EMPLOYMENT TRIBUNALS

Claimant: Mrs R Kalam

Respondent: The Chief Constable of West Midlands Police

FINAL HEARING

Heard at: Birmingham **On:** 11 to 14 & 17 to 19 July & (deliberations with no parties) 20 July 2023

Before: Employment Judge Camp **Members:** Mrs RA Forrest
Mr J Reeves

Appearances
For the Claimant: Mr J Feeny, counsel
For the Respondent: Mr D Basu, King's Counsel; Mr A Rathmell, counsel

RESERVED REMEDIES JUDGMENT

Further to the Judgment by Consent sent to the parties on 15 September 2023, an unsigned copy of the text of which is attached to this decision, the Claimant's compensation and damages are assessed as follows and are to be assessed (if not agreed) on the following basis:

1. No reduction to compensation and damages in accordance with the principle applied in **Thaine v London School of Economics** [2010] ICR 1422 is to be made.

2. The Respondent must pay the Claimant £30,000 for injury to feelings. No separate award for pain, suffering and loss of amenity for psychiatric injury is made.

3. The Claimant is not entitled to aggravated damages.

4. Compensation and damages for lost earnings and pension must be calculated as if the following were the case:

   4.1 as to what would have happened if the Claimant had not been subjected to the discrimination, victimisation and detriments set out in the Judgment by Consent, she would have –

   4.1.1 been promoted from Inspector to Chief Inspector in February 2026 and from Chief Inspector to Superintendent in August 2030;

   4.1.2 retired from the Police in the rank of Superintendent at age 60;

   4.1.3 worked in some other capacity, earning as much as she had been earning as a Superintendent, for a further 16.8 months after retirement from the Police;

   4.2 as to what will in fact happen –

   4.2.1 the Claimant's gross annual earnings from 31 July 2023 will be £nil in year 1, £35,000 in years 2 to 6, £45,000 in years 6 to 10, £60,000 in years 11 to 16, and £70,000 from year 17 onwards (for as long as she continues working);

   4.2.2 the Claimant will work (full-time; in paid employment) to age 60 and there is a 50 percent chance of her continuing to do so from then to age 67 and a 50 percent chance of her retiring altogether at age 60, i.e. her loss of earnings and pension should be calculated as if she will be earning £70,000 per annum from age 60 to age 63 ½.

5. Section A1(1) of the Damages Act 1996 applies and the 'discount rate' to be used is that prescribed by an order made by the Lord Chancellor under that section: minus 0.25 percent.

6. In accordance with **Smoker v London Fire and Civil Defence Authority** [1991] 2 AC 502, the injury on duty award / injury pension payable to the Claimant under the Police (Injury Benefit) Regulations 2006 may not be set off against / deducted from her compensation and damages for lost earnings in respect of the period before she turns 60.

7. On past losses, interest is payable at 8 percent per annum from 16 February 2021.

REASONS

Introduction

8. In these Reasons, "the Respondent" will be used interchangeably to mean the Chief Constable[1] and West Midlands Police and, meaning no disrespect to the Chief Constable, we'll refer to the Respondent as "it" rather than as "him".

9. From 14 September 2008 until her medical retirement on 31 July 2023, the Claimant was a police officer with the Respondent. From January 2012 to March 2021, she was an Authorised Firearms Officer in the Firearms Operations Unit ("FOU"). She started this Tribunal claim on 12 May 2021 after a period of Acas early conciliation from 2 March to 12 April 2021. The claim concerns her time in FOU, including things that occurred as long ago as 2012 and what happened when she wanted to leave the FOU. It consists of complaints of direct and indirect sex discrimination, harassment related to sex, victimisation, and detriment for making protected disclosures.

10. At the same time as bringing her Tribunal claim, the Claimant brought a grievance about the same things. In its original Grounds of Resistance, the Respondent defended the whole claim, but, noting the then ongoing grievance process, did not otherwise respond substantively to it. In November 2022, almost every part of the grievance was upheld. As a result, the Respondent amended its response. In its Replacement [amended] Grounds of Resistance dated 2 December 2022, the Respondent, broadly, admitted the discrimination, harassment, victimisation and detriments the Claimant was making her claim about, but took time limits points. That remained the position until a matter of days before the start of this hearing, when the Respondent withdrew its time limits points and in effect fully admitted liability. This hearing then became, for all intents and purposes, a remedy hearing.

11. It is evident that, understandably, the last minute concession of liability and consequent change of focus of the hearing significantly affected the parties' preparation for it. Much work ended up being carried out during the hearing itself that would ordinarily have been completed well beforehand. We would like to pay tribute to and thank both sides' legal teams, as well as the experts, for their willingness to put in the long hours and additional work that will have been necessary to ensure that a fully effective remedy hearing could take place and be completed within the available time-slot.

12. Near the start of the hearing, both sides agreed that it would be appropriate for us to issue a judgment on liability based on admissions set out in an agreed list of issues dated 10 July 2023 ("List of Issues"), to which we shall return shortly. The List of Issues is Annex B to this decision: see pages 44 to 48 below. A draft consent judgment was prepared by Respondent's counsel, but we were not entirely happy with it and resolved to prepare one ourselves. We had intended

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[1] The Respondent to the Tribunal claim is necessarily the Chief Constable for technical legal reasons; no wrongdoing by the Chief Constable himself or his predecessors is alleged as part of this claim.

to do so during the hearing, but for one reason or another this did not happen. Our Judgment by Consent was not in fact sent to the parties until 15 September 2023. The body of that Judgment by Consent is attached to this decision for ease of reference as Annex A: see pages 42 and 43 below. Any differences between the wording of the Judgment by Consent and that of the corresponding parts of the List of Issues are down to purely stylistic changes.

13. Finally by way of introduction, we note that this case has garnered a lot of media interest. This may well have affected the way the parties approached this hearing. Both sides have to an extent presented their cases as if we were conducting a general investigation into the Respondent's reputation and culture and in particular into whether the Respondent could fairly be described as institutionally misogynistic. That is not what we are doing. Our role is simply to assess what compensation and damages are payable to one individual – the Claimant – because of some specific admitted unlawful acts and omissions by a handful of individuals at particular times over the last 10 years or so; no more and no less than that.

Issues & List of Issues

14. The List of Issues was prepared before the Respondent's last-minute admission of liability and it contains time limits points that we no longer have to deal with. This is not a criticism of it, but even before the Respondent admitted liability, most of the List of Issues was not a conventional list of issues, identifying the issues that we – the Tribunal – would have to determine, of the kind that a set of reasons needs to contain in accordance with rule 62(5). Instead, most of it consists of: a list of all the complaints being made and confirmation that they have been admitted "*to the extent set out in the Replacement Grounds of Response, dated 2 December 2022*"; and in effect, a concession by the Claimant that she is not pursuing any Tribunal complaints other than those admitted by the Respondent and is not seeking to take any of those complaints beyond the extent of the Respondent's admissions.

15. Within the List of Issues, some allegations that have been made by the Claimant in various places that are not part of any Tribunal complaint she is pursuing are identified. This is mostly in sub-paragraphs a. to h. of paragraph 4 [of the List of Issues]. The very serious allegations in paragraph 4 were explicitly being relied on for the sole purpose of supporting her argument that it would be "*just and equitable*" to extend time under section 123(1)(b) of the Equality Act 2010 ("EQA") if it was necessary to do so. Once time limits ceased to be an issue, those allegations became irrelevant to the issues we had to deal with. The Respondent applied for redaction of the Claimant's witness statement, to excise from it allegations that were said to be unpleaded (i.e. not in the claim form) and irrelevant, including those in paragraph 4. We substantially granted the application, giving a fully reasoned decision orally, on 13 July 2023: day 2 of the hearing. Written reasons will not be provided unless asked for by a written request presented by any party within 14 days of the sending of this written record of the decision.

16. The issues we in fact had to decide were all remedy issues. They did not include what happened as a matter of fact when the Claimant was subjected to the unlawful treatment that the Respondent has admitted liability for. As we would have expected, the Claimant's witness statement contained relatively little about those facts and the Respondent's witness statements

contained nothing significant at all about them. We mention this because some of the cross-examination of the Claimant by Mr Basu KC, Respondent's leading counsel, concerned those facts. Counsel sought to justify these lines of cross-examination on the basis that (as it was put in written closing submissions), "*In law, context is everything.*"

17. As an abstract precept, we wouldn't substantially disagree with that; context is certainly very important. However, as we highlighted during the hearing, we are in no position to make detailed findings about what happened other than to note the admissions that have been made, as we lack an evidential basis for doing so; we are necessarily constrained by the extent of the Respondent's admissions, as, in the circumstances of this case, are both parties.

18. In addition, the cross-examination in question was largely to the effect that admitted mistreatment of the Claimant was not in fact mistreatment at all. For example, the Claimant was cross-examined about the harassment complaint that (from our Judgment by Consent), "*the Claimant was not given a handgun with an easier trigger pull like other male officers were*". What was put to her was along these lines: the reason for the difference in treatment was not her being a woman but was instead that she passed her qualification 'shoots' whereas the male officers who were given a handgun with an easier trigger pull failed theirs. It was and is difficult to see how that being the reason would be consistent with this being harassment related to the protected characteristic of sex, which the Respondent admits it was.

19. There were further examples of cross-examination that seemed to us to be an attempt to go behind or backtrack from the Respondent's admissions in relation to victimisation and 'whistleblowing' complaints. The justification put forward in closing submissions for having done this was that it was relevant whether the actions of the victimiser (a Chief Inspector Nunn – "CI Nunn" – in this instance) were or were not intentional. We put to one side the fact that the questions being asked of the Claimant did not appear to be about CI Nunn's intentionality, but were instead to the effect that the reason the Claimant was treated differently from others was not the Claimant blowing the whistle or doing a protected act but something else; and that the Claimant could not sensibly have given evidence of fact about what was going through the mind of CI Nunn; and that the Respondent led no evidence from CI Nunn. We accept that victimisation – and protected disclosure / whistleblowing detriment – can be unintentional in the sense that the victimiser may not realise that their motivation for subjecting the Claimant to detriments is the Claimant's protected act or protected disclosure. However, we do not accept, at least not in this case, that the victimiser's conscious subjective motivation makes any significant difference

to the extent of – to quote from the Respondent's written closing submissions – the "*deleterious effect on the victim*".

20. In any event, the Claimant resolutely and convincingly denied what was being put to her; and, as already mentioned, there was no evidence from the Respondent's side to the contrary.

21. Returning, then, to what issues we are deciding, they are reflected in our Reserved Judgment, above:

 21.1 what reduction to compensation and damages, if any, should be made to reflect loss and damage caused or contributed to by things other than the admitted discrimination, harassment, and detriments?

 21.2 what award for injury to feelings and for psychiatric injury should there be?

 21.3 should there be an award of aggravated damages and if so how much should it be?

 21.4 what should the basis of calculation for lost earnings and pension be, with particular reference to –

  21.4.1 what the Claimant's career path in the Police would have been had there been no discrimination, victimisation or detriments;

  21.4.2 what the Claimant's career path, and approximate earnings, outside the Police will in fact be;

 21.5 should a different discount rate to that set by the Lord Chancellor (-0.25%) be applied? The Respondent contends for +2.0%;

 21.6 should the Claimant's statutory injury pension and gratuity be set off against her future loss of earnings and pension, or (as the Claimant contends) may only the annual injury pension post- her 'but for' retirement date be set off against pension loss? In the end, this was not a live issue before us. The Respondent accepts that we will consider ourselves bound by **Smoker v London Fire and Civil Defence Authority** [1991] 2 AC 502 to decide that the injury on duty award / injury pension payable to the Claimant under the Police (Injury Benefit) Regulations 2006 may not be set off against / deducted from her compensation and damages for lost earnings in respect of the period before she turns 60. The Respondent merely asks us to note that it has taken the point and that it reserves the right to argue it on appeal;

 21.7 what interest should be awarded?

Evidence & basic facts

22. Our decision concerns the effects of the admitted discrimination, harassment and detriments on the Claimant's financial situation and mental wellbeing. The evidence we have needed to consider is the evidence relevant to those two things.

23. The following lay / non-expert witnesses gave evidence orally:

    23.1 the Claimant and her husband, Mr[2] R Kalam (a Detective Sergeant with the Respondent);

    23.2 for the Claimant, Mr A Pritchard, a Temporary Detective Chief Inspector who was the Claimant's line manager from January 2022 and has known her since then; and Dr B Langley, a former Detective Superintendent in the Respondent's Force Criminal Investigation Department and now an academic at the University of Cambridge, who has known the Claimant since November 2021, when she was a Detective Inspector in the same department. Their evidence concerned the Claimant's character and abilities and their views as to the likelihood of her becoming a senior officer had she stayed in the police;

    23.3 the remaining non-expert witnesses were from the Respondent;

    23.4 Mr M Longdon, a Detective Inspector within the Respondent's Professional Standards Department. PSD is the Department that investigates alleged breaches of professional standards by police officers. He gave evidence about the investigations he undertook into and the assessments and decisions he made in relation to inappropriate social media posts and messages by members of the FOU after the Claimant provided material to the Respondent in June / July 2022 and late October 2022 and in relation to possible misconduct by various police officers highlighted in the Claimant's grievance outcome in November 2022;

    23.5 Mr S Prentice, a Lead Analyst (a civilian employee) of the Respondent. He provided particularly helpful evidence consisting of information about and a statistical analysis of what has happened since 2010 within the Respondent in terms of how many Inspectors have made it to Chief Inspector and from Chief Inspector to Superintendent, and so on, and over what time frame. These were almost the only data we had upon which we could make any remotely 'scientific' decision as to what might have happened to the Claimant in terms of promotion had she remained in the Police. Some of his evidence occupied the borderlands between lay and expert evidence, but neither side objected to it on the basis that it was actually expert evidence for which permission had not been given, and both sides relied on it;

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[2] As we did during the hearing, we have, for various reasons, chosen not to refer to witnesses who are police officers by their rank. No discourtesy is intended.

23.6 Mr M O'Hara, Temporary Assistant Chief Constable. He has no personal knowledge of the Claimant and his evidence related to the processes for and prospects of promotion generally. His statement ends with an expression of opinion that, "*Having considered Inspector Kalam's service history, and given my experience in policing and as a senior leader, I would say that I am confident that she would have been promoted to the rank of Chief Inspector and I feel that she would have had a chance of promotion to the next rank, that of Superintendent. Beyond that, the competition becomes far stiffer and there are many ambitious officers every bit as good as Inspector Kalam who have been disappointed by not progressing beyond the rank of Chief Inspector.*"

24. In addition, we considered the contents of the witness statements of the following non-expert witnesses, whose evidence was relied on by the Respondent:

24.1 Mr S Brick, the Respondent's Assistant Director for Workforce and Resourcing. His evidence concerned the police promotion process, both generally within the police and specifically within the Respondent. He did not give oral evidence because his statement was agreed;

24.2 Wendy Bailey, a Superintendent in PSD. Mr Longden reported to her. Her evidence concerned the police officer misconduct regime generally and the outcomes of the misconduct processes that resulted from the material the Claimant provided to PSD and her grievance outcome. Her statement was not agreed (although it seems to us that the Claimant is not really in a position to dispute most of the facts set out in it); the Respondent chose not to call her.

25. There was expert evidence from:

25.1 Psychiatrists for each side – Professor Tom Burns for the Claimant and Dr Jan Wise for the Respondent. Both gave oral evidence in addition to their written evidence, which included a joint statement dated 10 July 2023, prepared on the eve of this hearing. Part of their written evidence concerned an issue not relevant to our decision but that, it was said, might have been relevant when time limits were still in play: the relative contribution of any causative events that took place before 3 December 2020 versus those that took place on or after that date. The important matter we had to decide to which their evidence mainly went was causation, and in particular whether loss and damage suffered by the Claimant that she is claiming for are attributable to things other than the discrimination, harassment and detriments in relation to which judgment has been given in her favour;

25.2 Employment experts from both sides – Mr P Perlin for the Respondent and Mr K Carter for the Claimant. Both gave written and oral evidence. By the end of closing submissions, the only part of their evidence that was significant in relation to our decision-making was information they provided about earnings in various sectors and jobs, which we used to decide what the Claimant might earn in the future having left the police. Mr Carter also, amongst other things, expressed views in his evidence as to how the Claimant's career

might have progressed had she remained in the police. However, as we shall explain later in these Reasons, we felt that this was not a subject on which he truly had expertise;

25.3 Mr T Sture, an accountant, for the Claimant; and Vanessa Smart, an actuary, for the Respondent – written evidence only. Their evidence did not assist on any of the matters we decided. These experts will no doubt come into their own when the parties work out what our decision means for lost earnings and pension in terms of pounds and pence.

26. The files or 'bundles' of documents in this case totalled over 3000 pages. It was impracticable for us to read more than a fraction of those pages and we have relied on the parties to guide us to the particular parts of particular documents that we needed to read; although we have to a limited extent ranged further than the parties explicitly asked us to. In our reading before and at the start of the hearing and overnight during the hearing, we necessarily focussed on the witness and expert evidence. We note that the bundle of witness and expert evidence was 540 pages long, although that did include lots of appendices and it was not necessary for us to read every single page.

27. As explained above, apart from (to a very limited extent) the Claimant herself, none of the witnesses gave evidence about the less favourable treatment, unwanted conduct and detriments that form the subject matter of the claim. It would not be appropriate for us to, nor do we intend to, make findings about what happened in relation to them; nor have we been asked to by the Claimant; nor, except as explained in paragraphs 16 to 20 above, has the Respondent asked us to; nor could we do so without extensive witness evidence from both sides that we do not have.

28. The parties have in effect agreed what happened: what the Respondent has accepted in the List of Issues, which in turn refers back to the Replacement Grounds of Response, which in turn refers back to the grievance outcome (a letter addressed to the Claimant dated 24 November 2022 that is 31 pages long and that speaks for itself). For the purposes of these Reasons, it is unnecessary for us to go much further than that. In particular, we refer to the terms of the Judgment by Consent, which correspond to what is admitted in the List of Issues.

29. We shall now outline the facts in a chronological summary of events. We shall then go through the issues one by one, making necessary findings along the way.

Sep 2008	The Claimant, "C", in her mid 20s, joined the police and the Respondent, "R", having previously been to university and worked as a Geologist and a Geo-Environmental Consultant
Jan 2012	C joined FOU
2012	Harassment incidents d. to g. in the List of Issues (paragraphs 2.1 to 2.4 of the Judgment by Consent)
[?]2012-2020	Harassment incidents i. and j. (paras 2.6 & 2.7 Judgment by Consent)

Jan 2015	C’s temporary promotion to Sergeant
Jan 2016	C [permanently] promoted to Sergeant
Apr 2016	Requiring C to do photoshoot while pregnant (para 2.5 Judgment by Consent)
2016-2021	Failure to provide PPE (para 1 Judgment by Consent)
5-13 Dec 2020	Not allowing C to attend assessment days for aspirant firearms officers (paras 2.9, 3.1 & 4.1 Judgment by Consent)
14 Dec 2020	Incident involving CI Nunn of FOU at a meeting with C (paras 2.11 & 4.3 Judgment by Consent)
4 Jan 21	C asked to leave FOU
Jan-Feb 21	C’s transfer out of FOU was delayed (paras 2.10, 3.2 & 4.2 Judgment by Consent) – last unwanted conduct / detriment
11 Feb 21	Upsetting electronic message from Inspector Vale of FOU to C re transfer
12 Feb – 28 Mar 21	C off work; signed off sick from 18/2/21 with “Stress at work”
23 Feb 21	C informally told transfer out of FOU confirmed; more formally confirmed on 24/2/21
2 Mar 21	C started Acas early conciliation process
23 Mar 21	C formally joined CID
31 Mar 21	C raised grievance. The grievance largely mirrored her Tribunal claim
12 Apr 21	End of early conciliation
Late Apr 21	C’s grievance ‘triaged’ by a Dignity at Work Triage Panel and referred to PSD (see paragraphs 8 and 9 of Supt Wendy Bailey’s witness statement)
12 May 21	Presentation of claim form
18 May 21	C’s grievance ‘triaged’ by PSD – assessed as suitable for grievance process rather than PSD investigation (see paragraph 10 of Supt Bailey’s statement)

July / Aug 21	C has ‘in-house’ counselling
Aug 21	C becomes an Inspector
Nov 21 – Feb 22	Further counselling sessions
23 Feb 22	Judicial mediation[3]
11 Apr 22	C went off sick and did not subsequently return to work; MED3 described condition as “*Acute stress reaction*”
June / July 22	C provided social media material to R which was referred to PSD (see DI Longdon statement para 4)
11 July 22	Grievance investigator’s report
1 Sep 22	DI Longdon’s (PSD) assessment was that none of the matters raised in C’s grievance were eligible for recording as a [formal] Conduct Matter
28 Oct 22	Further social media material provided by C (see DI Longdon’s statement para 17)
11 Nov 22	Supt Bailey (PSD) decided 6 individuals were potential subjects of misconduct proceedings
24 Nov 22	Grievance outcome from CS Madill
7 Dec 22	DI Longdon and Supt Bailey undertook conduct assessment. Outcome as summarised in para 25 of DI Longdon’s witness statement
11 Jan 23	Psychiatric report recommended consideration of early retirement on ill-health grounds
27 Mar 23	DS Madill confirmed her support for the Claimant gaining a place on the Police Superintendents Association ‘Future Supers Programme’, a programme designed to identify police officers from underrepresented groups who had potential to achieve the rank of Superintendent
[?]Mar-July 23	Disciplinary hearings and/or sanctions against 13 police officers and 4 police staff members as a result of matters raised by C – see para 19 of Supt Bailey’s witness statement

[3] The possible relevance of this is explained in paragraphs 62 and 68 below.

26 Apr 23	C assessed as permanently disabled from the ordinary duties of a police officer (certificate dated 5/7/23)

Causation

30. Although there was a lot of discussion on the topic at the hearing, there does not seem to be a significant difference between the parties as to the law we have to apply in relation to causation. It is accurately set out in paragraphs 21 to 24 of the written submissions of Mr Feeny, Claimant's counsel.

31. We note in particular in the passage from the 21st edition of *McGregor on Damages* that is quoted in paragraph 24 of those submissions:

> *8-003: The test for whether a defendant's wrongful conduct is a cause in fact of the damage to a claimant, which has almost universal acceptance, is the so-called 'but for' test or test of 'necessary contribution'. The defendant's wrongful conduct is a cause of the claimant's harm if such harm would not have occurred without it; 'but for' it. In other words, the defendant's conduct was necessary for the claimant's harm to have occurred.[…]*
>
> *8-005: The "but for" test thus requires the court to consider whether the wrongdoer's act or omission was necessary for the loss that was suffered. The basic question is whether the loss would still have been suffered if the wrongful act had not occurred.*

32. The Respondent appears to accept (and whether this is accepted or not, it is indubitably so) that but for the discrimination, harassment and detriments set out in the Judgment by Consent, the Claimant would not have sustained the psychiatric injury and injury to feelings that led to the termination of her career in the police and the financial losses that flow from that. The live issue is whether, and if so to what extent and with what effect on compensation / damages, matters other than that and those discrimination, harassment and detriments have been a cause of the Claimant's ill-health and consequent retirement from the police. Those other matters may include the allegations in paragraph 4 of the List of Issues, which we mentioned earlier.

33. In relation to this issue, Defendant's counsel have referred us to **Thaine v London School of Economics** [2010] ICR 1422. Although **Thaine** remains good law, the leading case, and one we have found of more assistance, is **BAE Systems (Operations) Ltd v Konczak** [2017] EWCA Civ 1188, in which – amongst other things – the Court of Appeal (Underhill LJ giving the leading judgment) endorsed the EAT's approach in **Thaine**.

34. We have sought to apply the law as set out by the Court in **Konzcak**, in particular in the following part of its decision:

> *71.What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the*

divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm.

72.That distinction is easy enough to apply in the case of a straightforward physical injury. A broken leg is "indivisible": if it was suffered as a result of two torts, each tortfeasor is liable for the whole, and any question of the relative degree of "causative potency" (or culpability) is relevant only to contribution under the 1978 Act. It is less easy in the case of psychiatric harm. The message of Hatton [**Hatton v Sutherland** [2002] EWCA Civ 76] *is that such harm may well be divisible. In* Rahman [**Rahman v Arearose Ltd** [2001] QB 351] *the exercise was made easier by the fact … that the medical evidence distinguished between different elements in the claimant's overall condition, and their causes, though even there it must be recognised that the attributions were both partial and approximate. In many, I suspect most, cases the tribunal will not have that degree of assistance. But it does not follow that no apportionment will be possible. … the tribunal should seek to find a rational basis for distinguishing between a part of the illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence. If there is no such basis, then the injury will indeed be, in Hale LJ's words, "truly indivisible", and principle requires that the claimant is compensated for the whole of the injury …*

35. We note that, as is clear from what we have just quoted, it is permissible for a Tribunal to apportion damages in the way we are being invited to by the Respondent without detailed psychiatric evidence on the point – Claimant's counsel seemed in submissions to be suggesting otherwise.

36. We could in theory apportion differently for different types of damage. For example, (as we shall explain shortly) psychiatric injury occurred in February 2021 whereas the overwhelming majority of pecuniary loss occurred because of medical retirement, and the period of sickness that led to medical retirement began in April 2022. However, neither side has suggested we should do so and, given that psychiatric ill-health has persisted since February 2021, we think that if we are going to apportion at all, we should apply the same percentage reduction across the board.

37. The Respondent is not suggesting that the Claimant should get no damages and compensation for money losses such as lost earnings and pension. It agrees that damages and compensation should be substantial, but suggests they should be a lot less than has been claimed because, it is said, the Claimant's losses were mostly caused by something other than the wrongs for which she is entitled to damages and compensation.

38. To support its argument that we should reduce damages / compensation on this basis, the Respondent relies wholly or mainly on its psychiatric evidence, from Dr Wise. Submissions have been made along these lines: that we should make a decision as to whether we prefer the evidence of Dr Wise or that of the Claimant's expert Professor Burns; that for various reasons (principally because, it is said, Professor Burns was misled by what he was told by the Claimant)

Dr Wise's evidence is to be preferred; and that if we prefer Dr Wise's evidence, we should adopt his views on apportionment, which would result in a reduction of between two-thirds and three-quarters. We think things are not as straightforward as that.

39. We start by reminding ourselves of the views expressed by Dr Wise in his original report, of 20 June 2023. As already explained, one of the things he was asked for his opinion on, and gave it, in that report was apportionment, but it was apportionment on a different basis from that now relied on by the Respondent. Specifically, it was: the relative contribution of any causative events that took place before 3 December 2020 versus those that took place on or after that date. His opinion was that "*events before December 2020 … do not account for more than 25% of what has gone on*" – "*what has gone on*" meaning the Claimant's mental ill-health. Had limitation remained an issue, then, the Respondent would have been arguing on the back of that report for an apportionment resulting in an up-to-75 percent reduction to compensation and damages – the same apportionment the Respondent is now seeking on the back of the evidence produced by Dr Wise after limitation ceased to be an issue, based on a completely different apportionment argument.

40. The potentially relevant harassment and detriments that took place or began after 3 December 2020 are those listed in paragraphs 3. l. to s. of the List of Issues: not letting the Claimant attend assessment days; the meeting on 14 December 2020 with CI Nunn and Insp Vale; delaying the Claimant's transfer out of FOU. There can be no doubt that these were the most significant events in terms of causing the Claimant to develop a psychiatric illness and go off sick in February 2021. There is nothing else that we are aware of that would explain why the Claimant would become ill then rather than at some other time.

41. Dr Wise seemed unduly reluctant to make concessions and at points in his oral evidence seemed to want to backtrack from concessions he had already made. In particular, there was a rather protracted part of his cross-examination (protracted because of this reluctance) concerning the following in his and Professor Burns's joint statement: "*Professor Burns holds the opinion that it* [the Claimant's mental ill-health] *crosses over into a diagnoseable disorder at this point* [around February 2021]. *Dr Wise holds the view that it is when she is signed off sick in spring 2021 that this point is reached.*" Putting that into its proper context: these two experts agree that the Claimant has suffered with a psychiatric disorder since 2021 and although they disagree as to the precise diagnosis, that disagreement is only a "*minor difference*" between them; earlier in the joint statement, it is recorded that there is agreement that "*prior to* [the Claimant's] *breakdown in 2021 she had no past psychiatric history or evidence of significant psychological vulnerability.*"

42. Dr Wise initially refused to agree that the cross-over point "*in spring 2021*" referred to in the joint statement was in fact on or around 11 February 2021, following the Claimant's receipt of a WhatsApp message from Inspector Vale (see the chronological summary of events, above; this was a message that the Claimant took as a signal from Insp Vale and, indirectly, from CI Nunn, that she would be forced to remain in FOU against her will). It appeared to us that he simply did not know the chronology, and in particular did not appreciate: that it was the issue around her wanting to transfer out of FOU and the transfer being delayed, and in particular this WhatsApp message, that immediately preceded the Claimant's absence from work in February 2021; and

that she had consulted her GP on 16 February 2021, complaining that she had been off work because the Respondent was (as set out in her GP records) "*blocking moving her post*"; and that she was signed off sick from around then with "*Stress at work*". Dr Wise only agreed it was in February 2021 that the Claimant developed a diagnosable psychiatric disorder when it was pointed out to him in terms that did not brook contradiction that this was when the Claimant went off sick.

43. In the joint statement, it is stated that: "*Dr Wise believes that whilst the work environment was a contributing factor, childcare, stress at home, and pain, were responsible for the development of her anxiety disorder, from January 2022 onwards other factors, including financial and litigation concerns, and the press coverage (April 2022) were more significant drivers of her disorder.*" In the joint statement, this comes immediately before his opinion that "*factors identified in 3) a-s account for 25%-33% of the cause of her psychiatric disorder*", i.e. that factors other than the discrimination, harassment and detriments in the Judgment by Consent are responsible for up to 75 percent of the psychiatric damage for which she is seeking compensation.

44. As to the suggestion that childcare issues were potentially significant, in his original report, in the "*Summary*" section, he wrote, "*Examination of the records shows that problems are reported after the birth of her children and childcare issues emerge.*" This was not an accurate summary of the evidence that was before him, or even of what he put in the body of his report. Apart from anything else, the Claimant's first child was born in 2016 and her second in Nov 2018. It is a summary that gives the impression that childcare issues had a greater longevity and importance than was actually the case. The Claimant's only significant childcare issues we are aware of were those directly caused to her by the Respondent's victimisation of her in early 2021 in relation to transferring out of FOU. In so far as she was caused stress by childcare issues, it was stress directly attributable to a detriment for which the Respondent has accepted responsibility.

45. As to the "*stress at home*" that Dr Wise deemed significant, that appears to be based on those three words being used in the GP records once, on 16 February 2021. Dr Wise seems not to have asked the Claimant any questions about it when he saw her, nor was the Claimant cross-examined about it at this hearing.

46. On the evidence before us, the only cause of stress at home at that point in time was issues directly connected to stress at and related to work, in particular to the victimisation to do with the transfer. When he was being cross-examined, Dr Wise referred under this heading to the fact that the Claimant had moved house, but that appeared to be pure speculation on his part and, moreover, from what he said from the witness table, it appeared that he had no idea when the Claimant had moved house and had only found out that she had done so during the hearing. We are not satisfied that it was what he had in mind when he referred to stress at home in the joint statement.

47. Dr Wise's reference to "*pain*" in the joint statement is to back pain.

48. In his original report, in the "*Summary*" section, Dr Wise wrote: "*At least one entry* [in the Claimant's medical records] *suggests the onset of back problems are more significant than her*

reported perception of experiences with senior officers and a hostile work environment". Earlier in that report, he recorded the first reference to back problems (other than to something in 2015) as being in November 2020. We cannot find the document he is referring to in the hearing bundle so we cannot check his reference, but on the face of what he has recorded and taking into account the medical records we have seen in the bundle, the November 2020 back problem seems to have been a minor one. Looking at the medical records, relevant entries in the GP records first indicate significant back problems in September to November 2021. There is no evidence that the Claimant had any significant back problems in or around February 2021.

49. Moreover, it was – as with "s*tress at home*" – not put to the Claimant during cross-examination that she had significant back problems then, nor was it put to her that such problems caused her anxiety and stress. This omission would have troubled us much more had we decided that there was some merit to the suggestion that back problems were a significant cause of psychiatric injury.

50. When giving evidence about this, Dr Wise once again seemed unaware of, or to have overlooked, how things fitted together chronologically and the fact that: he was purporting to assess what caused the Claimant to develop a psychiatric disorder; she developed a psychiatric disorder in February 2021; the Claimant's "*reported perception of experiences with senior officers and a hostile work environment*" is about things the Claimant experienced in and before Feb 2021; there was no potentially relevant "*onset of*" significant "*back problems*" until after February 2021.

51. Further on the Claimant's back condition, Dr Wise appeared to seize upon a letter from a physiotherapist dated 16 May 2022 that is in the Claimant's medical records, to which Dr Wise was taken in re-examination and which features in Respondent's counsel's written closing submissions. It describes back pain symptoms since 2015 which "*There has not been improvement in*" since then, and more troubling symptoms "*Over the last 12 months*" i.e. since around May 2021. She had had an MRI in November 2021. The letter stated that she was "*physically limited, unable to lift and participate in exercise to any degree. She is not able to lift her daughter and pain is obviously having an impact on all aspects of her life.*"

52. The physiotherapist clearly got the wrong end of the stick to some extent, in that she also wrote, "*As a result of the onset of these symptoms she has had to change career direction.*" In May 2021, the Claimant had recently started in CID and was thriving, to the extent that she was promoted to Inspector in August 2021. This single sentence in a single letter is the only evidence we have seen suggesting that any change of career direction was at all connected to a back problem.

53. The letter does not in fact provide a solid basis for Dr Wise's speculative suggestion that back pain was a significantly causative factor. No doubt he was right when he gave evidence to the effect that pain is often associated with mood disturbance, meaning that if the Claimant was in considerable pain at a relevant time this may have contributed to her psychiatric condition. However, the notion that is actually did materially contribute to it is substantially unevidenced. Perhaps more importantly, the evidence shows that the Claimant's back problem was treated in

August 2022 and there is no suggestion that it has caused the Claimant significant problems since then. We are not, then, satisfied that it was to any material extent directly or indirectly responsible for the Claimant being medically retired from the police.

54. Another example of Dr Wise expressing an opinion potentially favourable to the Respondent apparently on the basis of a misunderstanding of, or ignorance about, the chronology is his statement in his original report that, "*In January 2022 it sounds as if the financial aspects of litigation are the source of increased stress rather than the way she is being treated at work.*" He evidently did not appreciate that there is no allegation of mistreatment at work in January 2022; and even if there were and the allegation were true, this statement appears in the part of his report where he is being asked about causation with reference to a cut-off date of 3 December 2020 and the statement does not help explain his conclusions on that point to any great extent, still less does it justify what is stated in the next sentence in the report: "*Thus, from my understanding of the notes, non-psychiatric factors and factors other than bullying are the main issue until round about February 2021.*"

55. Much the same goes for the following statements, also from the same section of Dr Wise's original report, a little further down the page: "*Press coverage in April 2022, the realisation of financial issues, related litigation in January 2022, and the realisation that the system is geared up to give financial compensation rather than achieve organisational change are probably bigger factors in the distress than the events themselves. … The realisation that she cannot achieve organisational change, that her fears have been realised elsewhere and that she may be liable for a considerable sum of money if the employment tribunal does not go favourably are probably responsible for a bigger range of factors* [than events before December 2020]." We discuss this further, below.

56. It is notable that in the whole section of his report where he discusses causation, with particular reference to a cut-off date of 3 December 2020, Dr Wise did not to any significant extent discuss the events making up the claim, and which occurred before and which occurred after December 2020. We don't think he actually addressed his mind to those things.

57. In summary, Dr Wise provided no coherent explanation for the view in the report he expressed that, "*events before December 2020 …. do not account for more than 25% of what has gone on*".

58. In addition, there is, in practice even if not in theory, a contradiction between: on the one hand, that view expressed in Dr's Wise's report that only 25 percent of the Claimant's psychiatric damage was due to things that happened before 3 December 2020; and, on the other, his evidence in the joint statement that just 25 to 33 percent of it was attributable to <u>all</u> of the discrimination, harassment and detriments in the Judgment by Consent. Consistent with what was in his original report, we would expect him to agree that the part of that discrimination and harassment and those detriments occurring before 3 December 2020 was much less causatively significant than the part that came after. Given this, on the basis of logic alone (whatever else) – and fully taking into account the fact that there were potentially relevant things before 3 December 2020 that were not discrimination, harassment and detriments in the Judgment by

Consent – we would expect Dr Wise to have come up with a significantly higher figure than 25 percent (or between 25 and 33 percent) for the total percentage of damage attributable to that discrimination and harassment and those detriments regardless of date, i.e. including discrimination, harassment and detriments in December 2020 to February 2021.

59. Dr Wise was asked during cross-examination to explain why his figure went no higher than 33 percent, given that the things that the Claimant says were most significant in terms of causing her to become ill (and that were as a matter of chronology seemingly the immediate cause of her consequent sickness absence) occurred between December 2020 and February 2021. He was unable to give a satisfactory answer. Further, he said that after speaking to Professor Burns he had felt able to attribute a greater causative impact to the events described in paragraphs 3. a. to s. in the List of Issues (i.e. the discrimination, harassment and detriments in the Judgment by Consent) than to everything before 3 December 2020, and yet the bottom of the range of figures he gave for the former was the same as the figure he had given for the latter: 25 percent.

60. Other than by his references to the back condition, which (as above) do not withstand scrutiny, Dr Wise was unable with any coherence to explain what it was that he thought had caused the remaining two-third to three-quarters of the Claimant's psychiatric injury. That brings us back to the things listed in his original report that happened from 3 December 2020 to which he attributes causation, mentioned in paragraph 55 above.

61. We note that none, or almost none, of those things seems to have been discussed between the Claimant and Dr Wise, nor was the Claimant cross-examined about them to any significant extent.

62. "*Fears that she may be liable for a considerable sum*" appears to relate to an entry apparently in the Claimant's GP records from 13 January 2022, which is recorded in Appendix 4 to Dr Wise's report: "*She has been told that if she goes to an employment tribunal and wins but is awarded less than what she would in an internal one she would have to pay all the costs. This information has added to client's stress and anxiety.*" This entry must be connected with the judicial mediation that took place in February 2022. In all likelihood it is a garbled account of advice the Claimant was presumably given by her legal team around the risk of costs if she refused to mediate and/or if she was awarded less by the Tribunal than she was offered in settlement at mediation. (We bear in mind that in January / February 2022, liability was still very much in issue between the parties).

63. It is unclear why so much significance has been given to a single entry in the GP records, dating from nearly a year after the Claimant first developed a psychiatric disorder, when she was in work and apparently content in her work, and several months before the start, in April 2022, of the long period of sickness absence that ended with her successful application for ill-health retirement.

64. We are not satisfied that the Claimant's evident concerns about a potential costs liability in January 2022 was significantly causative of the injury, loss and damage she is claiming for. In any event, if it is causative, it flows directly from the Tribunal proceedings which in turn are the

direct result of the discrimination, harassment and detriments that are the proceedings' subject matter.

65. So far as concerns "*Press coverage in April 2022*", Dr Wise is on rather more solid ground here, in that: an entry in the GP records for 12 April 2022 states, "*no improvement with meds but increased stress since consult as employment tribunal has now hit the press and now facing media outside her home address*"; this was the time that the Claimant was signed off work. However, that came after, and as a follow up to, an entry for 16 March 2022 giving an "*Acute stress reaction*" related to "*bullying in the workplace 18m ago*" as a new problem and recording that the Claimant was prescribed the anti-depressant Sertraline. In other words, the problem that seems to have been the immediate cause of the Claimant going off sick in April 2022 appears merely to have been exacerbated by (to some indeterminable extent), rather than caused by, press coverage. Dr Wise could not explain why it was that the Claimant developed an acute stress reaction in March 2022 rather than beforehand or afterwards. In any event, press coverage of the Claimant's Tribunal claim is not substantially separable from the claim itself, which (as above) arises from the wrongs the Respondent did to the Claimant.

66. As to, "*The realisation that she cannot achieve organisational change*" that Dr Wise mentions in his report as another post-3 December 2020 causative factor, it is not entirely clear what this is a reference to. It may, again, be to what Dr Wise says he has seen in the Claimant's GP records, set out in Appendix 4 of his report, that we have been unable to find in the hearing bundle and verify for ourselves, specifically to suggestions that the Claimant was not at various times interested in a financial settlement and instead wanted to change the culture. Particularly in circumstances where Dr Wise did not question the Claimant about this, we once again do not know why he gives this the significance he does.

67. We also note that at this stage – January / February 2022 – the Claimant was still pursuing her grievance vigorously and was still hoping that it would have her desired outcome. She did not know the final outcome until November 2022.

68. We accept that the Claimant may very well have found mediation stressful, because of the pressure necessarily put on her to settle a case that she was wanting to pursue for non-financial reasons. This was well before the Respondent had made any relevant admissions of any kind. In so far as this was a significant causative factor, it was part and parcel of the stress of litigation, which was in turn directly referable to the discrimination, harassment and detriments in the Judgment by Consent.

69. Dr Wise did not, we note, make the point heavily relied on by Respondent's counsel: that a significant potential cause of injury, loss and damage was the Claimant's exaggerated perception of the risk of violent reprisal against her and/or her family, and/or was threats allegedly made against her which are not part of the claim that is before the Tribunal. It is true that the Claimant has, or certainly had, such a perception and she has alleged that she was told of such threats. We shall go into this in more detail later in these Reasons. Dr Wise's evidence did not, though, support this part of Respondent's counsel's submissions.

70. Dr Wise did not attribute causation to anything to do with the Claimant's grievance either. The Employment Judge asked him about this. Dr Wise's response was rather vague, but he didn't seem to agree with Professor Burns that those concerns were significant.

71. In summary, based just on Dr Wise's evidence, and without considering that of Professor Burns, we are not satisfied that any "*particular part of the suffering*"[4] for which the Claimant is claiming damages was due to something other than the wrongs done to her by the Respondent that are listed in the Judgment by Consent. The only causative factors we are satisfied of are those wrongs themselves and what stemmed from them, in particular stress directly and indirectly caused to the Claimant by her Tribunal claim.

72. In any event, bearing all of the above in mind, the conclusion we have come to in relation to Dr Wise is that – no doubt unconsciously, but even so – he was actively looking for things to bolster a pre-determined view that supported the party on behalf of whom he was instructed, rather than coming to an objective view, on the basis of all the available evidence, uninfluenced by the effect on the Defendant's case of the view he came to.

73. We are about to move on to Professor Burns's evidence. This is a convenient moment to consider questions that have been raised around the Claimant's credibility and their significance in the context of the issues we have to decide. We start by asking ourselves: how relevant is her credibility to those issues?

74. We note that Professor Burns and Dr Wise, and through them the parties, are in broad agreement as to the fundamentals: the Claimant developed a psychiatric disorder that became diagnosable in February 2021; the precise diagnosis makes no difference to our decision; the things she has brought her claim about materially contributed to her getting the disorder, and therefore in legal terms there is causation; for the foreseeable future the Claimant will not return to working in the police service. There is no suggestion that what caused the Claimant to go off sick in April 2022 and ultimately be medically retired and incapable of functioning as a police officer was a different condition from the one that developed in February 2021. The experts seem to agree that this is not a case where the Claimant developed two or more different conditions in succession, or anything like that, and that what happened was that the Claimant had a single condition, which was exacerbated and increased in severity at some stage after she returned to work in March 2021, in the end leading to medical retirement.

75. The attack that has been made on the Claimant's credibility is not to allege that she is fabricating or exaggerating her injury in a way that makes a significant difference to compensation. It appears to be being made wholly or largely to provide a basis for undermining Professor Burns's report. Our understanding of what is being argued is that because, allegedly, the Claimant lied to Professor Burns, or at the very least told him things that were not true, the accuracy of his report and the reliability of his conclusions are cast into doubt.

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[4] **Konczak**, paragraph 71.

76. Two things the Respondent seems to be asking us to consider alongside the Claimant's credibility and our assessment of the expert evidence is what is labelled "*context*" in paragraphs 15 to 18 of Respondent's counsel's written submissions and (paragraph 28 of those written submissions) "*the concept of affect laden cognition, explained by Dr Wise*". We think both are potentially significant only to injury to feelings – and in practice not of any great significance at all.

77. Affect-laden cognition, as Dr Wise explained it, is the notion that an individual's memories at any given time are affected by their state of mind at that time, e.g. someone who is in a negative frame of mind will have a tendency to remember negative things rather than positive things and/or to remember something that was unpleasant as having been worse than it was in reality. He put it like this in his original report, "*it is easier to access memories of a similar emotional load or content to a state one is currently in*". This is not, we think, at all controversial, and it accords with our experience and with common sense. Professor Burns, when asked about it, said something like, "*It is bread and butter* [of psychiatry] *that current mental state affects recall.*" It is something we agree we must bear in mind, particularly in relation to the Claimant's evidence as to how the Respondent's unlawful treatment of her some years ago made her feel. We accept she may be unconsciously exaggerating the extent of her past injured feelings. But this does not alter our assessment of causation.

78. Objectively, much of the admitted harassment and so on that the Claimant suffered during the 2010s is very serious. However, there is scant evidence before us that the Claimant was, prior to her return from maternity leave in 2020, significantly affected by any of it other than relatively briefly, at the time. The Claimant is not saying that her time in FOU was unremittingly miserable, nor that she at all times had a bad working relationship with the individuals who the Respondent agrees harassed her and subjected her to detriments. The experts agree that there was no psychiatric injury prior to the end of 2020 at the very earliest. The overwhelming majority of loss and damage – including injury to feelings – being claimed in these proceedings was clearly suffered because of what occurred from December 2020 onwards. Our focus is therefore on those events. This means that, for example, the Claimant being positive about the FOU in an article in an internal police publication in June 2016 (something focussed on by Respondent's counsel in cross-examination and, as "*context*", in submissions) is of no great significance to our decision-making.

79. The main factual basis for the Respondent challenging the Claimant's credibility is the Claimant having made allegations that are, or are alleged to be, factually incorrect. We shall go through some of these now.

80. In his report, Professor Burns recorded that the Claimant, "*reports that the PSD case is so serious that she has been advised to have enhanced security because of risk from other officers who may seek revenge on her if they are dismissed. She worries that they may harm her or her family.*" That was not true. It is no longer part of the Claimant's case, if ever it was, that she was specifically advised to have enhanced security. However, it <u>is</u> part of her case that colleagues told her that she needed to be careful because she was raising issues that could lead to disciplinary proceedings against a large number of fellow officers. A suggestion that the Claimant

needed to be careful could be referring to a range of things in terms of what she needed to be careful of. There is no suggestion that anyone other than the Claimant herself, and possibly her husband, believed there was any risk of violent retaliation towards her or her family.

81. Another thing recorded in Professor Burns's report that is not true is: "*She has moved to a detached house specifically to improve security (she has six CCTV cameras outside her house and security equipment within the home. She is on a priority list for response by Staffordshire police).*"

82. The Claimant admitted in evidence that the house move was not because of security fears; although it was helpful having a bigger detached house from the point of view of increasing security.

83. So far as concerns her being on a "*priority list for response by Staffordshire police*", there is a signed statement from Mr Pritchard of 27 February 2023 in which he stated: "*I can confirm that under my direction, critical risk markers have been placed on* [the Claimant's] *home address and the school to which her children attend.*" This is misleading (we don't say deliberately so). Reading it, the assumption we and most people would make would be that the Claimant was officially recognised by the police to be at an increased risk to her health and safety and that therefore calls from and relating to her were to be given increased priority. In fact that was not the case, as Mr Pritchard made clear in his evidence during cross-examination. The 'marker' was put in place in October 2022. It made no difference at all to the priority given by the police to calls from and relating to the Claimant's house and her children's school. All it did was to make Mr Pritchard a particular point of contact (quoting from an email he sent on 13 October 2022): "*With the exception of any urgent or immediate responses required to the address, I would recommend that all enquiries relating to either be directed to me in the first instance, and so I will act as the sole point of contact for any external requests for contact with either.*"

84. Precisely why Mr Pritchard decided to do this is not entirely clear to us. As best we can tell, though, he was doing it as the Claimant's friend, out of a well-intentioned wish to give her the false impression that something substantial was being done, to provide her with reassurance and allay her genuine but disproportionate fears.

85. We are not satisfied that the Claimant herself was lying when she told Professor Burns about this. We don't think she realised that the marker put on her property and on her children's school had relatively little significance. Mr Pritchard was one of the Claimant's witnesses and she relied on his evidence, but his oral evidence on this point, given after hers, would have come as a surprise to her.

86. We again emphasise that the significance of this issue around the Claimant's credibility, in terms of the submissions made in connection with it on Respondent's behalf, is as to the weight we should give the views expressed in Professor Burns's report rather than anything else. In relation to that, it does not matter whether the Claimant was lying or merely giving inaccurate evidence. The point being made by Respondent's counsel is that that report is necessarily based in part

on what Professor Burns was told by the Claimant; and that if what he was told was inaccurate, this has a knock-on effect on report's reliability.

87. It is with that in mind that we examine what Professor Burns has to say in relation to causation and attribution.

88. In his report, he expresses the opinion that: "*Rebecca Kalam's anxiety disorder is a sole and direct consequence of her treatment in the FOU in the West Midlands Police.*" The basis for him expressing that view seems to be: first, chronology – that the Claimant had no significant mental health problems before December 2020, but had such problems afterwards; secondly, the apparent absence of other things that are likely to have caused those problems. Neither of these things is changed by the above-mentioned inaccuracies in what the Claimant told him.

89. In contrast to Dr Wise, it is clear that Professor Burns had closely studied what the allegations of harassment (and so on) were and had a clear understanding of what happened and when around late 2020 and early 2021.

90. Professor Burns did not seek to put percentage figures on the causative effects of events pre- and post-December 2020, merely writing (in answer to questions posed on the Respondent's behalf): "*I believe that the events before December 2020 made her vulnerable to a generalised anxiety disorder and the events of December 2020 "pushed" her over the threshold.*"

91. Professor Burns similarly did not, in the experts' joint statement, directly and fully answer questions posed as to the causative effect of the admitted mistreatment set out under paragraph 3 of the List of Issues[5] versus that of other things: the former "*are the sole cause of the onset of her psychiatric disorder, although he accepts that its intensity has been increased and perpetuated by the investigation. On balance he would apportion it as 70% due to the initial discrimination and harassment, and 30% due to the pressures of the investigation*". He also expressed the view that, "*the experience of her work environment and the conflict with her seniors was the cause of her breakdown, although he acknowledges that this has been exacerbated by problems with childcare later and also financial worries about litigation.*"

92. In his oral evidence. Professor Burns cast doubt on any back problem as a cause of the Claimant's poor mental health and he no longer thought that childcare difficulties were significant either. In addition, as to the attribution of causation as between the paragraph 3 factors and other factors, specifically in relation to those listed under paragraph 4 of the List of Issues, he said something to the following effect: a lot of it was now historical and not significant; in the round he didn't think it made much of a difference. That was evidently not a considered view: he was responding off the top of his head to specific questions being asked, and we don't criticise him in any way for attempting to help us in this way.

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[5] The "discrimination, harassment and detriments listed in the Judgment by Consent", the "admitted mistreatment set out under paragraph 3 of the List of Issues" and the "paragraph 3 factors" (paragraph 92 below) are synonymous.

93. We have a similar problem in relation to Professor Burns's expressed opinion that causation should be apportioned "*70% due to the initial discrimination and harassment, and 30% due to the pressures of the investigation*" as to Dr Wise's opinions on attribution: we don't understand the basis for it.

94. In Professor Burns's original report, he wrote: "*She returned to work in late March 2021, but her health continued to decline, and she went off sick for a second time in April 2022 until now.*" That is not the picture painted by the evidence. The Claimant was, by her own account, only too ill to work for around a fortnight in February / March 2021. She seems to have done very well indeed once she started in CID, achieving promotion to inspector by August 2021. She did have sessions of therapy of various kinds during 2021 and into 2022. However, she didn't have any time off work and appears to have been broadly well in herself until, at the earliest, the latter stages of 2021. Mr Pritchard's unchallenged evidence was that as late as January 2022, when he first encountered the Claimant, "*From the moment I arrived in my new role I was instantly impressed with the energy and enthusiasm displayed by the Claimant towards all elements of her role. … Within the workplace the Claimant is a positive, highly motivated individual who always sought to do the very best that she could, not only within her role when delivering performance and driving the business, but also when dealing with people.*" In his witness statement, Mr Pritchard gave a number of examples of the Claimant performing to a high standard, examples on the face of it given from Mr Pritchard's personal experience of working with the Claimant in early 2022.

95. There seems to have been a fairly sudden deterioration in the Claimant's condition around March 2022. What we would like to have had from the experts was an explanation of why the Claimant went from someone who was apparently succeeding in the police in 2021 and into early 2022 to someone off sick from April 2022, never to return and looking at medical retirement by late 2022 / early 2023. Neither expert addressed this to any significant extent in their written evidence and neither of them dealt with it satisfactorily in their oral evidence.

96. We appreciate that causation of psychiatric injury does not necessarily work in a logical or linear way, but given the chronology we have just outlined, we struggle with the notion that only 30 percent of the Claimant's current state is attributable to what happened after February 2021. Certainly, such an attribution hasn't been adequately explained and the basis for it has not been established.

97. In paragraph 19 of their written submissions, Respondent's counsel highlighted part of Professor Burns's oral evidence: that fear of retribution made a "*major contribution*" to causation. This to an extent mirrored his views expressed in the Joint Statement: "*that the major drivers of her anxiety are apprehension about the future (eg, retribution from colleagues) rather than preoccupation with past traumatic events*". He did go on to say that he remained of the view that the cause of the Claimant developing a psychiatric disorder was her experiences in FOU, but that it was exacerbated by the investigation and her fears. He also said that that by a "*major*

contribution" he did not mean more than 50 percent; he stuck with a 30 percent figure – albeit he described coming up with specific percentages as "*hubristic*"[6].

98. In conclusion, we do not think we have from either expert a reliable basis for attributing particular percentages to the [List of Issues] paragraph 3 factors on the one hand and other things on the other.

99. Nevertheless, we do still have to consider whether there are factors separable from the discrimination, harassment and detriments listed in the Judgment by Consent which materially contributed to the Claimant's loss and damage, and in particular to her being so unwell that she had to leave the police.

100. We have already explained we are not satisfied that childcare difficulties were a significant causative factor. We agree with Professor Burns about them and we think Dr Wise's opinion to the contrary has no solid foundation. See paragraph 44 above. Much the same goes for stress at home: see paragraphs 45 and 46 above.

101. We accept that this litigation and press interest in it have exacerbated the Claimant's mental ill-health and contributed to her condition deteriorating such that she has been medically retired. There was, as explained above, a significant deterioration from March 2022, she went off sick in April 2022, and the only potentially relevant things that happened around those months that are referred to in contemporaneous documents to which we have been taken are the judicial mediation at the end of February 2022 and press interest in the Tribunal proceedings in early April 2022. However, these things stem from the discrimination, harassment and detriments listed in the Judgment by Consent and all of the resulting "*suffering* [or] *illness … is due to the employer's* [the Respondent's] *wrong*" in accordance with **Konzcak**.

102. Something that has been said on the Respondent's behalf to be very causatively significant is the Claimant's fear of retribution.

103. The Respondent's primary case on this, as it progressed, seemed to be that the Claimant's professed fears of retribution were not merely exaggerated but to an extent made up. If we accepted they were made up (and we do not), that would help the Claimant's case enormously because it would mean that none of her loss and damage could be attributable to it.

104. The Respondent's secondary case seemed to be that if the Claimant's fears were subjectively real to her, they were objectively irrational and unjustified, and therefore were not attributable to the discrimination, harassment or detriments in the Judgment by Consent.

105. We agree with the Respondent that the extent of the Claimant's fears of retribution were not objectively based. We do, though, think that those fears were genuine; that much came across very strongly in her oral evidence. For the Claimant to have some fear of retribution was far from unreasonable or irrational. She had already been victimised and subjected to detriments for

[6] Not "*heuristic*", as is recorded in paragraph 19 of Respondent's counsel's written submissions.

'blowing the whistle', as is admitted by the Respondent, and she was raising concerns that could have led to disciplinaries against a large number of officers and did lead to action, including disciplinary action, against some officers. The position is therefore that the victimisation and whistleblowing-related detriment caused her to have concerns about retribution and (together with the respondent's discrimination and harassment of her) caused her to develop an anxiety disorder, which in turn is likely to have led to her perceiving that the risk of serious retribution was greater than was actually the case. Even if the evidence is insufficient for us to say that the misperception of risk of retribution is wholly or mainly due to her anxiety disorder, there is no evidence of a cause of that perception other than the discrimination, harassment or detriments in the Judgment by Consent, in particular the victimisation and whistleblowing-related detriments the Claimant was subjected to from December 2020 onwards.

106. The only caveat or qualification to that is that the Claimant has alleged she was told that threats had been made against her. She says she was told this in October 2022. If she suffered relevant harm because of being told this then that harm cannot be attributed to the Respondent. This is because it is not a proven fact that such threats were actually made by anyone for whose actions the Respondent might be held liable and the Claimant is not asking us to make a finding to that effect.

107. The question for us is therefore: are we satisfied that significant harm for which the Claimant is claiming compensation – that "*a particular part of the suffering*" – was "*due to*" [7] the Claimant being told that these threats had been made? The answer is: we are not.

107.1 The Claimant was allegedly told this in October 2022, by which stage she had already been off sick for 6 months.

107.2 By October 2022, the Claimant already had a very significant fear of retribution, attributable to the victimisation and whistleblowing-related detriment, as explained above.

107.3 The main reason we give this answer is that neither expert attributed causation to this. The closest either of them came to do doing was Professor Burns (whose evidence the Respondent is asking us to reject) saying that fear of retribution generally – not any specific reports of threats in October 2022 or at any other time – made a major contribution, by which he meant it was a significant part of the 30 percent of the Claimant's condition that he thought could be attributed to factors other than the discrimination, harassment and detriments listed in the Judgment by Consent in and of themselves

108. We are alive to the danger of applying what we might fondly consider to be our 'robust common sense' to a question of medical / psychiatric causation, particularly when we have experts who have themselves expressed views on it. We agree it is quite possible, indeed likely, that being told threats had been made would have increased the Claimant's fears. But it would be quite

[7] **Konczak**, paragraph 72.

another thing for us to say that it would have significantly exacerbated her condition. In the absence of psychiatric evidence directly on the point, we are not satisfied that it did.

109. The other factor seemingly relied on by the Respondent on this causation / attribution issue is the Claimant's grievance and, specifically, her apparent belief that the way in which it was handled was victimisation towards her and in any event was incompetence and was unreasonable. This includes her perception that the Respondent was engaged in a cover-up and/or that her allegations were not taken seriously and/or that officers responsible for wrongdoing have been insufficiently punished.

110. We accept the Respondent's point that in principle it cannot be held responsible for the effect on the Claimant of victimisation, or a perception of victimisation, or anything else (e.g. the Claimant's concerns about social media usage within FOU that she raised in 2022, dealt with in Mr Longdon's statement) that is outside of the discrimination, harassment and detriments listed in the Judgment by Consent. However, the Respondent <u>is</u> responsible for harm caused by the grievance process itself, in circumstances where the grievance corresponded with the Tribunal claim. For example, for whatever reason (and on any view it was not the Claimant's doing) the grievance process took a long time to reach its conclusion and that appears to us to have added to the Claimant's stress and to her fears that it would not be upheld and was not being taken seriously. The Respondent does not have to be at fault in relation to the length of the grievance process for harm caused by that to be part and parcel of the Claimant bringing a grievance, something that is in turn inseparable from the discrimination, harassment and detriments listed in the Judgment by Consent.

111. Similarly, it is commonplace for whistleblowers to be dissatisfied with whatever disciplinary or other action is taken against those they have blown the whistle about. That kind of dissatisfaction is, again, part and parcel of this kind of claim and this kind of grievance and is not a separate and distinct cause of injury to which we could rationally attribute a percentage.

112. The psychiatric experts did not really deal with this. Dr Wise was specifically invited by the Employment Judge to attribute causation to the grievance and things around it but declined to do so. We have already mentioned the fact that he attributed harm to the Claimant thinking she could not achieve cultural change, but that that thought arose in early 2022 in connection with pressure she felt to settle her claim at a time before the Respondent had made any admissions. Professor Burns did give us his 30 percent figure, but that covered not only all things connected with the grievance but also everything else that was not the discrimination, harassment and detriments listed in the Judgment by Consent in and of themselves.

113. So far as concerns the specific allegation of victimisation made in connection with the grievance and other things clearly outside the scope of discrimination, harassment and detriments listed in the Judgment by Consent and the grievance flowing from them, we think the situation is similar to that we described in relation to the alleged threats the Claimant was told about in October 2022: we agree it is likely that these things had some impact on the extent of the Claimant's injured feelings and we need to bear that in mind when assessing damages for injury to feelings; however, in the absence of psychiatric evidence specifically on the point, we are not satisfied

that it had a significant impact on the other harms – i.e. psychiatric injury and, broadly, medical retirement – for which the Claimant is claiming damages and compensation.

114. As to the allegation that back pain was causative of relevant loss and damage, we have already largely dealt with this, in paragraphs 47 to 53 above, in which we rejected the allegation. The suggestion that it was causative now seems in practice to be based almost entirely on what a physiotherapist wrote in a letter to the Claimant's GP in May 2022 (see paragraph 51 above). The factual statements made in that letter were not put to the Claimant; she wasn't cross-examined about that letter at all. Indeed, prior to closing submissions, it was mentioned once during the hearing, when Mr Basu KC took Dr Wise to it in re-examination. We have already noted that the letter contains factual inaccuracies, in particular the suggestion that the Claimant's back problem in the 12 months to 16 May 2022 meant, "*she has had to change career direction*". We have no idea what the author of the letter was referring to here. There is nothing else to support a suggestion that the Claimant had to change career direction because of back pain between May 2021 and May 2022. Over and around that period, the only thing that could possibly be described as a change of career direction was the move from FOU to CID in March 2021, which no evidence whatsoever suggests was anything to do with back problems. It is most likely that the author of the letter made a mistake or misheard or misunderstood what the Claimant was telling her. Any significant ongoing back problems were, on the evidence, sorted out by treatment in August 2022: see paragraph 53 above.

115. We accept there is a possibility that a back problem might, at some point in the future, come what may, have had an effect on the Claimant's career progression. This is one of the 'imponderables' that we have to take into account. The only other point the Respondent might legitimately advance in relation to this is that the Claimant's psychiatric state may have been affected by back problems in the first half of 2022. Even if it did, we have considered the point, and decided we are not satisfied that back pain was a cause of significant harm for which damages and compensation are being sought in these proceedings.

116. Those are all the factors that have been put forward on the Respondent's behalf in support of us making a percentage reduction to damages and compensation. We note that in written closing submissions, Respondent's counsel have entirely or almost entirely based their arguments on this point on Dr Wise's evidence. We have explained why we are not persuaded by that evidence.

117. In conclusion, we are not satisfied that any identifiable part of the loss and damage for which the Claimant is claiming compensation and damages is attributable to anything other than the discrimination, harassment and detriments in the Judgment by Consent. It is therefore not appropriate to reduce compensation in accordance with **Thaine** and **Konczak**.

What would have happened; the 'but for' career path

118. In this section of our Reasons, we are assessing how the Claimant's career in the police might have panned out had there been no discrimination, harassment and detriments, with what effect on her damages.

119. There is no dispute as to the applicable law. We were referred to **Wardle v Crédit Agricole Corporate and Investment Bank** [2011] ICR 1290 and (by both sides) **Ministry of Defence v Cannock** [1994] ICR 918. We note in particular the section in **Cannock** from 949C to 953F.

120. We are undertaking an exercise in speculation and we used the word "*might*" rather than "*would*" in paragraph 118 above deliberately. There are cases where the Court or Tribunal assessing damages feels able to do so based on findings that certain things would have happened at certain times, or that there were particular percentage chances of particular things happening at particular times. This case is not one of them. Given, amongst other things, the need to think about not just what might have happened but when things might have happened and the fact that the Claimant potentially would have had a further 20 years or so in the police, we are looking not at probabilities but at a multitude of possibilities.

121. The approach we are adopting is to base our assessment of compensation and damages on a career path for the Claimant that she might plausibly have followed but for the discrimination, harassment and detriments in the Judgment by Consent. We are not saying that that is the career path the Claimant probably would have taken, or even necessarily that that would have been her most likely career path. Were we to be saying anything like that we would be pretending to an ability to make predictions with a level of accuracy and precision that we lack. Instead, it is the career path that reflects as best we can the many possibilities and imponderables there are; and that will, we hope, result in an award that fairly reflects all those possibilities and imponderables.

122. Although there has to be a chance that – for any number of reasons – the Claimant would have left the police in any event, or would at some stage have reduced her working hours, it is a small one and both sides agree (or seem to) that the plausible 'but for' career path for the Claimant we should be speculating about is one where she remained in the police, working full time, until retirement. So far as concerns when she might have retired from the police, the Claimant was adamant that it would have been when she completed 35 years' service, at age 60. In so far as the Respondent is pursuing an argument that it would have been after 30 years' service, we do not accept it. She could have retired after 30 years, but there is nothing in the evidence showing she would have done.

123. As we mentioned earlier, in paragraph 25.2 above, the Claimant's employment expert, Mr Carter, gave opinion evidence on this question of how far up the ranks the Claimant would have got. We were not assisted by this. He has no particular expertise in police careers. He did not suggest, for example, that he had looked at the careers and characteristics of a representative group of now retired officers who had made it to Inspector relatively early in their service and that from this he could say that the Claimant was most like the individuals who retired at one rank rather than another, or anything of that kind. It seemed to us that he was in no better position than we are to answer the question; and that this part of his evidence was not admissible expert opinion evidence.

124. We think the best evidence we have on which to make our decision as to how the Claimant would have progressed through the ranks is that produced by Mr Prentice. As is explained in

paragraph 23.5 above, his evidence largely consisted of data showing, historically, whether and when officers were promoted. His statistics have their limitations, as we shall explain shortly, and they of course can only tell us about what has happened in the past, in general, to people falling into particular groups; and they cannot tell us with any certainty what would have happened, in the future, specifically to the Claimant as an individual. However, they have an objectivity that is lacking in the other evidence before us, for example the evidence of Mr Pritchard and Dr Langley. For all their virtues, Mr Pritchard and Dr Langley worked with the Claimant for less than 6 months in 2021/2022, they are clearly – to differing degrees, but nevertheless – personally well disposed and sympathetic towards her, and when they gave evidence about the Claimant potentially progressing to the rank of Chief Superintendent or above, they were discussing something beyond their own direct experience, in that Mr Pritchard is a Chief Inspector and Dr Langley left the police in the rank of Superintendent.

125. Everyone – Mr Prentice himself included, we think – agrees that we should approach his statistics with caution. Even putting to one side the fact, just mentioned, that they cannot in and of themselves show what will happen or would have happened to any particular individual, including the Claimant, issues with them include:

125.1 what has happened in the past in terms of chances of promotion may not be a reliable guide as to what is likely to happen in the future, given the many external factors that might have affected and might affect these things, such as local and national policy as to police recruitment and numbers;

125.2 police officers now have to do more years' service before they can retire on a full pension than was formerly the case, which on the one hand means they have a longer career in which to achieve promotion, but on the other means higher ranks staying in post longer and there being a slower turnover of higher ranks and therefore potentially fewer opportunities for advancement;

125.3 the fact that they only show what happened to officers within the Respondent, so they would not, for example, record someone as having been promoted who achieved promotion by moving from the Respondent to a neighbouring police force or by moving from a neighbouring police force into the Respondent. The higher up the ranks an officer gets, the more likely it is that they will need to move forces to achieve their next promotion;

125.4 Mr Prentice's entire dataset is not made up of particularly large numbers of individuals, and as one goes up the ranks the numbers get progressively smaller and the chances of a small dataset leading to misleading statistics gets progressively bigger;

125.5 Mr Prentice has taken out of account current officers in rank with under 3 years service. He has done this on the basis of an assumption that no one is likely to achieve promotion in less than 3 years and that were these officers to be included in his analysis, it would produce figures for the chances of promotion that were artificially low. That may be a reasonable assumption for him to make, and it probably is the right approach for there to be some kind of cut-off point, but there doesn't seem to be any particular reason to make

that point 3 years rather than, say, 33 months or 39 months. Whatever cut-off point is used will, one way or the other, affect the percentages produced by doing the necessary arithmetic;

125.6 Mr Prentice includes all current officers who have been in rank for at least 3 years in his analysis. Amongst those officers will be some who have not achieved promotion for a long period of time, but who will achieve promotion before they retire. It is impossible to identify who out of the current officers with 3 or more years service will and who will not be promoted to the next rank before they retire. But Claimant's counsel's proposed solution to this, which is (paragraph 77 of his written submissions) "*for the current inspectors to be completely stripped out of the calculation*", would result in an artificially high percentage chance of promotion, since the only current officers who would be being counted would be those who had been promoted to Chief Inspector.

125.7 The only way fully to deal with the problem raised by Claimant's counsel that is identified in the previous sub-paragraph would be to ignore all current officers and to examine the entire careers of all officers who retired over a period of time in the rank of Inspector or above. We don't have the data that would enable us to do that and if we did the dataset would consist of officers who started their careers in the police many years, even decades[8], before the Claimant did, where circumstances and promotion prospects were in all likelihood quite different.

126. The most useful table we have is one produced by Mr Prentice on 14 July 2023, appended to his supplementary statement: "*Table 2 v3: Progression exc Current Staff with less than 3 years in rank*". It shows data relating to 798 individuals who served in the rank of Inspector within the Respondent force at some stage between 1 January 2000 and (roughly) June 2023, excluding those with less than 3 years in rank. Off those 798: 277 were promoted to Chief Inspector within the Respondent, 138 were promoted to Superintendent, and 52 to Chief Superintendent. The data in the table includes the average length of time in rank before promotion.

127. The table also shows subsets of those data, relating to the number of officers who were promoted to Inspector with less than 15 years, less than 13 years, and less than 11.2 years service. The reason for this is that those who get to Inspector quicker have a higher chance of progressing further up the ranks. The Claimant made it from Police Constable to Inspector in just under 13 years and we therefore take as our starting point the data in the "*<13yrs Service*" column in the table.

128. The information in this column is that: out of 142 officers in this category, 91 were promoted to Chief Inspector; 84 out of the 91 had at least 3 years service in that rank and out of those 84, 61 made it to Superintendent; 49 out of those 61 had at least 3 years service in that rank and out of those 49, 27 made it to Chief Superintendent. The overall percentage chance of officers in this column making it from Police Constable to Chief Superintendent, ignoring those with less

8 If the data used were similar to Mr Prentice's, it would include many officers who retired in the early 2000s, who started their police careers in the 1970s.

than 3 years service in any of the ranks, was 25.6 percent. If we were to include those with less than 3 years as Chief Inspector and as Superintendent it would be 19.0 percent (27 officers out of 142). The equivalent figures for getting to Superintendent are 46.5 percent and 43.0 percent. The average time in rank before promotion was 4.6 years for promotion from Inspector to Chief Inspector, 4.4 years from Chief Inspector to Superintendent, and 4.2 years from Superintendent to Chief Superintendent.

129. Claimant's counsel submits that we should make an adjustment to take into account the column in the table for those promoted to Inspector with less than 11.2 years service. This is on the basis that the Claimant had two periods of maternity leave during her 13 years of service before she made it to Inspector. We reject that submission. There is no evidence that taking maternity leave significantly affects the speed of promotion within the Respondent. Moreover, Mr Prentice's figures that produced the percentages and averages detailed in the previous paragraph include significant numbers of women who took maternity leave.

130. Claimant's counsel also invites us to factor in other data from Mr Prentice showing that in a number of recent promotion exercises within the Respondent, women did better than men. However, the number of promotion exercises involved is small, as is the number of officers involved, and the number of officers involved is tiny when it comes to the two Superintendent to Chief Superintendent promotion exercises that are featured. We don't think it would be safe on the basis of the very limited available data to conclude that the Claimant was more likely to be promoted because she is a woman.

131. Much the same goes for counsel's submission that the Claimant being a graduate and having a Masters is a significant factor. The data we have relate to a small number of applicants for promotion up to the rank of Chief Inspector and no further and suggest that those with equivalent qualifications to the Claimant's have at best a very marginal advantage. The statistical quirks that can arise when the dataset is small are illustrated by the fact that according to those data, having a Post Graduate or equivalent qualification is a <u>disadvantage</u> for those wanting to move from Inspector to Chief Inspector and that the best qualification to have in that situation is a Foundation degree or equivalent, rather than a Bachelors degree or anything else.

132. Having considered Mr Prentice's evidence, we look at the Claimant as an individual. Although we have, in paragraph 123 above, downplayed the significance of the evidence from Mr Pritchard and Dr Langley about the Claimant's qualities, we accept it has value and we take it fully into account, as we do the things listed in paragraph 82 of Claimant's counsel's written submissions as "*the Claimant's personal qualities that would have affected her chances of promotion*".

133. Looking at everything together, and as the Respondent appears to accept, the Claimant was an excellent police officer and her abilities, experience and drive were such that had she remained in the police, uninjured by the Respondent's mistreatment of her, she had a very good chance of achieving promotion to the rank of Chief Inspector. She also, we think, had a reasonable chance – we would perhaps even say a probability – of getting to the rank of Superintendent. But for the Claimant to have got to Chief Superintendent level, and for her damages to be

assessed on that basis – which is what it is submitted on her behalf we should do – is a different matter.

134. We don't criticise the Claimant or her representatives for this, but what is absent from their analysis is at least two important things:

134.1 a recognition of the need to put into the equation not just the possibility that the Claimant's career trajectory would have been better than if it had simply followed its probable path (such as the possibility, which we think is some way below 50 percent, that she would have reached a rank above Superintendent), but the possibility that it would have been worse as well. For example, the chances of the Claimant being promoted to Chief Inspector at some stage was high, but some way from being 100 percent. We think the possibility that she would not have made it to that rank – including e.g. the possibility that for whatever reason she would have left the police as an Inspector well before retirement age – is significantly higher than the possibility that she would have achieved a rank above Chief Superintendent, bearing in mind the very small numbers of Assistant Chief Constables, Deputy Assistant Chief Constables and Chief Constables, and the proportion of Inspectors who never become Chief Inspectors;

134.2 the fact that the further up the ranks she went, the less exceptional or unusual the Claimant would seem. On the evidence, the Claimant was towards the top end of her peer group of police officers – although not right at the top – and accordingly stood out amongst them, and she was marked out by at least one Superintendent (Dr Langley) and one Chief Superintendent (Kim Madill) as having the potential to achieve high rank. But we would expect anyone who, like the Claimant, could reasonably hope to make it to Superintendent to have similar qualities. In his report, Mr Carter produced figures for the numbers of officers at different ranks within the Respondent in March 2021 showing that out of over 6000 officers in total there were 279 Inspectors but only 69 Chief Inspectors and 39 Superintendents. The majority of those 39 would almost necessarily be exceptional to some extent. The Claimant has some impressive things on her CV, but we do not have the CVs of other potential Superintendents to compare it to, and if we did, we would expect to see impressive things there too.

135. We accept and adopt Respondent's counsel's closing submissions from paragraphs 41 to 44, including the following:

> *41. … How many people do we each know who we think should have got further than they have, have the grit and determination to do so, but just do not quite make the cut?*
>
> *42. People change careers. Many people end up in a very different job or vocation or location than they had planned. The best laid schemes of mice and men …*
>
> *43. Even Dr. Brandon Langley, a plainly highly intelligent and talented man … left the force at the rank of Superintendent after 30 years.*

> 44. *The tribunal must factor in the imponderables. … None of us is really the same person now as we were a decade ago or will be a decade hence.*

136. In all the circumstances, we have decided that damages and compensation should be calculated on the basis that the Claimant would have progressed from Inspector to Chief Inspector and from Chief Inspector to Superintendent, but no further up the ranks than that. So far as concerns when she would have been promoted, there are no figures we could rationally use other than the average figures given in the "*<13yrs Service*" column of Mr Prentice's table referred to above: 4.6 years from when the Claimant became an Inspector for her to get to Chief Inspector; and 4.4 more years for her to achieve the rank of Superintendent.

137. As explained above, we are working on the basis that the Claimant would have retired from the police at age 60. There was some discussion during submissions as to whether when assessing compensation and damages we should in effect ignore what would have happened and what will happen in terms of any work the Claimant might be or might have been doing after that age, with Claimant's counsel seeming to suggest that we should. If this is being suggested, we reject the suggestion. We have to look at the Claimant's total financial position as we think it will be and compare it to what it would have been but for the Respondent's wrongs. It would be mistake for us not to take this part of the financial picture into account given that what the Claimant's financial circumstances after age 60 will be and what they would have been may well not be the same.

138. We therefore have to decide whether, in the 'but for' scenario, the Claimant would have worked after 60. Our conclusion is that it is more likely than not that she would not have done because: in this scenario, she would have spent over 10 years as a Superintendent at the end of a long career in the police; she would have been able to retire on a full pension; she would have been married to a police officer who was also able to retire early, i.e. below state pension age.

139. There is, however, a significant chance that the Claimant would have done other work after retiring from the police. The Claimant will be 60 in 2043. By then, most people will be working to pension age of 67, and pension age is due to go up to 68 between 2044 and 2046. The Claimant is, or at least was, a very driven and ambitious individual, with many transferable skills and in this scenario she would be willing to do 'police adjacent' work, which she could do to a high level without re-training or having to work her way up. (By "police-adjacent work" we mean work that would bring her into contact with the police, or work such as private security work that is similar to police work, which she feels unable to do at present and cannot ever foresee herself doing because of the Respondent's mistreatment of her and her consequent mental ill-health).

140. We also need to factor-in the possibilities: of the Claimant working after age 60 only part-time; that she would not have been earning as much after age 60 as she would have been earning as a Superintendent; that she would work after age 60, but not all the way to age 67.

141. This is, of necessity, very much an impressionistic rather than a scientific or mathematical assessment, but bearing all of the above in mind, we have decided that the Claimant's losses should be assessed as if: upon her retirement from the police as a Superintendent aged 60,

there was a 20 percent chance of her working full time to age 67, earning the same amount she had been earning as a Superintendent.

What will happen; the 'actual' career path

142. We shall now examine what will or might happen in the Claimant's working life given the harms inflicted on her by the Respondent and her retirement from the police. Similarly to what applied to the consideration of the 'but for' scenario that we have just undertaken: it is impossible for us to say with precision what will probably happen; the best we can do is to identify a plausible scenario that fairly reflects all the myriad possibilities and results in appropriate compensation. We also need to bear in mind the Claimant's so-called 'duty' to mitigate her loss and to assume that she will comply with that duty.

143. In the psychiatric experts' joint statement, they record their agreement that: "*for the foreseeable future they could not see* [the Claimant] *returning to working in the police service.*" On that basis, the Claimant's assertion, passionately and vehemently expressed during her oral evidence, that she cannot envisage going into 'police-adjacent' jobs[9] either is credible and, at least in the short- to medium-term, it would be a reasonable approach for her to take.

144. It is common ground that (from the psychiatrists' joint statement): "*her prognosis in the medium to long-term is good. They believe that after the end of litigation, and her disengagement from the police, that she will recover fully.*" It is clear that by "*recover fully*" in this context they do not mean to say that the Claimant will recover to the point where she could return to the Police.

145. We accept the Claimant might feel differently about, at least, police-adjacent jobs in the longer term: say, in 10 years' time. However, we bear in mind that as things are she will – see below – be embarking on a completely new career path, starting in around 12 months' time. Looking forward 10 years, she will be well on that career path and in all probability committed to it.

146. We therefore reject as unrealistic the assertion in paragraph 66 of Respondent's counsel's written closing submissions that the Claimant, "*would be likely to obtain an equivalent (likely) private sector job – and progression – to that which she would have held in the police within a fairly short space of time, her remuneration package being at least equivalent to that in the police*". This would only be right in practice if the Claimant went into a police-adjacent job, something she is, reasonably, not going to do.

147. In the same paragraph, Respondent's counsel suggest we could consider "*Vanessa Smart's*[10] *scenario 3(b) (with a longer loss profile)*". We are not entirely sure what is being got at here. In her report, Vanessa Smart's scenario 3b is a 'but for' scenario rather than a 'what will / might happen' ("actual") scenario. The only actual scenario she uses involves the Claimant earning: "*£14,000 pa net from 1 September 2023 to 1.5 years from now, then £35,000 pa gross from 1.5 to 5.5 years, then £47,500 pa gross from 5.5 years to 9.5 years and then £80,000 pa gross.*" In

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[9] See paragraph 139 above.

[10] Vanessa Smart is the Respondent's actuarial / accountancy expert.

paragraph 4.5 of her report, she states that she was instructed to use that scenario. We do not know what her instructions were based on other than (presumably) the Respondent's legal team's view that it is an appropriate one; nor why that view was (again presumably) taken.

148. We think the approach advocated for in Claimant's counsel's written submissions is balanced and reasonable. He urges us to base our decision on the figures in Mr Perlin's – the Respondent's employment expert's – table at paragraph 11.4 of his report. We repeat that the Claimant will not be doing police-adjacent jobs and will therefore be embarking on a new career in which she will, to an extent, have to work her way up from the bottom. There are no doubt many non-police-adjacent jobs she could do and the jobs featured in that table in Mr Perlin's report are no more than examples. The two particular jobs within the table on which counsel's submissions are based are not outliers in terms of earnings. We understand the figures in the table are a little out of date, which given wage inflation in the private sector is potentially significant; however they also include London salaries, which are usually significantly higher, and the Claimant is unlikely ever to be doing a job based in London, so it is reasonable to use those figures without an increase. We also agree it is reasonable to assume that it will take a year or so for the Claimant to recover sufficiently to be able actively to seek work and then to find a suitable job.

149. Claimant's counsel's figures for projected annual earnings (paragraph 94 of his written submissions) are: year 1 - no income; years 2 to 6 - £35,000 gross; years 6 to 10 - £45,000 gross; years 11 to 16 - £60,000 gross; years 17 to 20 - £65,000 gross. We make one slight adjustment to those figures: for year 17 onwards, we think a figure of £70,000 gross per annum is more appropriate. The existing figures entail only a very small increase in earnings from year 11 onwards and we doubt that would satisfy the Claimant's ambitions. We bear in mind that what we are deciding is not precisely what job the Claimant will be doing and precisely what she will be earning and when, but broadly what kind of job and earnings she might get.

150. Comparing this 'actual' scenario with the 'but for' scenario, there is an increased chance of the Claimant being in paid work past the age of 60. This is principally because: she will be in the private sector, where most people work to pension age; based on the career path we have projected for her, she will reach her earnings peak only shortly before she turns 60. However, we accept it is by no means certain she will work past 60, nor that, if she does, it will be to age 67.

151. Making the same kind of impressionistic assessment that (paragraph 141 above) we made in relation to the 'but for' situation and taking similar considerations into account, the Claimant's losses should be assessed as if: there is a 50 percent chance of her working to the age of 67, earning £70,000 gross per annum.

The injury on duty award / injury pension

152. See paragraph 21.6 above.

Discount rate

153. We can deal with this shortly:

 153.1 section A1(1) of the Damages Act 1996 applies, because what we are doing is "*determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury*";

 153.2 for us to apply a different rate from that "*prescribed by an order made by the Lord Chancellor*" in accordance with section A1(2) of the Damages Act 1996, there would in practice have to be something exceptional about this particular case that justified such a departure. In relation to this, we refer to and adopt paragraphs 109 to 112 of Claimant's counsel's written submissions;

 153.3 there is nothing materially exceptional about this case. It <u>is</u> exceptional as an Employment Tribunal case in terms of its potential 7-figure value and highly unusual in that an Employment Tribunal is being tasked with "*determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury*" at all. As "*an action for personal injury*", though, it is neither exceptional nor unusual in either respect, nor in any other respect.

Aggravated damages

154. Everyone agrees that the applicable law in relation to aggravated damages is set out in paragraphs 19 to 24 of **Commissioner of Police of the Metropolis v Shaw** [2012] ICR 464. In recent years, we have noticed a regrettable tendency for a claim for aggravated damages to be made in virtually every whistleblowing claim or claim under the Equality Act 2010. In some sense, by definition, every instance of discriminatory harassment will involve some kind of "*high-handed, malicious, insulting or oppressive*" behaviour, in that harassment involves conduct with the "*purpose or effect of violating … dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment*". All unlawful discrimination, harassment, victimisation and whistleblowing detriment is a profound wrong that causes damage, often (as in the present case) substantial damage. For the Claimant to be entitled to aggravated damages, there must be significantly more; something that is not part of the wrong and the damage inherent to these types of claim.

155. The Claimant relies on an analogy between her case and **British Telecommunications v Reid** [2004] IRLR 327, which her counsel submits are on all fours with each other. We disagree that there is any relevant striking similarity between the two cases. **Reid** was particular to its facts, and its facts are in any event not comparable. The particular aggravating feature in **Reid** that justified an award of aggravated damages was that the discriminator was promoted whilst under investigation for race discrimination. Nothing like that happened in the present case.

156. We shall now go through the features of the Claimant's claim that are said to support awarding aggravated damages.

157. Unreasonable delay in the grievance process: we accept that the grievance process was unnecessarily prolonged and that this added to the Claimant's distress, something which will be taken into account when we assess damages for injury to feelings. It could constitute "*high-handed behaviour*" if it meant that the Respondent was not taking the grievance seriously and/or was suppressing it, but there was no evidence of either of those things.

158. Incompetence in the grievance investigation: the Claimant alleges that after her grievance had been 'triaged' by a Dignity at Work Triage Panel and deemed suitable for PSD in late April 2021, PSD should not subsequently have made their own assessment of it and then sent it from PSD to human resources for them to go through a standard grievance process (see paragraph 29 above). That allegation is based on a misunderstanding of PSD duties and processes. As Mr Longdon explained in his oral evidence, PSD has to conduct its own formal assessment of whether or not a grievance belongs in PSD. The fact that the Claimant disagrees with the assessment PSD made in May 2021 does not make it wrong, let alone incompetent or "*high-handed, malicious, insulting or oppressive*". The other part of this incompetence allegation boils down to a complaint that the standard of HR's investigation of her grievance was significantly lower than that of a CID officer's investigation into a crime. Again, that does not mean there was incompetence (and we are not satisfied there was) and even if there was, incompetence is not the same as high-handedness, malice, insult or oppression.

159. (From counsel's skeleton argument) "*The failure to take seriously the disciplinary issues that arose from the grievance, in particular in relation to CI Nunn*". To level this charge against the Respondent is not objectively justified. The Respondent did take potential disciplinary issues seriously, as is evident from (amongst other places) the evidence set out in paragraph 19 of Wendy Bailey's statement. It is just that its judgment as to the degree of seriousness of those issues was different from the Claimant's. We are in no position to second guess the judgment calls made by the Respondent in relation to this and related matters and there is no evidence that they were made in bad faith.

160. We also note the differences between what CS Madill was doing when adjudicating on the allegations made in the Claimant's grievance and what PSD were doing when looking at the same allegations as potential disciplinary issues against particular police officers. The Claimant seems to be arguing that because one part of the Respondent, by dint of CS Madill's grievance decision, had upheld her allegations and her grievance and admitted liability for a claim that includes complaints of discriminatory harassment, victimisation and so on, the part of the Respondent that is responsible for discipline also had to decide that the allegations were well founded and therefore that CI Nunn was guilty of gross misconduct. If the Respondent had acted as, and made the decisions that, the Claimant is alleging it should have done, it would in all probability have been acting unlawfully so far as concerns any disciplinary action against CI Nunn and others. A grievance brought by one person and a disciplinary process against another are separate and distinct and are to be dealt with separately and distinctly, even where they

concern the same allegations. This is particularly so in the police where officer discipline is so heavily regulated.

161. The issue connected with potential disciplinary action against officers that seems most to exercise the Claimant now is how her allegations around misuse of social media were handled. The allegation (paragraph 37 of counsel's written submissions) is that: "the *inordinate period of delay had a material negative impact on the PSD investigation: relevant officers retired in the meantime (so could not face action) and limitation under the Communications Act 2003 is 3 years, used as justification by DI Longden to close down the criminal aspect of his investigation.*" In fact, the allegations about misuse of social media – certainly the evidence to support them – was not provided by the Claimant until around July 2022, over a year after she raised her grievance, with a further tranche of evidence in late October 2022. More significantly in relation to the aggravated damages claim, these social media allegations are not part of the claim that is before this Tribunal.

162. For these reasons, the Claimant is not entitled to aggravated damages.

Injury to feelings & psychiatric injury

163. By the conclusion of submissions, both sides agreed that there should be a composite award of damages covering both injury to feelings and pain, suffering and loss of amenity from psychiatric injury rather than two separate awards. We concur, as in this case there is almost complete overlap between psychiatric injury and injury to feelings.

164. We note the Presidential Guidance and the relevant update (the Fourth Addendum) to it, which are at:
https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-5-September-2017.pdf &
https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-April-2021-addendum-1.pdf

165. The applicable figures are: "*In respect of claims presented on or after 6 April 2021, the Vento bands shall be as follows: a lower band of £900 to £9,100 (less serious cases); a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.*"

166. The **Vento** case itself (**Vento v Chief Constable of West Yorkshire Police (No. 2)** [2002] EWCA Civ 1871) says this about the upper band: "*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.*" That statement in **Vento**, and statements in other cases that are binding on us, can be read as suggesting that the most important thing in assessing damages for injury to feelings is how serious the discriminatory acts were, rather than how badly injured the claimant's feelings were. That is not so. Although the nature and duration of the discriminatory acts are relevant – presumably because there tends to be a correlation

between the severity of the discrimination and severity of the injury to feelings – damages for injury to feelings are, just like general damages for pain, suffering and loss of amenity in a personal injury case, compensatory. Our focus must therefore be on the extent of the Claimant's injured feelings and, because we are making a composite award, of her psychiatric injury.

167. The present case involves acts of harassment taking place over nearly 9 years or so, a "*lengthy*" period of time. We would probably not use the word "*campaign*" to describe what occurred from 2012 onwards, but in any event it is not the length of time over which the Respondent has mistreated the Claimant, or the number of instances of harassment, that makes this matter particularly serious. As we have already explained (see paragraph 78 above) the fact that the harassment goes back to 2012 is a less important feature here than it might be in another case. This is because, on the evidence, the harassment and detriments that by a considerable margin caused the most injured feelings and led to the Claimant sustaining psychiatric injury were those that occurred from December 2020 onwards. Further, the Claimant remains substantially injured to this day, and the period from December 2020 to the present is relatively lengthy.

168. In terms of injury to feelings, the severity of this case comes mainly from the fact that the admitted wrongs inflicted on the Claimant by the Respondent have resulted in a relatively young woman, ambitious in her career generally and specifically ambitious in her career in the police, being made so unwell that she has been medically retired and has been rendered unable to work for the police again for the foreseeable future. Mr Kalam's evidence in his witness statement about the enormous effects the discrimination, harassment and detriments generally, and losing her chosen career specifically, have had on the Claimant and on their family life, and the Claimant's feelings of guilt around that, was not challenged.

169. The Claimant has also suffered significant psychiatric injury. This developed in February 2021. As things stand – around 2 ½ years later – it is a relatively severe psychiatric disorder. She has been too unwell to work since April 2022 and will not be well enough even to work in a field outside policing for a further year, albeit the medium- to long-term prognosis is good.

170. If we were assessing just damages for pain, suffering and loss of amenity for psychiatric injury, we agree with Claimant's counsel that the award would be in bracket 4(A)(c) (moderate "*Psychiatric Damage Generally*") in the Judicial College Guidelines, set out in paragraph 62 of his written submissions. That bracket is £5,860 to £19,070. We accept the award could conceivably be as much as £15,000; although we think it would probably be a little less than that.

171. Taking everything into account, we think this case is sufficiently serious to come into the upper **Vento** band. We do, though, disagree with the Claimant that it comes into the middle of that band. Even if it did, that would not make the appropriate award the £45,600 the Claimant is asking for. Bearing in mind, in particular, the severity of injury and loss of career, but also the favourable prognosis, we think we should make an award that is near, but not quite right at, the bottom of the upper band. We assess damages for injury to feelings (incorporating pain suffering and loss of amenity for psychiatric injury) at: £30,000.

Interest

172. We agree entirely with what is set out in paragraph 64 of Claimant's counsel's written submissions about interest. We note that his proposal – interest from 16 February 2021 – is less generous to the Claimant than what was proposed in paragraph 107 of Respondent's counsel's written submissions.

Deduction of income tax

173. Paragraph 96 of Claimant's counsel's written submissions is: "*it may assist the pension experts if, in giving its main judgment, the Tribunal indicates whether it considers it appropriate to deduct income tax from the ill health pension before or after calculating the tax due on the civilian income – see joint statement box C [4520].*"

174. There were no oral submissions on this whatsoever and no written submissions on it from the Respondent's side, so it would not be appropriate for us to express a decided view on it.

175. Our provisional view is:

175.1 we are being asked to answer a question of tax law and/or practice, in which we have no expertise, rather than employment law and/or practice;

175.2 the question as we understand it is as to how HMRC should, or will in practice, tax parts of an award of damages and in particular whether (to quote from the accountancy / actuarial experts' joint statement) "*the personal allowance and lower tax bands* [should] *be applied to the earnings* [first]*, and then the marginal tax rate .. applied to the ill health pension*" or whether tax should be applied to "*the ill-health pension*" first, meaning "*the ill-health pension uses up most of the personal allowance*";

175.3 we cannot answer that question on the basis of the information we have. The correct person to answer that question would probably be an accountant or a tax lawyer rather than an actuary or employment lawyer.

Employment Judge Camp 15 October 2023

ANNEX A

Judgment by Consent, sent to the parties on 15 September 2023

1. The Respondent is liable to the Claimant for the following direct and indirect sex discrimination:

    1.1 the failure to provide to her suitable Personal Protective Equipment (“PPE”) including trousers, tops, Crye two-piece, folding handcuffs and ballistic body armour;

    1.2 the failure to order ballistic body armour suited to her irrespective of when male body armour would be ordered.

2. The Respondent is liable to the Claimant for the following harassment related to sex:

    2.1 in 2012 the Claimant was made the ‘poster girl’ for the FOU [Firearms Operations Unit] department and was told she could not pass the training course if she did not agree;

    2.2 in March 2012 the Claimant was required to act as a ‘stooge’ in a mock training exercise by having her clothes cut off and stripped down to her underwear so that first aid could be given. The scenario was based on a bullet hole on the top of the left breast, which officers would then have to treat in the training session. She felt extremely uncomfortable;

    2.3 during a training exercise in March 2012 the Claimant was doing press ups, and a male trainer pushed her down with his foot on the back of her neck and said ‘just because you have tits does not mean you cannot do a press up’;

    2.4 the Claimant was not given a handgun with an easier trigger pull like other male officers were;

    2.5 the Claimant was required to pose for a photo shoot when 5 months pregnant in April 2016;

    2.6 male officers have drawn male genitalia images on notice boards around the station;

    2.7 male officers have often used the word ‘cunt’ whilst in the station;

    2.8 failing to provide suitable PPE;

    2.9 refusing the Claimant from attending the assessment days for aspiring firearms officers in December 2020;

    2.10 delaying transferring the Claimant out of the FOU to her new role in Force CID in January 2021;

    2.11 at a meeting on 14 December 2020 with CI Nunn and Insp Vale whereby CI Nunn became angry, stood up to the Claimant, shouted, and the door was slammed behind the Claimant.

3. The Respondent is liable to the Claimant for the following victimisation:

   3.1 the Claimant could not attend the assessment days which were arranged on 5, 6, 12 and 13 December 2020;

   3.2 delaying the Claimant's transfer out of FOU, which she requested on 4 January 2021.

4. The Respondent is liable to the Claimant for the Claimant being subjected to the following detriments because she made a protected disclosure:

   4.1 the Claimant could not attend the assessment days which were arranged on 5, 6, 12 and 13 December 2020;

   4.2 delaying the Claimant's transfer out of FOU, which she requested on 4 January 2021;

   4.3 at a meeting on 14 December 2020 with CI Nunn and Insp Vale whereby CI Nunn became angry, stood up to the Claimant, shouted, and the door was slammed behind the Claimant.

5. The Respondent shall pay the Claimant the sum of £3,000 in respect of pain, suffering and loss of amenity for her claim for physical injury (scarring).

ANNEX B

IN THE MIDLANDS WEST EMPLOYMENT TRIBUNAL **Claim No. 1301519/2021**

B E T W E E N :-

REBECCA KALAM **Claimant**

-and-

THE CHIEF CONSTABLE OF WEST MIDLANDS POLICE

Respondent

AGREED LIST OF ISSUES – 10 July 2023

The claims

1. Detective Inspector Kalam's claims are as follows:

   a. Direct sex discrimination contrary to section 13 of the Equality Act 2010 ("EA 2010").

   b. Indirect sex discrimination contrary to section 19 of the EA 2010.

   c. Harassment contrary to section 26 of the EA 2010.

   d. Victimisation contrary to section 27 of the EA 2010.

   e. Protected disclosure detriment contrary to section 47B of the Employment Rights Act 1996 ("ERA 1996").

2. Claims pleaded by Detective Inspector Kalam are admitted by the Respondent to the extent set out in the Replacement Grounds of Response, dated 2nd December 2022, [**79**].

3. In particular, the Respondent admits:-

Direct sex discrimination

   a. The failure to provide suitable Personal Protective Equipment including trousers, tops, crye two piece, folding handcuffs and ballistic body armour, to the Detective Inspector Kalam.

b. The failure to order ballistic body armour suited to Detective Inspector Kalam irrespective of when male body armour would be ordered.

(Collectively, "***PPE***")

Indirect sex discrimination

c. As above in respect of the particulars of direct sex discrimination.

Harassment related to sex

d. In 2012 Detective Inspector Kalam was made the 'poster girl' for the FOU department and was told she could not pass the training course if she did not agree. ("***poster***")

e. In March 2012 Detective Inspector Kalam was required to act as a 'stooge' in a mock training exercise by having her clothes cut off and stripped down to her underwear so that first aid could be given. The scenario was based on a bullet hole on the top of the left breast, which officers would then have to treat in the training session. Detective Inspector Kalam felt extremely uncomfortable. ("***stooge***")

(*The Respondent does not however admit the versions of this allegation which have since evolved to be, in substance, allegations of sexual assault, whether or not that label has been disavowed, and the parties agree that her compensation is to be assessed leaving such allegations out of account.)*

f. During a training exercise in March 2012 Detective Inspector Kalam was doing press ups, and a male trainer pushed her down with his foot on the back of her neck and said 'just because you have tits does not mean you cannot do a press up'. ("***press up harassment***")

g. Detective Inspector Kalam was not given a handgun with an easier trigger pull like other male officers were. ("***easier trigger gun***")

h. Detective Inspector Kalam was required to pose for a photo shoot when 5 months pregnant in April 2016. ("***photoshoot while pregnant***")

i. That male officers have drawn male genitalia images on notice boards around the station. ("***male genitalia images***")

j. The male officers have often used the word 'cunt' whilst in the station. ("***use of c- word***")

(*The Respondent does not however admit the versions of this allegation which have since evolved to include that she was herself called a 'cunt' and the parties agree that her compensation is to be assessed leaving this allegation out of account.)*

k. The Respondent failed to provide suitable PPE. (“***PPE***”)

l. Respondent refused Detective Inspector Kalam from attending the assessment days for aspiring firearms officers in December 2020. (“***refused assessment days***”)

m. The Respondent delayed transferring Detective Inspector Kalam out of FOU to her new role in Force CID in January 2021. (“***delayed transfer to CID***”)

n. The meeting on 14 December 2020, with CI Nunn and Insp Vale whereby CI Nunn became angry, stood up to Detective Inspector Kalam, shouted and the door was slammed behind Detective Inspector Kalam. (“***door slam meeting***”)

Victimisation

o. Detective Inspector Kalam could not attend the assessment days which were arranged on 5, 6, 12 and 13 December 2020. (“***refused assessment days***”)

p. Delay in Detective Inspector Kalam’s transfer out of FOU which she requested on 4 January 2021. (“***delayed transfer to CID***”)

Protected disclosure detriment

q. Detective Inspector Kalam could not attend the assessment days which were arranged on 5, 6, 12 and 13 December 2020. (“***refused assessment days***”)

r. Delay in Detective Inspector Kalam’s transfer out of FOU which she requested on 4 January 2021. (“***delayed transfer to CID***”)

s. The meeting on 14 December 2020, with CI Nunn and Insp Vale whereby CI Nunn became angry, stood up to Detective Inspector Kalam, shouted and the door was slammed behind Detective Inspector Kalam. (“***door slam meeting***”)

4. The Respondent’s admissions do **not** include the following allegations by Detective Inspector Kalam made to clinicians and/or in her witness statement, which were not pleaded or included in her detailed list of issues:

   a. Being called a ‘cunt’, ‘snitch’ or ‘traitor’ and being the subject of threats of retribution (e.g. Detective Inspector Kalam’s witness statement at paragraphs 53, 57).

   b. Sexual touching as part of the March 2012 ‘stooge’ training incident referred to in para. 3(d) above

(e.g. Detective Inspector Kalam's witness statement at paragraphs 20, 75, 80 – and see §7.12 of Prof Burns' report ("*The result is she was stripped to her pants and bra in an exercise of 40 men who were then required to "examine" her breast*") [**4284**]).

c. Being put in a headlock by former PC Harris and having a gun pointed at her in early 2012 (e.g. Detective Inspector Kalam's witness statement at paragraphs 20).

d. A trainer attempting to grab her crotch (e.g. Detective Inspector Kalam's witness statement at paragraphs 29).

e. A male officer exposing his penis and scrotum to her at work in early 2012 (e.g. Detective Inspector Kalam's witness statement at paragraphs 57).

f. An 'initiation' rite in early 2012 (e.g. Detective Inspector Kalam's witness statement at paragraphs 24).

g. Not being allowed to use the toilet facilities when menstruating (e.g. Detective Inspector Kalam's witness statement at paragraphs 19).

h. "*I have subsequently received further victimisation from the Respondent since submitting the Tribunal Claim, including how I was treated after raising an internal grievance dated 31 March 2021*" (e.g. Detective Inspector Kalam's witness statement at paragraphs 11).

5. The Claimant does not intend to apply to amend her claim, she will say that she had included those matters in her statement to address the "just and equitable" test. The parties agree that her compensation is to be assessed leaving allegations 4(a) – (h) out of account .

Time limits/jurisdiction

6. Given the date the claim form was presented and the dates of early conciliation, any complaint about an act (or deliberate omission) which occurred before 3 December 2020 is *prima facie* out of time. The parties agree that the pleaded and admitted matters amount to an act extending over a period for the purposes of s.123(3)(a) EA and that, in any event, it is just and equitable for the Tribunal to hear and determine the pleaded and admitted matters, given the Respondent's admissions.

7. The Respondent will, however, contend that the materially more serious and new allegations referred to in paragraph 4(a) – (g) above **are** out of time (note that paragraph 4(h) is unparticularised and is not the subject of any amendment application by Detective Inspector Kalam).

Remedy

8. Declaration: should the Tribunal make a declaration that Detective Inspector Kalam has been unlawfully treated and subjected to discrimination, harassment, victimisation and protected disclosure detriment?

9. Injury to feelings: what, if any, award is Detective Inspector Kalam entitled to recover for injury to feelings in respect of the admitted prohibited conduct?

10. Aggravated damages: should such an award be made in respect of the admitted prohibited conduct? If so, in what amount?

11. Personal injury: what, if any, award should be made in respect of any injury to health in respect of the admitted prohibited conduct? (Detective Inspector Kalam claims compensation in respect of psychiatric and physical injuries).

12. What pecuniary loss has been caused to Detective Inspector Kalam by the admitted prohibited conduct? This issue will include consideration of:-

    a. salary and pension but for the admitted prohibited conduct;

    b. actual future salary and pension;

    c. whether Detective Inspector Kalam's statutory injury pension and gratuity should be set off against her future loss of earnings and pension, or (as the Claimant contends) may only the annual injury pension post her 'but for' retirement date be set off against pension loss;

    d. should the Tribunal apply a different discount rate to that set by the Lord Chancellor (- 0.25%)? The Respondent contends for +2.0%.

13. What, if any, award of interest is Detective Inspector Kalam entitled to?