



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111346/2021

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Hearing held in Glasgow 21 and 22 November 2022
Deliberations: 23 and 24 November 2022 and 1 December 2022

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Employment Judge D Hoey
Members: J Lindsay and D McFarlane

Mr P McCue

Claimant
Represented by:
Mr Maxwell -
Solicitor

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Civil Nuclear Police Authority

Respondent
Represented by:
Mr Stilittz KC -
Barrister
[Instructed by
Respondent]

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent shall pay to the claimant the following sums, which flow from the unlawful act found in the judgment dated 12 April 2022, namely the sum of **fourteen thousand pounds** (£14,000) in respect of injury to feelings, with interest of **one thousand five hundred and ninety two pounds and fifty five pence** (£1,592.55) and financial loss totalling **twenty six thousand eight hundred and fifty eight pounds and sixty three pence** (£26,858.63) with interest of **one thousand five hundred and thirty pounds and fifty eight pence** (£1,530.58).

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REASONS

1. By Judgment dated 12 April 2022 the Tribunal found that the claimant had
35 been unlawfully discriminated against by reason of unlawful religious harassment following an incident on 30 June 2021. The other claims (that related to earlier incidents) were ill founded. This Hearing had been fixed to deal with remedy.

2. The only issue to be determined was what compensation should be awarded to reflect the losses sustained as a result of the unlawful act.
3. The hearing took place in person with the parties referring to facts as found by the Tribunal with the claimant giving additional evidence and evidence being given by Dr Moss (clinical consultant psychologist who is the respondent's specialist clinical psychology and strategic lead for mental health (who examined the claimant), Ms Timms (Head of HR), Ms Ferguson (HR Business Partner), Chief Inspector Arnold (who managed the claimant during stage 1 meetings) and Sergeant Wilson (the claimant's appointed welfare officer).
4. The parties had worked together to reach agreement on key facts which has assisted the Tribunal.

Facts

5. The Tribunal's judgment is referred to for the facts as found, as summarised below, supplemented by the evidence heard by the Tribunal at the Remedy Hearing.

Background

6. The claimant is a 42 year old veteran. He served in the armed forces from 1995 until 2003.
7. He worked as an NHS auxiliary case assistance from 2004 until 2007. He carried out general duties.
8. On 17 May 2007, the claimant joined the respondent and in 2018 he was promoted to Sergeant. The claimant was based at Hunterston. He was engaged as an operational firearm officer.
9. His role with the respondent involved the claimant being entrusted with significant responsibility. He carried and operated firearms and was highly trained. The claimant had been operational firearms commander and had led simulated incidents and managed stressful situations and worked with

different agencies and teams. As Sergeant he had significant management responsibilities. He is an articulate and intelligent individual.

Policy documents

- 5 10. The **capability management policy** and procedure sets out the approach the respondent takes in managing absence. Absence is normally initially managed on an informal basis, which can involve exploring alternatives and adjustments. If the formal policy is engaged a capability management meeting will take place. A stage one capability management meeting will set out the purpose, which is to support the employee with a return to work and if 10 this is not possible to consider other options. Individuals are to be informed that if having exhausted all other options a return to work is not possible dismissal may be considered as a final outcome. The individual would be given the opportunity to present their view on what is needed to secure a return to work and an action plan should be formulated. That could include a 15 trial return, restricted duties, referral to a risk assessment panel or other interventions (including medical intervention). Following conclusion of the action plan a stage one review meeting should take place to determine the next stage which could involve completion, an extension to the action plan or progressing to a stage two capability meeting. If agreement is reached, it may 20 be possible to proceed directly to stage two.
11. If a risk assessment panel is required, to consider a restriction (for example) to firearm operations, the action plan could include referral to the redeployment panel for consideration for alternative roles. Individuals have the right to appeal the outcome of a stage one capability meeting.
- 25 12. If there is no satisfactory or sustained improvement in line with the requirements of the action plan or subsequent meetings, a stage two meeting will be called. There may be more than one stage two meeting before a final capability meeting is held. If it is extremely unlikely that recovery or return to work within a reasonable period is likely a final capability meeting could be 30 held.

13. At stage two a risk assessment panel and redeployment panel should consider matters before a final capability meeting is held. Those panels would look at alternative roles in light of the individual's circumstances. Where appropriate ill health retirement options should be explored. The employee would be told the purpose of the meeting, including whether the action plan should be extended or if there are other options available or whether dismissal should be recommended to the Head of HR. Reasonable adjustments would be considered. The chair will ensure all alternative roles have been explored. The outcome will be to extend or amend the action plan or confirm that all options have been exhausted and to recommend dismissal (which would then be considered by the Head of HR who would review the full case to ensure they are satisfied all alternatives have been exhausted).
14. An individual has the right to appeal any formal decision.
15. The **welfare support policy** and procedure sets out the respondent's approach to dealing with individuals who are not at the workplace, such as by reason of sickness. Welfare support should be given to such staff with regular keeping in touch days and the involvement of occupational health as required.
16. The **extension to sick pay entitlement policy** applies to employees approaching the end of full, half or pension rate sick leave. The policy sets out the circumstances when sick pay can be extended. The policy notes that the standard entitlement is to a maximum of 6 months full pay in any 12 month period, thereafter moving to half pay (subject to a maximum of 12 months absence in any four year period). When full or half pay limits have been reached eligible employees may be allowed sick pay at pension rate or half pay (whichever is less) if there was a reasonable prospect of a return to work supported by medical evidence. Sick pay at pension rate for more than 12 months will be permitted exceptionally where there is a reasonable prospect of return to work.
17. The policy sets out 3 circumstances when discretion can be exercised to extend pay. The first is where the employee is sick as a result of an industrial accident or disease. The second situation is where there is additional sickness

and there is a relatively minor ailment, continuing treatment or debilitating side effects. A maximum of 56 days pay in a 12 month period may be permitted, potentially extending by a further 28 days. The final circumstance when sick pay can be extended is where there is a terminal or life threatening illness, where matters beyond the control of the individual have delayed the decision or resolution of matters or where extension of pay is considered a reasonable adjustment and time is needed to put reasonable adjustments in place. The policy notes that there are no restriction on the circumstances when discretion may be exercised to extend sick pay and matters will be reviewed on 3 monthly intervals, if not sooner.

18. The **ill health retirement policy** and procedure sets out the process in respect of termination of employment on grounds of ill health retirement, including requests for consideration of early payment of pension benefits under the scheme. The procedure may run in parallel with other management procedure, including capability management. It is the respondent's responsibility to determine whether an individual's employment should be considered for termination on medical grounds where no further adjustment can be made and it is not possible to find suitable work to redeploy. The criteria for ill health retirement and/or early payment of pension benefits is that the individual is prevented by ill health from discharging their duties and the ill health is likely to be permanent (that the individual on the balance of probability is not expected to carry out any reasonable alternative job before pension age). Individuals can make the application with medical evidence from occupational health and other professionals being obtained. It is possible for the respondent to commence the process (even if the individual does not consent). The respondents chief medical officer will assess the information and prepare a report with comments permitted from the GP and pension scheme manager.

19. There is also a process whereby an individual subject to certain incapacities such that they cannot return to work may be entitled to a **capability payment**, amounting to potentially (in this case) up to £42,000 in this case upon termination of employment. That is subject to other rules.

Absence and occupational health meetings

20. Between 11 February 2020 and 11 March 2020 the claimant was on sick leave due to work related stress and anxiety. This had stemmed from allegations in connection with his working environment.
- 5 21. On 14 February 2020 the claimant attended an occupational health meeting. The report noted that the claimant had allegations made against him in Summer 2019 by another officer which were found to be unfounded. He found the matter very stressful although he continued to work. He was affected but tried to keep going. The claimant experienced a number of stress related
10 symptoms as he was concerned about the position. He was signed off work with stress and anxiety. He was offered medication by his GP but chose to deal with the symptoms himself. It was considered likely that the symptoms would ease as the investigation ended and the claimant would return to fitness. It was considered that his symptoms were considered to be caused
15 by events at work and allegations from a colleague.
22. In March 2020 the claimant had another occupational health consultation. The claimant had returned to work. He reported that the stress had largely abated and his anxiety levels were in the normal range. The physician considered that the symptoms were caused by events occurring at work and
20 related to previous allegations made against him.

Incidents leading to the claim

23. On 1 June 2020 the claimant found an envelope with "UDA No Surrender" written on it in his pigeon hole.
24. On 17 August 2020 the claimant's wife found a piece of paper with "UDA No
25 Surrender" written on it in his work jacket.
25. On 19 August 2020 the claimant commenced period of sickness absence (because of stress at work) which lasted until 10 October 2020 when the claimant returned to work.

Further absence and occupational health sessions

26. On 20 August 2020 the claimant attended another occupational health session. The claimant had self certified with stress at work. He had been attending his GP and undergoing counselling. The consulting physician's view was that the claimant was likely to return to fitness in the longer term with appropriate support.
27. On 3 September 2020 the claimant attended an occupational health session. The claimant had been experiencing severe stress. Although prognosis was uncertain in the short term, longer term the prognosis was positive. This was also the position at an occupational health session on 16 September 2020. The consulting physician considered that the claimant experienced mild symptoms associated with stress and anxiety resulting from the incident on 17 August 2020. Prognosis would depend upon the support provided.
28. A further occupational session took place on 19 October 2020. The physician noted that when the claimant returns to the workplace, he would not use firearms until matters resolved. The claimant felt more positive about a return to work. The prognosis depended upon the outcome of the support the claimant received.

Third incident

29. On 30 June 2021 the claimant found graffiti "FTP" on his mug in the kitchen area at Hunterston. The matter was reported to Police Scotland. On 30 June 2021 the claimant was offered access to the Employment Assistance Programme, which he accepted. On 30 June 2021 the claimant commenced sick leave with work-related stress. He has not returned to work.

Further occupational health sessions

30. On 8 July 2021 the claimant attended a further occupational health session. The claimant reported that he was not sleeping, feels fed up, mistrustful, and moody. His anxiety levels were high. The graffiti on the mug incident had led the claimant to experience anxiety. The consulting physician believed that his illness was attributed to an incident at work rather than work activity *per se*.

The claimant stated that he needed the issue (sectarianism) to be resolved and counselling before he could contemplate a return to work.

31. On 3 August 2021 the claimant attended another occupational health session. The claimant had commenced anti anxiety medication and was engaged with counselling. The physician considered that the claimant was significantly affected by the workplace incident that took place in July 2021 and that affected his sleep, concentration and motivation. It was considered likely that the claimant would recover albeit the timescales were uncertain. To reduce the risk of further issues at work addressing the underlying culture and behaviours at work was considered helpful. The consulting physician was of the opinion that with the full resolution of the underlying workplace issues future attendance at work was expected.
32. Between 5 August 2021 and 6 October 2021 equality, diversity and inclusion training took place at Hunterston.
33. On 18 August 2021 a further occupational health session took place at which the claimant continued to be significantly affected by the incident that led to his absence and remained very anxious. This continued at the occupational health session on 9 September 2021 where the claimant experienced low mood and was severely anxious which affected his concentration, motivation and demeanour. It was noted that the claimant would require to show 6 months of stability and be referred to the risk assessment panel before being considered for a return to firearm duties. The incident at work was considered the cause of the illness.
34. On 9 September 2021 the Tribunal claim was presented.
35. On 29 September 2021 the claimant attended another occupational health meeting. He was to be referred for additional psychology therapy following his counselling. The claimant continued to be significantly affected by the sectarian incident that took place at work. While his mood had improved he remained severely anxious. It was hoped that a return to work was likely

36. On 25 October 2021 the claimant attended a further occupational health session having completed counselling. The medication he had been prescribed had not been well received. Psychological therapy was being explored. He had been experiencing severe anxiety and had expressed concerns about returning to his unit.

Capability meetings

37. On 1 November 2021 a **Stage 1 capability meeting** was held with the claimant. This meeting was held to support the claimant in returning to work. The claimant explained that he had been subjected to harassment in the workplace which had impacted upon his mental health. The claimant said that he had been participating in counselling sessions and was exploring CBT. The claimant said that he was hopeful his health would thereafter improve sufficiently to facilitate a return to work. The claimant said that he would like to return to work but at that time could not see how his feelings about returning to Hunterston in relation to trusting personnel at the unit would change but he was willing to engage in trying to address the matter. He said he would consider alternative sites once he was feeling better. The claimant explained that as he was proceeding with a Tribunal he would not be comfortable at Hunterston. He said he would perhaps consider a permanent move (such as to Torness which may be acceptable given its location). The claimant said he wanted to focus on a return to health and then consider a return to work. He did want to return to work but was not able to make a decision at the time.

38. The claimant had stated that going through the Tribunal was stressful as he had to recollect and write about previous events. The claimant was told that he was not to worry about the Tribunal as he was being supported and the respondent would do its very best to support him back into the workplace. The claimant was grateful for that as the worry had added to the effect on his mental health. The claimant's federation representative noted that a move to another unit (such as Torness) would be a new start and helpful for the claimant's mindset.

39. On 4 November 2021 the claimant was issued with a letter confirming that an action plan was being issued to assist the claimant with regard to CBT sessions. A further capability meeting would be held thereafter to review progress and assess any further support the claimant needed.

5 **CBT commences**

40. On 9 December 2021 the claimant commenced the first (of 6) CBT sessions. These were paused during the Tribunal process.

Further occupational health sessions and capability meetings

10 41. On 14 January 2022 the claimant attended another occupational referral. The claimant was considered to be unfit for work experiencing severe anxiety as a result of the incident that took place in Summer 2021. At this stage he was not taking any medication and was receiving psychological therapy. The occupational health physician considered that the claimant remained “significantly affected by events”. He was unfit for work and a review planned
15 for 9 February 2022.

42. On 11 February 2022 a one month extension to sick pay was approved.

43. On 25 February 2022 a **second Stage 1 capability meeting** was held. The claimant noted that 5 CBT sessions had taken place and more sessions had been sought. The claimant said that further sessions were needed as there
20 had been a number of negative impact factors on his mental health, including the claimant’s financial situation and the legal situation. Another 6 sessions were needed after the initial 6 sessions. The claimant said he was feeling better but it was agreed to pause the CBT while the negative stressors (which included the Tribunal) were ongoing. It was agreed that the action plan and
25 CBT would be paused until after the Tribunal and that 6 additional sessions would be confirmed. The claimant was advised by letter dated 18 March 2022 that the action plan would be paused until completion of the Tribunal after which a new 6 week plan would be issued with a further meeting arranged thereafter. Full sick pay was to be authorised.

44. Between 14 and 21 March 2022 the Liability Hearing took place before the Employment Tribunal
45. On 7 April 2022 the claimant's full sick pay was extended to 13 May 2022.
46. On 13 April 2022 the Liability Judgment was sent to the parties
- 5 47. On 27 April 2022 a **third stage 1 capability review meeting** was held. The claimant did not attend as the claimant's police federation representative was attending on his behalf and he did not consider matters to have materially changed. The claimant's representative stated that 2 of the 6 additional sessions had taken place but the claimant was not able to determine how he
10 felt about returning to work or when he would return or to what as his treatment was ongoing. It was agreed that the existing action plan would remain in place and a further meeting arranged to discuss a possible return to work and see what further support was needed.
48. On 27 May 2022 the respondent approved sick pay extension to 21 June
15 2022.
49. On 6 June 2022 a **fourth stage 1 capability review meeting** was held which the claimant attended with his federation representative. The claimant explained that he had 5 of the 6 CBT sessions but symptoms were still the same. He considered at this stage that a return to work was not viable. His
20 anxiety had reduced but his depression had worsened. He would consider a move to another unit, such as Torness, but at that time his mental health was such he would not consider that just now. It was agreed to reconvene on 21 June 2022 to see how the claimant felt. An extension of pay had been agreed to 21 June 2022.
- 25 50. On 16 June 2022 a future management of capability case meeting was held where it was noted that the intention was to end stage one at 21 August 2022 and seek a report from a specialist. It had been agreed to extend by 4 weeks to allow a specialist report and engagement with Dr Moss to take place.
51. On 21 June 2022 a **fifth stage 1 capability review meeting** was held which
30 the claimant attended with his representative. The claimant had one more

CBT session left and had spoken to Dr Moss. The claimant was continuing to take his medication and did not consider himself fit to return to work as his mental health had not changed. Dr Moss had advised the claimant that Dr Moss would write to his GP to access NHS resources. It was agreed to extend the action plan to July to allow the sessions to conclude and for the medical report to be received. Stage 2 would be considered if no further action points rose.

52. On 21 June 2022 Dr Moss, the respondent's consultant clinical psychologist, undertook a telephone assessment of the claimant. His health had not changed,

53. On 28 June 2022 Dr Moss wrote to the claimant's GP recommending a review of his medication and referral to the Community Mental Health team. He noted that the self reported clinical measures suggested severe generalised anxiety and severe depressed mood. The claimant continued to experience panic attacks and anxiety. CBT had assisted to a degree but the claimant still experienced low mood. His medication ought to be reviewed as no change had been experienced after one month. The community mental health team and psychiatry assessment could assist, and that could be expedited via the NHS, particular as the claimant had formerly been in the armed forces.

54. On 29 June 2022 the attended the last CBT session

55. On 14 July 2022 the claimant's GP referred the claimant to the Community Mental Health team.

56. On 18 July 2022 the **sixth stage 1 capability review meeting** was held which the claimant attended with his representative. He explained that his CBT had finished and his therapist had recommended no further sessions, and that the claimant put the strategies that had been discussed into practice. There was no real change as to how the claimant was feeling regarding his stress anxiety and depression and he would progress his medication review with his GP. The claimant did not feel able to return to work at that time. It was agreed that matters would progress to stage 2 in the absence of any other steps at that time.

Progress to stage 2 capability

57. On 25 July 2022 the claimant was advised in writing that matters would progress now to a stage 2 capability meeting to discuss the claimant's status and what support can be offered to facilitate a return to work.
- 5 58. On 5 September 2022 a **stage 2 capability meeting** was held which the claimant attended with his federation representative. The claimant stated that since the conclusion of his CBT he felt his mental health has deteriorated. He had seen his GP and was diagnosed with severe anxiety and depression and had changed his medication. He did not feel able to return to work but his
10 medication would take time to settle. As to other options, the claimant said he did not feel a return to his original site would be safe as he considered it detrimental to his health. He felt a move even to Torness would limit the support network he had. He felt he had lost trust in the respondent with the impact upon his mental health and personal life. The impact of changes to his
15 pay had adversely affected his mental health. The claimant said a 3 month action plan was unlikely to be achievable. He believed the bullying and harassment had affected him. It was noted that a 3 to 6 month wait may provide some stability, with which the claimant agreed, noting, however that would not necessarily affect the trust that he had lost in the respondent. The
20 claimant said he was willing to try returning to work but was concerned he would not feel safe.
59. The claimant was advised that the respondent would allow time for the medication to take effect and explore all options to assist the claimant, including in rebuilding trust. There were options that could be explored,
25 including other roles. The claimant had changed his medication.
60. The claimant's representative noted that the claimant had a concern that continuing his employment was making his health worse. His representative suggested that the claimant felt his career with the respondent was over and might have to consider applying for ill health retirement but was not sure if he
30 would qualify. The claimant was advised that a return to work in some capacity was one option. Other options included resignation, dismissal on grounds of

capability and ill health retirement. The capability process would need to conclude before ill health retirement could be explored. A 3 month action plan would allow time for medication to settle and allow ill health retirement to be considered. The claimant was unsure whether he wished to explore ill health retirement as he hoped to return to work at some stage. Options included capability, resignation, return to work or ill health retirement. The claimant did not want to resign and the claimant was advised that a return to work was being sought, with the respondent being flexible and supportive including rebuilding trust.

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- 10 61. The claimant appreciated the support that was being offered and suggested time may be needed to allow the medication to settle and he would speak with his GP. A 3 month action plan would allow time to consider if a realistic return was possible, allows the claimant time to explore ill health retirement and other options. The claimant's half pay extension was to be progressed.
- 15 62. On 6 September 2022 Dr Moss undertook an occupational health review with the claimant and his health had not materially changed.
63. On 8 September 2022 a four month half pay extension backdated to June 2022 was approved.
- 20 64. On 14 September 2022 the claimant was advised that the outcome of the stage 2 capability meeting was that a three month action plan would be issued with a 6 week review meeting to be arranged.
- 25 65. On 17 October 2022 a **second stage 2 capability review meeting** was held which the claimant attended with his federation representative. It was explained that the purpose of the meeting was to allow the claimant to have more time following his revised medication and to identify progress and to give the claimant time to identify his options, including a return to work, exit via capability or ill health retirement or resignation (albeit the claimant had said he did not wish to resign). The claimant said the only change was his health which had been assessed by the local NHS mental health team, including a discussion with the NHS psychologist panel. There was to be a gradual increase of the claimant's medication, and he was awaiting his GP to progress
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that. He had been assigned a 24 hour key worker in respect of his severe anxiety and depression and there had been no change at the moment. Backdating of his pay had reduced his stress and anxiety. He was to be placed on pensionable pay from 13 October 2022 and had requested holidays until any extension had been approved. He was looking forward to working with the mental health team but did not feel he could carry a firearm nor travel to another unit and be away from his support network. An extension of half pay was being explored with a further review meeting to take place in 6 weeks to allow the claimant time to explore his options. The claimant did not wish to apply for ill health retirement as he considered that a “big statement for a victim” and he did not want to exit the organisation. As medication was changing, a further period would be given to allow matters to settle.

66. On 18 October 2022 Dr Moss conducted a further occupational health review with the claimant with no material change in his health noted.

67. On 24 October 2022 the claimant was advised in writing that a further stage 2 capability review meeting would take place in around 6 weeks, with the meeting having been set up for 5 December 2022.

Claimant's GP's view

68. On 16 November 2022 the claimant's GP provided a statement saying as follows: “The [claimant] has been having significant problems with anxiety and depression. These matters first came to our attention in February 2020 when he saw one of my colleagues and advised he had been suffering from stress at work for around 6 months with work related issues. It would seem the situation possibly improved between February and then around August 2020 there was a recurrence with the patient being seen by another of my colleagues on 21 August 2020... He felt he was unable to return to work and was certified off work until 16 October 2020. In July 2021 I spoke with him on the phone when he advised the work related stress had significantly flared up again and this has continued until the present time. He has been medically managed with appropriate treatments since July 2021 and currently is on

Sertraline, an anti depressant and Pericyazine, a treatment for anxiety. There is no past history of mental health issues prior to these occurrences.”

69. Also on 16 November the claimant was advised by a specialist NHS occupational therapist that the claimant’s mental health assessment that had taken place on 8 September 2022 with the claimant had led to the claimant being given a key worker and it being recommended that the claimant speak with his GP to increase his medication.

70. The claimant found the financial position stressful and the discussion as to the changes in his pay, and the uncertainty in not knowing if the applications to exercise discretion would be granted, contributed to the claimant’s anxiety.

71. The Remedy Hearing took place on 21 and 22 November 2022.

Earnings

72. In his current role the claimant earns a basic gross monthly salary of £3,544.75 (with net pay being £2,826.84). He would work overtime earning an additional £300 to £500 but there could be months where no overtime was payable. The pension contribution lost each month the claimant is absent amounted to around £300.

73. From June 2021 until June 2022 the claimant received his full salary. From June 2022 until October 2022 the claimant secured half pay. Back pay applications would be backdated if approved.

74. The claimant had accrued annual leave which enabled him to remain on half pay until 29 November 2022. Once annual leave is exhausted, the claimant’s sick pay will reduce to pension rate pay of £969.51.

75. The respondent operated a retention bonus scheme each year. This was paid to the claimant in 2021 in the sum of £3,000. The claimant has not received the bonus in 2022 but there was no evidence as to the reason why, nor in relation to other individuals (who also did not get the bonus). The position in respect of the claimant (and others) is under review and to be determined.

There was no reason why the sum would not be paid to the claimant following the review.

Summary of medical position

76. The claimant had been regularly managed via the respondent's occupational health support team together with the respondent's specialist clinical psychologist (who is also the strategic lead for mental health in the respondent). The psychologist had agreed to fund psychological treatment for the claimant. During the reviews by the psychologist the claimant's health had not materially improved (which was the position by October 2022). He found the lack of improvement in the claimant's mental health "puzzling". In addition to the final graffiti incident (which contributed to the claimant's illness) other potential contributing causes could be the litigation process itself (and the requirement to relive the behaviours) and the impact of previous periods of absence (and the situations that led to such absences). He stated that it was possible that the claimant has enduring and intractable issues with mood disorder. He believed that it is a reasonable assumption that the claimant would recover with time and treatment but the timescales are unknown.

Future position

77. The claimant does not believe his mental health issues will be lifelong and expects a recovery and return to full health at some point. The claimant does not know when. He accepted that he is unlikely to be able to return to operational firearms duties in the short to medium term. His present desire is to return to work as a police officer. He finds the thoughts of redeployment to cause him anxiety and adversely affect his health.

78. The respondent had taken steps following the final incident to address the culture and approach that had existed prior to the claimant going absent. Training had been introduced which appeared to be successful with no further sectarian incidents arising.

79. The claimant becomes stressed when considering a return to his unit. He is fearful and anxious. At the moment he is unable to contemplate a return to

any role for the respondent. He believes it is not a safe environment for him and is paranoid about suffering more harassment.

- 5 80. The respondent will continue to manage the claimant and seek to assist the claimant in securing some form of return to work, including looking at alternative roles.

Alternative roles

- 10 81. It is common for vacancies to arise in the respondent, across their organisation. Such roles can include non firearm responsibilities, including project work (assisting the unit commander with required tasks) or in other roles in other sites. Training roles can also become available.

- 15 82. In the event of a firearms officer not being able to return to firearm duties the respondent's approach is to exhaustively consider alternatives (which can take months, if not years to conclude). Their experience in securing alternatives, and avoiding dismissal, is excellent. Officers who are unable to return to firearm duties would be referred to a risk assessment panel for consideration which could result in a permanent restriction being offered. Thereafter the individual would be referred to a redeployment panel to consider other roles. Often roles are ringfenced to allow officers who require to be redeployed to be considered. Vacancies can also arise in learning and development and professional standards teams.
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- 25 83. Ms Ferguson (HR Business Partner for the respondent) has experience in managing absence and long term absence and in dealing with redeployment situations. She had over 25 years experience as a senior HR professional. She has handled over 120 cases of redeployment and there were only 4 of those situations where a role was not found and dismissal was the outcome. The remaining 116 cases resulted in successful redeployment. The respondent seeks to work with individuals to secure a positive outcome, exhaustively looking at all options prior to dismissal. In her experience and view it is extremely unlikely that there would not be other roles available when the claimant is fit to return to work in light of the size of the respondent and
- 30 vacancies that arise and are likely to arise.

84. If a role was not suitable ill health retirement would be explored failing which capability dismissal (with a potential capability exit payment). Each case is dealt with on its merits and there have been situations of long term absence lasting 2 years. All the available options are exhaustively considered prior to dismissal. It is possible to return an officer to full pay if the reason for a delay is in seeking an alternative role. Risk assessment panels meet monthly (or bimonthly) with redeployment panels meeting quarterly or sooner if required.
85. Once a recommendation for dismissal on grounds of capability is made, following a stage 2 capability management meeting, the matter is referred to the Head of HR who then considers whether there are no alternatives and all options have been exhausted which would include reviewing the redeployment position and ill health retirement and whether a capability payment should be sought.

Causes of absence

86. The claimant first suffered work related stress around Summer 2019. He was then absent from work for around a month in early 2020 (prior to the issues that led to the Tribunal claim which took place on 1 June 2020, 17 August 2020 and 30 June 2021). The claimant was also absent by reason of sickness from August to October 2020 (which was as a result of the second incident in August 2020). The issues the claimant suffered which led to these absences had an impact upon the claimant's mental health.
87. The final incident (the graffiti on the claimant's cup) caused the claimant to become stressed and anxious. He became paranoid and upset. The stress and anxiety remain present. The claimant's sleep was affected and he experienced panic attacks. The claimant has a sense of failure and low mood. The claimant has been prescribed different medication and the claimant hopes this will settle the symptoms he experiences. The key worker provided to the claimant and support from the NHS are providing the claimant with positive support mechanisms and will assist the claimant in his recovery.
88. The unlawful act was an important cause of the absence from 30 June 2021 and the adverse impact on the claimant's mental health. The previous acts

and behaviour the claimant faced also amounted to material causes of the claimant's absence from 30 June 2021 and adverse impact upon his mental health. The Tribunal finds that the unlawful act was 70% responsible for the impact upon the claimant with the other causes 30%. The other causes
5 include the prior 2 incidents together with the other matters that were affecting the claimant as set out above.

89. The providers of the CBT provided a report to the respondent and opined that the claimant was "feeling anxious and stressed due to ongoing issues within the workplace for a number of years ... Gradual build up of symptoms which
10 have worsened since June 2021". In other words, it was clear that the claimant's final absence was not solely caused by the third act but the third act was a cause alongside the other acts which had a significant impact upon the claimant. In assessing this, the Tribunal has carefully assessed the evidence. It was regrettable that there was no specialist medical evidence
15 presented to assist the Tribunal on this key issue. The occupational health reports and the GP's view are of limited value given their context. In reaching the decision the Tribunal assessed the evidence and considered what the reasons for his absence following the third incident were. Although that was a proximate cause, in the sense of the final straw, it was possible the claimant
20 may have gone off work in any event absent the incident as a result of the effect of the previous incidents, which had a lasting impact upon the claimant.

90. The unlawful act was 70% responsible for the latest absence.

Next steps

91. The next stage 2 meeting was to take place on 5 December 2022. The
25 claimant finds the uncertainty around his continued employment stressful. He believes he will be dismissed and that considerably affects his anxiety and depression.

92. The claimant did not presently consider that he could move far away from his support unit which is based in Inverclyde.

93. The claimant's normal place of work (near Inverclyde) is scheduled to close in 2025 (at which point, if he were able and willing) he would be able to work elsewhere for the respondent.
94. The claimant's health had not changed materially and is unlikely to change prior to the meeting of 5 December 2022. It is likely that further time would be given to the claimant given the prevailing circumstances, namely the completion of the Tribunal process and the changes to the claimant's medication (with the respondent working with the claimant to rebuild the relationship). It is likely that the claimant's health would improve thereafter as the Tribunal process has a negative impact upon the claimant (and his being required to relive the behaviours that led to it: see paragraph 37 above). The claimant's medication also requires time to settle to ensure the correct medication is identified, which should assist the claimant alongside the other support measures now in place. The improvement to the claimant's health will also be facilitated by the fact the respondent has taken steps to deal with the issues that led to the behaviour the claimant faced that caused him to be absent.
95. It is virtually certain that the claimant will be given a further 9 month period to assess his next steps to determine whether he is able to consider a return to work in some capacity, including at a different unit (on a phased basis) and that by the end of that period the claimant would return to work.
96. It is unlikely that the claimant would seek (or that the respondent would seek) ill health retirement given the claimant's health is likely to improve such that the claimant will be fit to return to work in some capacity.
97. It is virtually certain that the claimant would be fit to return to work in around 9 months, as a result of his medication settling, the Tribunal process completing, the respondent working with the claimant to rebuild trust (and show the claimant the change in culture) and his support mechanisms assisting him. It is highly unlikely he would be dismissed.
98. In the event the claimant is dismissed by reason of capability, a capability exit payment of around £42,000 would be secured by the claimant.

99. Given the claimant is likely to return to work in some capacity the claimant would not be entitled to ill health retirement (and he would not seek this).

Future work

- 5 100. The claimant had given some thought to alternative roles but had not progressed matters beyond initial thoughts. He believed that it would not be possible to transfer into Police Scotland (as they are distinct bodies) but his skills and experience as Sergeant would undoubtedly be attractive and would likely allow the claimant to be successful in such a role. While the approach is different, the skills and experience the claimant acquired as a Sergeant and
10 operational firearms commander with the respondent are transferrable and attractive to that organisation. The claimant would progress through that organisation quickly. It is highly likely the claimant would achieve a similar status to that he currently has within a 4 to 5 year period at most.

- 15 101. The first year salary for a police officer would be £28,074 rising to £33,019 and then in year 2 £34,991 and £36,069.

102. The claimant also considered security. To carry out such roles the claimant would require to undergo retraining. Income levels would be less than his current role.

Observations on the evidence

- 20 103. There were no real factual disputes that the Tribunal required to resolve and each witness did their best to give evidence in a truthful and candid way. The issue for the Tribunal was assessing what might happen which it did from the evidence presented. As explained below the assessment the Tribunal requires to undertake was not assisted by the production of relevant
25 independent medical expert evidence. That resulted in the Tribunal having to make assessments on the basis of the limited and vague evidence it had, using its experience as an industrial jury in light of the context and the evidence heard.

Law

104. Section 124 of the Equality Act 2010 deals with compensation as a remedy for unlawful discrimination and states:

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

5 (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;*

10 (c) *make an appropriate recommendation.*

(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.....*

105. Section 119 states:

15 (3) *The sheriff has the power to make any order which could be made by the Court of Session –*

(a) *in proceedings for reparation*

(b) *on a petition for judicial review.*

20 (4) *An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).....”*

106. In considering remedy the Tribunal should consider pecuniary and non pecuniary loss. This amounts to past and future loss (of money) and an award for injury to feelings.

Injury to feelings

25 107. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 in which the Court of

Appeal gave guidance on the level of award that may be made noting that the award is compensating subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief and humiliation. The three bands were referred to as being lower, middle and upper, with the following explanation:

- 5 *“i) 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. This case falls within that band. Only in the most exceptional case should an award of*
- 10 *compensation for injury to feelings exceed £25,000.*
- ii) 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.*
- iii) 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*
- 15 *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.”*

108. In **De Souza v Vinci Construction (UK) Ltd** [2017] IRLR 844, the Court of Appeal suggested that it might be helpful for guidance to be provided by the

20 Presidents as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2021, the Vento bands include

25 a lower band of £900 to £9,100, a middle band of £9,100 to £27,400 and a higher band of £27,400 to £45,600.

109. The higher band applies to “the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment”, the middle band “for serious cases which do not merit an award in the highest band” and the lower

30 band “for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence”.

110. General principles that apply to assessing injury to feelings awards were given in **Prison Service v Johnson** 1997 IRLR 162 where it was noted that such awards are compensatory and should be just to both parties. They should compensate fully but not punish any party. Awards should not be too low to diminish the policy of the legislation. Awards should have some broad general similarity to the range of personal injury awards and Tribunal should take into account the value in everyday life of the sums in question and the need for public respect for such awards.
111. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (made pursuant to section 139(1) of the Equality Act 2010) interest is simple and accrues from day to day. The judicial rate (fixed per the Sheriff Courts (Scotland) Extracts Act 1892) is presently 8%. Interest on an award for injury to feelings is awarded from the date of the act of discrimination until the date of calculation (Regulation 6(1)(a)).

15 **Pecuniary loss**

112. In assessing compensation, the loss must be attributable to the specific act that has been held to constitute discrimination, and not to other acts (whether potentially discriminatory or not). Where loss has been caused by a combination of factors, including some which are not the unlawful discrimination complained of, the compensation awarded can be discounted by such percentage as reflects the appointment of that responsibility: see **Thaine v LSE** [2010] ICR 1422; and **Olayemi v Athena Medical Centre** [2016] ICR 1074. The Tribunal should, however, focus not on the divisibility of the causative contribution but on the divisibility of the harm, see Underhill LJ in **BAE Systems (Operations) Ltd v Konczak** [2017] IRLR 893: 'the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong'. The Tribunal is thus trying 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 (for whatever reason).

113. In **Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (No 2) C-271/91** [1993] IRLR 445 it was stated that the effect that compensation must enable the loss actually sustained to be made good in full. The ordinary principles of causation and qualification of damages in reparation in delict apply.
114. Harvey on Industrial Relations and Employment Law at paragraph 852 of Volume L provide a summary of the guiding principles which underpin the approach to compensation for all forms of unlawful discrimination. These include the following:
- The measure of damages is the same as it would be before an ordinary court;
 - There is no upper limit on the amount of compensation that can be awarded;
 - Whether there are multiple claims or simply different heads of loss in one claim of unlawful discrimination, there should be no double recovery in the compensation awarded for loss suffered;
 - The Tribunal is not obliged to make an order for compensation if it does not consider it just and equitable to do so; but, having decided to make such an order, it must adopt the usual measure of damages: there is no jurisdiction to award only such as the Tribunal considers just and equitable in the circumstances (**Hurley v Mustoe (No 2)** [1983] ICR 422).
 - In effect, the claimant is to be put into the financial position they would have been but for the unlawful conduct of the employer (**Ministry of Defence v Cannock** [1994] IRLR 509).
 - Unlike the approach in reparation, however, there is no requirement that the loss suffered be 'reasonably foreseeable'; compensation can be awarded in respect of all harm that arises naturally and directly from the act of discrimination, at least in cases where the discrimination was deliberate and overt (**Essa v**

Laing [2004] IRLR 313 and **Abbey National plc and Hopkins v Chagger** [2009] IRLR 86.

5 — In calculating compensation according to ordinary delictual principles the Tribunal must take into account the chance that the respondent might have caused the same damage lawfully if it had not done so on discriminatory grounds. (**Livingstone v Rawyards Coal Co** (1880) 5 App Cas 25).

10 115. The issue to be decided is not which is just and equitable to award but what figure compensates the claimant for the losses suffered that flow from the unlawful act, assessing the sum in the same way as damages for a delict (**Hurley v Mustoe (No 2)** [1983] ICR 422).

15 116. Compensation should be awarded on the basis that 'as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer]' (**Ministry of Defence v Cannock** [1994] IRLR 509).

117. In assessing loss the Tribunal should ensure the total award of compensation is just and appropriate. In **Ministry of Defence v Cannock** [1994] IRLR 509.

20 118. In assessing the chances of matters happening in the future the Tribunal must base its decision on a realistic view of the future with reasons being given. Thus in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 the Tribunal was entitled to calculate loss of earnings on the basis that the claimant would have enjoyed a period of service of 21 years, retiring at age 55. The Tribunal was entitled to reach such a conclusion notwithstanding statistical evidence which showed that only 9% of women
25 who had left the Force had served for more than 18 years. The situation of the claimant was different from most – she could not have any more children, and the reason why most women left the force was to have children. Also, the statistics related to past practice, and 'family friendly' employment policies indicated that these would make it more likely women would stay on. The
30 award could not be attacked as perverse.

119. The 'eggshell skull' principle of the law of delict applies in cases of unlawful discrimination: a discriminator must take their victim as they are. That means that the wrong-doer takes the risk that the wronged may be very much affected by an act of sexual harassment, say, by reason of their own character and psychological temperament. Provided the losses claimed can be shown to be causally linked with the unlawful act, the respondent must meet them.
120. It is enough to show a causal link between the unlawful act and injury on the part of the victim and the test of reasonable foreseeability is not applicable to limit the wrongdoer's liability: **Essa v Laing Ltd** [2004] IRLR 313.
121. In assessing the financial loss sustained as a result of the unlawful act, the Tribunal should consider losses sustained to date (past loss) and assess the position in the future.

Past loss

122. Past loss is that suffered by the claimant from the date of the discriminatory act to the date of assessment and may include full or partial loss of earnings (including any overtime), to be assessed net of tax, and also other benefits associated with the employment. Credit must be given for sums received by the claimant by way of mitigation of their losses. Compensation may be decreased here not only by such sums as the claimant has actually received but also by such amount as that the claimant could reasonably have expected to receive had they taken all reasonable steps to mitigate their loss.
123. In assessing loss, consideration should be given to the possibility that the discriminatory act might not have been the only causative factor. As confirmed in **Abbey National plc and Hopkins v Chagger** [2009] IRLR 86 the general rule in assessing compensation is that damages are to place the claimant into the position they would have been in if the wrong had not been sustained.
124. In **Wardle v Credit Agricole Corporate and Investment Bank** [2011] IRLR 604 the Court of Appeal stated that if it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point

where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the Tribunal is sure that the claimant would find an equivalent job is the wrong approach

5 **Future loss**

125. In assessing future loss, the Tribunal has to make decisions about the chances that employment would have continued had the discrimination not taken place. It is important that this is done by reference to calculating the percentage probabilities, and not on a simple balance of probabilities. That approach was endorsed by the CA in **Vento v Chief Constable of West Yorkshire Police (No 2)** Ibid (see per Mummery LJ at [32]–[33]).
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126. In **Newsome v Sunderland City Council** EAT/36/02 the claimant was held to have suffered unlawful discrimination when her employers failed to make reasonable adjustments and she was forced to take ill-health retirement at the age of 48. Compensation was based on the Tribunal's finding that she would (on the balance of probabilities) have remained in the employment until 65. The Employment Appeal Tribunal held that approach was fundamentally wrong as the Tribunal should have made an assessment of the chance she had of remaining in service until 65.
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127. In **Taylor v Dumfries and Galloway Citizens Advice Services** (2004 Scot (D) 10/4) the Court of Session held in principle in discrimination cases it could be appropriate to assess find there was a 10% chance that, but for the unlawful act, the employee would have retained his employment provided reasons are given for adopting such a figure.
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128. The Employment Appeal Tribunal confirmed in **Ministry of Defence v Cannock** [1994] IRLR 509 that it was wrong to assess loss in a situation where there had been a dismissal on grounds of pregnancy on the basis of what would have happened (judged on a balance of probabilities) had she not suffered unlawful discrimination. Instead, the calculation of loss should be dealt with as the evaluation of the loss of a chance.
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Interest on financial sums

129. Interest is awarded on financial losses as per the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803. Regulation 2(1) requires Tribunals to consider whether to award interest on compensation in discrimination cases. The interest is to be calculated as simple interest, which accrues daily at the rate fixed by section 9 of the Sheriff Courts (Scotland) Extracts Act 1892 (regulation 3(2)) which is currently 8 per cent.
130. Interest is awarded from the half way point between the date of the discriminatory act and the date of calculation.
131. The Tribunal retains a discretion, however, to award interest or not to do so and to calculate interest as it considers appropriate, having regard to whether, in any particular case, a 'serious injustice' would be caused if interest were to be awarded (regulation 6(3)).

15 Taxation

132. The rules to be applied are those imported from the law of delict. The claimant is to be awarded the sum of money that will put them in the same position as they would have been in had the unlawful act not occurred which means that income tax should be taken into account in assessing damages for either actual or prospective loss of earnings.
133. Compensation for loss of income will need to be calculated on a net basis. For awards exceeding £30,000 the award is likely to be taxed in terms of the Income Tax (Earnings and Pensions) Act 2003 (see sections 401 and 403) and so the award should be 'grossed up' so that the claimant is not in a worse position (by effectively having paid tax twice on the same sum) after receiving the award. That is often called the Gourley principle.
134. The issue of how tax affects compensation for discrimination was expressly considered by the Employment Appeal Tribunal in **Yorkshire Housing v Cuerden** [2010] All ER (D) 52 (Sep), where the following guidance was given for the assessment of compensation for discrimination in which the Gourley

principle would apply: 'injury to feelings and personal injury awards that related to an employer's discriminatory conduct pre-dating the termination of employment (in that case, a failure to make reasonable adjustments), are not termination payments and are therefore not taxable and, hence, not subject to grossing up; an award of compensation for loss of pension rights on termination of employment is not a payment to a beneficiary out of a pension scheme falling under section 407 ITEPA 2003 and therefore should not be grossed up.'

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135. Compensation for injury to feelings counts towards the £30,000 and will be taxable to the extent that it exceeds this sum unless the compensation is for injury to feelings perpetrated during employment in which case it does not fall to be taxed either as an emolument of employment or as a termination payment under section 403.

Submissions

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136. Both agents had prepared detailed written submissions and had the opportunity to consider and comment upon each other's submissions. Both agents were also able to address the Tribunal in relation to the key issues and answer relevant questions. The submissions were taken into account by the Tribunal in reaching its decision. The Tribunal breaks the matter down in the stages submitted by the parties, looking at causation, injury to feelings, past and future loss and pension loss.

Claimant's submission on causation

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137. It was the claimant's position that his losses arose from the third incident of harassment for which the respondent was liable. The claimant's role was inherently stressful and previous absence and stress was not relevant to the current absence. It was submitted that there was no medical evidence to suggest that the claimant's current absence has been caused by anything other than the third incident. Dr Moss conceded he did not know if there was a link but the occupational health physician was of the view that the absence was caused by the third incident. The Tribunal should only find that the

Claimant's current absence and mental health issues have been caused by the third incident, there is no evidence to the contrary

138. It was submitted that there was no basis to find that the Tribunal proceedings contributed to the claimant's ill health and it was argued it was fanciful to suggest that upon receipt of the remedy hearing judgement the claimant will be "cured" of his mental health issues.

Respondent's submission on causation

139. Senior counsel for the respondent noted there was a fundamental disagreement of principle between the parties as to the basis on which compensation should be approached in this case. The claimant remains in the respondent's employment. He has not been dismissed. He may well return to work and continue to work for the respondent in the long term. In these circumstances, it was submitted that there is on any view no basis for calculating compensation on the basis that the claimant has been or even is likely to be dismissed. This is because:

- The present claim included no claim in respect of discriminatory dismissal, nor could it;
- The claimant might have resigned and claimed constructive discriminatory dismissal, but has chosen not to do so;
- The claimant remains in employment and there is no basis for assuming that his dismissal is inevitable or imminent. Once the Tribunal proceedings have concluded, there is every prospect that he will in due course return to work;
- There is a long way to go under the respondent's procedures before the claimant would approach dismissal. The stage 2 capability meetings are ongoing, with an Action Plan in place. If the claimant's health improves, he has indicated that he is willing to consider a transfer to another site. Even if stage 2 of the capability procedure is not effective in assisting the claimant's return to work, he would be subject to a Risk Assessment Panel

and then a Redeployment Panel before dismissal. The Redeployment Panel has proved effective in other cases in securing officers' return to work when they are no longer able to undertake firearm duties on medical grounds.

5 140. Senior counsel submitted that "most fundamentally, the Tribunal is being invited to engage in unrealistic speculation by the claimant by anticipating his supposedly imminent dismissal." It was argued that the respondent was doing all it can in supporting the claimant in his return to work and is adopting a thorough and patient approach. The completion of the Tribunal process will
10 no doubt remove a major stressor. There is no reason to assume that the claimant's health will not improve in due course.

141. Senior counsel for the respondent argued that there were a series of events that took their toll upon the claimant and cumulatively led to him being off work. In other words the third act (the unlawful act) was not the only cause of
15 the losses relied upon. Senior counsel used the analogy of felling a tree and there being 3 strikes. Each strike contributed to the fall of the tree and it would be wrong to say only the third strike caused the tree to fall. Had the first 2 acts being found unlawful but not the third, it would have been open to the claimant to say that but for the first 2 acts the third incident would not have had the
20 impact that it did and so the loss after the third act is causally attributable to the first 2. That shows the one cannot artificially extract one of series events in assessing causation. The law requires consideration to be given to all causes of the loss and compensation is only due in respect of the losses caused (to the extent they were contributed by) the unlawful act. The Tribunal
25 requires to make an assessment as to the extent to which the unlawful act contributed to the losses

Decision on causation

142. This was not an easy issue to determine. The evidence before the Tribunal was very limited in this regard. There was no medical specialist who had
30 examined the claimant and considered the position from a medical

perspective with a view to assessing the prospects of his return to work or specifically to deal with the issues the Tribunal requires to determine.

143. The evidence the Tribunal had was from those who are examining and managing the claimant for the purposes of his ongoing employment or his GP (from a general perspective). It is unfortunate that the parties had not agreed a joint instruction of an appropriate and independent medical expert to assess the position and provide the Tribunal with an informed position in relation to the specific issues facing the Tribunal given the fundamental dispute in this case and the value of the sums in question. The Tribunal can only proceed with the evidence presented to it.

144. The first and second incidents occurred on 1 June and 17 August 2020. The claimant had a period of work related stress the preceding year and his GP confirmed that the claimant had managed mental health issues prior to the incidents in question. Those issues do not, however, by themselves support the argument that the absence following the third act (the unlawful act) are causes of the later absence.

145. The Tribunal did not consider the occupational health evidence (which was provided in written form only) to be determinative of the issue. It was not surprising in assessing the claimant following the third incident, immediately after which he is unable to work, to consider that the third act caused the absence. That equally by itself does not mean that earlier acts had no causal connection with the absence. The only medical specialist who gave evidence, Dr Moss, was of the view that it was possible earlier acts could have contributed to the claimant's mental health that led to him being absent after the final act but given he was not involved at the time and was not consulted about that matter specifically, he was unable to say.

146. The Tribunal considered whether it was appropriate to delay determination until the parties had been given the chance of agreeing the referral of the claimant to an independent medical expert and to allow such evidence to be considered by both parties with submissions being made. We decided against this approach on the basis that both parties were legally represented by

specialist employment lawyers and both parties had chosen to close their case on the basis of the information presented, knowing the medical information was limited and knowing the disputes in this case. It was also entirely possible that an independent medical expert reviewing matters may be in no better position to assess matters than the individuals who had already managed the issues the claimant encountered.

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147. The Tribunal is therefore left with the challenging situation of there being no specialist medical evidence to guide the Tribunal in this key question. The Tribunal has considered the evidence that was led carefully. It is important in assessing this issue that the Tribunal considers the correct question. In applying delictual principles the wrongdoer must take the victim as they find him (which includes their mental and physical health). That is a different question, however, of assessing whether previous acts (whether discriminatory or otherwise) caused the loss relied upon or whether it was only the unlawful act that caused the loss. This is an important distinction.

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148. The claimant was in a stressful role. He was a strong performer. It is common for individual employees to suffer stress and on occasion require periods away from work to recover. The claimant's role was inherently stressful. He is an intelligent and capable individual. The previous work issues had an impact upon the claimant and had affected his mental health.

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149. The earlier 2 incidents to which the claimant was subject had a material impact upon the claimant's mental health. The evidence before the Tribunal was that these incidents had materially affected the claimant's mental health. He did his best to maintain his resolve and continue working and sought to return to work, particularly following the second incident. There was a period of time between the second incident and third incident during which the claimant was able to return to work. When the third incident occurred, the effect upon the claimant's mental health was serious. That was occasioned not just because of the third incident but also because the earlier incidents and the conduct (at work) to which the claimant had been subject. The third incident was not the only cause of the claimant's absence on the facts.

150. In the absence of medical evidence on this issue the Tribunal can only do the best it can from the evidence presented to assess this issue. From the evidence presented the Tribunal finds that the unlawful act had a material bearing upon the claimant's mental health but that such an act was not 100% the cause. From the evidence presented to both the liability and remedy hearing the Tribunal concludes that the unlawful act was 70% of the cause of the impact upon the claimant's mental health that led to the losses relied upon (including his absence). In other words the Tribunal finds that there were other causes of the losses relied upon that were not unlawful and those causes contributed to the loss by a proportion of 30%, being careful to assess the cause of the claimant's absence (and losses).
151. The other material factors which had an impact upon the losses sustained by the claimant were the 2 previous acts of harassment (which were not found to be unlawful). Those factors had a significant impact upon the claimant at the time. They were not, however, factors that disappeared from the claimant's mind and were factors which, when taken together, materially and adversely affected the claimant's mental health and caused the claimant's absence following the third incident. The claimant noted his mood has been affected. The earlier acts were, in part, causes of the final absence.
152. Had the third act happened without the previous 2 incidents it is highly likely that the claimant's mental health would not have been affected in the same way and his attendance at work may have been preserved. It is possible the claimant may still have gone off work when he did even if the third act had not happened as a consequence of the impact of the previous behaviours and the claimant's mental health and surrounding factors.
153. The context of the acts and impact of the behaviour to which the claimant was subject caused the losses relied upon to an appreciable extent.
154. The Tribunal therefore concluded that the unlawful act (the unlawful harassment) caused the losses relied upon to the proportion of 70%, from its assessment of the facts and applying the legal test set out above. The unlawful act was not the sole cause of the losses.

Claimant's submissions on injury to feelings

155. The claimant's agent argued the award made should be at the upper end of the middle Vento band. At paragraph 312 of the liability judgement the Tribunal concluded that "following the second incident the respondent was essentially on notice that a person or persons wished to offend the claimant with particular reference to his religion". The respondent was on notice that the claimant had been the victim of harassment. The respondent had seen how the previous incidents had affected the Claimant, he had gone off sick with work related stress as a result. Thus, when it eventually came to the third incident, for which the Tribunal has found the respondent liable, the respondent ought to have the previous incidents in its contemplation and where it failed to manage the situation appropriately, they should be liable to the full extent of the third incident.

156. Just because an act of discrimination may be one off is not determinative nor provide the full picture as the Vento guidance is not a straightjacket. The question for the Tribunal is always what the particular effect on the individual complainant was.

157. In this claim the impact on the claimant has been severe. The claimant's evidence in respect of the effects third incident had was compelling. It was submitted that the claimant has been off work for 16 months as a direct result of the third incident and has reported scores of severe anxiety and depression. He has undergone CBT and has now been assigned a mental health key worker. He experiences panic attacks and is now in receipt of medication to manage his mental health.

158. The effect on the claimant has been profound it has lasted for now 16 months and that effect is continuing, this is an exceptional case. Therefore an award at the top end of the middle Vento band would be appropriate.

Respondent's submissions on injury to feelings

159. Senior counsel for the respondent argued the award must be confined to the injury to feelings which arose specifically from the single incident of

harassment. For the purposes of determining injury to feelings, historic events relating to sectarianism and difficult relationships at Hunterston must be left out of account. Similarly, the impact of the first two incidents must be left wholly out of account even although they plainly caused the claimant distress.

5 The third incident must, for present purposes, be treated as a one off incident.

160. It was submitted that this is a case “close to the margin”. The Tribunal essentially found that the only reasons why the statutory defence was not made out in relation to the third incident were that the respondent implemented its bespoke training after about a year, when it would have been reasonable to do so within six months; and the respondent did not undertake its own independent investigation into the third incident at the time, relying instead on the Police Scotland investigation.

161. Far from being a case where management were involved or implicated in the discrimination, in this case it would appear that the incident was perpetrated by a rogue employee, whom it has not been possible to identify.

162. Far from condoning the discrimination, or displaying a complacent attitude, the respondent and its management have made it clear throughout that such harassment is wholly unacceptable and have been diligent in taking steps to prevent and mitigate such harassment (albeit, as the Tribunal found, not sufficiently to make out the statutory defence to the third incident).

163. For all these reasons, it was submitted that the third incident should be treated as a one off incident, albeit a serious one, in respect of which injury to feelings should be awarded at the higher end of the lower Vento band. The respondent suggested an award of £8,000.

25 **Decision on injury to feelings**

164. The purpose of an award for injury to feelings is to compensate the claimant for the effect of the unlawful treatment. It is a compensatory award not a punitive award. In other words, the Tribunal must be careful to ensure the sum awarded properly compensate the claimant in respect of the impact the unlawful treatment had. The focus is therefore on the consequences of the

unlawful act upon the claimant, assessing the actual injury suffered by the claimant and not the gravity of the acts of the respondent.

165. The effect of the third act of harassment was significant and substantial for the claimant. He has been absent from work for over 16 months and his mental health had been adversely affected. The Tribunal must consider the injury to the claimant following upon the unlawful act only.
166. The Tribunal is satisfied that this is a case which merits compensation for injury to feelings in the middle band. The Tribunal did not consider this to be a less serious case. This was a one off act of unlawful harassment but the impact of the harassment was severe. It is important that the sum awarded is not so low so as to diminish respect for anti discrimination legislation while avoiding excessive awards. There requires to be a degree of similarity to awards in personal injury cases bearing in mind the need for public respect for awards of this nature.
167. The effect upon the claimant's mental health was serious. His mental health was affected with anxiety and depression as a result.
168. Having considered the evidence before the Tribunal the Tribunal considers it fair and just to make an award in the lower end of the middle band in respect of the impact of all the acts upon the claimant in the sum of £20,000 in respect of the injury to feelings sustained by the claimant consequent upon the cumulative effect of the acts upon the claimant (which included the unlawful act).
169. The effect upon the claimant (and the injury to feelings) was not, however, 100% caused by the unlawful act. The impact upon the claimant was caused as a result of each of the causes found by the Tribunal from the facts. Having carefully assessed the evidence and context, the Tribunal found that the unlawful act was 70% to blame for the loss that was caused, which includes the injury to feelings sustained by the claimant, from the evidence before the Tribunal. The award in respect of injury to feelings flowing from the unlawful act is therefore £14,000.

170. Having taken a step back and assessed the impact of the unlawful act upon the claimant, £14,000 is a just and fair value in respect of the non-pecuniary loss sustained by the claimant flowing from the unlawful act.

5 171. Interest is awarded from the date of the discriminatory act to the date of calculation.

172. The act occurred on 30 June 2021 which is 519 days. Interest is at 8% and is therefore $519 \times 0.08 \times 1/365 \times £14,000$ which is £1,592.55.

Claimant's submissions on past loss

10 173. The claimant's agent argued that the claimant should be compensated for the sums he would have received had he not been absent on sick leave since June 2021. The sum sought in respect of this is £8,669.47.

174. The claimant also sought a sum in respect of a retention bonus which the claimant received last year. It was submitted that this year's retention bonus of £2,000 had already been paid to other officers.

15 175. Past losses should be compensated in full. His absence has not been caused by a multitude of factors; it was 100% caused by the third incident of June 2021 alone. Occupational health assessments confirmed this.

Respondent's submissions on past loss

20 176. Senior counsel for the respondent submitted that it would be wrong in principle to attribute all past loss to the act of discrimination. In reality, there would appear to have been a number of other causes of the claimant's ill health: (a) events prior to the incidents (which led the claimant to be off sick with stress and anxiety from 11 February 2020 to 11 March 2020; (b) the effect of the first and second incidents (which led to the claimant being off sick with stress and anxiety from 19 August 2020 to 10 October 2020. Dr Moss noted that the
25 Claimant may have enduring and intractable issues with mood disorder.

177. Senior counsel also noted that the CBT providers recorded that "Client feeling anxious and stressed due to ongoing issues within the workplace for a number of years ... Gradual build up of symptoms which have worsened since June

2021". It is submitted that this accurately reflects the true position. The Claimant's mental health had been deteriorating for some time, first as result of incidents which pre-dated the harassment, and then as a result of the first and second incidents, for which the respondent is not liable. This is consistent with the claimant's GP letter of 16 November 2022, which confirms that the claimant first went to see his GP with mental health issues in February 2020 (before any of the incidents), by which time he had already been suffering with stress for around 6 months.

178. It was argued that the claimant's suggestion that all his difficulties arose from the single third act of harassment is not consistent with the factual history.

179. The respondent's position was that only a portion of past loss should be awarded, to reflect the multiple factors in play. In reality, the claimant's ill health would appear to have been building for a time before the third incident. He was off sick for a month with stress and anxiety in February to March 2020 and for nearly two months in August to October 2020. Although he had not had absence for mental health reasons prior to 2020, the issues would appear to have building at least from the summer of 2019. Moreover, the claimant had suffered a deterioration in his mental health whilst on sick leave which self-evidently cannot be attributed to any unlawful activity of the respondent.

180. It was submitted that taken in the round it would not be appropriate to attribute more than 30-40% of the claimant's injury to the single act of harassment for which the respondent was found liable. The prior acts (for which the respondent was not found liable) plainly had a cumulative effect.

181. Senior counsel argued that the retention bonus should not be included as there was no evidence that the claimant would not receive this. It was a matter that was being considered and others had not received it.

Decision on past loss

182. In assessing past loss, the Tribunal requires to compensate the claimant for the loss attributable to the unlawful act (and not losses caused by other factors or loss which was not caused by the unlawful act). If the loss was caused by

a combination of factors, the Tribunal should award compensation that properly reflects the extent to which the unlawful discrimination contributed to the loss.

5 183. Having considered the evidence, the Tribunal was satisfied that the unlawful act was not the only cause of the losses. While the unlawful act was a material cause, the other acts to which the claimant was subject prior to the third act caused the losses to an extent.

10 184. The Tribunal is satisfied the unlawful act was 70% responsible for the losses relied upon. The Tribunal found that the other factors, particularly the first two incidents and the behaviour to which the claimant was subjected at work did cause the losses to be sustained. The absence was not caused 100% because of the last incident (as submitted by the claimant's agent) but 70%.

15 185. The Tribunal heard no evidence around the issue of the retention bonus. During submissions it was stated that the bonus had not been finally determined and matters were ongoing. Although the claimant believed all other staff had received the bonus, that was not accepted. The bonus was a matter that was being considered and as such it was not a loss the claimant had sustained as the final decision had not been taken. On that basis that sum does not form part of the sums the claimant would have earned had he
20 been working. It is likely that the sum would be paid following consideration.

25 186. The claimant stated (in his witness statement) that he regularly worked overtime. This was not challenged in evidence by the respondent. No detailed figures were produced in this regard and it was regrettable that the parties had not agreed the specific figures. The Tribunal takes a broad brush approach.

187. The sum agreed in respect of past loss was £8,669.47. As the unlawful act was 70% responsible, compensation for past loss amounts to **£6,068.63**.

Claimant's submissions on future loss

30 188. In relation to future loss of earnings, a sum of £311,110.30 was sought. It was accepted that the assessment of future losses is an exercise in speculation

as the claimant has not been dismissed role. The claimant should be put in a position that he would have been but for the unlawful conduct. The claimant should not lose out on potential loss of earnings just because that loss has not crystallised yet when that loss arises from the unlawful conduct. That would be perverse and not in the interests of justice.

- 5
189. The possibility that a loss will be suffered should be accounted for. The claimant's agent submitted that unless the Tribunal concludes it is a certainty the claimant will not be dismissed then the possibility of dismissal must be considered on a percentage basis not on a simple balance of probabilities.
- 10 190. If the Tribunal considers that there to be a chance the claimant will not get dismissed the award should be discounted by the percentage possibility he is not dismissed.
- 15 191. The claimant had been absent for 16 months with mental health issues. He is in a specialised position, with no realistic chance of redeployment. There is no medical evidence to suggest his return is imminent or even possible. It is far from unrealistic speculation to conclude there is an inevitability, or virtual inevitability, that he will not be able to return to work. It would be wilful blindness to ignore the impending likelihood of a dismissal.
- 20 192. The claimant is coming to the end of his Stage 2 capability action plan. The capability process is not indefinite. There are other steps that require to be completed before a decision can be taken. If the claimant's health does not improve, he cannot return to work. The timescale is unknown but these panels are held monthly. A decision could be taken on 5 December to refer him to the various panels. It is entirely possible that within 3 months the claimant is dismissed, or it could be longer. If the claimant is still unfit for work available vacancies would not be relevant as there is no prognosis on the claimant's likely recovery. The claimant believes it will be some time before he is well enough to consider a return to work.
- 25
- 30 193. As the claimant's mental health issues continue, it is his position that termination of his employment is a matter of if not when and future loss of

earnings are appropriate. He is far closer to the end of the process than he is the beginning.

194. The claimant sought to apply his mind to what alternative roles he could reasonably obtain when dismissed as he is aware, he is unlikely to qualify for career long losses. He cannot transfer to Police Scotland and would have to work his way from the bottom if he were accepted for a role with them. There is no guarantee he would get accepted for a role. Working in security would lead to a significant reduction in pay compared to his current wage.

195. In any event the claimant is currently not in receipt of full pay. His half pay will run out and he would be in receipt of pensionable pay. The claimant should be awarded full losses for the period until he is fit for work.

Respondent's submissions on future loss

196. Senior counsel for the respondent argued that this head of loss is wholly speculative and should be rejected in its entirety. The claimant remains in employment. There is every prospect of him returning to work in due course and continuing his career with the respondent. This is not a "dismissal" case, yet the claimant is inviting the Tribunal to treat the case as if: (a) the claimant had already been dismissed; and (b) the dismissal was an act of discrimination for which the respondent should be held liable. Both of these premises are entirely false.

197. It was also argued that the sum claimed is wholly unrealistic and speculative, for the following reasons, among others:

— Even if such loss were in principle recoverable, it would have to be substantially discounted to reflect the fact that there is a substantial possibility that the claimant will continue in employment. His health may improve, particularly after the Tribunal is over. Even if he continues to suffer with ill health, he may be redeployed, either to a different role or to another location. The evidence showed that of 120 ill health cases one HR Business Partner dealt with while working for the respondent over

10 years, only 4 have resulted in dismissal on grounds of capability. Some of those cases have involved absences of more than two years. As a percentage, this suggests that the claimant's prospects of returning to work are 96.7%;

5 — Such compensation would need to be further substantially discounted to reflect the fact that there are multiple causes of the claimant's ill health, including matters for which the respondent is not liable. The claimant's ill health would appear to have been building for a time before the third incident. Taken in the round, it is submitted that it would not be appropriate to attribute more than 10 30-40% of the claimant's injury to the single act of harassment for which the respondent was found liable. The prior acts (for which the respondent was not found liable) plainly had a cumulative effect and materially contributed to his subsequent ill health;

15 — There is no basis for the assumption that the claimant would have undertaken regular overtime with the respondent;

 — Even if the claimant were eventually to be dismissed, no allowance has been made for the prospect that he might obtain ill health retirement or obtain a capability payment on termination, 20 both of which would reduce the financial impact of dismissal;

 — The claimant's assumptions in respect of mitigation are unrealistic. There is no justification for assuming that the claimant would be unable to find alternative employment for 12 months after his dismissal or retirement (even assuming he will eventually 25 be dismissed or retire). Any dismissal would be likely to take place at some distance in the future. It is likely that the claimant's ill health will have improved by that time, in particular with the Tribunal proceedings having long before concluded. Moreover, there is nothing to prevent the claimant from applying for a range 30 of jobs before any future dismissal so as to have a seamless transition to a new employer;

- Given the claimant’s extensive experience as a Police Sergeant within the respondent, it is unduly pessimistic to assume that he would progress to the rank of sergeant only after 15 years with Police Scotland. Once would expect his experience and expertise to be recognised.
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198. It was submitted that the claimant’s claim in respect of future losses is based on a series of factual premises which do not reflect the reality. He has not been dismissed, he remains an employee, and extensive efforts will be made to retain him, whether in his current job or a different one, and whether in his current location or another.
- 10
199. If the Tribunal were minded to award a period of future loss, it was submitted that should be limited to the loss which he may suffer whilst he continues to recover his mental health. Importantly, with Dr Moss’s assistance the claimant has now had his medication reviewed and has a key worker. The claimant stated he was “definitely” finding the ongoing support from the key worker helpful and has 24 hours contact and ongoing sessions with them. With the access to support and treatment having opened up, the claimant’s prospects of a recovery are significantly improved.
- 15
200. Senior counsel noted that the claimant agreed conclusion of the Tribunal proceedings would give him “closure” on the situation. As Dr Moss stated in his evidence, there are “inherent stresses in the ET process”, and “to have that resolved and know the outcomes” could have a positive impact on the claimant’s mental state.
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201. The claimant also accepted that, if his mental health improves, he could return to Hunterston. Given that Hunterston is closing in 2025, moving to Torness or Sellafield remain valuable options. The claimant accepted these could be options in the future. Even if the claimant does not return to firearms duties, there are project roles, procurement, training, logistics and control centre roles which could be considered. There are always non-safety critical roles available. There can be no doubt the respondent will continue to show the patience, tenacity and sympathy in bringing the claimant back to work it has
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shown so far. In the circumstances, it is submitted that any future loss should be limited to a period of six months.

202. The respondent has an excellent track record of getting even those on long-term ill health back into the workplace. Other ill health cases have gone on
5 for two years before resolution

203. Even if the claimant were eventually to go through a risk assessment and redeployment panel and still not be well enough to work in any capacity with the Respondent, the overwhelming likelihood is that he would be eligible either for ill-health retirement or for a capability payment. Were the claimant
10 to receive a capability payment today, it would amount to £42,239. It would be likely to be higher if awarded at some date in the future. That sum would fall to be deducted from future loss.

204. It was submitted that overtime loss is speculative, since the claimant has no entitlement to overtime and in practice its availability was variable.

15 **Decision on future loss**

205. The purpose of future loss is to ensure the claimant is put back to the position, so far as money can, he would have been in had there been no unlawful treatment. In this case that is a highly speculative exercise. This is not a discriminatory dismissal case. Nevertheless, the Tribunal's job is to assess
20 what would have happened had the unlawful act not occurred and ensure the claimant is compensated accordingly.

206. The authorities in this area direct that the assessment is to be on a percentage loss of chance basis, if possible to do so. The Tribunal is not to consider whether on the balance of probabilities he would be dismissed but rather
25 assess the chance that his employment would continue or not and award compensation on that basis.

207. This is an unusual case given the circumstances. The Tribunal has to do 2 things. Firstly it needs to assess what would have happened had there been no unlawful treatment. Secondly the Tribunal requires to consider what will
30 actually happen (and award compensation to reflect the losses the Tribunal

considers the claimant would sustain as a consequence of the unlawful treatment). While that is a common exercise in assessing future loss in employment cases, the difficulty in this case is that the claimant has not been dismissed and might never be dismissed. There are a large number of events that could happen all of which significantly affect the position. The Tribunal assessed the evidence led and considered this matter in detail and at great length.

5
208. Firstly the Tribunal considered what was likely to have happened had the unlawful act not occurred. The Tribunal was satisfied the claimant would by and large have continued to carry out his duties. While there was evidence of intermittent absences and while the previous bad behaviour to which the claimant was subject had a material impact upon the claimant's mental health, the steps he has taken to deal with those challenges are such that the claimant would in all probability either seek further assistance and manage the matter or deal with the issues himself such that he would remain in position. From the evidence before the Tribunal there is no basis to consider the claimant's employment would have ended in the short to medium term (or within 5 years).

15
209. Secondly the Tribunal requires to assess what is likely to happen as a result of the unlawful conduct and assess the differential and make an award to reflect the loss (solely) sustained as a result of the unlawful act.

20
210. There are a large number of unknown variables in this case as noted by the respondent's agent. It is entirely possible the claimant recovers to an extent that he is able to return to work for the respondent in some capacity (earning the sums he earned prior to his absence). It is also possible the claimant could remain unable to work for the respondent for potentially a number of months. During submissions the claimant's agent conceded that the claimant would return to fitness to allow him to return to work certainly prior to 2025 when Hunterston was due to close. This is therefore not a career loss case. There is likely to be a period when the claimant will be fit to return to work.

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211. The medical evidence before the Tribunal is regrettably very limited. It is clear that the claimant is presently unfit to return to work. It is also clear that the Tribunal process does have some negative impact upon the claimant (see paragraph 37) and closure of the Tribunal process is likely to have some positive effect, given the claimant will be awarded some form of compensation. While he said the initial judgment had a limited effect upon him, the closure the remedy judgment brings is highly likely to have a positive impact.
212. As the claimant is likely to return to work (or to be work ready) it is unlikely he would qualify for (or seek) early retirement. It is likely, however, if he were to be dismissed because of his incapability that he would receive a capability payment amounting to a year's salary. The evidence was such that it was almost unheard of for an individual in that situation not to receive a payment where employment ended on capability grounds. There is no medical evidence to assist the Tribunal with regard to future loss. In cases such as this it is very common for there to be a specialist medical opinion to assist the Tribunal grapple with the assessment it has to carry out.
213. The evidence before the Tribunal shows that the respondent works extremely hard to avoid dismissal which seem to genuinely be a last resort where there is no alternative. It is very rare for the respondent to dismiss on capability grounds and the circumstances require to be exceptional.
214. In this case there are a number of potential alternatives to dismissal which would require to be explored before dismissal would occur. While the claimant's agent argued such alternatives are irrelevant, that is so only when the claimant is unfit to work. The Tribunal considered that there are a number of factors which support a conclusion that the claimant would be fit to return to work.
215. It is highly likely (if not certain) that the claimant's health will improve following conclusion of the Tribunal process, particularly where the respondent had taken steps to deal with the cultural issues which led to the claims arising (and can support the claimant with regard to a phased return to work and

demonstrating its position to diversity) and given the additional medication and support measures in place for the claimant, which he accepted are having positive effects upon his health. Building trust in an employer is not an easy process but given the alternatives and given the claimant's desire to progress, the Tribunal considers that there is an excellent prospect of a return to work in the short to medium term. It is also assumed that the claimant wishes genuinely to embrace in returning to work. There was no evidence from the claimant that he did not wish to do all he could to return to work and the assessment is made on the basis the claimant will look positively upon the changes in his life and in the respondent and work with them to facilitate the best possible outcome for him.

216. The respondent clearly wanted to work with the claimant and rebuild the trust the claimant had lost. That included showing the claimant the steps taken to deal with the sectarian issues the respondent had faced. The training that had taken place was significant and no further issues had arisen. Once the claimant is shown the change in approach and the seriousness with which the respondent takes the concerns the claimant had and sees the steps taken to address those concerns, with the support the respondent offers, the concerns the claimant had would reduce and disappear over time. The cultural issues perceived by the claimant created a serious limitation upon his ability to contemplate a return to work. The Tribunal considers the respondent would work with the claimant to address those issues and assist him in a return to work on the facts of this case.

217. The Tribunal also considered that the changes to the claimant's medication and support mechanisms, including the support of a key worker and the surrounding context, are major factors in supporting the claimant to a return to work. He had a genuine desire to return to health and work and the changes in his support framework would facilitate that.

218. The Tribunal considers, from the evidence led and its careful assessment of the position that there is a virtually 100% chance the claimant would absent for a period of 9 months. While there is a chance the claimant returns to work sooner, in some capacity, to ensure the sum awarded is fair and just the

5 Tribunal proceeds on the basis that he would not return to work during that period but focus on taking steps to become work ready, working with the respondent to reach that stage. Potentially he could take longer to return but on the facts the Tribunal considered there to be a virtually 100% chance he would return by 9 months. During the 9 month period it is likely that the support mechanisms the claimant has would allow him to return to fitness. The Tribunal considers the respondent would work with the claimant to demonstrate their learning from this case as to the approach to diversity and their approach to inclusivity (and the change in culture that has been effected).
10 The medication the claimant is taking will have settled and the Tribunal process will, it is hoped, be complete with the claimant having received compensation for the impact the unlawful treatment had upon him. Those are important factors and provide a very strong foundation that is likely to support the claimant in his desire to return to fitness and to resume working in some
15 capacity, which would assist his general mental and physical health.

219. It may be that he is able to return to work on a phased basis prior to the expiry of the 9 month period but the Tribunal can only assess matters on the basis of the chance things will happen and seek to achieve a fair and just outcome.

20 220. The Tribunal considers there to be 100% chance that the respondent maintains the claimant's position during this time and does not dismiss. The Tribunal considers that from the evidence and context the respondent would not dismiss the claimant given the issues arising in this case, including the discrimination the claimant suffered and the potential for a return to work. The evidence the Tribunal heard was clear in that dismissal is genuinely a "final
25 final" outcome and in this case it is unlikely that it would happen within the next 9 months.

30 221. The Tribunal considered whether it was likely the respondent would exercise its discretion and pay the claimant half pay during a final 6 month period. While this was a possibility, to ensure the sums awarded to the claimant properly compensated him for the losses sustained, the Tribunal concluded that it was not likely that half pay would be awarded. While pensionable pay would arise, the Tribunal considers it just to assess future loss on the basis that no

payments would be made, thereby increasing the sums due to the claimant. The Tribunal considers, overall, that to be a fair way to deal with the losses that arise and ensure the compensation that is awarded is as accurate taking account of the unknown variables in the assessment.

5 222. The Tribunal considered very carefully the chance of the claimant being able to return to work following the 9 month period. The claimant's position was he was unlikely to be fit. The respondent argued he would be fit. Having carefully assessed matters the Tribunal considers that it is likely the claimant would be fit to return to work in some capacity by the expiry of the 9 month period and
10 virtually certain he would return by the expiry of 9 months. The claimant is not currently fit and does not consider himself to be fit. The medical evidence was unable to assist in assessing the position. However, the claimant's position with regard to his medication and support now provided indicate that things will improve. The respondent's supportive approach together with the
15 claimant's desire to return to work (when in a better state of mental health) support the Tribunal's decision as set out above. The Tribunal had no evidence to suggest upon a return to work the claimant's salary would be less than that he currently receives (working full time) – even if his role were to change.

20 223. From the evidence before the Tribunal, the Tribunal considers that there is a 100% chance the claimant would have secured an alternative role that suits him which would be at his current salary package following a 9 month period. This was not an easy assessment and the Tribunal considered whether it was just and fair to assess the loss of chance at less than 100%. The Tribunal did
25 not consider it able to do so from the evidence before it and considered a fair and just assessment to be that he would return after 9 months and should be compensated accordingly. There are a number of reasons the Tribunal reached this decision.

224. Firstly there was no specialist independent medical evidence that supported
30 the assertion that the claimant would be unfit to return to work following that period of time in light of the support given the claimant and changes afoot. The respondent's medical evidence did not assist since the expert, Dr Moss,

was “puzzled” as to why the claimant had not returned to fitness and could not say what the position would be. The Tribunal had to assess the position.

225. Secondly the evidence before the Tribunal was such that the Tribunal considered an improvement was virtually certain once the Tribunal had concluded and the claimant and respondent continued to work together with a focus on his return to work (with the attendant support mechanisms). It was clear the claimant loved his job and had and has a genuine desire to return to work. Once his medication and support mechanisms take effect combined with a concerted approach by the respondent to work with the claimant to show how they have overcome the issues that contributed to the claimant’s absence (which was the evidence before the Tribunal, with dismissal only being explored as a final resort), it is very likely the parties will realise it is in both their interests to facilitate a return to work.

226. Thirdly and finally the onus is on the claimant to establish his loss in evidence. Absent clear medical evidence the Tribunal could only assess matters using the evidence that was presented, which was vague. The Tribunal therefore assessed the evidence it had using its experience as an industrial jury to carry out the assessment exercise as best it could in those challenging circumstances and in context of the evidence led, making sure ultimately the sum awarded is just and fair in light of the unlawful act, with the sum being awarded properly reflecting what the Tribunal considers the losses to the claimant to be, so far as flowing from the unlawful act given the uncertainty and speculation.

227. The Tribunal found the assessment as to future loss challenging in the absence of clear medical evidence as to the position. It is entirely possible that the claimant’s losses are minimal as he secures a return to work, in which case the compensation awarded would be significantly above the sums the claimant has lost. It is also possible, however, that the claimant is off work for a longer period or fails to secure an alternative position at a comparable rate at the time the Tribunal determined in which case the sum awarded would be considerably less than the sum actually lost by the claimant. The claimant would receive a capability payment if he were to be dismissed and in the

Tribunal's view would likely secure alternative employment within a relatively short period of time given his transferable skills and experience (and could well secure a comparable role within a few years). The capability payment the claimant would receive would provide the claimant with financial assistance.

5 228. The Tribunal made a decision based on the evidence before it in light of the facts, recognising that this is not a dismissal case and there is no certainty the claimant will be dismissed, whilst applying the legal principles set out above. That has been taken into account in reaching our decision. The Tribunal concluded it was virtually certain the claimant will return to fitness by the end
10 of a 9 month period. If the claimant were dismissed (contrary to what the Tribunal considers to be virtually certain) the normal remedies from someone in the claimant's position exist and the claimant may not be without remedy.

15 229. This is a highly speculative decision that is based on limited evidence. It was regrettable that no specialist independent medical evidence was presented to assist the Tribunal nor evidence from experts within the industry as to available roles and progression. The Tribunal can only make a decision from the information that has been presented to it and did so carefully applying the legal principles above to the facts.

Sums awarded by way of future loss

20 230. Had the unlawful act not occurred, it is likely that the claimant would have earned £3,000 a month net pay (which takes account of fluctuating overtime). That monthly amount would have continued each month for the remainder of the period in consideration. There was no evidence of any wage increase (or decrease) or any change forthcoming.

25 231. The Tribunal calculates loss on the basis that he would not receive half pay during the 9 month period when he is likely to be absent.

232. His net pay has fluctuated but a fair figure is £3,000 a month (representing the fact there may be months when no overtime is provided and some when overtime is provided). He is likely to receive no pay for 9 months.

30 233. His losses for this period would therefore be £27,000.

234. As the unlawful act was 70% responsible, the loss for this period is **£18,900**.

Interest on financial sums

235. The total financial loss was £24,968.63 (past loss of £6,068.63 and future loss of £18,900). As the act occurred on 30 June 2021 which is 519 days ago
5 interest on the pecuniary sums is calculated from the midpoint, 260 days ago, meaning interest is at 8% and is therefore $260 \times 0.08 \times 1/365 \times £24,968.63$ which is £1,422.87.

Claimant's submission on pension loss

236. The claimant sought £279,000 for pension loss as per an actuary report. The
10 expert did not give evidence and the report was based upon a career ending loss, calculating loss of pension over 16.5 years.

237. The claimant's agent argued that these losses stem from the unlawful act. Dismissal is a virtual certainty. The report notes that calculations could be revised if further information was known such as dismissal date, and details
15 of new pension. However, these are unknown at this stage and the report acknowledges that the Tribunal may need to reduce the award by a 'withdrawal factor' and to consider the extent which loss might be mitigated by accrual of other pension rights obtained.

238. The claimant's agent submitted that it is for the Tribunal to consider these
20 factors and adjust the sum sought accordingly taking into account these factors.

Respondent's submissions on pension loss

239. It was submitted that the claim in respect of pension loss is based on a series
25 of manifestly incorrect or unrealistic factual premises, and is even more speculative than the claim in respect of future loss of earnings: Even if such loss were in principle recoverable (which it is submitted it is not), it would again have to be substantially discounted to reflect the fact that there is a substantial possibility that the claimant will continue in employment, whether in his current role or a different role. Such compensation would again need to be further

substantially discounted to reflect the fact that there are multiple causes of the claimant's ill health, including matters for which the respondent is not liable;

240. The pension loss calculation was premised on the claimant being dismissed on 5 December 2022. There was no prospect of that happening. The claimant has a very long way to go with the capability procedure, and potentially with a subsequent Risk Assessment Panel and a Redeployment Panel, assuming that he does not come back to work before then.
241. Even if the claimant were eventually to be dismissed, no allowance has been made for the prospect that he might obtain ill health retirement or obtain a capability payment on termination. Plainly, an award of ill health retirement would substantially reduce his pension losses.
242. Critically, the sum claimed in respect of pension makes no allowance whatsoever in respect of the claimant's likely mitigation of his losses. There is no reason to assume that the claimant would not obtain an equivalent pension if, for example, he obtained a position with Police Scotland.
243. The Joint Presidential Guidance on 'Principles for Compensating Pension Loss' is premised on the claimant having been dismissed. Under the section 'The Principles: Key Concepts' at paragraph (4), in describing the "simple" method, the Guidance states that "This method requires the tribunal to aggregate the contributions that, but for the dismissal, the employer would have made ...". Similarly, paragraph (5), in considering the "complex" method, note that it is appropriate in "career loss" cases.
244. The same point is clear from the Employment Tribunals Principles for Compensating Pension Loss 4th Edition (Third Revision) 2021, which contains the following provisions:
- "When a person is dismissed, they usually suffer financial loss";
 - "In the principles, we use the phrase "unlawful dismissal" to describe three scenarios ... (a) Wrongful dismissal ...; (b) Unfair dismissal; (c) Discriminatory dismissal" (para 1.1);

- “When assessing compensation for a claimant’s pension loss, difficulties arise because the claimant has not lost money, as such, at the time of dismissal” (para 1.3).

245. These extracts served to underline the unreality of the claimant’s claim. He remains in employment, yet seeks to compensated as if he had been dismissed on discriminatory grounds.

Decision on pension loss

246. This is an inherently speculative exercise given the absence of any clear evidence as to the position. Applying the reasoning from above, the Tribunal considers that it is not appropriate to adopt the method of calculation set out by the claimant’s agent, which is based upon a career ending situation and covers almost 17 years of loss. In this case the Tribunal considers that an appropriate and fair way to compensate for pension loss would be to award the claimant a sum representing the contributions likely to be lost for the 9 month period. The contributions lost appear to be £300 per month (which is what the Tribunal gleaned from the papers submitted in the absence of any agreement on this matter). The claimant is likely to lose 9 months worth of contribution valued at £2,700. The unlawful act was 70% to blame which led to a value of £1,890.

247. Interest should be added to the lost pension contributions part of future loss. The financial loss was £1,890. As the discriminatory act occurred on 30 June 2021 which is 519 days ago interest on the pension loss is calculated from the midpoint, 260 days ago, meaning interest is at 8% and is therefore $260 \times 0.08 \times \frac{1}{365} \times £1,890$ which is £107.71.

Taking a step back

248. The Tribunal once it concluded its deliberations took a step back to assess the decision it had reached to ensure that the sum awarded was properly attributable to the losses sustained by the unlawful act. The Tribunal recognises this is not a science nor an arithmetical exercise which is why it

has made certain assumptions and used the sums it has and taken the approach it has taken.

249. The Tribunal was careful in reaching its conclusions as to loss of chance that the assessment was based upon the evidence. There was limited evidence available. While it is rare for a Tribunal to be 100% certain that things will occur, on the facts of this case and after careful and lengthy deliberations given the surrounding facts and context the assessment carried out was fair and reasonable in all the circumstances applying the legal principles summarised above. It was as accurate an assessment as to future loss that the Tribunal was able to achieve from the evidence before it to ensure the claimant is put into the position that would have occurred, so far as money can do so, had the unlawful act not occurred.

250. Taking a step back the Tribunal is satisfied that the total sums awarded fully compensate the claimant for the losses he sustained as a result of the unlawful act from the evidence presented to the Tribunal.

Grossing up

251. As the sums awarded are less than £30,000 grossing up is not required. This is because the award in respect of injury to feelings is not in respect of termination of employment but a discriminatory act that occurred during employment.

Summary

252. The Tribunal has unanimously found that the following sums flow directly from the unlawful act of discrimination and should be paid to the claimant:

Injury to feelings: £14,000

Interest on injury to feelings: £1,592.55

Past loss: £6068.63

Future loss: £18,900

Interest: £1,422.87

Pension loss: £1,890

Interest: £107.71

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Observations

253. Finally the Tribunal wishes to thank both agents for their assistance and working together to ensure the overriding objective was achieved and matters were dealt with fairly and justly. It is hoped that the claimant can now work with the respondent and move forward and continue to build upon his successes to date.

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15 **Employment Judge: D Hoey**
Date of Judgment: 01 December 2022
Entered in register: 15 December 2022
and copied to parties