harm. He says: *'The complaint was not simply about the*

hours'. That submission presupposes that the tasks that the Claimant found stressful or unreasonable had no impact on the hours she needed to spend at work. We cannot accept that. The fact that there was a turnover of staff in the team, the fact that new team members required training, the fact that the team was often shorthanded would have and we find did add to the Claimant's workload. We accept that initially a significant cause of the Claimant having to work late into the evening was the need to start some tasks after the UK trading day had ended but then that the arrangements for a hand over to New York were not fully effective. However, that was not the only reason why the Claimant worked long hours. She did so because she had more work than could be done within her ordinary contracted hours (as did every member of the team – see our liability decision at paragraph 125 where we record James Kinghorn saying that typically the working day is 9-10 hours: '*it is virtually impossible to complete our jobs* between *9—5!'*.

147. It follows that whilst we have found many tasks that the Claimant has complained of were not of themselves unlawful that does not mean that they had no effect on the working hours. It does not follow in our view that the Claimant's experience of these additional workloads as stressful falls to be disregarded by the Tribunal.

148. We do accept the broad thrust of Mr Susskind's argument that Barclays should not be liable for events in the workplace which did not manifest themselves through additional workload and hours. Examples would be the anxiety that the Claimant felt in response to delays in directly employing her or her treatment by a former line manager.

149. Having decided that any award for the Claimant's experience of pain caused by endometriosis requires a discount what remains is to attempt some apportionment to reflect the fact that the Claimant's heightened experience of pain and her anxiety had a number or causes in addition to the excessive working hours.

150. Giving weight to our conclusion that the excessive hours caused in turn by an excessive workload were a significant source of stress for the Claimant we have come to the conclusion that a further reduction of 1/3 (applied after the first reduction) to any award for pain suffering and loss of amenity under both heads of claim is appropriate.

151. What that means is that:

    151.1. In respect of the Claimant's experience of pain during the relevant period we apply an initial deduction of 60% in an attempt to quantify the pain directly attributable to physical changes in her body. We then hold Barclays responsible for 2/3 of the pain that remained.

    151.2. In respect of the anxiety we do not think it possible to isolate the anxiety about physical changes from the anxiety about

symptoms. The Claimant was not anxious about part of her health she was anxious about all of it. However, we do accept that in addition to the hours of work the Claimant had many stressors that we have not considered unlawful. Those were made a measurable contribution to her anxiety. We find it appropriate to hold Barclays responsible for 2/3 of the exacerbation to the Claimant's pre-existing anxiety in the relevant period. Thereafter, very sadly, the Claimant's mental health would have been the same even without the unlawful treatment.

Quantification of loss – personal injury

152. We start with the symptoms of endometriosis. Ms Sole's submissions referred the Tribunal to the Judicial College Guidelines for the Assessment if General Damages in Personal Injury Claims 17th Edition. Both Counsel accepted that we should apply the most recent guidance (in contrast to the suggested approach to injury to feelings). Ms Sole's analysis of where we should start in respect of those guidelines was to acknowledge that the Claimant had pre-existing endometriosis and anxiety before any breach of duty but her position was that Barclays bore full responsibility for deterioration in the Claimant's health from that point onwards. The basis for that argument was a suggestion that the entirety of that additional injury was indivisible. We have disagreed with that premise. Our conclusions above require us to take a different approach to Ms Sole's otherwise careful analysis. It also renders many of the cases that she has asked us to use as comparators inapplicable.

153. The first category of guidance that Ms Sole says we need to consider is Section 6F – Injuries to Internal Organs – Female Reproductive System. The guidance sets out categories of injury from (a) to (g). Categories (a) to (e) concern infertility. Neither Mr Hirsch nor any of the Claimant's treating doctors have said that the Claimant is infertile. What is more important compensating the Claimant on the basis of physical changes in her body, as opposed to heightened symptoms would be entirely inconsistent with our conclusion that the unlawful conduct we have found had no impact on the physical progression of the disease. Category (g) has no application to the facts of this case as it concerns failed sterilization and an unwanted pregnancy.

154. Category (f) discusses damages for a delay in diagnosing an ectopic pregnancy. Whilst that is not the case here some of the factors identified in assessing damages do appear to us to be similar to the factors present in this case. It is suggested that the award would depend on the extent of any pain, suffering, bleeding, whether a blood transfusion was required, anxiety and adjustment disorder and whether there is resultant removal of one of the fallopian tubes. Of these the need for removal of a fallopian tube or a blood transfusion is not a feature of the present case (although there was heavy blood loss in December 2018).

155. What we are trying to assess is the level of award for the symptoms of endometriosis the Claimant experienced. Those symptoms did include pain, suffering bleeding and anxiety. The level of awards in this category (f) are between £4,140 to £24,930. The absence of a serious factor such as fallopian tube removal might point towards an award below the highest level. However, a distinction between the case of an ectopic pregnancy and the heightened symptoms of endometriosis is the longer term nature of the latter condition. In the Claimant's case she suffered the exacerbated symptoms for just over a year. That factor makes us reluctant to use category (f) as anything other than a useful indicator. If that was the only guidance we had we would consider that that an award at the very top end of the scale would be appropriate (before applying the apportionment we have held is necessary).

156. In her oral submissions Ms Sole took us to the guidelines on Chronic Pain. Whilst the guidelines are directed to pain disorders without any organic basis we consider that they are of assistance in gauging the measure of an award where the symptoms are pain experienced over a longer period than for say an ectopic pregnancy. We doubt that there can be any principled distinction between an award to compensate for pain with an organic cause and pain that has no organic cause. The effect on the victim is the same.

157. Whilst not a perfectly analogous situation we have been assisted by looking at the awards for 'Other Pain Disorders'. We do not consider that the Claimant's condition in the period we are looking at is comparable with the description of a Severe Pain Disorder. To fall into that category there would be an adverse impact on an ability to work and the need for care and assistance. This was not the case throughout the period we are looking at but the impact was approaching that level by the end of the period. The Moderate category is closer to the experience of the Claimant. Awards in that category are between £25,710 and £49,970.

158. We accept that the Claimant's experience of the symptoms of endometriosis included a significant element of pain. That said she was able to undertake a complex and demanding job although as we have found that became increasingly difficult for her. The guidance suggests that awards at the top end should be made where the symptoms are ongoing. That is the case here, but the ongoing symptoms are not attributable to the unlawful acts. We are dealing with pain only between 3 November 2017 and 15 January 2019. Awards at the lower end are suggested where pain has persisted for a number of years but there is a complete recovery.

159. We have taken into account the guidance for both categories of injury. Neither are an exact match for the exercise we are undertaking. We are conscious that we are also invited to make an award in respect of the exacerbation to the injury to the Claimant's mental health. The experience of pain and anxiety are not necessarily independent. That leads to a risk of overcompensation. We reviewed the entirety of the

award we made when assessing the potential overlap with an injury to feelings award.

160. The conclusion that we have reached in assessing the level of compensation that would be appropriate if the entirety of the symptoms of endometriosis experienced by the Claimant and principally the pain she experienced over the period we have identified would be £28,500 at the lower end of the 'Moderate' awards for pain and just over the top end for an award for an undiagnosed ectopic pregnancy. The long term nature of the Claimant's condition justifies exceeding that latter guidance.

161. Arrive at the award we actually make to the Claimant we need to apply a discount of 73.33% to reflect our conclusion that the harm to the Claimant is divisible and should be apportioned. The award made for the injury we have described as an exacerbation of the symptoms of endometriosis is therefore (100 - 73.33) x £28,500 = **£7599.81**. It is not our intention to include any element of personal injury to the Claimant's mental health in that award.

162. We turn to the quantification of the exacerbation of the Claimant's mental health condition in the period after the duty to make adjustments arose and before we found that the unlawful treatment had no further impact.

163. Ms Sole pointed us towards the Judicial College Guidelines and the Chapter dealing with Psychiatric and Psychological Damage. She suggested that the relevant guidelines were those dealing with general psychiatric damages. We did not understand Mr Susskind to dissent on that general point. We found those guidelines of considerable assistance.

164. Ms Sole had spent some time in her written submissions analysing the award for psychiatric injury on the basis that Barclays was responsible for the entirety of the Claimant's symptoms up to and including the hearing. Given that we have rejected that contention and reached the conclusion that the damages should be divisible in both a temporal sense and in an apportionment sense her careful research rather fell away.

165. The factors that the guidelines suggest a court or tribunal take into account are:

(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.

166. Given our conclusion that, sadly the Claimant's physical health would have resulted in the same prognosis from 15 January 2019 factors (iii) to (v) have little bearing on this case. In our view factors (i) and (ii) are the more weighty factors that we need to consider.

167. The Claimant was working hard in a difficult job at the start of her career. She became gradually overwhelmed. We have found that she had panic attacks, she found day to day tasks difficult and she found it difficult to socialise. Her text messages to her father amply demonstrated how anxious she had become even before the duty to make adjustments arose.

168. We need to undertake a difficult exercise. First we need to strip out the fact that the Claimant was anxious before any unlawful treatment. Then we need to limit any award for pain suffering and loss of amenity to the period before 15 January 2019. We find that in that period the Claimant was 'just coping' with work but was very anxious indeed.

169. Were we assessing the Claimant's mental health today we would agree that the case might fit into the 'moderately severe' category. During her employment we would accept that the factors identified at (i) and (ii) could properly be described as significant (using the language of the guidance. That would suggest a bracket of £23,270 to £66,920 for any award. The problem with simply using that guidance is that it does not deal with the issue we have in this case that the symptoms would have occurred anyway. We looked at the description of the Moderate category. We note that this might apply where there had been a marked improvement by trial. Whilst this is not the case here (the opposite in fact) it does suggest a level of award appropriate for an injury with a shorter time span.

170. We need to do the best that we can. We have applied aspects of the guidance in that we regarded the symptoms of anxiety as being 'significant' but that the period over which Barclays has responsibility for this is much shorter than the cases suggested in the severe category. The conclusion we reached is that if the Claimant were to be compensated for the entirety of the psychiatric injury over the period of responsibility the proper award would be £20,000. We need to apply the apportionment of 2/3 we have identified above to that amount to reflect the fact that there were multiple stressors responsible for the entire injury. We find that the appropriate award for Psychiatric injury is **£13,333.33.**

Injury to feelings – Failure to make adjustments

171. The Claimant makes a claim of £42,000 for injury to feelings in addition to the awards she has claimed for personal injury. The Barclays accepts in principle that an award for injury to feelings is applicable but takes the same approach as it has done in respect of personal injuries and argues that there were such a plethora of causes for the Claimant's injured feelings only one of which relevant here that the proper level of award is £900.00.

172. The matters compensated for by an injury to feelings award include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression ***Vento v Chief Constable of West Yorkshire Police*** **(No2) [2003] IRLR 102**.

173. In ***Vento*** the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'

174. In recent years the bands have been increased annually by Presidential Guidance. When the Claimant issued her first case, they were as follows

175. lower band: £900 to £8,800;

176. middle band: £8,800 to £26,300;

177. top band: £26,300 to £44,000.

178. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation: society has condemned discrimination, and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches ***Prison Service v Johnson*** **[1997] IRLR 162, EAT at [27]**.

179. The Tribunal must focus on the impact of the discrimination on the individual concerned; unlawful discrimination may affect different individuals differently ***Essa v Lang [2004] IRLR 313***.

180. Where an individual has suffered a number of acts of discrimination, some caused by one protected ground, e.g. race, others by another protected ground, e.g. disability, the tribunal should make separate awards for each protected ground, as each is a separate wrong giving a right to damages ***Al Jumard v Clywd Leisure Ltd*** **[2008] IRLR 345**. However, the tribunal must always have regard to the proportionality of the overall figure awarded for injury to feelings.

181. We need to be very aware of the need to avoid double recovery between an award for injury to feelings and one for psychiatric injury. There is no clear bright line between feelings that can be pathologised and those emptions that fall short of that.

182. We accept Mr Susskind's argument that when assessing injury to feelings whether there are both lawful and unlawful causes compensation should only awarded for the injuries caused by the unlawful conduct. However, we repeat our reasoning in respect of the apportionment of the Claimant's anxiety. The failure to make reasonable adjustments would, in our view, have caused the Claimant's response to other events and aspects of her working life that she found objectionable.

183. We refer to our findings of fact in the liability decision. It is clear that the Claimant was deeply unhappy about her workload. That was expressed as dissatisfaction about the hours as well as the tasks she had to do. Concern about workload and the time available to complete it are not unrelated.

184. We consider that the failure to make reasonable adjustments was sustained and that the Claimant felt angry upset and let down for over 1 year. The fact that she was ill magnified that. A matter for which Barclays cannot expect any discount. They take their victim as she was. It is not inevitable that we should discount any award to any large extent to reflect the fact that the Claimant was distraught, angry and upset that she was ill. It is possible, indeed not abnormal, to be angry and upset

about more then one thing at a time.

185. Had the Claimant not suffered from symptoms that can be pathologized we would have awarded a significant sum in respect of injury to feelings. The sum we consider would properly compensate the Claimant for the entirety of her feelings (both pathologized and not) as a response to her long working hours we would have awarded a sum of £23,000. That sum is intended to compensate the Claimant only for the way she felt about her hours but we include within that the fact that her hours were affected by her general workload.

186. We then need to consider the fact that there is a clear overlap between the award we have identified for injury to feelings and the personal injury award we make for anxiety. Some deduction needs to be made from the injury to feelings award to reflect that. This is not an exact science. We have decided that the injury to feelings award should be reduced by £13,000 to **£10,000** to reflect this overlap.

Injury to feelings – Sex discrimination

187. On behalf of the Claimant Ms Sole did not suggest that the sex discrimination complain that we have upheld caused or contributed to any personal injury. It was the position of both parties that the Tribunal should make a separate award for this act of discrimination. The Claimant contended for an award of £9,000 (An amount that the 2019 Presidential Guidance suggested would be close to the bottom of the middle band). The Respondent contended that the award should be at the lowest end of the lower band a figure of £900 was suggested. The advocates appear to have inadvertently used the 2020 Presidential Guidance. The claim that included this complaint of sex discrimination was presented on 9 May 2019 and to is the 2019 guidance that we should apply.

188. We remind ourselves that an award for injury to feelings is compensatory. An apparently minor insult may cause a major injury and vice versa. The level of damages is not to be fixed solely by looking at the nature of the discrimination. That said the nature of the discrimination may assist the Tribunal in making findings about the extent of any offence caused.

189. We depreciate the use of the phrase ‘birds’ as a reference to women in the professional environment but we would not regards the conduct that we have held to be unlawful as particularly grave or serious. It was very much at the lower end of what might reasonably be regarded as a detriment. Taking into account the context we would anticipate the use of the phrase ‘birds’ to cause some annoyance and irritation. Anything beyond that would in our view be a surprising response.

190. We have no doubt that the Claimant was offended by James Kinghorn’s misplaced irony. We have found that it was only after she made her

feelings clear on several occasions that he stopped using the phrase 'birds'.

191. Having regard to the evidence as a whole we find that the Claimant was mildly offended by the use of the phrase 'birds' and became irritated when it was repeated. That corresponds with the reaction we would have anticipated. We bear in mind that the Claimant had far greater and more serious concerns at this time. It seems to us that Mr Susskind is right that if that is the level of injury to feelings attributable to the acts of discrimination we have upheld the award should be very near the bottom of the lower band for awards of injury to feelings.

192. We do not accept that the award should be at the very lowest level and have decided that the proper level of award should be **£1,000.00**.

Aggravated damages

193. Aggravated damages can be awarded in a discrimination case where the employer has behaved *'in a high-handed, malicious, insulting or oppressive manner in committing the act of discrimination'* - ***Alexander v Home Office*** **1988 ICR 685, CA**. Some guidance as to when aggravated damages might be awarded was given by Underhill P (as he was) in ***Commissioner of Police of the Metropolis v Shaw*** **2012 ICR 464, EAT.** The first point to be drawn from that case is that an award of aggravated damages should be compensatory and not punitive (in contrast to exemplary damages) – see paragraph 20. He went on to say at paragraph 21 (some parts left out):

Aggravated damages are an aspect of injury to feelings……..Aggravated damages are thus not, conceptually, a different creature from 'injury to feelings' : rather, they refer to the aggravation – etymologically, the making more serious – of the injury to feelings caused by the wrongful act as a result of some additional element.

194. Dealing with the circumstances that might merit an award of aggravated damages Underhill P said at paragraph 22:

The circumstances attracting an award of aggravated damages fall into the three categories helpfully identified by the Law Commission: see paragraph 16(2) above. Reviewing them briefly:

(a) The manner in which the wrong was committed. The basic concept here is of course that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. In this context the phrase 'high-handed, malicious, insulting or oppressive' is often referred to (as it was by the tribunal in this case). It derives from the speech of Lord Reid in Broome v Cassell & Co Ltd [1972] AC 1027 (see at p.1087G), though it has it roots in earlier authorities. It is there used to describe conduct which would justify a jury

in a defamation case in making an award at 'the top of the bracket'. It came into the discrimination case law by being referred to by May LJ in Alexander as an example of the kind of conduct which might attract an award of aggravated damages. It gives a good general idea of the territory we are in, but it should not be treated as an exhaustive definition of the kind of behaviour which may justify an award of aggravated damages. As the Law Commission makes clear 8, an award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.

(b) Motive. It is unnecessary to say much about this. Discriminatory conduct which is evidently based on prejudice or animosity or which is spiteful or vindictive 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. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury – see Ministry of Defence v Meredith [1995] IRLR 539, at paragraphs 32–33 (p.543). There is thus in practice a considerable overlap with head (a).

(c) Subsequent conduct. The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. Such cases can arise in the discrimination context: see Zaiwalla and Co v Walia [2002] IRLR 697 (though NB Maurice Kay J's warning at paragraph 28 of his judgment (p.702)); and Fletcher (above). But there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously: examples of this kind can be found in Armitage, Salmon and British Telecommunications v Reid. A failure to apologise may also come into this category; but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case. (For another example, see the very recent decision of this tribunal (Silber J presiding) in Bungay v Saini (UKEAT/0331/10/CEA).) This basis of awarding aggravated damages is rather different from the other two in as much as it involves reliance on conduct by the defendant other than the acts complained of themselves or the behaviour immediately associated with them. A purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach. However, tribunals should be aware of the risks of awarding compensation in respect of conduct which has not been properly proved or examined in evidence, and of allowing the scope of the hearing to be disproportionately extended by considering distinct allegations of

subsequent misconduct only on the basis that they are said to be relevant to a claim for aggravated damages.

195. It is necessary for us to deal with the two claims that we have upheld separately. We shall start with the claim that there was a failure to make reasonable adjustments.

196. In our liability decision we dealt with the issue of the Respondents' knowledge of the Claimant disabilities. We did not conclude that the Respondents had any actual knowledge either that the Claimant's endometriosis or her anxiety had reached the threshold of being a disability. However, we found that Barclays ought to have known that the Claimant was disabled See paragraphs 497 and 498. We found that the lack of knowledge was due to a lack of training 495.

197. We have accepted that the Claimant raised the issue of excessive hour during the time she was working – see in particular paragraph [797]. She did slightly muddy the waters by complaining about not being paid for overtime but it should have been clear to Barclays that she was unhappy with her workload. She did not at the time specifically request a reasonable adjustment for her disabilities using any clear language or referencing the Equality Act 2010. We have accepted that James Kinghorn did attempt to address the issue of long hours for the entire team but made no progress – see paragraph [591]

198. Overall, the conclusion that we reached in our liability judgment and repeat explicitly here is that Barclays actions were thoughtless. It could have identified the difficulties the Claimant was facing earlier through proper training and monitoring of workload. However, the failure to make reasonable adjustments was in no sense conscious, deliberate or malicious. We are not satisfied that the failure to make reasonable adjustments falls into either of the first two categories identified by Underhill P above.

199. Barclays did not admit the Claimant was disabled and put her to proof that she met the statutory definition up to the first day of the hearing when a limited concession was made in respect of the period that the Claimant was off work. We need to consider whether that stance was of a degree where it 'rubbed salt into the wound' to an extent that an award of aggravated damages would be justified. We do not accept that it did. The issue of knowledge of disability was one which the Tribunal considers was finely balanced. We do not find it surprising that Barclays took that point. The same can be said in respect of the point at which the Claimant satisfied the 'long term condition'. Whilst the Tribunal has concluded that she did so Barclays putting the Claimant to proof of this point was not in our view unreasonable. Whilst the Claimant undoubtedly experienced it differently we record that Ms Berry, who conducted the liability hearing, was a consummate professional never putting the Respondents' case any higher than necessary.

200. We have come to the conclusion that there was no conduct of Barclays that could justify an award of aggravated damages for failing to make reasonable adjustments. We add that if our analysis of this is wrong we remind ourselves of the close relationship between aggravated damages and injury to feelings awards. We are satisfied that the entirety of Barclays conduct is properly reflected in the awards made above and that any aggravation is already fully compensated.

201. We turn to the sex discrimination complaint. Our findings in the liability judgment assist us in determining whether there was any conduct by the Respondents that would justify making an award of aggravated damages. Our key findings are at paragraph 100 of our liability decision. We found: *'The use of the phrase 'bird' was a misplaced use of irony which inadvertently caused offence'*.

202. We do not consider that there was anything about the manner of carrying out this act of discrimination that would justify an award of aggravated damages. Our findings of fact deal with Mr Kinghorn's motive. His conduct was in no sense malicious. The facts supporting this allegation were only disputed insofar as the number of occasions the word 'birds' was used. The only defence advanced with any enthusiasm during the hearing was that the words used were not of sufficient gravity to sustain a complaint. As we have found above the issue was dealt with in an appropriate way by Ms Berry.

203. We have concluded that there is no basis for an award of aggravated damages and that the entirety of any assault to the Claimant's feelings is already fully compensated by the awards for injury to feelings we have made.

ACAS Uplift

204. In her schedule of loss the Claimant says that any award made by the Tribunal should be the subject of a 25% uplift by reason of unreasonable failures to follow a relevant code of practice. The sums claimed are not inconsiderable as the Claimant contended that a 20% uplift on a total sum of £1.377M was the proper award. For the reasons above we have rejected many aspects of that claim to damages but despite this we need to adopt a principled approach to the issue of any uplift.

205. The basis for claiming any uplift was set out in the Claimant's Particulars of Loss and Causation ordered by the Tribunal. She contends that (our emphasis added) *'While there were meetings and written outcomes to the Claimant's grievances and appeal, this was a matter of form not substance. In substance the Claimant's complaints about being discriminated against (including the sex discrimination) and failure to reduce her hours remained unaddressed'*.

206. A duty to consider uplifting certain awards of compensation because of failures by an employer to act in a manner that is procedurally fair is

imposed by The Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C) Act 1992'). The material parts of Section 207A say:

207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) 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 all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) ……

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes…..

207. The list of relevant claims in Schedule 2A of TULR(C) Act 1992 includes claims brought in the field of employment under sections 120 and 127 of the Equality Act 2010.

208. Where there is a complaint that an employer has failed to make reasonable adjustments then the only applicable 'relevant code' would be the Acas Code of Practice on disciplinary and grievance procedures published on 11 March 2015.

209. Before a tribunal can uplift any award of compensation it would need to be satisfied that the employer '*failed to comply with that Code in relation to that matter'.* If there was such a failure it is then necessary to ask if the failure was unreasonable - ***Kuehne and Nagel Ltd v Cosgrove*** **EAT 0165/13**. The Tribunal needs to consider whether it is just and equitable to uplift any award and if so, by what proportion between 0 and 25% as to the relevant factors in that exercise see ***Slade and anor v Biggs and ors*** **2022 IRLR 216, EAT**.

210. The procedural steps relevant to grievances in the ACAS Code are set out as follows:

210.1. The employee needs to set out the problem in writing for the employer – paragraph 32

210.2. The employer must, without unreasonable delay, invite the employee to a meeting to discuss the grievance – paragraph 33

210.3. The employee should make every effort to attend a meeting – paragraph 34

210.4. The meeting might need to be postponed if any investigation is necessary – paragraph 34

210.5. The employer must permit the employee to be accompanied at any meeting and permit participation of that companion in accordance with the statutory rights afforded to employees – paragraphs 35 to 39.

210.6. The employer must decide what to do and then communicate that decision in writing to the employee – paragraph 40

210.7. The employee should be afforded a right of appeal – paragraph 40

210.8. If dissatisfied the employee should exercise the right to appeal and set out their grounds of appeal in writing– paragraph 41

210.9. An appeal meeting should take place without unreasonable delay – paragraph 42

210.10. The appeal should be conducted by a person who is impartial and preferably who had no previous involvement – paragraph 43

210.11. The employer must allow the employee to be accompanied in accordance with the statutory right – paragraph 44

210.12. The employer, without unreasonable delay, should let the employee know the final decision in writing – paragraph 45.

211. We have made the following findings in our liability decision:

211.1. The Claimant set out a written grievance on 1 April 2019 which included references to excessive duties and long hours and referred to her health in that context – paragraph [217]

211.2. On 2 April 2019 the Claimant was told that a meeting would be arranged with an independent manager – paragraph [218]

211.3. On 15 April 2019 the Claimant was informed that Karen McGoldrick had been appointed to hear her grievance –

paragraph [219]

211.4. Karen McGoldrick offered to meet the Claimant on 2 May 2019 and told her of her right to be accompanied (including our findings as to the delay in holding this meeting some 2 days later than Barclays' policy suggested) – paragraph [220]

211.5. The Claimant asked for the remainder of the process to be conducted in writing – paragraph [220]

211.6. Karen McGoldrick conducted a *'comprehensive investigation'* – paragraph [222]

211.7. An outcome letter was sent to the Claimant on 4 July 2019 – paragraph [225]

211.8. Karen McGoldrick *'carried out a through investigation and .. her conclusions were generally fair and thoughtful'* – paragraph [226]

211.9. The Claimant was afforded a right of appeal an outcome was delivered in writing on 21 August 2019.

211.10. She brought a further grievance which is not material to our considerations – see paragraph [232].

212. The first question we needed to address is whether the Claimant has established that there was any breach of the ACAS code. During submissions we invited Ms Sole to deal with our concern that no particular paragraph of the code of practice had been identified. Ms Sole adopted the stance taken in the Particulars of Loss and Causation. In essence that whilst no particular procedural failure could be identified the fact that the grievances were not all decided in the Claimant's favour meant that there had been a failure to follow the spirit of the ACAS Code.

213. We would accept that the paragraphs of the ACAS Code of practice that we have summarized above must be read in conjunction with the introductory paragraphs of the Code and in particular paragraph 4 which includes a reference to conducting processes 'fairly'. That paragraph also suggests that *'Employers should carry out any necessary investigations, to establish the facts of the case'* (emphasis added).

214. We would accept that there could be a breach of the code of practice if, despite following the procedural steps to the letter an employer acted 'unfairly'. An example of unfairness that might suffice is 'going through the motions' as the Claimant suggests is the case here.

215. We do not accept that where paragraph 4 of the code requires an employer to *'establish the facts of the case'* that is to be taken as a direction to reach the same conclusion as the tribunal did after a formal

trial. We find that it is a requirement to act fairly in attempting to establish the facts and not an absolute requirement. If it were otherwise then in an unfair dismissal claim an employment tribunal would need to make findings of fact for itself to determine whether the employer had followed the ACAS code and then take that into account in assessing the fairness of the dismissal.

216. In our liability decision we have found that the relevant grievance (the first one) was investigated thoroughly. We have identified some areas where we have reached differing conclusions to Karen McGoldrick. In respect of her approach to the 'birds' allegation we would accept that her reasoning was not as robust as it might have been had she been say a tribunal member. In respect of the Claimant's complaint about the calculation of her bonus we have concluded that Karen McGoldrick was only given a partial picture by those she interviewed.

217. We do not accept the suggestion made by the Claimant that the grievance outcome failed to address the excessive hours question. In fact Karen McGoldrick partially agreed with the Claimant that she had been working in excess of her contractual hours. By the time of the grievance the Claimant was no longer working. It was not possible to turn back the clock.

218. We do not accept the suggestion that Karen McGoldrick was merely 'going through the motions'. On the contrary we find that she was doing her level best to establish what had happened. We were unable to identify any unfairness in her approach and none was singled out by the Claimant at the hearing before us.

219. We have been unable to identify any breach of the ACAS code. That is fatal to the Claimant's contention that there should be an uplift to the compensation that we have awarded.

220. If we are wrong about that we would need to turn to the question of whether any breach was unreasonable. We shall address this question making an assumption that the ACAS code requires the employer to draw the same factual and legal conclusions as the tribunal.

221. We are satisfied that where the conclusions of the grievance in respect of the two successful claims differ from our own Barclays has not acted unreasonably. Determining who is right or wrong in a given situation is not easy even for a tribunal. It cannot be right to hold an employer to the same standards as a court of law. What is 'reasonable' suggests some degree of latitude. We are satisfied that in respect of any failure of the grievance procedure that Barclays was not unreasonable. To hold otherwise on our findings is to expect a remarkably high standard.

222. We shall not deal at length with the final questions about whether an uplift is just and equitable and the level of any uplift because we find that they do not arise. Barclays has not escaped criticism in this case but its'

conduct of the grievance process was better than most complex cases that we have seen. There would be nothing 'just and equitable' in uplifting compensation in this case.

Interest

223. The Respondents accepted that any award we made should attract interest under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. An award of interest is discretionary – see Regulation 2 but is an award is made, the calculation of that award must be in accordance with the regulations.

224. The following propositions were not controversial:

224.1. That the rate of interest is that specified in the Section 17 of the Judgments Act 1838 – currently 8% - see regulation 3

224.2. The interest is simple interest – Regulation 3

224.3. That in the case of injury to feelings any award will attract interest from the date of the contravention complained of – see Regulation 6(1)(a). In this context injury to feelings should include any personal injury.

224.4. That the interest shall run up to the 'date of calculation' for these purposes the date of this judgment - see Regulations 4(1) and 6(1)(a).

224.5. He tribunal may depart from the ordinary calculation of interest but only where there would otherwise be a serious injustice – Regulation 6(3).

225. The date of the contravention in respect of the failure to make reasonable adjustments was 3 November 2017 when the duty to make adjustments arose once the Respondent had constructive knowledge of the fact that the Claimant met the statutory test of disability because of endometriosis. The fact that an additional duty arose when they had constructive knowledge of her anxiety amounting to a disability is not material to the calculation of interest.

226. There are 2553 days between 3 November 2017 and 29 October 2024 the date of this calculation.

227. The calculation of interest is: 2553/365 x 8/100 x (£7599.81 + £13,333.33 + £10,000) = **£17,309.00** for the reasonable adjustments claim.

228. We had no exact dates upon which we have found that James Kinghorn used the phrase 'birds'. We did find that he used that phrase in early 2018 and stopped in mid 2018. We have decided that it is just and

equitable to use a date of 1 April 2018 as the starting date from which interest should run.

229. There are 2404 days between 1 April 2018 and 29 October 2024 the date of this calculation.

230. The calculation of interest is: 2404/365 x 8/100 x £1,000 = **£526.90**

231. The awards of interest are substantial in this case. We have considered whether the size of the awards is a good reason to depart from the usual formula for calculating interest. The question is whether there is any serious injustice. We find that there is not. The Respondents could have protected themselves against the award of interest by making a voluntary payment. The delays were in the main ordinary delays of litigation. The Claimant is in desperate circumstances in Romania unable to afford medical treatment. It seems to us that the only risk of a serious injustice would be withholding any interest from her given how long she has had to wait for compensation that is lawfully due.

Taxation

232. The parties had insufficient information in the absence of a judgment to make submissions about whether any part of the award we make should be 'grossed up' to take account of the incidence of tax. We agreed that the Tribunal would make an award that assumed that it was not taxable but that the parties would have liberty to apply to vary the award if this assumption is incorrect. We have provided for that above.

Recommendations

233. Section 124(2)(c) of the Equality Act 2010 provides that a tribunal 'may' make an appropriate recommendation. An appropriate recommendation is one a recommendation that *'within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant' of any matter to which the proceedings relate'*.

234. The parties had not made any submissions in respect of this potential remedy. The Tribunal raised the possibility of a recommendation that the Respondent nominator a mentor to give reasonable assistance and advice to the Claimant were she seek to re-enter the banking sector. Neither party encouraged us to take that course. The Claimant does not see this as a possibility and does not want to deal with Barclays. After discussions what emerged was that both parties considered it appropriate for the Tribunal to recommend that upon request Barclays give any prospective employer a reference which sets out the dates of the Claimant's engagement and her job title. It may, if the Claimant asks, also state that she was made redundant.

235. We are not as pessimistic as the Claimant was about her future prospects. Both of the experts that we heard from thought that there was a real potential for her health to improve. She needs treatment. Perhaps the award that we have made will assist at least in part with that. We would hope that one day soon the Claimant will be able to resume a career that she worked so hard to forge. It was not the Claimant's fault that she fell ill. We have not awarded the Claimant much of what she sought. We must make findings and apply the law. That does not mean that we do not have the greatest sympathy for the Claimant.

236. There have been several months of delay in sending out this judgment. The reasons will be explained in a separate letter to the parties. The Employment Judge recognises the additional stress that this causes the parties and apologises unreservedly.

Employment Judge Crosfill
Dated: 29 October 2024