EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4109987/2015 and 4123241/2018

Remedy hearing held in Glasgow on 31 October 2022, 28 November 2022, 29 November 2022, 11 January 2023, 18 April 2023 (submissions) and 25 April 2023 (deliberations)

Employment Judge M Whitcombe
Tribunal Member Ms P McColl
Tribunal Member Mr W Muir

Ms K Harper	Claimant Represented by: Mr M Allison (Advocate)
The Chief Constable, Police Service of Scotland	Respondent Represented by: Mr G Mitchell (Solicitor)

RESERVED JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is as follows.

(1) The claimant is entitled to compensation for injury to feelings totalling £17,076.30 including interest.

(2) The respondent's application for expenses is refused.

REASONS

Introduction and background

1. The purpose of this hearing was to decide the appropriate remedy following the Tribunal's previous judgment in the claimant's favour. The hearing in late 2019 and early 2020 dealt only with questions of liability. The liability judgment was sent to the parties on 26 February 2020. The Tribunal found that in one respect only the claimant had been victimised contrary to section 27 of the Equality Act 2010 and regulation 7 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Full details of the claims decided at that hearing, including those which failed, are set out in the liability judgment under the heading "issues" at paragraphs 4 and 5.

2. The Tribunal's liability judgment was confirmed following an application for reconsideration. The claimant's appeal was rejected on 2 October 2020 by HHJ Barklem on the Employment Appeal Tribunal sift and again at a rule 3(10) hearing before Lord Fairley in Edinburgh on 9 September 2021. Matters then returned to the Employment Tribunal.

3. The liability judgment made the mandatory declaration of unlawful treatment required by section 124(2)(a) of the Equality Act 2010 and the equivalent declaration permitted by regulation 8(7)(a) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The only additional remedy now sought by the claimant is compensation under section 124(2)(b) and regulation 8(7)(b). The claimant does not seek a recommendation under section 124(2)(c) or regulation 8(7)(c).

Constitution of the Tribunal panel

4. We should explain some personnel changes since the liability judgment. Tribunal Member Mr I MacFarlane has now retired. It was not possible for him to come out of retirement to hear the remedy issues. The then Vice President

and Acting President Judge Susan Walker decided that a substitute non-legal member should be allocated in place of Mr I MacFarlane. Tribunal Member Ms P McColl therefore joined the panel at the remedy stage. As before, this unanimous judgment is one to which all three members of the Tribunal have actively contributed.

Representation

5. The claimant is no longer represented by Mr Hay (Advocate) but rather by Mr Allison (Advocate). Mr Allison is not new to the case, having been Mr Hay's instructing solicitor at the liability stage. The respondent has been represented by Mr Mitchell (Solicitor) both at the liability stage and now at the remedy hearing.

The unlawful act

6. The relevant act was when Sergeant Doug Bell supplied certain information relating to the claimant to Chief Inspector Hollis on 30 April 2015. Importantly, the claimant was not aware of that act at the time and only discovered it the following year when documents were disclosed to her as part of this litigation. It was common ground at this hearing that the claimant became aware of Sergeant Bell's unlawful act on or about 15 January 2016.

7. We dismissed 7 other allegations of victimisation as well as 2 allegations of detrimental treatment for having made a protected disclosure. The liability judgment sets out full details of those allegations, our findings on the relevant evidence and the reasons why we rejected each of those allegations.

The positions of the parties

8. The positions of the parties can be summarised as follows.

    a. The claimant argues that the unlawful act caused not only significant

injury to her feelings but also psychiatric injury including Post Traumatic Stress Disorder ("PTSD") and Major Depressive Disorder (Severe). She also contends that the act of victimisation caused financial loss flowing primarily from the claimant's retirement from the police force on medical grounds on 27 October 2017 and a restricted ability to do other types of work since then. Although the claimant acknowledges some concurrent causes of psychiatric injury and ill health retirement, she argues that the harm caused by the unlawful act is indivisible from the harm caused by those other matters, so that she is entitled to compensation for the totality of the harm.

b. The respondent argues that the unlawful act caused only limited injury to the claimant's feelings. The respondent also argues that the claimant's condition does not meet the diagnostic criteria for PTSD and that the Mixed Anxiety and Depressive Disorder she now experiences has been caused by other matters, including traumatic events in her personal life, issues at work including but not limited to the 9 unsuccessful allegations in this litigation and the claimant's subsequent distress at the Tribunal's liability judgment. The respondent argues that the claimant is entitled only to compensation for injury to feelings and that the injury to the claimant's psychiatric health and subsequent ill health retirement would have happened anyway, even if the unlawful act had not occurred.

9. In financial terms, the claimant's submission is that the just award of compensation would be around £440,000, before interest and grossing up. In stark contrast, the respondent's submission is that an award of £6,000 for injury to feelings plus interest would represent full and fair compensation.

Evidence

Witnesses

10. We heard evidence from:

a. the claimant, who adopted a witness statement on remedy issues dated 31 October 2022 and a supplementary witness statement dated 13 March 2023. We admitted them into evidence despite a failure to comply fully with requirements of the Practice Direction. The statement of truth from the claimant was non-compliant and the statement of truth from the claimant's solicitor was entirely absent. The claimant's evidence was heard by video, though she rather forced our hand on that issue by remaining at home on the day that her extremely late application for permission to give evidence remotely was heard. Any other decision would have delayed the hearing.

b. Mrs Mary Keenan Ross, Consultant Clinical Psychologist. She was originally instructed by the claimant prior to the liability hearing, then jointly instructed by both sides before the respondent applied successfully for permission to instruct an additional expert. Her reports are dated 12 November 2019 ("Psychological Report"), 24 February 2022 ("Amended Supplementary Psychological Report) and 24 August 2022 (comments on Dr Khan's report).

c. Dr Khuram Khan, Consultant Forensic Psychiatrist, instructed by the respondent. His reports are dated 24 July 2022 (Psychiatric Report) and 13 September 2022 (Supplementary Psychiatric Report).

11. All of those witnesses were cross examined. For the reasons set out in more detail below, we had significant concerns about the consistency, rigour and reliability of Mrs Keenan Ross' evidence and ultimately we preferred that of Dr Khan on several important issues.

Documents

12. We were provided with a first file of documentary evidence running to 547 pages and a supplementary file running to 116 pages.

Summary of the expert evidence

13. This section contains a summary of the key parts of the expert evidence, as well as some observations on that evidence.

Dr Paul Dedman, Consultant Psychiatrist

14. Dr Paul Dedman was not instructed to prepare a medico-legal report for the purposes of this litigation, but both sides referred to his report dated 10 July 2018 (clinic date 27 June 2018). That is about 30 months after the date on which the claimant became aware of the unlawful act and about 18 months prior to the Tribunal's liability decision. It is the earliest expert report regarding the claimant's psychiatric health and has value both because it was carried out much closer in time to the relevant events than the subsequent reports and also because the outcome of the litigation was not then known.

15. Dr Dedman noted that the claimant considered that she had been discriminated against since 2009 and that she had commenced long term sick leave in February 2015 (the exact date was 11 February 2015). The commencement of sick leave was therefore prior to the unlawful act, which occurred on 30 April 2015, and significantly prior to the claimant learning of it on 15 January 2016.

16. Dr Dedman's summary of the key events notes the distress caused by events in the claimant's marriage, disputes about flexible and part-time working, the death of the claimant's mother, unspecified bullying by a sergeant, the investigation into the claimant's conduct, the visit by officers to talk to the claimant's ex-husband and a threatened charge of causing a breach of the

peace. Several of those matters were allegations which we considered and rejected at the liability hearing. There is no clear reference to the unlawful act with which we are now concerned. If it is contained within the unspecific reference to bullying by an unnamed sergeant then the unlawful act on 30 April 2015 and its discovery by the claimant on 15 January 2016 have no prominence in the narrative. Dr Dedman does not identify 30 April 2015 or 15 January 2016 as significant dates.

17. Dr Dedman diagnosed a Mixed Anxiety and Depressive Disorder which was ongoing at the date of the report. That is the same diagnosis as that subsequently made by the respondent's expert Dr Khan. The claimant's GP had already commenced appropriate treatment with the anti-depressant Sertraline and the recommendation was that the claimant should continue on that medication at the same dose.

Mrs Keenan Ross, Consultant Clinical Psychologist
- first report, 12 November 2019

18. When this report was prepared the claimant had been aware of Sergeant Bell's act on 30 April 2015 for about 3 years and 10 months. The ET hearing was due to start the following month, although an order was made limiting the scope of that hearing to liability issues only. Consequently, all ten allegations remained live when the report was written.

19. At internal page 8, Mrs Keenan Ross confirms the claimant's understanding of the purpose of the psychological assessment as being to assess, *"the impact on her of work stress, bullying, harassment and discrimination during her employment with Police Scotland particularly between 2009 and February 2015".* That period does not include 30 April 2015, the date on which the unlawful act occurred, or 15 January 2016, when the claimant became aware of it. In the section headed *"History of Adverse Life Events"* there is no reference to Sergeant Bell's act on 30 April 2015 or to the claimant learning of it on 15 January 2016. In the section headed *"Previous*

Psychological/Psychiatric History" there are some generalised references to bullying in 2015 and 2016 but no clearer specific reference to Sergeant Bell's unlawful act on 30 April 2015 or to the claimant learning about it on 15 January 2016. That section does note:

a. stress on joining Police Scotland in 1996;
b. further stress from 1999 until approximately 2002 necessitating sick leave and medication when her ex-partner faced criminal charges arising from work;
c. a private medical issue which it is not necessary to describe causing stress and depression in 2003 (the inconsistent reference to 2005 appears to be a typo);
d. anxiety and depression by 2002 and 2003;
e. the deterioration of her marriage and an alleged experience of physical and emotional abuse by 2005;
f. the end of the claimant's relationship and the death of her father in 2007;
g. concerns about arrangements for the claimant's son when visiting his father in 2013;
h. the claimant's mother became ill in 2013;
i. litigation about child arrangements in 2013;
j. the death of the claimant's mother in 2014, leading to a grief reaction of anger, sadness and low mood;
k. by 11 February 2015 the claimant was *"unable to cope in the workplace or in her personal life and she stated that she believed that 'the whole world was a hostile place"'.*

20. Mrs Keenan Ross noted and agreed with Dr Dedman's diagnosis of "Mixed Anxiety and Depressive Disorder" but added "Post Traumatic Stress Disorder". Her view was that the claimant was *"permanently disabled in relation to future employment with Police Scotland and any future employment'.* When read with paragraph 25 at internal page 29 it is clear that Mrs Keenan Ross thought that the claimant had been permanently disabled from employment with Police Scotland since 11 February 2015, the date of

commencement of sick leave. Mrs Keenan Ross confirmed that view during cross-examination at this hearing, saying that the claimant was permanently disabled from working for the respondent or any associated organisation from 11 February 2015. That is well before the unlawful act (30 April 2015) or the claimant's awareness of it (15 January 2016).

21. Mrs Keenan Ross' opinion at the end of the section headed *"Previous Psychological/Psychiatric History"'* was that by February 2015 the claimant was unable to continue with her employment with Police Scotland and having experienced anxiety and depression for many years by 2015, the claimant was experiencing symptoms which met the full diagnostic criteria for PTSD.

22. Inconsistently, in paragraph 8 of the section headed *"Conclusions and Recommendations"* Mrs Keenan Ross stated that the claimant began to experience symptoms of PTSD and depression "particularly from 2015" but that *"PTSD was established in 2016".* There is no explanation for the difference, nor any reference to a particular event of relevance in 2016. Inconsistently again, in paragraph 15 of the same section, Mrs Keenan Ross said that by 2015 the claimant's symptoms met the DSM-V diagnostic criteria for PTSD (severe). There is no reference in the rest of paragraph 15 to Sergeant Bell's act on 30 April 2015, or to the claimant discovering it on 15 January 2016. Neither is highlighted as a key event.

23. Mrs Keenan Ross' view was that adverse life experiences in the claimant's relationship with her ex-partner caused the vast majority of mental health difficulties until 2005, that from 2005 until 2014 there were mixed causes (60% personal, 40% work) and that by 2014 many of the previous life stressors had completely resolved and workplace issues were entirely responsible for the impact on the claimant's psychological functioning.

24. The diagnosis was that the claimant met the DSM-V diagnostic criteria for Post Traumatic Stress Disorder (severe) and Major Depressive Disorder (Mild). Elsewhere in the report Mrs Keenan Ross had endorsed Dr Dedman's

diagnosis of Mixed Anxiety and Depressive Disorder. In relation to that, Mrs Keenan Ross used the present tense, so we do not read her report as saying, in effect, that Dr Dedman was correct to diagnose one condition when he reported, but that the condition had evolved into a Major Depressive Disorder by the time of the examination carried out by Mrs Keenan Ross. Leaving the separate issue of PTSD aside, Mrs Keenan Ross appears to diagnose both Mixed Anxiety and Depressive Disorder as well as Major Depressive Disorder (Mild). On the face of it, that appears inconsistent. The diagnosis of Mixed Anxiety and Depressive Disorder is not mentioned at all in the conclusions section.

25. In another inconsistent passage, at internal page 28 Mrs Keenan Ross states that the claimant experienced PTSD "particularly from 2014" which was caused by *"her employment issues with Police Scotland particularly from 2014".* In paragraph 21 Mrs Keenan Ross states that *"It was only by 2014 that the difficulties with Police Scotland caused significant psychological difficulties for [the claimant] resulting in her being unable to work from February 2015".* \We find it impossible to read that passage as including the unlawful act on 30 April 2015, or the claimant's awareness of it from 15 January 2016.

26. The prognosis was that the claimant would struggle to cope in the future with any employment in which she was supervised. On that basis, Mrs Keenan Ross stated *"it is therefore my view that [the claimant] is permanently disabled from future employment."* Later passages re-emphasise the opinion that the claimant was permanently disabled from carrying out *any work at all,* and not just service with Police Scotland.

Mrs Keenan Ross, Consultant Clinical Psychologist
- second report, 24 February 2022

27. By the date of this report the outcome of the liability hearing was known and the appeal process was at an end. It was therefore clear that the only unlawful

act for which the claimant would be entitled to compensation was victimisation by Sergeant Bell on 30 April 2015, discovered by the claimant on or about 15 January 2016. The joint letter of instruction, summarised by Mrs Keenan Ross, emphasised that the ET had found that the claimant had been subjected to a single act of victimisation, that it had occurred on 30 April 2015 and that the claimant was unaware of it until January 2016.

28. The most significant stressor or traumatic event since the last report was said to be *"the Employment Tribunal and legal proceedings"* (supplementary bundle page 17). The claimant's view was that she had not seen *"justice and accountability',* felt *"belittled and ridiculed"* and became increasingly hopeless and more depressed. Later, Mrs Keenan-Ross expressed the view that the Employment Tribunal proceedings had retraumatised the claimant but linked that to events experienced by the claimant *"since 2014"* (supplementary bundle page 21).

29. There was no change in the diagnosis of PTSD but the psychological assessment and test indicated a significant increase in the level of clinical depression, which now fulfilled the DSM-V diagnostic criteria for "Major Depressive Disorder (Severe)" (supplementary bundle page 25).

30. The claimant's feelings upon reading Sergeant Bell's email of 30 April 2015 on 15 January 2016 are recorded at page 20 of the supplementary bundle. The experience was described as "horrific", leading to the claimant feeling unsafe in the world and that everyone was watching the claimant. Later, at page 27 of the Supplementary Bundle, the report records that the claimant "*became extremely anxious and panicky and was unable to contact her legal representative at that time and stated this is a continual flashback".* The claimant worried that further false allegations would be made and felt that she was unsafe.

31. At page 25 of the supplementary bundle, Mrs Keenan Ross summarises other symptoms of anxiety: a feeling that something bad is going to happen,

preoccupation with anxious thoughts about the legal proceedings and the fact that the claimant would never recover from events during her police service *"particularly from 2014",* being unable to relax, increased heart rate, stomach ache, muscular tension, breathing difficulties, difficulties swallowing and heaviness in the chest. Breathing techniques were not effective to manage those symptoms. The claimant experienced sadness, hopelessness, feelings of failure and disappointment in herself. She experienced reduced pleasure and satisfaction in activities and in meeting other people as well as severe sleep disturbance. The claimant experienced memory loss and poor concentration. She also experienced flashbacks of traumatic events during employment and intrusive thoughts.

32. At page 28 of the supplementary bundle, under the heading *"What is the current prognosis for any mental health condition [the claimant] has?"* Mrs Keenan Ross makes an error which at first glance might be thought to be minor. However, it is repeated and betrays a relevant misunderstanding of the stage that the proceedings in this Tribunal had reached. Mrs Keenan Ross refers to *"the Tribunal's Liability Judgement and Remedyb Awards"* (sic). The following paragraphs repeatedly refer to a "Remedy Award" which the Tribunal had simply not made or sought to make. The only issue had been liability. Compounding that error, Mrs Keenan Ross records that the Tribunal had awarded £5,000, and that although the claimant felt *"it was not about the money"* the size of the award was such that she felt *"ridiculed and laughed at* and that the remedy award stated that she "was *not significantly harmed by Police Scotland".*

33. Clearly, we had not awarded any sum at all and we are concerned to see the Tribunal's supposed award of compensation identified as a significant stressor having a bearing on the claimant's prognosis. Mrs Keenan Ross had fundamentally misunderstood what the Tribunal had done and the stage the proceedings had reached. She identified a stressor which simply didn't exist. That undermines our confidence that she correctly identified, recorded and analysed other stressors. She explained in cross-examination that she had

only understood that remedy remained to be decided on the first day of this remedy hearing. That also concerns us, since it calls into question whether Mrs Keenan Ross had truly understood the purpose of her report and the letter of instruction. Mrs Keenan Ross eventually concluded that the reference to £5,000 and a *"remedy award"* must have come from something that the claimant had said to her. If the claimant did say anything like that, then it should have been obvious to Mrs Keenan Ross from her instructions and her remit that it could not be correct, but whatever the claimant said appears to have been accepted without scrutiny.

34. The prognosis was for a significant reduction in the intensity of symptoms of PTSD once legal proceedings were over, though full symptom resolution might not be achieved, even allowing for psychological therapy. Trauma focussed cognitive behavioural therapy and EMDR therapy were recommended. A 65-75% reduction in symptoms was expected, with a requirement for lifelong "top-up" therapy.

35. As for causation, in this second report Mrs Keenan Ross thought that the approach by Professional Standards to the claimant's ex-husband in May 2015 (an allegation of unlawful treatment which we did not uphold) caused the *beginnings* of the onset of the symptoms of PTSD, which became more intense and *established* when the claimant became aware of other information in January 2016 (supplementary bundle page 34, third bullet point). Mrs Keenan Ross does not refer to the other inconsistent opinions expressed about the date of onset of PTSD in her first report, in particular the passages in which she suggested that PTSD had been established by 2014 or 2015. She did not acknowledge or explain the reasons for any change of view.

36. In section E of the second report (page 35 of the supplementary bundle) Mrs Keenan Ross considered the various allegations which the claimant had alleged to be unlawful and causative of harm, but which the Tribunal had not upheld.

a. The commencement on or around 20 April 2015 of an investigation into the claimant's off duty conduct had caused her to suffer *"increased anxiety and depression".* The claimant became aware of that investigation in May 2015. This was an allegation of unlawful treatment which failed at the liability hearing.

b. The report from CI Hollis to SI Lowther on 8 May 2015 in relation to that alleged conduct also caused increased anxiety and depression and *"caused increased anxiety and depression and began the onset of the PTSD in January 2016".* The claimant learned of this at the same time as learning of Sgt Bell's unlawful act. This was also an allegation of unlawful treatment which failed at the liability hearing.

c. The decision on or about 11 May 2015 to broaden the scope of the investigation was another matter the claimant learned about in January 2016. This was also an allegation of unlawful treatment which failed at the liability hearing. This *"caused her anxiety and depression which then became PTSD once the claimant became aware of the documents in January 2016."*

d. The attendance of police officers at the homes of the claimant's neighbours in May 2015 was also something the claimant learned about in January 2016. Mrs Keenan Ross does not give a clear answer regarding the causative relevance but does say *"this was when her PTSD began".* This was an allegation of unlawful treatment which failed at the liability hearing.

e. The investigation into the claimant's conduct under the police conduct regulations caused the claimant to feel undermined, to fear false allegations, to feel that she could not trust others and that her continued service with Police Scotland was dangerous to her well-being. Rather unhelpfully, Mrs Keenan Ross fails to make any comment at all on the causative impact of this issue. This was an allegation which failed at the liability hearing.

f. The failure to inform the claimant of the investigation until July 2015 caused further trauma and *"resulted in the onset of PTSD".* This conclusion therefore appears inconsistent with the main theme of the

second report, that PTSD was only established in January 2016 when the claimant read documents including, but not limited to, evidence of the act which we ultimately found to have been unlawful. At this point in the report Mrs Keenan Ross attributes the onset of PTSD to something the claimant learned in July 2015. This was an allegation of unlawful treatment which failed at the liability hearing.

g. The passing of information from Sergeant Bell to Inspector Davidson on 10 February 2015 also caused *"severe anxiety and symptoms of trauma"* when the claimant became aware of it in January 2016. No comment is made on the causative relevance of this incident to PTSD or any other diagnosis. Once again, this was an allegation of unlawful treatment which failed at the liability hearing.

37. In an inconsistent paragraph at page 37 of the supplementary bundle, Mrs Keenan Ross concluded that "from January 2017" the claimant's psychological difficulties caused *"permanent disablement'* for the purposes of the Police Pensions (Scotland) Regulations 2007 *"over the course of 2016 and 2017".* Leaving aside that inconsistency, in which "January 2017" might be a typo for "January 2016", there is no reference to the view expressed in Mrs Keenan Ross' original report that the claimant was permanently disabled from continued service with Police Scotland from *11 February 2015,* the date on which sick leave commenced. The change of opinion is not acknowledged or explained.

38. At page 38 of the supplementary bundle Mrs Keenan Ross appears once again to have misunderstood what the Employment Tribunal had already decided and what remained to be decided. She said, *"However, it is my opinion that it was not just the single unlawful act, although I respect the Judgement of the Employment Tribunal, which caused the entirety of the PTSD which resulted in permanent disablement. It appears to be the unlawful act together with the larger scale investigation of Ms Harper which caused her to experience PTSD and a severe Major Depressive Disorder which resulted in her permanent disablement."* That highlights the very question of

causation that Mrs Keenan Ross had been asked to help answer, and the Tribunal had not reached any contrary judgment. Mrs Keenan Ross also concluded that "*had the unlawful act not occurred then I do not believe Mrs Harper would have experienced PTSD and therefore I do not believe that she would have retired on ill health grounds from the police at any point prior to her retirement age."* Without further explanation that is difficult to reconcile with the finding in the first report that the claimant was already permanently disabled from work by 11 February 2015, prior to Sergeant Bell's unlawful act and 11 months prior to the claimant's awareness of it. The conclusion just two bullet points earlier in the second report that it was "*the unlawful act together with the larger scale investigation"* which caused PTSD and permanent disablement is not necessarily inconsistent with a finding that the unlawful act alone would have led to the same result, but we are not confident that Mrs Keenan Ross had accurately understood the scope of the unlawful act when she wrote that. We return to that point at paragraph 44 below.

39. At page 39 of the supplementary bundle Mrs Keenan Ross concludes that "*the unlawful act alone*" caused PTSD and Major Depressive Disorder and resulted in permanent disablement between 30 April 2015 and ill-health retirement on 17 October 2017. This is the third different date given by Mrs Keenan Ross for the claimant's permanent incapacity to work. It also suggests that Sergeant Bell's unlawful act on 30 April 2015 somehow affected the claimant's health and wellbeing from 30 April 2015, even though the claimant was not aware of that act until 15 January 2016. Mrs Keenan Ross' logic was not entirely clear to us, but during cross-examination she appeared to take as a starting point the claimant's general suspicion in late 2015 that something was afoot, then to associate Sergeant Bell's unlawful act with various other matters which the claimant subsequently suspected or believed had been triggered or influenced by that unlawful act, based on what she read in January 2016. However, those other events were separate allegations of unlawful treatment that we did not uphold, for example, the commencement and broadening of the investigation into the claimant's conduct, or the visit to the claimant's ex-husband and neighbours. The difficulty with Mrs Keenan

Ross' blurring of those distinctions is that we did not find that Sergeant Bell's unlawful act had been a significant cause of any of the other 8 allegations of unlawful treatment. We found that they had other lawful causes. That is the basis on which Mrs Keenan Ross was asked to report. If Sergeant Bell's unlawful act had been part of the cause in any way whatsoever then those other allegations would have been upheld.

Oral evidence from Mrs Keenan Ross

40. In her oral evidence in chief Mrs Keenan Ross said that 2016 was the earliest date on which she could consider the diagnostic criteria for PTSD to have been met, but that there were probably symptoms from 2014 too. That conclusion would tally with the claimant's discovery of the unlawful act being a key trigger.

41. However, we regard that as an attempt to finesse the conflict between her reports. The first report contained inconsistent dates, but clearly stated that PTSD was *established* by 2015 and (sometimes) 2014 as well as 2016. In that first report it was not simply a question of symptoms of trauma short of an established diagnosis. For example, at page 76 of the main bundle, Mrs Keenan Ross had said in 2019, *"It is my opinion that by 2015, Ms Harper was experiencing symptoms which would fulfil the DSM-5 diagnostic criteria of PTSD 309.81 (severe) and a Major Depressive Disorder (Mild). The onset of both the PTSD and the Major Depressive Disorder was fully attributable to the stressors during employment with Police Scotland particularly from 2014…The onset of the PTSD in particular is attributable to significant stressors in relation to Police Scotland in 2014."*

42. Mrs Keenan Ross also stated that it was difficult to separate the causative impact of the other unsuccessful allegations made at the liability hearing. Really, they were cumulative. Importantly, Mrs Keenan Ross added that she thought the claimant would have been unfit for work even if she had not become aware of certain facts, including the unlawful act, in January 2016.

This is a direct contradiction of the opinion expressed in her second report.

43. In cross-examination Mrs Keenan Ross accepted that it was strange that Dr Dedman's report in 2018 did not mention the discovery by the claimant in January 2016 of information including the unlawful act. Mrs Keenan Ross described that event as *"pivotal in cementing the diagnosis of PTSD".* She accepted that it was possible that the claimant had not mentioned it to Dr Dedman because it had not been significant to her at the time. Mrs Keenan Ross also accepted that her own report in 2019 hardly mentioned the year 2016 at all and certainly did not specifically mention the significance of the claimant becoming aware of certain emails in January 2016. Mrs Keenan Ross accepted that one possibility was that the claimant had not mentioned events in 2016 when interviewed by Mrs Keenan Ross in 2019 because those events had not seemed important to the claimant at the time. Mrs Keenan Ross also put forward an alternative explanation that she, Mrs Keenan Ross, might not have asked about it. We find that difficult to accept given that medical experts should be seeking to identify the significant stressors and symptoms to make a sound diagnosis.

44. We were concerned that Mrs Keenan Ross said that she had only very recently understood the detail of the information passed by Sergeant Bell as part of the act of victimisation. That had not been clear to her until reading the bundle of documents over the weekend two days prior to giving evidence. She claimed to have understood the unlawful act when the reports were written but she was obviously still confused about it at this hearing, admitting that she had thought that the unlawful act concerned visits to neighbours and the claimant's ex-husband. Those were certainly issues in the case, but we did not uphold those allegations. This was a worrying admission because it confused the allegation that we did uphold with two that we did not. Given the importance of those distinctions to the central issue of causation this significantly undermined her opinion.

45. Mrs Keenan Ross' view had been that the approaches to neighbours had

caused significant stress. She had not appreciated that some neighbours contacted the police first or that the claimant became aware of that fact too. More relevantly, she had not appreciated that the visits to the claimant's neighbours were *not* part of the unlawful act. She first realised that during cross-examination, but appeared to think that it made no difference, saying "*the fact that the claimant knew about this, lawful or unlawful, was the damaging thing''.*

46. Mrs Keenan Ross accepted that when the claimant read about the unlawful act in January 2016, she knew at the same time that it would not, and had not, been taken any further. Mrs Keenan Ross first appreciated that during cross-examination but agreed that it was a *"pretty significant* fact, although she also emphasised that the basis of the claimant's PTSD was a *"lack of trust.* That generalised explanation may be valid on one level, but it fails to assess the impact of each act identified in the letter of instruction.

47. In cross-examination Mrs Keenan Ross said, *"I rigidly followed the diagnostic criteria".* On that, we must make three findings.

a. If Mrs Keenan Ross rigidly followed any diagnostic criteria, they were the wrong ones. Her report misquotes the DSM-V diagnostic criteria, and instead erroneously quotes the equivalent criteria contained in the superseded DSM-IV regime. That caused us great concern. The careful application of DSM or ICD diagnostic criteria is so fundamental to the issues in this case that we cannot regard that as a trivial error, especially when Mrs Keenan Ross had not spotted the error herself prior to it being put to her in cross-examination.

b. Mrs Keenan Ross attempted to equate the DSM-V and DSM-IV criteria in a way that we did not find convincing or reassuring. Part of the definition of trigger conditions for PTSD in DSM-IV (apparently applied by Mrs Keenan Ross in her report) was *"a threat to the physical integrity of self or others".* She said that was *"nothing different* from the wording of the diagnostic criteria for PTSD in DSM-V which is *"exposure to actual or threatened death, serious injury or sexual*

violence...". We do not agree, and we think that the respondent was right to suggest that Mrs Keenan Ross had wrongly set the bar too low. These are not merely guidelines; they are diagnostic criteria and have particular importance in a case where the diagnosis is disputed on the basis of trigger conditions.

c. In fact, Mrs Keenan Ross demonstrated in cross-examination that she was prepared to depart from the diagnostic criteria, in the way set out in the following paragraph.

48. When the correct criteria and Dr Khan's rather different view were put to Mrs Keenan Ross, she justified her opinion by saying, "*I looked at research to say that bullying is a trigger for PTSD".* The diagnostic criteria contained in DSM-V and ICD-10 already allow for that in theory, but only if the bullying reached a particular threshold of severity. DSM-V requires *"exposure to actual or threatened death, serious injury or sexual violence"* in one of a number of specified ways and ICD-10 requires exposure *"to a stressful event or situation (of either brief or long duration) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone".* Mrs Keenan Ross seemed to argue that workplace bullying in general was a sufficient trigger. If so, that would sidestep the assessment of trigger severity required by the DSM and ICD schemes. Further, Mrs Keenan Ross stated in re-examination that the literature she had relied on in relation to bullying as a trigger for PTSD was *"part of a debate"* as to whether someone could suffer symptoms of PTSD without a trigger. We were not presented with literature representing the other side of that "debate", but quite apart from that the answer confuses the causation of symptoms with the diagnosis of a particular psychiatric condition. The fact remains that triggers or traumatising events of a particular level of severity are a key element both of the DSM-V diagnostic criteria and also the ICD-10 diagnostic criteria. In the absence of a trigger meeting one or other of those tests there might well be symptoms of trauma and perhaps the criteria for some other psychiatric illness might be met instead, but PTSD should not be diagnosed.

49. The Employment Judge asked Mrs Keenan Ross how she explained her conclusion that something which occurred in February 2015 (permanent unfitness for work as a police officer) could be caused by something which occurred on 30 April 2015 (the unlawful act), which came to the claimant's attention in January 2016. The explanation concerned us since it blurred the distinction between the unlawful act and allegations which had not been upheld. The answer also seemed to go behind the Tribunal's findings. Mrs Keenan Ross said, *"The claimant was already picking up that something was wrong. I have great difficulty in believing that was a one-off event. I know the claimant made complaints prior to the unlawful act, I have to accept the ET's findings, but I do appreciate that I have to go on what you have found. There is a circle called victimisation, and the victimisation predated the unlawful act, the difficulty I have is that the claimant suspected it between February 2015 and January 2016. So there was a shock but a confirmation of what she suspected, but I do have to respect that, if I have to stick to the law, and stick to the unlawful act".* We intend no disrespect to Mrs Keenan Ross but we must say that we did not find that explanation to be coherent or convincing.

Dr Khuram Khan, Consultant Psychiatrist, report dated 24 July 2022

50. Dr Khan reported having considered the Tribunal's liability judgment, all of the pre-existing reports from Dr Dedman and Mrs Keenan Ross, the claimant's GP notes, the Schedule of Loss and an interview with the claimant by video link on 12 July 2022. During the interview the claimant suggested that Dr Khan was being aggressive in his exploration of the claimant's work history.

51. Dr Khan diagnosed "Mixed Anxiety and Depressive Disorder" using the ICD-10 classification and diagnostic criteria. That is where symptoms of both anxiety and depression are present but neither set of symptoms considered separately are sufficiently severe to justify a different diagnosis. This matches Dr Dedman's diagnosis in 2018.

52. Dr Khan did not think that the ICD-10 diagnostic criteria for PTSD were met.

They required a response to a stressful event of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone. While Dr Khan accepted that the claimant did start to experience symptoms of psychological trauma, he did not class the triggering stressful event as *"exceptionally stressful or catastrophic in nature".* The issue was the nature and severity of the triggering event, which fell short of the threshold required for a diagnosis of PTSD, rather than a lack of traumatic symptomatology.

53. The future prognosis was positive. Sertraline at 100mg per day had been helpful, EMDR therapy had also been helpful. Closure of the ET proceedings which had, by then, been ongoing for 7 years would result in further recovery. The claimant's permanent disablement from work was caused by *"the stress she had been under at work"* and she would not be able to work with the Police Service again. There was no evidence to suggest that the claimant would have retired on grounds of ill health *"prior to this even?.* The nature of that event is not specified, but it appears to be a general reference to all sources of stress at work, and not just the unlawful act.

Dr Khuram Khan, Consultant Psychiatrist, supplementary report dated 13 September 2022

54. Clarification of Dr Khan's view of causation came in this report. Dr Khan was unable to speak to the claimant when preparing this report because she disconnected the call when Dr Khan introduced himself.

55. Dr Khan's view was as follows.

    a. Workplace difficulties significantly impacted on mental health from 30 April 2015.
    b. There was no evidence that non-workplace difficulties had impacted on the claimant's mental health at the relevant times.
    c. It is impossible to separate out clinically the various allegations originally made by the claimant and considered at the liability hearing.

Instead, it was their cumulative effect which precipitated and perpetuated the mental disorder, which was "Mixed Anxiety and Depressive Disorder".

d. It was also possible that the claimant's threshold for, or resilience to the development of, symptoms of anxiety and depression due to workplace difficulties was low.

Dr Khan's oral evidence

56. In his oral evidence in chief Dr Khan emphasised that the only difference between his opinion of that of Mrs Keenan Ross regarding PTSD, although an important one, was the diagnostic criterion concerning the triggering event. Nothing turns on the use by Dr Khan of the ICD scheme and the use by Mrs Keenan Ross of the DSM scheme. Whichever scheme is used the difference between the experts turns on the severity of the trigger. Dr Khan did not think that the triggering events had reached the required level of *"life threatening or catastrophic".* Also, the claimant's symptomatology was sufficiently explained by the diagnosis of Mixed Anxiety and Depressive Disorder.

57. Dr Khan found it impossible to disentangle the work-related stressors and thought on balance that it was a cumulative effect. It was not possible to isolate one particular incident, it was all part of a package which destabilised the claimant's mental state. It was not possible to single out an event as the leading cause. Dr Khan declined the invitation in cross-examination to agree that all workplace stressors had a *"serious and substantial effect',* replying instead that *"they contributed".* When pressed by Mr Allison on the significance of the claimant's discovery of the unlawful act in January 2016, Dr Khan repeatedly disagreed with the suggestion that it had any special significance as a last event or tipping point. He said, "*I can't agree with that, it could not be explained, it is a cumulative effect".*

58. Dr Khan was not comfortable using words like *"severe"* or *"significant'* to describe the claimant's ongoing problems. In his view the claimant was a very intelligent and motivated woman with insight into her problems and the

motivation to do something about them. There were low grade symptoms of anxiety and depression.

59. Dr Khan accepted that the words "life threatening" do not appear in the ICD-10 diagnostic criteria for PTSD, but he reiterated that in his view the triggers in the claimant's case did not meet the level of "*an exceptionally threatening or catastrophic nature",* which was the correct quotation. Workplace stressors could, in principle, qualify but they would have to be of an extremely serious nature. That appears to us to be a cogent and accurate application of the diagnostic criteria.

60. In cross-examination, Mr Allison asked Dr Khan squarely whether the claimant would have become permanently disabled from working for the police if the unlawful act had *not* happened, but the other workplace stressors *had* happened. Dr Khan's reply was rightly framed in terms of the balance of probabilities. On that basis he said that it was more likely than not that the claimant would have experienced the same mental health problems, which would have led to the same disability and the same inability to continue working in the police force. Dr Khan's reasoning, based on the medical notes and the way the claimant described matters to him, was that the background was of a longstanding history of mental health problems. Some of those were triggered by life stressors, both work and non-work. They included previous issues during police service. If the unlawful act were to be excluded then on the balance of probabilities the other stressors would combine to mean that the outcome would have been the same. While the claimant had recovered from non-work stressors by 2015, they remained predisposing factors, causing vulnerability.

61. Mr Allison described Dr Khan's opinions as *"ipse dixit,* by which we understood him to mean a dogmatic or unreasoned opinion which we should not accept. We do not think that characterisation of Dr Khan's evidence is well-founded. It appeared to us that both orally and in writing, Dr Khan's evidence was expressed clearly and cogently but not dogmatically. Some

might find Dr Khan's style rather more concise than that of Mrs Keenan Ross, but we do not think that is a weakness or a cause for concern. Most importantly of all, Dr Khan's views were certainly not unreasoned, as Mr Allison had submitted. For example, Dr Khan's opinion on the likely cumulative effect of other stressors if the unlawful act had not occurred was based on the claimant's medical history, a long history of mental health problems, the existence of other stressors and Dr Khan's clinical experience of mental illness and its causation. Dr Khan's view that PTSD was not established was based on an application of well-recognised diagnostic criteria and his view that one of those criteria was not met on the facts. That is not an unreasoned opinion.

Legal principles

62. The starting point is that compensation for unlawful victimisation contrary to section 27 of the Equality Act 2010 and regulation 7 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is to assessed on the same basis as would be adopted by a Sheriff Court in proceedings for reparation in Scotland, or by a County Court in a tort claim in England and Wales. See section 119(2) and (3) and section 124(2)(b) and (6) of the Equality Act 2010. Neither representative suggested that there was any relevant difference between the Sheriff Court and County Court approaches in this case.

63. The wording of regulation 8(9) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is different, and more closely related to the wording of the discrimination legislation which preceded the Equality Act 2010. Compensation shall be "such as the tribunal considers just and equitable in all the circumstances, having regard to - (a) the infringement to which the complaint relates, and (b) any loss which is attributable to the infringement…". The *"pro rata* principle" is not of any relevance to this claim. Compensation for injury to feelings is potentially available for a breach of regulation 7, but not regulation 5 (see regulation 8(11)). However, neither

representative suggested that the approach to compensation under those regulations should be any different from the approach under the Equality Act 2010.

64. The key principle, derived from those applicable to civil claims in delict and tort, is that *"as best as money can do it, the [claimant] must be put in the position she would have been in but for the unlawful conduct'* ***(MOD v Cannock*** [1994] ICR 918, EAT). Tribunals must therefore decide the position the claimant would have been in if the discrimination had not occurred. This is the correct approach to the question "what loss has been caused by the discrimination in question".

65. Compensation for an act of discrimination or victimisation should cover all the harm caused directly by the act of discrimination, whether or not it was reasonably foreseeable ***(Essa v Laing Ltd*** [2004] ICR 746, CA). Even in comparable civil claims, where the recoverable losses are limited by the extent to which they were foreseeable, the issue is foreseeability of a particular *type* of harm, rather than foreseeability of its *extent.*

66. That leads on to an important principle which lawyers frequently refer to as "the egg shell skull rule" or "the thin skull rule". Those are now dated and awkward phrases, but the rule simply means that a respondent must take the claimant as they find them, even if other people might have been less severely affected by the same unlawful act. A claimant will be compensated for the injury and loss actually suffered, even if that claimant was unusually sensitive or susceptible.

67. Where the harm suffered by a claimant is partly caused by factors other than the discrimination for which the respondent has been found liable, it may be necessary to consider whether that harm is "divisible".

68. Some of the key principles were set out by Hale LJ in ***Hatton v Sutherland and others*** [2002] ICR 613, CA. In any case where it is established that a

"constellation" of different symptoms suffered by the claimant stems from several different extrinsic causes, a sensible attempt should be made to apportion liability accordingly. Hale LJ identified 16 "practical propositions" relevant to determining whether an employer is liable for the personal or psychiatric injury suffered by the claimant. The last two, propositions 15 and 16, address the position where the causes of harm are multifarious but some of them are not due to the wrongful act of the employer, and where a claimant is predisposed to injury by a condition that was not caused by the employer's wrongdoing.

a. *Proposition 15.* Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered that is attributable to the wrongdoing, unless the harm is truly indivisible. It is for the employer and not the claimant to raise the question of apportionment.

b. *Proposition 16.* The assessment of compensation should take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event.

69. Although the Court of Appeal's decision on liability was overturned when the case reached the House of Lords (as ***Barber v Somerset County Council and others*** [2004] ICR 457, HL), the House nevertheless approved Hale LJ's general propositions. They were also expressly approved and applied by the EAT in ***Thaine v London School of Economics*** [2010] ICR 1422 and by the Court of Appeal in ***BAE Systems (Operations) Ltd v Konczak*** [2018] ICR 1. In the latter case the ET had concluded that the psychiatric harm suffered by the claimant was indivisible, so no reduction for lawful causes could properly be made. That judgment was upheld by the EAT and the Court of Appeal, where Underhill LJ explained the conceptual distinction between Hale LJ's two propositions, summarised above.

70. Proposition 15 applied where the injury had multiple causes, one or more of which were attributable to the employer's wrongful acts, but one or more of which were not. The proposition stipulated that in such a situation the employer should only be required to pay compensation for personal injury for that proportion of the harm attributable to its wrongdoing, *unless* the harm was truly indivisible. Apportionment in those circumstances was concerned not with the divisibility of the *causative contribution,* but rather with the divisibility of *harm.* In other words, the question was whether the ET could identify, however broadly, a particular part of the suffering that was due to the wrong of the discriminator, not whether it could assess the degree to which the wrong caused the harm. This distinction might be easier to apply in cases of physical injury, for example a broken leg is indivisible and if it was suffered as a result of two unlawful acts then each perpetrator would be liable for the whole. It may be more difficult in cases of psychiatric harm, but even psychiatric harm may be divisible. "Sensible efforts" should be made by tribunals to do this.

71. Proposition 16 meant that the assessment of damages should take account of any pre-existing disorder or peculiar vulnerability, and of the chance that a claimant would have succumbed to a psychiatric disorder regardless of whether the tortious act had been committed. This proposition must be applied when the claimant had a pre-existing vulnerability which was not a cause of the injury itself, but which might have led to a similar injury even if the wrong had not been committed.

The claimant's evidence

72. In order to explain our conclusions and reasoning it is only necessary to record the claimant's evidence in so far as it related to causation, injury to feelings and psychiatric injury. The claimant's employment history also has some bearing on those issues.

73. The claimant explained that her job had, to some extent, anchored her during

difficult times in her personal life. Her summary of the key stressors in her personal life is essentially the same as that noted in the expert reports so we will not set it out again here. The claimant expressly approved Mrs Keenan Ross' summary. Similarly, we do not see any value in setting out the claimant's summary of or quotations from the expert evidence. That should not really have been in a witness statement at all. The claimant agreed with Mrs Keenan Ross' view that by the time she went off sick in February 2015 the only things causing serious issues were *"workplace events".*

74. In relation to the unlawful act, the claimant explained that she had felt bullied by Sergeant Bell since her return to work in 2014, and that affected how she felt when she learned of his unlawful act in January 2016. She worried what else was being hidden and her trust was broken. She felt that Sergeant Bell was targeting her. The claimant said that she was *"devastated that not only had a senior officer tried to damage my career in that way; my impression was that Police Scotland had concealed that fact from me".* The claimant identified this as the tipping point that led to her ill-health retirement because she could not return to work for Police Scotland again.

75. Addressing the causation issue, the claimant said that "*I cannot say exactly how [the unlawful act] impacted on me, to the exclusion of everything else. It all affected me."* Nevertheless, the claimant said that it had a *"significant and serious impact'* which changed her outlook. It was "*the straw that broke the camel's back."*

76. The claimant described the impact on her health and wellbeing as *"devastating"* and *"all-encompassing".* She thinks about her experiences almost every day and finds it difficult to describe the effect on her. Her attempts to attend college in September 2018 were accompanied by crippling feelings of anxiety and lack of confidence, disrupting her progress. Her concentration and memory were affected. However, the claimant successfully completed a HNC in social sciences in 2019 and then attended university for a MA in Health and Social Sector Leadership. The claimant was working on

her dissertation for that qualification.

77. Otherwise, the claimant relied on the descriptions she had given to Mrs Keenan Ross and Dr Khan. We will not set out the claimant's summary of the conclusions and reasoning of those experts.

78. The claimant began work with Radical Services Limited in June 2019 supporting young people. She registered to do bank work with Sacro in October 2019, but did not in fact undertake any. The claimant started working with South Lanarkshire and Renfrewshire Women's Aid on 6 May 2021 and continued in that employment until 10 December 2021. It was a temporary role with a salary of £20,000 per year. The pandemic meant that the work was done from home. In January 2022 the claimant began to work with Rape Crisis on a salary of £23,130. She worked for 30 hours per week which divided up as 2 days from home and one in the office. The claimant enjoyed the work but whispering made her anxious. She did not work with many other staff and mainly worked with clients. The claimant did not think she could cope with a male dominated workplace or an office-based role. The claimant said in her witness statement that she intended to remain in that job for the foreseeable future.

79. However, matters developed differently. The claimant had secured a job with Glasgow City Council's "ASSIST" project which is a specialist domestic abuse advocacy and support service. The conditional offer was made on 27 July 2022, although it was not referred to in the claimant's first witness statement. The conditions were satisfied by November 2022 and the role formally commenced on 9 January 2023. The salary is £33,043. The claimant works for 28 hours a week, earning £26,437 gross per annum. The role is pensionable, and in a change of mind during her evidence the claimant decided to join the Local Government Pension Scheme. Employer contributions are 19.3% of gross earnings. The contract has a fixed term expiring on 31 March 2023 but there is a willingness on the employer's part to extend it, subject to funding.

Submissions

80. Since the representatives made their submissions primarily in writing, we will not set them out here. Some of those submissions were necessarily contingent on our conclusion on the central causation issue, so it is no longer necessary for us to address them all. We will deal with the key submissions made by each side in the course of our reasoning.

Findings of fact

81. Where facts were disputed we made our findings on 'the balance of probabilities' in other words, a 'more likely than not' basis. If, in our assessment, a fact is more likely to be true than untrue, then for the purposes of our decision it is treated as being true.

82. The claimant has the burden of proving all relevant facts, with one exception. The respondent argues that the claimant failed to act reasonably to mitigate her losses, so the respondent has the burden of establishing the relevant facts on that issue.

What was the effect of the unlawful act?

83. On the central issue, the claimant has not satisfied us that the unlawful act caused psychiatric injury or any loss of earnings, but we readily accept that it caused distress and injury to feelings short of psychiatric illness. We find that the claimant's view of the impact upon her of Sergeant Bell's unlawful act has changed since the liability judgment, which upheld that allegation alone. It is only since that judgment that the unlawful act has become prominent in the claimant's narrative of the key stressors and causes of trauma.

84. That conclusion can be stated fairly briefly, but the reasons for it are lengthier. Our reasons fall into two groups, which we will list separately.

a. First, the combined weight of several features of the factual or circumstantial evidence led us to conclude that the true impact of the unlawful act upon the claimant was far more limited than she now contends. No single factor in the list below was determinative on its own, but their cumulative weight was persuasive.

b. Second, we find that the expert evidence provides little support for the claimant's argument. We have serious reservations about the evidence given by Mrs Keenan Ross. It is undermined by several errors and inconsistencies on important matters. We give it limited weight. On disputed issues we much prefer the evidence of Dr Khan, which was clear, cogent and not undermined by similar errors or inconsistencies. We found it persuasive.

85. The features of the factual or circumstantial evidence which combine to undermine the claimant's case are as follows.

a. There is no reference to a significant event in 2016 in Dr Dedman's report, which was prepared far closer to the relevant time than any of the expert evidence commissioned in this litigation. If learning of Sergeant Bell's act of unlawful victimisation had caused the claimant to experience significant trauma then we would expect it to have been discussed with Dr Dedman and mentioned in his report.

b. There is no reference in the claimant's GP notes to suggest that learning of Sergeant Bell's unlawful act on 15 January 2016 was of particular significance. The claimant did not visit her GP at all in January 2016.

c. Neither the unlawful act nor its subsequent discovery is identified as a significant traumatic event in Mrs Keenan Ross' first report. Mrs Keenan Ross said that the claimant did *not* tell her in 2019 that learning about Sergeant Bell's actions on 15 January 2016 had been a traumatic event. Instead, the claimant emphasised the impact of police visits to her neighbours and ex-husband, which caused significant stress. This would be consistent with a change of view on

the claimant's part at some point after the liability judgment.

d. Mrs Keenan Ross accepted in cross-examination that it was *"pretty significant'* that when the claimant learned about Sergeant Bell's unlawful act she learned at the same time that substantially the same information had been supplied (lawfully) on another occasion, and also that no criminal charges had resulted from the information supplied by Sergeant Bell. Similarly, the claimant knew at the point of discovery that the allegations of "discreditable conduct" were not based on any information supplied only by Sergeant Bell. When considered in the context of the other evidence, we find that those facts probably cushioned the emotional blow to some extent. That could explain the lack of any reference to the unlawful act or its discovery in the material referred to in paragraphs a to c above.

e. The further and better particulars of the claimant's case, which were prepared by an experienced specialist discrimination lawyer, did not give any prominence to Sergeant Bell's unlawful act. Those further and better particulars run to 86 paragraphs and 25 pages of A4, so they could not be described as a brief or "broad brush" summary of the claimant's case. Given that those further and better particulars were prepared on 19 February 2016, around a month after the claimant's discovery of Sergeant Bell's act, it is surprising that it was not mentioned prominently if it really had caused the level of trauma now claimed.

f. The claimant commenced sick leave with work related stress on 11 February 2015. Sergeant Bell's unlawful act took place on 30 April 2015 and the claimant learned of it on 15 January 2016. Mrs Keenan Ross was initially clear that the claimant was permanently disabled from working for the respondent from 11 February 2015, Dr Khan was of the same view, and both experts agree that workplace stressors rather than anything in the claimant's personal life were the cause. Dr Khan very plausibly suggested that the claimant might have been predisposed to psychiatric injury by stressors in her private life or earlier work events, even though she had recovered from them. Either

way, the claimant had clearly suffered a significant psychiatric injury almost a year before learning of Sergeant Bell's unlawful act and about 11 weeks before the act occurred. This is not a case in which ill health was either precipitated or obviously aggravated at around the time the unlawful act was discovered by the claimant.

g. The claimant was not just on sick leave significantly prior to the unlawful act or learning about it, she was permanently disabled from working from the commencement of that leave. Mrs Keenan Ross's final position in cross-examination was that PTSD was definitely established by 2015 and that the claimant was permanently disabled from returning as a police officer from February 2015. Dr Khan agreed on the latter point although he disagreed with the diagnosis of PTSD. Significant (lawful) stressors had already occurred. While that certainly does not *exclude* further significant trauma in January 2016, permanent incapacity for work with the respondent was well established long before that.

86. The factors which arise from the expert evidence are as follows.

a. The first report of Mrs Keenan Ross gave inconsistent dates for the onset of PTSD. That inconsistency continued in her oral evidence.

b. The second report of Mrs Keenan Ross focussed on a different year for the onset of PTSD: 2016, which would be consistent with the case the claimant now advances. However, that year was barely mentioned in the first report. In her second report Mrs Keenan Ross does not acknowledge or explain the change of view.

c. We found Mrs Keenan Ross' attempts to do so in cross-examination unconvincing. She tried to distinguish the onset of symptoms from establishment of a condition which fully met the applicable diagnostic criteria, but the conclusions of the first report were clearly concerned with diagnosis and not merely symptomatology short of a diagnosis.

d. In cross-examination and in re-examination, Mrs Keenan Ross twice said *"there definitely was PTSD there by 2015 too"* or words to similar effect. That is difficult to reconcile with her other evidence that the

discovery of the unlawful act in January 2016 was *"pivotal"* to the diagnosis of PTSD.

e. At other points, Mrs Keenan Ross was prepared to blur the important distinction between the unlawful act and other stressors, including ones which had been allegations in the case but which we had not upheld.

f. Mrs Keenan Ross was confused about the nature of the unlawful act, thinking at one stage that it included the visits made to the claimant's neighbours and ex-husband. Importantly, those were allegations that we did not uphold.

g. Mrs Keenan Ross wrongly thought that the Tribunal had already awarded compensation of £5,000, causing additional trauma to the claimant who felt belittled and ridiculed by it. Clearly, we had not. This causes us to doubt the accuracy of Mrs Keenan Ross' understanding of the background facts, including the identification of significant stressors. Similarly, at one point Mrs Keenan Ross appeared to dispute a finding she thought the Tribunal had already made regarding causation. Once again, we had not made any such finding.

h. In her second report Mrs Keenan Ross was asked to consider the causative relevance of the allegations which did not succeed at the liability hearing. In relation to some of them, she failed to offer a view either way. On one allegation dating from July 2015 Mrs Keenan Ross said that it "resulted in the onset of PTSD", which appears inconsistent with her overall conclusion that PTSD was only firmly established in January 2016.

i. Mrs Keenan Ross offered inconsistent opinions regarding the date on which the claimant became permanently unfit to work. The first report states that the relevant date was 11 February 2015 and the second says that it was January 2016 or January 2017. The change of view is not acknowledged or explained. In oral evidence Mrs Keenan Ross reverted to her original view. Neither the final position nor the change of view assists the claimant's case.

j. In all of her reports Mrs Keenan Ross quoted the wrong diagnostic

criteria, purporting to apply the DSM-V criteria for PTSD but instead set out the wording of the DSM-IV criteria for PTSD. Mrs Keenan Ross' view that there was no significant difference between them is one that we are unable to accept.

k. We were concerned by Mrs Keenan Ross' willingness to sidestep diagnostic criteria and to rely instead on literature, especially when that literature formed only one side of an ongoing debate. Further, Mrs Keenan Ross' explanation seemed to confuse the causation of symptoms of trauma with a properly constituted diagnosis of PTSD. A triggering event of specified severity is part of the definition of PTSD, it is a diagnostic criterion, and it is not merely something to explain symptoms.

l. Mrs Keenan-Ross' original prognosis has been shown with hindsight to be too pessimistic. To her credit, the claimant has applied for and secured positions entailing the sort of supervision that Mrs Keenan Ross had thought impossible. Originally, Mrs Keenan Ross had thought that the claimant was permanently unfit for any work of any type at all.

m. In contrast, Dr Khan's evidence appeared cogent, considered and credible. He had an accurate understanding of the factual background. He engaged fully with the questions put to him and we were impressed by the reasoned basis of his answers. We did not detect any inconsistency in his conclusions or his reasoning.

n. Dr Khan's diagnosis of Mixed Anxiety and Depressive Disorder matched that of Dr Dedman in 2018.

o. Dr Khan's analysis of the trigger conditions required for a diagnosis of PTSD, and their absence in this case, was one that we found much more persuasive than Mrs Keenan Ross' treatment of the diagnostic criteria.

Divisibility of harm

87. \We do not think that the issue of divisibility of harm truly arises from our findings above, because our conclusion was that the unlawful act caused one

type of harm (injury to feelings) whereas the other matters caused a different and additional type of harm (psychiatric injury). Since the types of harm caused are distinct in nature, there is no need to consider whether a single type of harm can be divided.

88. Even if questions of divisibility of harm do arise, we are satisfied that the harm caused by the unlawful act can properly be divided from the harm caused by other stressors. The reason is the circumstantial evidence of the claimant's perception at the time. The further and better particulars indicate that the claimant was much more concerned about other matters than she was about the act which we subsequently found to be unlawful. That conclusion is further supported by the GP notes and the way in which the claimant described events to Dr Dedman and to Mrs Keenan Ross at the time of her *first* report. The harm caused by the unlawful act can therefore be divided from other harm on the basis of the severity of its impact when compared to that of the unsuccessful allegations.

89. We think that this approach is consistent with the guidance in ***BAE Systems (Operations) Ltd v Konczak*** (above). Having made the required "sensible efforts" we do not think that the harm could be described as "truly indivisible", therefore the respondent is required to compensate the claimant only for the part of the harm attributable to its own wrongdoing. We do not accept Mr Allison's submission that the experts agreed that the effect of the unlawful act could not rationally be separated from other stressors. The medical experts found it difficult to assess the individual "clinical" (i.e. causative) effect of the unlawful act, but as Underhill LJ explained in ***BAE Systems (Operations) Ltd v Konczak,*** the issue is not divisibility of *causative contribution,* it is divisibility of *harm.* *Ne* think that there is a rational basis on which to do that, if it is necessary to divide the harm at all.

What would most likely have happened if the unlawful act had not occurred?

90. This section concerns proposition 16 identified by Hale LJ in ***Hatton v Sutherland and others*** (above). For the reasons given in the preceding paragraphs we do not accept Mrs Keenan Ross' diagnosis of PTSD, and we accept instead Dr Khan's evidence that the correct diagnosis is of Mixed Anxiety and Depressive Disorder.

91. We also accept Dr Khan's view that if the unlawful act had not occurred, then on the balance of probabilities the many other stressors, both before and after the unlawful act and the claimant's awareness of it, would have caused the claimant to suffer exactly the same Mixed Anxiety and Depressive Disorder. We accept and adopt Dr Khan's reasoning on that point.

92. Further, on the separate issue of permanent incapacity to work, both experts agree. Mrs Keenan Ross accepted in cross-examination that if the unlawful act had not occurred, the claimant would nevertheless have been permanently unfit to return to service. It follows that even if we had preferred Mrs Keenan Ross' evidence, compensation for financial losses would be calculated on the basis that medical retirement would have occurred at around the same time anyway.

93. It follows from our conclusion on "proposition 16" matters that the financial loss suffered by the claimant would have been exactly the same if the unlawful act had not occurred. The other stressors would also have caused long term sick leave from the same date, a permanent inability to work for the respondent, ill health retirement and a restricted working capacity after that.

The effect of our conclusions

94. It follows from the conclusions set out above that the claimant is entitled to compensation for injury to feelings, but not to compensation for personal injury or financial loss.

95. In those circumstances it is not necessary to consider the respondent's argument that the claimant failed to act in reasonable mitigation of her financial losses.

Compensation for injury to feelings

96. We understood the representatives eventually to be agreed on the boundaries of the ***Vento*** bands for compensation for injury to feelings in this case.

97. The first claim form was received by the Tribunal in July 2015. That predates the first edition of the Joint Presidential Guidance on compensation for injury to feelings which was issued on 5 September 2017, but paragraph 11 contains the formula which should be used to update the ***Vento*** bands as appropriate. The interesting debate anticipated in every edition of that Joint Presidential Guidance as to whether ***Simmons v Castle*** [2012] EWCA Civ 1039 uplifts properly apply in Scotland will not be an issue in this case because the respondent conceded that such an uplift would be appropriate. Interestingly, Mr Allison told us that the Judicial College Guidelines developed for use in England and Wales are commonly cited in personal injury cases in Scotland too. Those guidelines now incorporate the ***Simmons v Castle*** uplift.

98. Therefore, the updated bands reflecting both inflation and also the ***Simmons v Castle*** uplift are as follows:

    a. Lower: £796.81 to £7968.10
    b. Middle: £7968.10 to £23,904.20
    c. Upper: £23,904.20 to £39,840.34.

99. We have considered very carefully the impact of the unlawful act on the claimant's feelings. Our approach must be compensatory. The issue is the claimant's loss, not the seriousness of Sergeant Bell's wrongdoing. That said,

aggravating or mitigating features of the case might serve to increase or reduce the injury to feelings experienced by the claimant.

100. While we have rejected the submission that the discovery of the unlawful act amounted to serious trauma causing or contributing to *psychiatric injury,* we have no hesitation in accepting that the claimant found it very worrying, upsetting and unsettling, suffering injury to feelings. Healthy and comfortable workplace relationships require mutual trust. Once the claimant discovered the unlawful act her trust in a more senior officer was justifiably undermined. The claimant felt that she had been under unfair and unsettling scrutiny. The fact that Sergeant Bell had committed an act of victimisation while holding a position of greater rank, power and responsibility is likely to have increased the impact on the claimant's feelings.

101. Nevertheless, the effect of the unlawful act must also be seen in the context of the entire complaint originally brought to this tribunal. We think that the surrounding circumstances justify an inference about the true impact on the claimant's feelings. The claimant was distressed about many other things allegedly done by the respondent's officers by the time she discovered the unlawful act. Many of the unsuccessful allegations in this case were also on the claimant's mind at or around the time that she learned of the unlawful act. The unlawful act had no prominence in the claimant's further and better particulars whereas many other unsuccessful allegations did. We regard that as an indicator of the relative impact of the unlawful act on the claimant's feelings. Quite simply, if the claimant had been suffering the alleged *"all-encompassing"* injury to feelings as a result of the unlawful act then we would have expected that unlawful act to have been referred to prominently in a document prepared by an experienced specialist solicitor shortly after the date on which the claimant became aware of the act.

102. There are also mitigating factors. At the point of discovery, the claimant understood that Sergeant Bell's act of victimisation had not resulted in ongoing disciplinary proceedings or a criminal charge. She also understood

that substantially the same information had been passed to more senior officers entirely lawfully on another occasion. That served to reduce, but certainly not to eliminate, the impact of the unlawful act on the claimant's feelings.

103. The claimant did not return to service at any point after discovering the unlawful act and she retired from the force on 27 October 2017, more than five and a half years ago. Sergeant Bell was not a feature of the claimant's working life after discovery of the unlawful act and the claimant's police service ended many years ago. We think that will also have reduced, but not eliminated, the ongoing impact of the unlawful act on the claimant's feelings.

104. We place this case in the middle band of seriousness. The injury to the claimant's feelings was certainly not trivial or transient, but nor was it among the most serious injuries we have encountered when assessing compensation for injury to feelings. It does not belong in the top ***Vento*** band. We accept that the claimant continues to be upset by the incident to this day, more than 7 years after discovering what Sergeant Bell had done. However, we do not accept that the injury to feelings attributable to that act was ever "all encompassing" and have concluded that it ranked relatively low among the matters which were causing the claimant distress from January 2016 onwards. Like Dr Khan, we think that the end of this lengthy litigation will begin a process of closure, even if the claimant is unhappy with the outcome. She will eventually feel able to move on and we are not persuaded that the injury to feelings caused by Sergeant Bell's act will continue for very much longer.

105. For those reasons, we have concluded that appropriate compensation for the injury to the claimant's feelings caused by the sole unlawful act is £10,750, plus interest.

Interest

106. Interest is calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The parties have not agreed interest in accordance with regulation 2(2) and so we have calculated it in accordance with regulations 3 to 6.

107. Under regulation 6(1)(a) interest would be due at 8% per year from 30 April 2015 (the date of the unlawful act) until the date of assessment. However, that would lead to over-compensation since the injury to feelings caused by the unlawful act was suffered on or about 15 January 2016. We have therefore applied regulation 6(3) to avoid "serious injustice". We will calculate interest from the date of injury to today's date because that represents the period over which the claimant has been harmed.

108. The period from 15 January 2016 to today's date is 2685 days or 7.36 years at 8% per year, so the total interest due on £10,750 is £6,326.30.

109. The total award of compensation, including interest, is therefore £17,076.30.

The respondent's application for expenses

110. The scope of the application narrowed during submissions but ultimately the argument was that the litigation had been conducted unreasonably by or on behalf of the claimant by failing to make prompt disclosure of information that the claimant had been offered a new job with Glasgow City Council, subject to references and checks. The respondent argued that this had necessitated an adjournment and a lengthened hearing, and that the claimant should be ordered to pay the additional legal costs incurred by the respondent in accordance with rule 76(1)(a). Those costs were said to be £1,400 based on 10 hours of extra work at £140 per hour.

111. The job offer letter was dated 27 July 2022. The remedy hearing began more

than 3 months later on 31 October 2022. The letter was disclosed to the respondent on 27 November 2022, just before the claimant gave her own evidence on 28 November 2022 (day 2). The letter was obviously important because it had a bearing on loss of earnings, pension loss and the type of work the claimant could undertake in future. Both experts had commented on that issue and needed to take account of the new job offer. We do not think there was any reasonable excuse for failing to disclose the letter earlier. The fact that the offer was conditional on satisfactory checks and references is not the point. The claimant's expectation was that she would be commencing employment once those formalities were completed. The claimant should have notified the respondent of the job offer as soon as it was made. We agree with the respondent that the failure to do so amounted to unreasonable conduct of the proceedings and the threshold condition for an award of costs or expenses is met.

112. However, awards of expenses remain discretionary and we decline to make an award of expenses in the respondent's favour. We do not think that would be in accordance with the overriding objective. The reason is that we think there was still enough time for the respondent to react and adapt before 11 January 2023 (day 4). We are not persuaded that the claimant's unreasonable conduct was the sole or main cause of the failure to complete the case on 11 January 2023 and an adjournment to a fifth and final day on 18 April 2023 for submissions. In part, the adjournment on 11 January 2023 was also necessitated by the respondent's late decision to update its evidence on pension loss and to apply for an adjournment on that basis. That decision could have been taken sooner. While we would not characterise the respondent's own conduct as unreasonable, we do not think that it would be fair for the claimant to be ordered to make a payment in respect of expenses in those circumstances.

Employment Judge: **M Whitcombe**
Date of Judgment: **25 May 2023**
Entered in register: **26 May 2023**
and copied to parties