Case No: 1806926/2013
1807824/2013
1800877/2014
1801373/2014

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EMPLOYMENT TRIBUNALS

First Claimant: **B**
Second Claimant: **C**

Respondent: **Chief Constable of West Yorkshire Police**

Heard at: **Leeds** **On: 7, 8, 9 and (deliberations only) 30 March 2017**

Before: **Employment Judge Maidment**
Member: **Mr K Hardacre**

Representation
Claimants: **Mr G Millar QC**
Respondent: **Mr I Skelt, Counsel**

RESERVED REMEDY JUDGMENT

1. As compensation for injury to feelings caused by the detriments suffered on the grounds of their having made protected disclosures, the respondent is ordered to pay B the sum of £22,000 plus an additional sum of £6,329.95 by way of interest and to C the sum of £19,800 plus an additional sum of £371.25 in interest.

2. No award is made to the claimants in respect of aggravated damages or psychiatric injury.

3. As compensation for loss of overtime the respondent is ordered to pay to B an amount representing 1873 hours of overtime covering the period from 1

September 2013 to 31 August 2016 plus interest at the rate of 8% from the appropriate mid point.

4. As compensation for loss of overtime the respondent is ordered to pay to C an amount representing 570.4 hours of overtime covering the period from 7 July 2013 to 21 May 2014 plus interest at the rate of 0.5% from the appropriate mid point.

5. The respondent is further ordered to pay to B and C the sums of £1200 each as costs pursuant to Rule 76(4) of the Employment Tribunals Rules of Procedure 2013 arising out of the Employment Tribunal fees incurred by them in bringing these proceedings. No order is made in respect of the issue fee paid in C's third complaint to the Tribunal where the claims pursued were not successful.

6. The parties agreed that following the conclusion of relevant High Court proceedings regarding the proper calculation of overtime payments for police officers they would provide to the Tribunal agreed figures for the calculations of loss of overtime referred to in paragraphs 3 and 4 above. The Tribunal was requested not to itself seek to calculate the value of such loss at this stage.

REASONS

The Issues

1. This remedy hearing was listed to determine the compensation due to the claimants arising out of them having suffered various detriments on the ground of their having made protected disclosures.

2. The Tribunal reminds itself that by no means all of the claimants' detriment complaints succeeded and any remedy is obviously confined to those which did.

3. C succeeded in his claim of detrimental treatment arising out of the terms of his May 2013 personal development review and his being prevented from participating in an HMIC review of Undercover Policing in January 2014. However, by far the most significant detriments (in terms of their affects on him) found in his favour related to his removal from undercover deployment where separate detriments were found to have occurred in his meeting with Mr D and Mr E on 26 June 2013 at which he was told that he was at substantial risk because of his relationship with a former police officer colleague who had been convicted of a criminal offence and that his removal from deployment was under consideration, his being summoned to the office on 7 July 2013 to be told that he was being removed from deployment on a particular operation and the refusal to show him risk assessment documentation at a series of meetings between 26 June to 23 July 2013. This cumulated in a meeting on 3 October 2013, found to comprise a final act of detriment, where he was required to return to work from sick leave in a civilian role working on automatic number plate recognition.

4. The most significant aspect of detrimental treatment found to have been suffered by B was his own removal from undercover work where the Tribunal found separate detriments in his treatment at a meeting held with Mr D and Mr N on 14 May 2013, his meeting with Mr I on 4 & 9 September 2013 and his case conference on 8 November 2013 at which he was told that PSD required his removal from the unit. Following on from such removal, it was found to be further acts of detrimental treatment for B to be offered a uniformed policing role in Leeds and posted on 2 December 2013 to a civilian role on Operation [2]. In common with C, the claimant was also found to have been subjected to a detrimental act in the terms of his May 2013 personal development review.

5. The remedies sought on behalf of both claimants are compensation for injury to feelings, an award of aggravated damages and compensation for personal injury. Furthermore, further compensation is sought in respect of lost overtime earnings as a result of their removal from undercover work.

The evidence

6. The Tribunal had before it an agreed bundle of documents in three sections and numbering in total in excess of 400 pages. The bundle before the Tribunal at this hearing included the Tribunal's own Judgment and Reasons as to liability. The Tribunal has taken time to revisit those findings which are obviously relevant to the continuing remedy issues now before it.

7. The Tribunal also during the hearing requested that the respondent provide for the Tribunal's assistance a schedule of overtime hours worked by the various police officers in the undercover unit. These were firstly supplied to the claimants' representatives together with supporting wages documentation such that the total of hours on the schedule could be, and was in fact, agreed. The Tribunal therefore had need only to be provided with the summary schedule of overtime hours worked.

8. The Tribunal took some time reading into witness statement evidence and relevant documentation such that when each witness came to give his evidence, he could do so by simply confirming the contents of his written statement and, subject to brief supplementary questions, then be open to be cross examined. The Tribunal heard firstly from B, whose evidence was interrupted after lunch time on the first day of the hearing by the interposition on behalf of the respondent of Mr Guildford. On the second day of the hearing the Tribunal then heard firstly, on behalf of the respondent, from Mr D and then briefly from Mr I. The claimant, C, then gave evidence on his own behalf following which Mr D was briefly recalled at the respondent's request to give evidence on a distinct point regarding availability of future undercover operations to which no objection was raised on the claimants' behalf.

9. Having considered all relevant evidence the Tribunal makes the findings of fact as follows.

The facts

10. B has served as a police officer with the respondent from [ ] 2002, becoming a dedicated undercover officer in February 2010. He remained as such until early September 2013 when he was removed from the respondent's Special Operations Unit.

11. When B commenced as an undercover officer, and indeed prior to that, there was an expectation that undercover officers could serve as such for a significant period without any prescribed limitations in terms of tenure.

12. On 14 May 2013 B was asked to meet with Mr D and Mr N during which meeting it was raised with B that his recent tattoo shortened his effectiveness in his life as an undercover officer. B recognised that the matter would be referred up to the Assistant Chief Constable.

13. B described his wife being worried on his return home that he was going to get into trouble at work. Indeed, he said that from the outset his wife was worried that he might lose his job as a police officer, not just as an undercover officer, which put some strain on their marriage which had not abated. B described his marriage being put under *"immense strain*" with them having slept in separate rooms for over three years due to the pressure caused by B having to deal with what he understood to be victimisation because of his being a whistleblower, his having disturbed sleep and the whole situation causing arguments between himself and his wife. He said that each time he had further discussions about his tattoo and other issues regarding his return to work, his wife became more and more agitated and anxious and he was unable to assure her that he would not lose his job as a police officer with the respondent.

14. B's upset was heightened by the nature of the tattoo itself and potential upset caused within the claimant's family regarding the reasons for its possible removal.

15. B completed his PDR review in May 2013. Within such review, whilst B was significantly praised for his performance, he was told of the need to concentrate his endeavours *'operationally'*. The Tribunal has concluded that had B not made protected disclosures, the objectives set at this PDR would have been different. The Tribunal accepts that B was concerned that the respondent was seeking to give him a message that his pursuance of his matters of concern would not be and were not being appreciated. However, the level of upset caused specifically by the PDR was relatively minor when compared to the suggestion and then moves to remove B from his role as an undercover officer. The May 2013 PDR review became more of an issue in hindsight. The Tribunal notes that whilst B was treated detrimentally by the provision of a six month rather than the standard twelve month review period, he was not aware that he and C were being treated differently to the other undercover officers in that regard until much later and indeed the previous Tribunal hearing.

16. The Tribunal does not accept that the May 2013 PDR review has been considered by B as in itself a blight on his long-term career prospects and

something which might be used against him in any future job application within the respondent.

17. At a meeting on 4 September 2013, B was complimented by Mr I on his hard work in closing down an operation, but was then told that there would be no more undercover work for him and he would be required to report to Operation [2] for work, possibly starting the following day or even that afternoon. B expressed the view that this was not how he expected to be treated on the end of an undercover assignment and expressed a view that he would be required to perform menial tasks on Operation [2]. He was told that the move related to ongoing issues with the region and the PSD investigation in which he was involved, his tattoo and a shortage of staff at [2].

18. B had a further meeting with Mr I on 9 September along similar lines to the 4 September meeting with the effective conclusion being that he had to take up one of two alternative roles proposed for him. Again, at this second meeting, Mr I sought to assure B that the issue was the compromise risk due to B's tattoo. B was told that a formal decision was required in terms of potential breach of Force policy before the situation could move forward. B said that he had made enquiries about having the tattoo removed. Ultimately, the Tribunal has noted that it was determined that B's tattoo did not breach Force policy as it was capable of being covered by a uniform.

19. B told the Tribunal that this treatment and his removal from his undercover position led him to commence a period of sickness absence from work from 9 September 2013. C points to his sickness record with the respondent with no pattern or history of lengthy or frequent absences from work due to ill health.

20. He described returning home following his meetings and the worry and upset leading to further arguments with his wife which increased over the next few weeks whilst he was absent due to sickness.

21. In the interim, Mr E met with the claimant for welfare review meetings. However, by letter of 30 September 2013 Mr I wrote to B inviting him to a case conference to discuss his continued absence from work due to sickness. He was told that Rachel Bamfield of Human Resources and B's Police Federation representative would be present at the meeting.

22. B received this invitation by post on 2 October 2013 which he said caused his stress to reach *"an unbearable peak"*. He said that the matter caused his wife to become even more worried and stressed as, to her, this illustrated that the respondent would try to do everything to get rid of him with the risk of loss of his job, house and family.

23. The invitation to this sickness case conference came at a particularly difficult time for B as on Friday 4 October he was due to attend the inquest into his mother's death which had occurred some 14 months previously. The evidence was not that any stress arising out of his mother's death had affected his ability to work.

24. Having further argued with his wife, B put a mobile phone charger cord around his neck and tightened it causing residual marking on his neck. On C noticing

these marks the following day, B was referred to Pinderfields Hospital and spoke to a nurse, doctor and mental health professional before being discharged.

25. B remained absent due to sickness until 2 December 2013.

26. B did in fact attend a rearranged case conference on 8 October where his health was discussed. B's Federation representative emailed Mr I on 11 October saying that B had made enquiries about laser treatment to remove his tattoo. Mr I was of the view that any future risk assessment before a redeployment would have to involve a consideration of B's state of health.

27. B was seen by Dr Shinn, the Force medical officer on 8 October who reported to Mr I to say that B was now fully fit to return to his policing role continuing that he was fit to undertake a normal front line policing role and there are no areas of work which he considered inappropriate for him.

28. B was then referred to a psychologist, Mr X10, on 23 October. He recommended the obtaining of a psychological report from a mental health professional with experience of the work involved in covert policing. Mr I, however, felt that obtaining such report was premature until the completion of the investigation by PSD into B's issues of concern. That did not indeed conclude until February 2014 although the report was only issued somewhat later.

29. Mr I contacted Dr Shinn on 28 October attaching X10's report and saying that he was particularly interested that Dr Shinn's assessment that B could return *"to a new role"* would seem to contradict X10's view.

30. Dr Shinn saw B again on 5 November after which he reverted to Mr I saying that when he commented previously regarding B's fitness, his comments ought to have been in the light of the referral made at the time where he said it was clear to him that B was not being returned to an undercover role. His view was that B was medically fit for any suitable role which amongst other things would have to be determined through a Force risk assessment. Dr Shinn commented that it would not be helpful for B to be placed in a meaningless or insignificant role which was how B viewed the option of deployment to Automatic Number Plate Recognition.

31. B attended a further case conference on 8 November when it was agreed that he would return to work on Monday 11 November. It was then proposed that the return would be to a uniformed role within a neighbourhood policing team in an area where B had previously worked as an undercover officer. B considered this to be the most dangerous option for him and, given where he lived, any compromise that arose would also endanger his family and home. B described himself as being left *"drained, stressed, unable to sleep and anxious that the Force were not only doing nothing to protect me but were actively seeking to put me in dangerous situations"* as a result of the risk assessment process.

32. Against this background B returned to work on 1 December 2013 at [2] House where he remained for 12 months in the role of researcher, a role which could be performed by a civilian.

33. B described that whilst he would have preferred to remain ultimately in this role, where he was seeking to inject more stability in his life and was receiving good feedback on his performance, moves were taken to relocate him again into a uniformed role. B, indeed, reverted to a uniformed role at [ ] Central Police Station from the beginning of January 2015 where he worked until early September 2015.

34. B referred in evidence to further stress being caused to him by the Employment Tribunal proceedings. He described not being allowed to attend the Tribunal during work time and his use of annual leave to assist his attendance for the duration of the Hearing.

35. Whilst B said that he had obtained some form of relief from the positive Tribunal outcome he described this as being short lived when the respondent appealed the Tribunal's decision. B described further difficulties at home and the situation causing arguments he described as *"unbearable*" causing him to move out of the family home to stay at his brother's house for a few nights.

36. The evidence was that B's stress was further significantly heightened by the forthcoming disciplinary case being pursued against C and B anticipating and preparing to give evidence during that process. This caused the claimant B to be absent due to work from September 2015 until February 2016 during which he attended six sessions of counselling with a psychologist engaged by the respondent and a greater number of sessions with a service to which he had been referred by his GP.

37. When B did return to work it was to a role at [ ]Police Station which B again considered to be a higher risk posting due to the connections he had with that locality. He was pleased that 11 weeks later he was able to be transferred back to [ ] from April 2016 where he remains and where he says he has received good support from his Inspector and Sergeant at that station.

38. B described himself now as feeling positive and vindicated after the Tribunal and subsequent Employment Appeal Tribunal rulings. He said he looked forward to completing the rest of his police service.

39. The Tribunal has seen a medical report of Dr Friedman, Consultant Psychiatrist after an assessment of B on 21 September 2015 together with a review of his medical and occupational health records. Indeed, the appointment came quite soon after B had commenced his period of sickness absence due to stress from 5 September 2015.

40. In terms of family history Dr Friedman referred to the death of B's mother in 2012 by [ ]. B repeated to Dr Friedman his feelings of anger as to how he had been treated and that his wife had been extremely stressed by the ongoing Tribunal proceedings and concerns about him losing his job. B referred to a major argument between them in October 2013. Dr Freidman described the phone charger incident as not appearing to have been a serious attempt by B to kill himself. B told him of distress felt when the respondent decided to appeal the Tribunal's findings and indeed just before the deadline expired for doing so. He also explained to Dr Friedman that he had commenced his period of sickness

three days before he learned of the respondent's appeal and had been to appear at a colleague's disciplinary meeting.

41. In terms of his opinion, Dr Friedman considered that B had attempted to give a reasonable account of his history and subsequent difficulties without exaggeration. He observed that B did not appear anxious or depressed during the assessment. His opinion was that B had been generally psychologically well throughout his life until recent times and, whilst his mother had a history of severe mental illness, there was no evidence that B had had any similar condition. As regards the work situation and sickness absence from September 2013, he commented that at the time he did not believe that B was significantly psychiatrically unwell but was angry and upset about the situation at work. He commented:

> *" [B] describes now, and the assessments at the time indicate, that it was not felt that he was seriously psychiatrically unwell or required any psychiatric input. It was seen as a reaction to the immediate stress of the situation for which he was regretful. In my opinion his stress reaction was caused by the problems at work."*

42. As regards the more recent absence from the beginning of September 2015, Dr Friedman expressed an opinion that B suffered from a panic attack which appeared to be relatively short lived and caused by the situation at work. He commented:

> *"I do not believe that he is generally suffering from a depressive disorder, anxiety disorder or panic disorder. I note that he was seen by an out of hours Doctor who prescribed some medication but that subsequently his GP did not feel that he required medication and referred him on for counselling. At the time I saw [B] I did not judge him to be significantly psychiatrically unwell. I do not believe that he currently fulfils the criteria for a psychiatric disorder. The major emotion that he describes is one of anger and frustration at the way he perceives he is being treated by the Police Force…. [B] remains preoccupied and ruminates over the events of work. It has put very significant stress upon his marital relationship over the last two years which has been upsetting and unhappy for him…. In my opinion, [B] has been very significantly distressed by the investigations and processes at work. He is a conscientious man who previously received a great deal of reward and enjoyment from his role as a Police Officer and feels angry and distressed that this has now been lost. I do not believe that he is at significant risk of developing a mental illness in the future but will obviously be extremely distressed if his future police career is affected by these matters…"*

43. B was then seen by another Consultant Psychiatrist, Dr J K Appleford, on 28 October 2016. He was also in possession of the medical records of B, occupational health records, Dr Friedman's earlier report and this Tribunal's liability judgment.

44. Dr Appleford had recorded that there was no history of mental health problems prior to the events that gave rise to B's Tribunal complaints.

45. The report noted B saying that he felt in September 2013 that his career was *"down the pan*". He had begun to ruminate on events which had restricted his sleep and if he did sleep would at times have nightmares. He described that he felt *"angry as much as down*". However, he was eating healthily and had no problems with anxiety or panic or concentration. He was not suicidal. However, the period up to his self harming incident in October 2013 was described as *"the lowest point I'd ever felt"* referring to arguments with his wife and worrying about his next employment. The letter received inviting him to a case conference regarding his sickness absence provoked a further argument with his wife and for the first time that day he experienced suicidal thoughts. B declined medication after his incident of self harming and described to Dr Appleford that he did not feel that he has *"ever had a mental health problem, before during or since*". He said he had *"done something stupid*".

46. Nevertheless, sleep problems persisted and B struggled to relax and stop thinking about his work situation. He reported anxiety and panic symptoms in September 2015 when he went off sick. He felt that the stress at the time was caused by the respondent's decision to appeal the Employment Tribunal decision. Further, he said that he felt there was a conflict between the requirement to give evidence in respect of C's disciplinary case and his duties. He described that: *"it just built and built"*. This caused B's sickness absence at this time and he continued to experience panic attacks for several weeks. B reported to Dr Appleford that at the time of the assessment he was now *"fine"* saying that there were no issues or problems at all.

47. Dr Appleford conducted assessments which produced a score within a range normally associated with borderline clinical depression and in a separate assessment a score which indicated very low levels of anxiety.

48. Dr Appleford proceeded to give an opinion that on the balance of probabilities B had experienced symptoms amounting to a psychiatric disorder classified as an adjustment disorder with prominent disturbance of other emotions. He went on to describe how adjustment disorders are defined, referring to onset recurring usually within one month of the occurrence of the stressful event or life change and the duration of symptoms not usually exceeding six months except in the case of prolonged depressive reaction. He described it as more than likely that the work related issues were the cause of the condition. He stated that the prognosis was favourable.

49. B has worked very little overtime since his removal from undercover police work and indeed the evidence was of only a small number of hours very recently which arose as a result of the need to cover another Police Officer's absence.

50. Had B remained in the Special Operations Unit he would have done so in an environment of attempts to reduce costs and rein in particular aspects of expenditure. The number of undercover officers in the unit has reduced from eight officers in 2013/2014 to seven officers in 2015/2016 and the number of cover officers has also reduced by one in the same period.

51. The use by the Police of undercover operatives has obviously attracted significant adverse publicity in recent years which has resulted in an HMIC

enquiry. Indeed, the emphasis of undercover operations has changed so as to now adopt a more targeted approach rather than the previous, sometimes prolonged, embedding of undercover officers in particular communities or criminal fraternities. The average time spent on an undercover operation has typically reduced.

52. Mr D gave evidence to the effect that B's redeployment undercover would not have been allowed until he had removed his tattoo and undertaken a psychological assessment. Those requirements and the respondent's reaction to them have been dealt with already in the Tribunal's liability judgment. He also maintained that before any subsequent redeployment it would have been necessary to disclose details of B having covertly recorded meetings and conversations with colleagues which would have made it unlikely that B would have been selected by a Senior Investigating Officer to work on his or her undercover operation.

53. The Tribunal notes that no disciplinary proceedings have ever been taken or informal advices given to B in respect of his covert recordings. Indeed, the issue of both claimants' whistleblowing and their consequential treatment as a result of it, as found by the Tribunal, has not been addressed with the claimants or any Police Officers who have been found to have treated the claimants to their detriment. There has been no formal debrief or dissection of the case in terms of identifying lessons to be learned. There has been no apology given to the claimants nor any recognition otherwise of the Tribunal's findings.

54. It is, however, clear on the evidence that undercover police officers will not in the future be able to work as, for instance, had C, moving from one undercover assignment to another almost without break for very many years. Within the Police nationally it is anticipated that a formal tenure policy will be put in place. This follows on from specific recommendations made by the National Policing Improvement Agency and HMIC. One recommendation made by HMIC in 2014 was that advanced undercover officers should be subject to a maximum tenure in the role amounting to 5 - 7 years. Initial discussions within the respondent's Special Operations Unit were to the effect that it would adopt a six year tenure policy, but such discussions have been superseded by more recent guidance issued by the College of Policing in October 2016. This indeed is to be formally adopted by the respondent and recommends that undercover officers should return to regular policing after 3 – 5 years. They would then be eligible to reapply to rejoin the unit after a suitable break with a suggestion of a break of not less than 18 months. This does not denote any entitlement to return to undercover work. Any application to return to undercover work would be subject to further psychological and risk assessments and as part of a competition with other applicants for such work, including potential new recruits.

55. The evidence before the Tribunal is that the respondent has started to implement such policy. One undercover officer with more service than B left the unit in April 2015 (Mr T) and Mr Z will leave sometime this year – he joined the undercover unit 18 months after B. On this basis, Mr D's estimation was that B, if he had remained as an undercover officer, would have been managed out of the unit in early 2016.

56. One of the factors influencing deployment opportunities for undercover officers is inevitably their personal profile. B would be deployed undercover as a [ ] male in his early 40s and would thus have to be convincing as such in any particular targeted operation. Traditionally, a significant proportion of undercover officers have a similar profile to B. The aim nationally is to recruit more undercover officers of Black and Asian ethnicity and to increase the representation of female Police Officers within the undercover community.

57. In the last four months of 2011 B worked 196 hours of overtime, 710.5 hours of overtime during the calendar year 2012 and 505 hours of overtime in the eight month period from January to August 2013. That gives an average monthly overtime worked of 58.81 hours.

58. Mr Z, Mr D accepted, was the closest to Mr B in terms of profile within the respondent's Special Operations Unit. Obviously, the amount of overtime will vary between officers according to their individual circumstances. Whilst the Tribunal has observed that periods between undercover assignments could involve some downtime when officers were engaged on other activities, including legend building and preparing for future operations, the records of hours worked show in fact an almost continuous involvement on undercover activities of a number of operatives. Mr Z worked, it appears, on undercover duties involving the availability of overtime hours without significant break. From 1 April 2013 to 31 March 2014 Mr Z worked 670 hours of overtime at an average of 55.83 per month, during 2014/2015 790.5 hours at an average of 65.88 per month, during 2015/2016 669 hours at an average of 55.75 per month and during the period from 1 April 2016 to 31 January 2017 he worked an average of 38.35 hours of overtime. Indeed, those latter figures suggest, in accordance with Mr D's evidence, that there has been a reduction in the amount of available overtime for undercover officers.

59. C has been a serving Police Officer with the respondent since [ ] 1989 and commenced undercover work in 1992/1993 becoming deployed from 1994 as a Specialist Undercover Officer including nationally and internationally. He worked as part of the respondent's undercover unit and subsequently the Regional Special Operations Unit from 2006.

60. C was concerned when he underwent a Personal Development Review in May 2013 as this was not the timing he expected, albeit again a significant amount of his upset at the review is with hindsight, having discovered in the Employment Tribunal proceedings in particular that he was subject to a six month review period, whereas other undercover officers retained a standard twelve monthly period of review. It can be said, however, that C was suspicious at the time as to the respondent's reaction to his disclosures and viewed the May 2013 review with commensurate suspicion, with particular reference to the objectives set.

61. C was told at a meeting with Mr D and Mr E on 26 June 2013 that he was at substantial risk because of his relationship with a rogue Police Officer who had just been sentenced to imprisonment. He was told that his removal from deployment on his current operation was under consideration.

62. C's immediate reaction at the time was that the respondent was looking for a pretext to remove him from undercover work as indeed a reaction to the concerns which he had raised. He considered that the way the risk had been evaluated was exaggerated and was effectively to scare him and his family, directly or indirectly. He described his wife being concerned when he arrived home and being shocked and initially scared when C told her of the risks he had just been informed of. He referred to his [family members] questioning whether they were safe which caused C further distress. However, C worked to allay their fears and persuaded his wife to his own way of thinking, i.e. that the evaluation of risk was in fact false.

63. C was summoned to the office on 7 July 2013 to be told that he was being removed from deployment on his current operation. At a series of meetings indeed with his supervisors between 26 June to 23 July 2013 there was a refusal to show to C the risk assessment documentation upon which the decision to remove him from undercover work was said to be based.

64. C described feeling subjected to "*constant humiliation and with contempt*". He said that this escalated the fears and anguish he and his family were facing. He said his family became increasingly concerned for their safety which caused fraught discussions between them against a background of the respondent intimating a continuing escalation of risk. It is clear that C continued to regard the risk assessment as false.

65. C complained of a report produced by Mr N which he described as defamatory. The Tribunal has referred to such report in its liability decision already. It notes at this stage that the report questioned the integrity of both of the claimants and indeed their mental state. It is noted also that this report only came to the claimants' attention during the disclosure process after they had commenced Employment Tribunal proceedings.

66. C met with Mr I on 3 October 2013 during which his return to work from sick leave in a civilian role working on Automatic Number Plate Recognition was discussed. C described being shocked when it was confirmed to him that he would be moved to a non police role, as he described it.

67. C described his exclusion from the HMIC visit, part of the review they were undertaking of undercover policing, in January 2014 to have been a hurtful and blatant attempt to prevent any critical information reaching the enquiry team.

68. C described that his family life and relationships with friends had suffered immensely *"consumed with negativity and fear*" and that his health had suffered due to stress and anxiety. He described his health as rendering him unfit for work from July to October 2013 and again from July 2015 to date. He described the last five years as the most traumatic over his entire police service for him personally and his family during which he had suffered daily anxiety and stress about the detriments he had suffered as a result of his protected disclosures. He said that he had suffered constant sleep deprivation and still, at this point in time, cannot comprehend what he regards as the total contempt and manipulation of his disclosures for the respondent's self protection.

69. C said that after the Employment Tribunal case had been heard he was informed that the Chief Constable would accept his resignation if offered. After consideration he decided to resign with effect from 3 October 2016, he said, to avoid years of protracted legal proceedings fighting the misconduct charges which, as described in the Tribunal's liability judgment, had been raised against him.

70. C was seen by Dr Friedman, Consultant Psychiatrist on 21 September 2015. Dr Friedman was aware that the claimant was suspended and had last worked in May 2014. Dr Friedman noted no previous medical history of note and no previous psychiatric history. He noted that C was taking at that point an anti depressant which he said he had been taking for the past few weeks.

71. C described the events at work to Dr Friedman. He described that during the initial period away from work he was angry and upset that he was not allowed to see the risk assessment. He was not sleeping well and was preoccupied with events and not being allowed to work. Whilst he had been told there was a concern over his family's safety he did not believe that this was really the case.

72. Dr Friedman described discussing with C any psychological problems he had suffered during the period and was told by C that he had continuing problems with sleep because he was ruminating over events at work, the ongoing complaints, the Tribunal and disciplinary hearings. He had bad dreams and disturbed sleep. He had lost some weight but was previously overweight and therefore was not concerned at this. He said that there were times when he was distracted such as when out socially when he could feel better. He described difficulties in his relationship with his wife who was also stressed and upset by issues of work.

73. Dr Friedman described a review of C's medical records which included a referral to a community mental health team on 3 October 2013 and being prescribed a daily anti depressants on 5 August 2014 by his GP which had continued. A letter from the Psychological Wellbeing Service from March 2014 described him as presenting with anxiety and low mood caused by the ongoing Tribunal. He struggled to engage in cognitive behavioural therapy treatment and did not feel that the therapy was helpful. His absence at the beginning of October 2013 was said to relate to stress/anxiety. A letter from Dr Shinn of 7 October 2013 referred to the case being complex but gave his view that C was fit to return to any acceptable police role.

74. In terms of opinion, Dr Friedman did not believe that C was exaggerating his current psychological problems. He noted a lack of previous psychiatric problems but in his opinion could find no evidence that C was, at the point of examination, suffering from a psychiatric problem at the level of a psychiatric disorder. Dr Friedman described that:

> *"He was distressed and upset but in an understandable and proportionate manner. He was able to function normally and was clear that if he had not been suspended or was told he could continue with his previous role he would have remained at work. It would seem that as soon as he saw the*

Occupation Health Physician at work there was agreement that he was fit to return to work and this was arranged. There was never any suggestion that he was suffering from a significant psychiatric disorder… [C] returned to work and was performing at a good level until the time he was subsequently suspended. He has not returned to work due to the suspension although generally felt that he would have been able to return to work at any point with the appropriate support… He has found the way that he has been treated extremely upsetting. He describes during the time of his suspension that he has had difficulty sleeping and remains preoccupied and is ruminating over events at work. There are times when he manages to distract himself when he can feel well and happy. He often feels frustrated that he continues to spend so much of his mental activity on these events. He generally sees his degree of concern and upset as understandable and proportionate to what has happened to him. [C] has seen his GP and been prescribed antidepressants. These have caused no difference to his presentation which I did not find surprising because I do not feel there is evidence that he has been suffering from a depressive disorder. In my opinion he has been significantly and understandably distressed by these events. He has been understandably concerned about his future career and has been well supported by his wife in these matters. In my opinion, whilst he has been very significantly upset by these matters I do not believe that they have quite fulfilled the criteria for a psychiatric disorder and he has not generally regarded himself as psychiatrically unwell. His overwhelming emotional response is one of anger and frustration of the way he feels he has been treated…. In my opinion therefore, I could not find evidence that he has suffered from a depressive illness, anxiety or Post Traumatic Stress Disorder… I believe that his general long term prognosis is good although he will obviously be extremely angry, distressed and frustrated if the outcome of the Tribunal and misconduct hearings prevented him from continuing with the police career that he has generally greatly enjoyed."

75. C was subsequently on 11 November *2016* assessed by Dr Appleford, Consultant Psychiatrist. The Tribunal has considered his report.

76. C, describing his difficulties at the time of the Tribunal, said: *"… they're supposed to be your family… stabbed in the back."* C described periods of stress in his role which had affected his home life. Many of the instances predated these Tribunal proceedings and the events leading up to them. In terms of more recent feelings, however, he described significantly disturbed sleep patterns. He told Dr Appleford that, in response to the respondent's intimation that he was at risk, he had put barbed wire around his garden and hedges. He described major arguments at this time with his wife and that they swore at each other for the first time. He described soiling himself in his sleep four times in three years and described confused dreams. He said that he had had a massive panic attack and further panic attacks triggered by events that reminded him of the incidents at work. One of the panic attacks had been when he had met with B and noticed marks around his neck. He continued to be anxious regarding B's mental state.

77. He described returning to work two weeks later but still having concerns in the background and his sleep remaining disturbed. He was anxious about negative

feedback from PSD and described his mood as very low and that he was tearful. He was not talking with his family at home. He said that when he was suspended he had thought that he would *"get fitted up*". He said that he had experienced *"massive paranoia"* that he was being monitored.

78. As regards his current health, C described himself as angry, having very low self worth and feeling physically drained. He said he was not suicidal. He felt recently some slight relief on account of leaving the respondent.

79. In an assessment for depression he was recorded with a score which was within a range normally associated with significant depression and a score in a separate assessment associated him with having significant anxiety.

80. Dr Appleford's opinion was on balance of probabilities that C had experienced symptoms amounting to a psychiatric disorder, in particular an adjustment disorder, mixed anxiety and depressive reaction. Work related issues were said to be the likely cause of his initial condition and subsequent episodes of recurrence. Prognosis for the future was said to be good.

81. In October 2013, after an examination of C's laptop, it was reported by PSD that C's activities in connection with a sex related website had been discovered. This resulted in a Gold Group meeting attended by Mr Guildford, Mr I and Mr Stead of PSD on 23 October 2013. They decided not to take any further action on that discovery at that point. At the liability hearing Mr Guildford confirmed that his view had been that it was inappropriate to take any further steps in connection with this discovery whilst the PSD investigation was still ongoing and as the risk in a delay was seen as low. This was indeed the understanding subsequently communicated to Deputy Chief Constable Collins at a briefing she received from Mr Guildford on 6 February 2014. By February 2014 the PSD enquiry was at the point of a final decision and Mrs Collins felt it appropriate to look at the laptop issue. This led, after a period of investigation, to C's suspension from work on 21 May 2014.

82. The Tribunal has heard further evidence from Mr Guildford who reiterated his responsibility for making the decision that the disciplinary investigation into C's computer usage would be delayed pending the conclusion of Operation Webford. He noted that at the time he made that decision in October 2013, C had already been removed from operational deployment in the Special Operations Unit, had been absent due to sickness since 22 July 2013 and was engaging in discussions regarding a return to work in another capacity. Mr Guildford said that there was no imminent prospect of him being returned to deployment as an undercover officer. He said, however, if the deployment as an undercover officer had been continuing at the time that his internet activity had been discovered, he would have been suspended immediately. This was in view of the operational security risks of allowing C to remain deployed having conducted himself in the manner disclosed by the website activity. He said this decision would have resulted in the disciplinary matter being investigated immediately rather than being deferred until the conclusion of Operation Webford. Mr I gave evidence to similar effect. He said had C not been absent due to sickness, he would have had no hesitation in recommending his immediate suspension from operational

deployment although the decision to suspend would have been for others to consider.

83. Turning to the issue of overtime, it is accepted that in the period following C's removal as an undercover officer on 7 July 2013 and until he left the respondent's service as a Police Officer he had no opportunity to earn overtime. The Tribunal notes that in the final four months of 2011 C worked 179.5 hours of overtime, in the calendar year 2012, 695 hours, and in the first six months of 2013 until 30 June 2013, 308 hours. This equated to a total of 1182.5 over a twenty two month period and therefore an average of overtime hours worked of 53.75 per month or 12.40 per week.

Applicable Law

84. The Tribunal heard submissions on behalf of the respondent and the claimants. Some of the parties' respective arguments based on the legal principles now set out are dealt with in the Tribunal's conclusions below. Authorities relating to compensation for unlawful discrimination were agreed to be relevant to detriment claims.

85. As regards injury to feelings arising out of the detriments as found to be proven, there was no dispute as to the correct legal approach. It was submitted with reference to **Prison Service and others v Johnson [1997] ICR 275** that the purpose of an award for injury to feelings is to compensate the claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with **Ministry of Defence v Cannock [1994] ICR 918** the aim is to award a sum that, in so far as money can do so, puts the claimant in the position he or she would have been had the discrimination not taken place. Pursuant to **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05**, an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the Claimant.

86. The Tribunal was referred to the Vento guidelines (derived from **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Nevertheless, the Tribunal considers that the decisive factor is the effect of the unlawful discrimination on the claimants. Obviously, the claimants are two separate individuals and there cases must be considered on their distinct individual facts.

87. The parties accepted that the bands originally set out in **Vento** have increased in their value due to inflation and, on the weight of current authority, a further uplift in accordance with an uplift of 10% given to general damages pursuant to the case of **Simmons v Castle [2012] EWCA Civ 1039**. It was not disputed that on the basis of those uplifts the middle band now ran from £6,600 at the lower end to £19,800 at the top end.

88. The claimants in their schedules of loss sought, in addition, an award for aggravated damages. The Tribunal was referred, for the principles to be applied, to the decision of Underhill J in **Commissioner of Police of the Metropolis v Shaw [2012] ICR 464**.

89. Aggravated damages are not ordinary damages for injury to feelings in consequence of discriminatory acts – that would be mere duplication. They may be awarded inappropriate cases in respect of the manner in which the wrong was committed. In this regard a Tribunal might be looking to see whether there has been behaviour of *"a high-handed, malicious, insulting or oppressive manner"*. Secondly the motive for the conduct of the employer may be relevant, if the employee was aware of it, in circumstances where spiteful, vindictive or deliberately wounding conduct is considered likely to cause more distress than conduct which results from ignorance or insensitivity. Under both these heads this Tribunal is mindful of the need to avoid duplication if indeed such factors are already compensated for within the award of injury to feelings.

90. The third head under which aggravated damages may be available is where an award is warranted by the Respondent's subsequent conduct after the discriminatory action. For instance, an award may be appropriate in the case of an employer who has deliberately refused to investigate a clear complaint of discrimination, failed to apologise when discrimination was patent or used his superior power and status to cause further distress. Conduct in the course of litigation may aggravate injury in a manner which can properly result in compensation, albeit respondents are allowed to defend themselves and an adversarial approach to a claimant's evidence is not in itself a ground for an aggravated award.

91. There are also claims in these proceedings for compensation for personal injury – see **Essa v Laing [2004] ICR 746**.

92. Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the Tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the claimant, so far as possible, into the position that he would have been in had the discrimination not occurred - see **Ministry of Defence v Cannock** above – essentially a "but for" test in causation when assessing damages flowing from discriminatory acts.

93. Clearly in this case loss of earnings is sought for an appropriate period to reflect a loss of opportunity to work overtime and be paid an addition to basic salary in respect of it. There is no other head of financial loss sought.

94. Applying the above legal tests to the Tribunal's factual findings and having considered the arguments raised by both parties the Tribunal reached the conclusions as to compensation set out below.

Further Discussion and Conclusions

95. The Tribunal considers firstly the appropriate award of compensation to both claimants in respect of injury to feelings. It is accepted by the parties that the

appropriate ranges of compensation now include a middle band of compensation for injury to feelings running from £6,600 to £19,800. The submissions on behalf of the claimants support an award for injury to feelings at a level falling in the top band (i.e. at or over £19,800) on the basis that it is said that the claimants both suffered serious detriments over a significant period of time. The further point is made that the claimants were/are officers within a disciplined service where there was more opportunity for punishment and therefore a greater need for their protection as whistleblowers. The claimants, it is observed, had suffered detriments despite the involvement of PSD.

96. The respondent's position is that compensation should be considered in the middle band and that the Tribunal ought to recognise that PSD provided some comfort to the claimants in terms of, at least, a partial finding in their favour in respect of the complaints raised. On consideration, the Tribunal does not consider that the involvement of PSD should impact on the award in either an upwards or downwards direction.

97. There can be no argument that the claimants did suffer significant detrimental treatment, in particular by their removal from undercover police work (which they both valued on a professional and personal level) and in their redeployment to alternative police service roles. The detrimental actions took place over a significant period of time and had significant continuing affects on both claimants.

98. On behalf of B, it is said that he suffered anxiety from the meeting regarding his tattoo on 14 May 2013 and was distressed by references to his future employability. In September 2013 he suffered a devastating loss of his undercover role which amounted to a loss of career such that he was certainly at that point in time, in a dark place. He self harmed after the letter inviting him to a sickness case conference which might be viewed as a trigger for further distress and damage caused to him. On behalf of the respondent, it is said that the letter was indeed a cause of distress and upset in itself, the point being made that the issuing of such letter was not part of the detrimental treatment as found by the Tribunal. The looming inquest in respect of B's mother was of some significance to his state of mind such that he had indeed already been to see Welfare on 1 October.

99. The Tribunal, however, prefers the argument advanced on behalf of B that, but for the cumulative affect of the earlier detriments, the sickness issue, continuing absence and act of self harm would, on the balance of probabilities, not have occurred. Indeed, but for the earlier detrimental treatment the claimant would still have been working in an undercover capacity and would not have been in the dark place he now found himself, would not have been sick in September and the letter inviting him to the case conference would therefore never have been sent.

100. There was no attempt on the part of the respondent to obtain psychological clearance for B or to make progress in consultation with him regarding the removal of the tattoo. The respondent instead took steps to redeploy him into a role which quite obviously would provide B with no career satisfaction and indeed raised issues regarding his personal safety. B had to himself push for a risk assessment regarding redeployment and the evidence, the Tribunal accepts, is

of B feeling drained and events having affected his personal relationships in terms of friends, family and particular strains on his marriage.

101. The Tribunal rejects the respondent's argument that any injury to feelings ought to be diminished in circumstances where B, regardless of any detriments, would have not been fit to undertake undercover work (but for the detriments indeed it is likely that he would have been fit), would not have been able to undertake such work because of the tattoo issue (the Tribunal has found that steps could have been taken for its removal) and that B's prospects were inevitably limited by his covert recording of colleagues. Again, the Tribunal cannot accept such proposition in circumstances where no action of even an informal nature was taken against B arising out of his involvement in making of such recordings.

102. Again, whilst B was absent due to sickness again from September 2015 because in part concern over his involvement in C's disciplinary case, this cannot be looked at in isolation as a factor causing his absence and again, but for the detrimental treatment as found and the upset caused by it, on the balance of probabilities B would not have been so vulnerable so as to have been caused to be absent due to sickness at that time.

103. The Tribunal further notes the lack of any acknowledgement of wrongdoing on the respondent's part or any seeking to rebuild trust and relationships with B. It is not unreasonable for B to have viewed the events as forming a significant blemish on his career.

104. Taking all these factors into account the Tribunal assesses injury to feelings as meriting compensation at the level of £22,000 which categorises the injury to feelings as falling within the top band albeit not by a significant margin. An award at a higher level would have required circumstances somewhat different to the current ones and with evidence of greater upset and adverse consequences suffered.

105. To this, interest must be added at the applicable rate of 8% over what is a 187 week period from 1 September 2013 when the effective removal from undercover work took place giving therefore a sum to be awarded in the B's favour in respect of interest of £6329.95.

106. Turning now to injury to feelings in respect of C, the Tribunal notes C's worry at the May PDR, family concerns regarding the intimation of a threat to C, even if C concluded that there was none, the secrecy regarding the risk assessment, the difficulty caused in terms of C's relationship with G's daughter and the devastating loss of career as an undercover officer which had been pursued by C for nearly twenty years. The 1 July meeting was distressing and C was kept guessing in terms of the content of the risk assessment for more than three weeks. The return to work meeting of 3 October 2013 produced a significant shock in terms of the non-policing role to which C was to be redeployed. The Tribunal recalls the position C found on Operation [3] was through his own independent efforts.

107. On the other hand, the Tribunal cannot avoid a conclusion that not all of the distress and upset caused to C arose because of the detrimental treatment as

found. A significant amount of upset and distress inevitably flowed from the May 2014 suspension of C on charges of misconduct and the subsequent disciplinary proceedings. It is said on his behalf that if there had been no earlier detrimental treatment C would have been more able to deal robustly with such action and that he was damaged by that stage already.

108. Whilst not rejecting such proposition completely, the Tribunal is of the view that the disciplinary charges and the nature of the misconduct being pursued against C constituted a significant freestanding and intervening cause of his distress and upset in the respondent's service. The discovery of the incriminating material arose from Operation Webford entirely independently of C's raising of concerns in a whistleblowing context. Certainly, the information did not come to light because of C's disclosures or any detrimental treatment he received because of them. It is likely that C was significantly distressed in circumstances where he would have foreseen that his service with the respondent was likely to be ended as a result of the discovery of his internet activity in circumstances where the respondent did not consider there to be any legitimate purpose for such activity. The impact of the disciplinary proceedings must, the Tribunal finds, have, as the respondent submits, been overwhelming in terms of any residual impact flowing from the earlier detrimental treatment such that the Tribunal's focus in terms of injury to feelings ought to be on the period from May 2013 to May 2014.

109. Weighing up all the evidence and above factors, the Tribunal considers that in C's case an award of compensation for injury to feelings should be in the sum of £19,800. Such significant award reflects the upset caused as being enhanced by C's effective loss of a twenty year career as an undercover officer in circumstances where he would have expected such career to continue to retirement. However, the evidence is of C's upset being at a lower level than B in circumstances where, whilst the effect of removal from undercover work may have been greater on C than on B, the future/continuing effect given the impending and supervening initiation of the disciplinary charges and period of future police service in any event was materially less. Given that C's complaint was not brought to the Tribunal before 1 July 2013, the applicable interest rate in his case is the previously lower rate of 0.5%. Interest is to be assessed over a period of 195 weeks giving a figure due of £371.25.

110. Turning now to the question of aggravated damages for both or either of the claimants, it is noted that, on behalf of the claimants, reliance is placed on the respondent arguing bad faith in terms of the disclosures made by the claimants, a suggestion that was put forward by them without evidential basis. Whilst, however, the Tribunal notes that a number of the respondent's witnesses in answer to questions before the Tribunal said that they did not regard the raising of concerns as dishonest, the respondent did have legitimate issues to explore with the claimants in terms of their motivations for raising the concerns such that the attempted defence to the whistleblowing complaints was not improperly raised.

111. Reliance is next placed on the report of Mr N which was said to be an attack on the characters of the claimants. This, as already noted, was disclosed during the course of the legal proceedings, as indeed it had to be, but the Tribunal was urged to note that it was also relied upon by the respondent. As regards such

report, the Tribunal considers that the report having being properly discloseable and indeed disclosed, the respondent had a legitimate reason for calling Mr N to explain his report, how it arose and, therefore, so that the respondent's treatment of the claimants could be put in an accurate overall context.

112. No award of aggravated damages can flow from the Gold Group meeting where it is said on behalf of the claimants that they were wrongly accused of interfering with witnesses. As a matter of fact, this was a belief held within the respondent at the time, albeit one which was quickly dispelled.

113. It was raised on behalf of the claimants that the respondent had appealed the Tribunal's judgment on the basis in part that the claimants had lied in circumstances where there was no such finding and where, on the EAT's sift, reliance on such points was found not to be arguable. The Tribunal considers the characterisation of the claimants as dishonest to have been a misnomer in circumstances where, whilst the Tribunal might have not accepted as accurate certain evidence given by the claimants, it did so on the balance of probabilities and without any effectively positive finding as to their dishonesty. The same could be said indeed in respect of a number of evidential disputes where the claimants' version was preferred to that of some witnesses called on behalf of the respondent. Nevertheless, the Tribunal does not consider that it should regard the respondent availing itself of an opportunity to appeal the Tribunal's judgment, even in circumstances where such appeal might, in part, have been too weak to pursue, to be an aggravating feature.

114. Specifically as regards to B, objection is taken on his behalf to the comment in the Gold Group meeting that he lost his credit card in a "bar brothel" incident, again a misnomer, but not the Tribunal views an aggravating feature in this case. Furthermore, it is said that certainly once the allegations made by him had found to be proven he ought to have been allowed to take time to attend the Tribunal during duty time rather than using annual or unpaid leave. The Tribunal understands, however, that claimants who wish to bring claims against the respondent have to do so without relief from their duty time – the respondent applied its standard policy.

115. The Tribunal notes also that in correspondence in preparation for these proceedings there was reference to B's sickness in October 2013 coinciding with his mother's funeral which was undoubtedly upsetting to B in circumstances where his mother had died some significant time previously. The Tribunal accepts, however, that this was straightforwardly an error, albeit a poor one, which the respondent did at least go some way to recovering in terms of a form of apology from the Force Solicitor to the representatives of B.

116. The Tribunal is, in terms of aggravated damages, more sympathetic to the position put forward on behalf of the claimants in respect of a lack of apology or any form of meeting with the claimants following the Tribunal's judgment, when allied with the lack of any approach to those identified as perpetrators of the detriments caused to the claimants, even on an educational basis. The Tribunal has, however, already considered such factors in its consideration of the appropriate level of compensation for injury to feelings and indeed its award of

compensation for injury to feelings is already reflective of that aspect of the respondent's conduct. No separate award of aggravated damages is made.

117. The Tribunal also declines to make any additional award of compensation for personal injury and psychiatric damage caused to the claimants by the detrimental treatment of them.

118. Unsurprisingly, on behalf of the claimants, the Tribunal is encouraged to follow and adopt the medical opinion of Dr Appleford rather than Dr Friedman. The burden is on the claimants to prove psychiatric damage and indeed the Tribunal is faced with having to consider the reports of two medical experts, each commissioned by the claimants, one of whom has been willing to find psychiatric injury and the other, Dr Friedman, who has given an opinion that such threshold has not been reached in the case of either claimant.

119. The Tribunal does not consider the claimants to have met the necessary burden of proof.

120. The Tribunal further considers that the report of Dr Friedman is to be preferred to that Dr Appleford in circumstances where he saw the claimants in September 2015, much and significantly closer to the events and acts of detrimental treatment complained of. He found no evidence of any psychiatric injury in circumstances where the Tribunal further notes that he examined and assessed B at a time when he was absent from work due to sickness.

121. The Tribunal recognises that psychiatric damage can occur, the effects diminish or disappear and potentially reoccur at any future time. However, the claimants assertion of psychiatric damage must be put in the context, in respect of both of them, of periods where they were clearly fit and able to return to work and where occupational health advised to that effect.

122. In C's case, he was sick from July to October 2013 but Dr Shinn recorded him as fit to return to work certainly from 7 October 2013. His distress from May 2014 was, on the Tribunal's findings already made, not straightforwardly linked to the detriments he had suffered and indeed given the significance of the suspension and the disciplinary allegations against him the Tribunal cannot but conclude that ill health after such an event is more likely to be attributable to the disciplinary issues rather than the earlier detriments. This cannot be viewed as a case where the claimant was already vulnerable to such an extent due to the detrimental treatment that the Tribunal ought to regard his circumstances as falling within the eggshell skull principle, such that the respondent is liable for the medical condition of C thereafter. The circumstances and nature of the accusations of a disciplinary nature levelled at C were likely to have had a significant effect on anyone and would, the Tribunal finds, have had the same significant detrimental effect on his health regardless of earlier events.

123. In terms of the competing medical reports, the Tribunal is also unimpressed by aspects of C's description of his feelings given to Dr Appleford. C, for instance, maintained that having been told of a risk to his safety he returned home to surround his house with barbed wire for the protection of himself and his family. The claimant's evidence before the Tribunal's hearing as to liability was that he

was told of a risk to his and his family's safety but did not accept there to be a risk and considered this to be an invention of the respondent. His erection of a barbed wire fence for his self protection contradicts that and is not evidence which was given, nor even hinted at, during the first hearing. On balance, the Tribunal cannot accept that this is what C did on his return to his family home. It is astonishing if he only thought of such detail and extreme actions he took when interviewed by Dr Appleford and, indeed, notably not when interviewed at the earlier stage by Dr Friedman. It must be viewed as an attempt to influence Mr Appleford into concluding a greater degree of affect on C than that which actually existed. The same might be said regarding the references to Dr Appleford of him soiling himself.

124. As regards B, the Tribunal again recognises that it is not inconsistent that people with mental health issues can still work. Such conditions do fluctuate. However, when Dr Shinn expressed the opinion on 8 October 2013 that B was fit to serve as a Police Officer the Tribunal cannot understand that he might have considered there to be any risk that C was psychologically ill. C indeed maintained an effective return to work from December 2013 until September 2015 with positive appraisals and no suggestion of any psychiatric or psychological impairment. Again, Dr Friedman had the benefit of seeing B at a point when he was absent from work due to sickness and yet was unable to come to a diagnosis of any psychiatric damage. That opinion is preferred to that of the later opinion of Dr Appleford.

125. The Tribunal finally turns to consideration of the question of overtime earnings. Here the Tribunal is assessing a loss of chance to earn overtime and has to imagine a world in which the detrimental treatment found to have occurred did not exist. In such circumstances, it is suggested that C would not have been taken off Operation [1] and that the Tribunal should project forward for a likely period of future undercover work where overtime would have been earned.

126. In C's case the Tribunal cannot, however, project further than a period from his removal from undercover work on 7 July 2013 to his suspension on 21 May 2014 on the aforementioned disciplinary charges. Again, those disciplinary charges would have come to light in any event and regardless of the protected disclosures and detrimental treatment resulting therefrom. They would have come to light in different circumstances but still, and in any event, in circumstances where C's suspension and removal from active duties where he could have earned overtime would have been inevitable.

127. The Tribunal does not, however, consider, as submitted on behalf of the respondent, that the appropriate cut off point ought to be 23 October 2013 when the internet usage of C was first discovered. The Tribunal's conclusion is that the respondent decided not to suspend C regardless of the type of work he was or would be performing. The Tribunal believes primary reliance can and ought to be placed on Mr Guildford's evidence before the original liability hearing where straightforwardly it was decided to delay C's suspension to let the Webford enquiry by PSD conclude. Mr Guildford's evidence at that stage, was not that there was a decision taken not to suspend C because he was absent due to sickness at the time.

128. The respondent asked the Tribunal to look at compensation on a just and equitable basis such that a delay in notice of disciplinary action should not be allowed to provide C with a further period of compensatable loss. Such argument might have been stronger if findings had ever been made regarding the claimant's internet activity, but of course none ever were. He resigned from his employment before the conclusion of any disciplinary process and in circumstances indeed where the respondent appeared content with such outcome to his police service.

129. As regards overtime opportunities, C was an extremely experienced and well thought of undercover officer who had a history of undertaking significant and sensitive undercover operations. Whilst there had been periods of legend building and non operational deployment in the past, the service of C is more accurately characterised as one of regular and almost continuous deployment. Given his [ ] ethnicity, the counter terrorism targets of undercover operations and the paucity of undercover officers of C's ethnicity, it is even more likely that he would have been in demand and been deployed during this period. Whilst not a comparable individual in terms of profile to C, Mr Z enjoyed significant deployment in this period. The lack of evidence as to specific operations which were about to be undertaken and indeed the evidence that Operation [W] did not go ahead does not lead the Tribunal to conclude that an individual such as C would not be in demand potentially from Police Forces outside the region. The Tribunal has already rejected the argument that the use of covert recordings by C or indeed B would have stopped their future deployment. Again, they were never taken to task for this and in circumstances of course where the recordings were only ever, on the evidence, used for the purpose of evidencing their protected disclosures and where there was no disclosure of the content of these recordings beyond PSD.

130. In C's case the most accurate likely indication of overtime earnings in the period from 7 July 2013 is derived from his own average overtime hours worked prior to that point.

131. On this basis the Tribunal determines that during the 46 week period from 7 July 2013 to 21 May 2014, C would have worked an average of 12.4 hours of overtime each week – a total of 570.4 hours.

132. The Tribunal then turns to consideration of the likely overtime earnings of B had he not been subjected to the detrimental treatment and, in particular, his removal from undercover work.

133. On behalf of the claimants, there was no basis, it was accepted, that Mr D's evidence regarding tenure could be contradicted. Indeed, there was a history of Mr D looking to reduce costs within the unit and of an imperative to concentrate on shorter more focussed deployments. Recommendations arising out of reports and investigations into undercover work produced concrete recommendations regarding tenure and the length of time undercover officers should spend on deployment. The evidence is indeed that the respondent had started to actively manage out undercover officers who had been within the unit a significant time. Mr T left in April 2015 and Mr Z who joined the unit around 18 months after B will

leave this year. On behalf of the respondent it is put forward that B would have left undercover work in any event in the early part of 2016.

134. B served as an undercover officer within the respondent from April 2010 such that by the time of his removal as an undercover officer in September 2013 he had held such a role for a period of three and a half years. Mr Z commenced as an undercover officer on the unit on 30 November 2011, some 18 months after B. He will reach 6 years' service as an undercover officer in November 2017 and the evidence suggested that there would be a transitioning out of the unit of Mr Z so that on the balance of probabilities he will, the Tribunal considers, leave his undercover role in March 2018 after six years and four months service in such role. Applying similar timescales to B, the Tribunal considers that having commenced undercover work in April 2010 the balance of probabilities is that he is likely to have left the unit regardless of the detrimental treatment on and by 31 August 2016.

135. In terms of compensation for overtime earnings the Tribunal is therefore looking at a period from 1 September 2013 to 31 August 2016, a period of three years. The Tribunal has no evidence that B has had an opportunity for overtime earnings during this period in his alternative police roles.

136. In B's case, the Tribunal considers that the most appropriate and accurate method of assessment of likely overtime earnings is by comparison of B to the overtime earnings achieved by Mr Z who fits his profile. The Tribunal accepts that if Mr Z was fully occupied on undercover work, B could not have been fully occupied on the same work, but of course opportunities for undercover deployment are not confined to an individual's home Force and local area and it is more likely that B (a more experienced officer) would have been utilised over this period and given his profile to at least a similar level as Mr Z.

137. The Tribunal from the statistics provided to it is able to see the exact number of hours of overtime worked by Mr Z in the period from 1 September 2013 to 31 August 2016. In the year 2013/2014 he worked 280 hours of overtime (i.e. from 1 September 2013 to 31 March 2014), in the year 2014/2015, 790.5 hours, in the year 2015/2016, 669 hours and in the period from 1 April 2016 to 31 August 2016 133.5 hours. This gives a total of 1873 of overtime worked and the Tribunal considers that B ought to be compensated for that number of hours of overtime lost over such period.

138. In reaching that assessment the Tribunal makes no discount in respect of the sickness absence suffered by B in circumstances where this arose as a result of detrimental treatment and no discount in respect of his possessing a tattoo because, had he been treated in a non-detrimental manner, quick arrangements could and would have been made with B's consent for its removal. The Tribunal makes further no discount for any period of run off towards the end of Mr B's likely service as an undercover officer to reflect his transition into a mainstream policing role in circumstances where the Tribunal recognises that its period of assessment is uncertain and cannot be scientifically determined and his undercover work could have endured a period longer in circumstances where, whilst there were recommendations as to tenure, there was no absolute bar on him working beyond a certain period as an undercover officer.

139. It has been put forward on behalf of B that, had he not been treated to his detriment he would have ended his undercover role, but in circumstances where he would have been transitioned into a type of policing role, perhaps as a detective, which might have attracted continuing additional opportunities for overtime. The Tribunal considers that it has no evidential basis for increasing the award in terms of loss of overtime beyond the assessment already made. There is no evidence as to what role B might have undertaken had he continued as an undercover officer and then been returned, in ordinary course, to mainstream policing or what overtime any such role might have attracted. There is further no evidence regarding any likely return to undercover work and the Tribunal has not been willing to speculate that at some point in the future B could have returned to undercover work after a period in mainstream policing. The Tribunal reaches such conclusion in circumstances where the nature of undercover work is clearly changing (and quite rapidly), where there is a programme of new recruitment, where there is an imperative to reduce overtime and where B is not the ideal profile in terms of types of individual where there is likely to be a requirement for and need to recruit for undercover duties.

Employment Judge Maidment

Date: 31 May 2017