



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Karim

v

Commissioner of Police
of the Metropolis

Heard at: London Central Employment Tribunal

On: 10 - 11 October 2023, 12 & 13 October 2023 (In Chambers)

Before: Employment Judge Brown
Member: Mr D Shaw

Appearances

For the Claimant: Mr J Crammond, Counsel
For the Respondent: Mr G Powell, Counsel

STAGE 1 REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The appropriate award for injury to feelings is £22,000;
2. The 40% Polkey deduction should be applied to economic loss arising 5 months after the Claimant's dismissal;
3. The Claimant's net past economic loss, excluding pension, is £26,658.43, having applied a 40% deduction where appropriate;
4. The substantial, complex loss method, as adopted by the expert, rather than the simple contributions method, is appropriate for calculating pension loss;
5. The appropriate discount rate is -0.25%, as set out in the Principles;
6. The pension expert has not overcompensated the Claimant in regard to life expectancy;
7. A withdrawal factor of 15% is appropriate, in respect of the pension alone. There should be no discount applied to future economic loss, excluding pension.
8. The Tribunal has given 2 different scenarios for calculating future loss: the first is that the Claimant is appointed to a substantive Grade E CONNECT post from 14 April

2024; the second is that he is appointed to a substantive Grade E post from 14 October 2024, but without the shift allowance and non-pensionable allowance applicable to the CONNECT post;

9. On both bases, the Claimant will be promoted to Band D and then Band C after 5 and 10 years from his first appointment date, respectively;
10. The Claimant's future economic loss, excluding pension, on the first basis is £37,497 (having applied the Polkey deduction);
11. The Claimant's future economic loss, excluding pension, on the second basis is £78,600 (having applied the Polkey deduction).

REASONS

1. By a Judgment sent to the parties on 15 December 2022 the Tribunal decided that
 - 1.1. The Respondent subjected the Claimant to discrimination arising from disability by dismissing him.
 - 1.2. The Respondent failed to make reasonable adjustments on account of the Claimant's disability by failing to:
 - 1.2.1. Pay the full cost of enhanced in-ear hearing aids, at any time before the Claimant was dismissed;
 - 1.2.2. Pay for the insurance of those enhanced in-ear hearing aids;
 - 1.2.3. Allow the Claimant to continue in his role, once the enhanced hearing aids had been provided, rather than putting him in non-operational roles;
 - 1.2.4. Provide the Claimant with refresher operational training and failing to allow him to practise operational duties with his enhanced hearing aids and make any necessary adjustments to his hearing aids, before he undertook the "at works test";
 - 1.2.5. Allow the Claimant more than one opportunity to undertake the "at works test" before making a decision to dismiss him.
 - 1.3. The Respondent subjected the Claimant to indirect disability discrimination.
 - 1.4. If the Respondent had acted lawfully, it was 40 % likely that the Claimant would have failed his probation and have been dismissed in any event.
 - 1.5. The Respondent did not directly discriminate against the Claimant because of disability.
2. The Claimant claims very substantial pension loss. A joint expert, Mr T Sture, had been instructed to report. Additional questions were put to the expert and he had produced answers and a further report.
3. Due to the complexity of the pension issue, the parties had agreed that the remedy hearing should be separated into 2 stages.

4. This hearing was listed as the first stage. The parties agreed that the Tribunal should make findings of fact which would be used to guide any final expert's calculations of the pension loss. The second stage would then make a final decision on pension loss.
5. In the event, however, the Respondent contended that the Tribunal should decide, having made its findings of fact, that any pension loss should be calculated on a "contributions" basis and not on a complex pension loss basis.
6. One of the members of the liability Tribunal panel was no longer available to sit. The parties agreed to proceed with a panel comprising the judge and a single Non Legal Member.
7. At the hearing, the Claimant told the Tribunal that he has now applied for a substantive CONNECT User Support Specialist post, employed directly by the MPS. That application is likely to be determined shortly. Given that the success or otherwise of his application for appointment to that post is likely to have a very substantial effect on the compensation, the Tribunal suggested to the parties that it should give its remedy judgment on 2 different bases: the first, on the basis that the Claimant is appointed to the substantive CONNECT User Support Specialist role and the second, on the basis that he is not.
8. The parties agreed that such an approach was open to the Tribunal. The Tribunal decided to give its judgment on these 2 separate bases. It could lead to an incongruous outcome if the Tribunal were to make a decision that the Claimant would, or would not, be appointed to the CONNECT role, only for the opposite fact to have happened, by the time of its final remedy judgment, or very shortly thereafter.

List of Issues

9. The List of Issues for the first stage remedy hearing, had been mostly agreed – but there was a disagreement about whether the Tribunal should apply a "loss of a chance approach" to losses. The parties' respective formulations of this issue are at paragraphs 18 and 19 of the List of Issues below, in italics:
 1. What are the correct gross and net figures to be used for the purposes of loss calculations?
 2. Will the Claimant be unemployed from March 2024 with no prospect of employment to retirement age?
 3. Will the Claimant remain in his current employment with Reed after March 2024?
 - i. If so:-
 - a) until what date is it likely he will be so employed?
 - b) in what role is it likely the Claimant will be working?
 - c) What salary / income will he be earning?
 - d) From when and until when will he be so employed?
 - e) What pension scheme will he be in?
 - ii. If not,

- a) for how long will the Claimant be unemployed, if at all and / or
 - b) into which role is the Claimant likely to then be placed / employed; and
 - c) when, at what salary / income and in which pension scheme?
4. Alternatively, or in addition, will the Claimant obtain a public sector role in the future and have the benefit of the Local Government Pension Scheme, or CSPS Alpha Pension Scheme, or other public sector scheme? If so:-
- i. from what date and for how long is it likely he will be so employed?
 - ii. at what salary / income is the Claimant likely to be so employed?
 - iii. what pension will the Claimant have the benefit of?
5. Alternatively, will the Claimant obtain employment in the private sector in the future? If so:-
- i. will that be employment with a Nest or with a more generous private sector pension scheme and, if so, which pension scheme?
 - ii. from what date and for how long is it likely he will be so employed?
 - iii. at what salary / income is he likely to be so employed?
6. Will the claimant have any periods of unemployment? If so, when and what length are those periods of unemployment likely to be?
7. Would the Claimant have been promoted to the rank of Sergeant and, if so,
- i. when would he have been promoted?
 - ii. what salary would the Claimant be earning in any such role as Sergeant?
8. Would the Claimant have remained serving in the Respondent's Police Force (or another Force) for the whole of his working life (had he completed his probation)? If not, when is it likely he would have left?
9. When will the Claimant retire – at age 55 or 60, or later?
10. What will the Claimant's loss of future income / earnings (other than pension) be on the basis of the above?
11. Is the appropriate discount to be applied in the pension calculation -0.25? If not, what is the appropriate discount to be applied?
12. Does the pension calculation over-compensate the Claimant (for about 2 years) based on the appropriate life expectancy for the Claimant?
13. What is / will be the Claimant's loss of pension (past and/or future) and what is the value / amount of that pension loss? [This is a matter for the single joint expert to consider after the First Stage remedy hearing and considering the findings made by the ET]

14. What is the appropriate award for injury to feelings?

15. What is the appropriate award for past loss of income?

i. Should this figure be reduced by £1,226.92 and that sum offset against the loss because the Respondent made an overpayment in this amount, having paid the Claimant for 24.5 days of annual leave instead of the 12.5 days he was owed, in July 2021?

16. Is the Claimant owed payment in lieu of 21 re-rostered rest days which he had outstanding on his termination and was not compensated for?

- i. Is this a claim advanced in the Claimant's claim?
- ii. Is any such claim in time?

17. Is the Claimant owed monies for the cost of insurance for hearing equipment [R agrees this head of loss in principle]?

18. *In relation to any heads of loss and/or findings required to be made, should the ET apply a prospects / chance approach to any such matters? If so, what should any such prospects / chance be assessed at in relation to any such matters? [This is the Claimant's suggested issue in respect of this issue of loss]*

19. *In relation to any heads of loss and/or findings required to be made, should the ET apply a prospects (balance of probability) or a loss of chance / opportunity approach to any such matters?*

If so,

i. To which heads of loss, if any, should the Tribunal apply a prospects (balance of probability) approach and to which heads of loss, if any, should the Tribunal apply a loss of chance / opportunity approach?

ii. In respect of the heads of loss, if any, to which the Tribunal applies:-

a) a prospects (balance of probability) approach, is it more likely than not that the Claimant has established he suffered that head of loss?

b) a loss of chance / opportunity approach:-

1. Is the loss of a chance recognised as a head of damage or loss in itself?

2. Has the Claimant shown that on the balance of probabilities he has lost the particular chance?

3. What is the value of that chance in percentages or proportions?

[This is the Respondent's proposed issue in respect of this issue of loss, rather than the issue as drafted at paragraph 18]

20. From what point, if at all, should the ET apply the reduction of 40% to any of the Claimant's losses as a result of the ET's finding in the judgment, that if the Respondent had

acted lawfully, the Claimant was only 40% likely to fail his probation and be dismissed in any event?

- i. On which heads of loss, if any, ought any such reduction be applied?
- ii. Should it be applied to the Claimant's losses after 11 October 2021, 3 months after termination of the Claimant's probation, allowing time for the Claimant to further undertake the At Work Test;
- iii. Should it be applied to the Claimant's losses from some other point in time? If so from when should it be applied?

Commented by R: It is the Respondent's position that since the finding (judgment para 289) has not been appealed by the Claimant and any appeal is now out of time, there is no basis for not applying the reduction to all of the losses save for the loss in the period to potential completion of the probation. Loss in the period to complete the probation should be awarded in full. Loss from completion of probation and potential lawful termination must all be reduced by 40% for the contingency found by the Tribunal, which has not been appealed.

21. What is the appropriate interest rate on the awards (i.e. future loss, past loss and injury to feelings) and for what period?

22. [What award / amount of interest is the Claimant entitled to receive?]

23. [What is the appropriate amount / award to make to the Claimant after a grossing up exercise is undertaken on any such sums as are found to be due and owing to the Claimant?]

10. The following matters were not in dispute:

11. The Respondent conceded at the 40% Polkey deduction should not be applied to an initial period after dismissal during which, had the Respondent not acted in a discriminatory manner, the Claimant would have been provided with in-ear hearing aids, would have had the opportunity to be retrained and would then have carried out an "at works" test to establish that he could operate as a police officer in confrontational situations with his in-ear hearing aids. The Respondent contended that that period should be 3 months. The Claimant suggested longer.
12. The Claimant's net weekly loss of earnings on dismissal was not in dispute at £551.84.
13. The parties were broadly in agreement that the injury to feelings award should be in the middle band of *Vento* – the Respondent proposed an injury to feelings award of £17,500 (the middle, middle band); the Claimant, an injury to feelings award of £27,500 (the top of that band).
14. The Respondent agreed that the Claimant was entitled to be compensated for the cost of insurance for his hearing equipment in the sum of £167.44.

Findings of Fact

15. The Claimant was born on 26 November 1991. He was aged 29 when he was dismissed on 12 July 2021.

16. Claimant gained a first class degree in Accounting and Finance from the University of East London in 2014. He had also undertaken a foundation degree in FdEng Engineering in 2011 at Birmingham University, which he passed.
17. He joined the MPS in 2105 and commenced in his probationary constable role on 30 November 2015.
18. The Tribunal accepted the Claimant's evidence that he considered policing to be his lifelong career. It noted that, despite his accounting and engineering qualifications, the Claimant had entered the police force and had persevered in his probationer constable role, despite difficulties obtaining adjustments for his disability, until the Respondent dismissed him. The Claimant's perseverance showed commitment to policing as a career.

What Would have Happened if the Claimant had not been Dismissed Sergeant / Inspector Promotion

19. The Claimant told the Tribunal that he would have applied to become a Sergeant and anticipated that he would have passed his exams and interview for this within 7 years of passing his probation. He gave evidence that he would also have applied to become an Inspector and anticipated that he would have achieved this 15-20 years after passing probation.
20. The Respondent produced a table, p2020, showing that, of the 2247 people who joined the MPS between 1 May 2003 and 1 December 2003, 20 years ago, 471 have achieved promotion to Sergeant or a higher rank. That equated to just under 21%.
21. The Tribunal considered that the statistics, in this regard, were a reliable guide to promotion prospects. They included all Constables who had joined in that period – and showed the current rank, or rank achieved before leaving. The Claimant did not contend that that period in 2003 had an atypical cohort of recruits. The Tribunal therefore accepted that about a fifth of constables achieve the rank of Sergeant. The corollary is that almost four fifths do not. In other words, the vast majority of constables do not achieve promotion to Sergeant.
22. The Tribunal did not have evidence that the Claimant was seen as a high performing constable who was likely to achieve the rank of Sergeant. There was no evidence that his educational background was unusually distinguished for entrants to the police force. In any event, there was no evidence that having a University Degree was a predictor of promotion prospects in the MPS.
23. On the evidence, the Tribunal concluded that the Claimant was no more likely than any other Constable to achieve promotion to Sergeant. It concluded, therefore, that it was very unlikely that he would do so. The Tribunal concluded that promotion to Sergeant should not be considered as part of the Claimant's future losses. For the same reasons, the likelihood of promotion to Inspector (only 119 entrants out of 2247 achieved the rank of Inspector or higher) should be discounted.

Chance of Leaving Police Force Before Retirement

24. The Respondent contended that there was a good chance that the Claimant would not have stayed in the MPS until retirement. The Respondent contended that it was speculative that the Claimant would have remained in the Police Force.
25. It produced a witness statement from Stephen Gull, workforce planning analyst, who told the Tribunal that, from statistics, p859, the average length of service of officers who have left the

MPS over the last 10 years is 18.28 years. He did not provide any other analysis of the figures he relied on. For example, he did not tell the Tribunal what percentage of leavers left at ordinary retirement age, or left to join another police force, or were medically retired, or died in service – all of whom were included in the figures. The Tribunal considered that all those officers appeared to have been committed to career-long service in a police force.

26. Most importantly, without knowing at what age officers joined the MPS, it was not possible for the Tribunal to tell whether leaving after 18.28 years' service represented an officer leaving early, before normal retirement. The 18.28 years length of service figure was the only statistic presented to the Tribunal from 345 pages of data with approximately 59 line entries in each page of data. Given the size of the data presented, the Tribunal was unable to carry out its own statistical analysis. However, as a matter of impression, from the large number of pages where almost all reasons for leaving were "ordinary retirement", it appeared that the most frequent reason for leaving was ordinary retirement, but that resignation was also a significant reason, followed by joining another police .
27. The Tribunal agreed with the Claimant's criticisms of the Respondent's analysis of the figures.
28. The Tribunal concluded that 18.28 length of service figure was practically useless as a statistic for indicating the likely length of the Claimant's service in the MPS. The Tribunal accepted that the Claimant's intention was to have a career in the MPS.
29. Nevertheless, it would not be appropriate for the Tribunal to ignore the fact that a significant number of MPS police officers do leave the force, primarily through resignation, before their ordinary retirement age. The Tribunal will return to this in its decision on compensation, below.

Time which would have been Taken to Conduct Non-Discriminatory At Works Test

30. The parties agreed that the 40% Polkey deduction should not be applied to the time it would have taken for the Claimant to have been provided with in-ear hearing aids, the Claimant to have practised using these, the "at works test" repeated and a decision on his probation to be made.
31. The Tribunal concluded that this whole process would have taken about 5 months - or 22 weeks. The in-ear hearing aids would need to have been provided and adjusted; Cubex could assist with ensuring compatibility of equipment with police systems. This would have been likely to take at least a month. The Claimant would need to have been provided with adequate time to refresh his training, by practising the relevant operational policing tasks. That was likely to have taken at least 6 weeks, given that the Claimant and fellow officers had policing jobs to undertake at the same time. The Respondent would then need to arrange the tests, allocate officers to them, and give the Claimant notice of them. That was likely to have taken another 4 weeks. Thereafter, a decision would have needed to be made on the Claimant's probation, with a meeting arranged. Judging by the length of time it had previously taken for a decision to be made, that was likely to have taken up to 6 weeks. In total, 5 months, or 22 weeks, appeared a reasonable time, taking into account the length of time it had taken for the Respondent to carry out the initial tests and make a decision, but also allowing time for the Claimant to be provided with the equipment he needed and adequately to prepare for the tests.

What Happened when the Claimant was Dismissed

32. The Claimant's total annual gross pay as at the date of termination was £41,856 gross – comprising basic pay of £34,950 plus London Allowances and London Weighting of £6,906, p814 and 841).

33. Had he not been dismissed, he would have received a pay increase on 30 November 2021 to £48,036 and then again, on 1 September 2022, to £50,067 gross per annum, p101.
34. The Claimant also worked overtime. Deducting his annual pension contributions at 13.44% each month, his net weekly pay was £595.34.
35. It was not in dispute that the Respondent made an overpayment of annual leave to the Claimant of £1,226.92.
36. The Claimant applied for Jobseeker's Allowance on 7 October 2021, p527. He received payments of £149.40 every two weeks from October 2021. The payments ceased on 11 April 2022 because he had reached the maximum number of days it was payable in one tax year (182 days), p572. He did not receive any further benefits.
37. The Claimant applied for over 50 vacancies between August 2021 and September 2022, including roles with TfL, Amazon and as a civilian police officer. He sought assistance from private and government-run employment support agencies, p518-524. He attended the Newham Work Jobs Fair in November 2021, p545, and the London Job Show in March 2022, p567.
38. The Claimant applied for a role on the CONNECT Support team with the MPS in or around November 2021. He commenced in that role on 26 September 2022. He did not apply for other roles after that date because he considered that he was unlikely to earn as much as he was earning in his CONNECT role.
39. The Claimant had applied for a Police Lecturer (PEQF) position, p544, in November 2021. However, he received little communication about his application until April 2023, when he had been working in the Police CONNECT role for 7 months.
40. The Respondent did not argue that the Claimant had failed to mitigate by not applying for further roles after he commenced with CONNECT.

Injury to Feelings

41. There were a number of acts of discrimination in this case.
42. Between April 2018 and July 2021, the Respondent failed to make reasonable adjustments on account of the Claimant's disability by failing to: Pay the full cost of enhanced in-ear hearing aids, at any time before the Claimant was dismissed; Pay for the insurance of those enhanced in-ear hearing aids; Allow the Claimant to continue in his role, once the enhanced hearing aids had been provided, rather than putting him in non-operational roles; Provide the Claimant with refresher operational training and to allow him to practise operational duties with his enhanced hearing aids and make any necessary adjustments to his hearing aids, before he undertook the "at works test"; Allow the Claimant more than one opportunity to undertake the "at works test" before making a decision to dismiss him.
43. The Respondent eventually dismissed him, leading to the loss of a career which he had intended would be his throughout his working life.
44. The acts of discrimination took place over a period of 3 years.
45. On his dismissal, the Claimant was unemployed, although he was able to look for work.

46. The Claimant remained unemployed for over a year until September 2022.
47. The Tribunal accepted the Claimant's evidence that he felt hurt and upset by the lack of assistance he had been given by the MPS in relation to his disability and that he felt that the conditions in which he had had to undertake the "at works" test were harsh and unfair.
48. The Tribunal also accepted his evidence that he was devastated by his dismissal and that the loss of his MPS income meant rationing food and eating less healthily while he was unemployed. During that period, he could not afford to buy clothes. He became withdrawn, had difficulty sleeping, he put on weight and he felt stressed and anxious as result of the loss of his job and continuing unemployment. His confidence was affected by multiple rejections when looking for other work. He still does not have a permanent role and feels uncertainty about his future.
49. Since 26 September 2022 the Claimant has been employed through Reed employment agency on a temporary contract to work in the MPS. He presented as a more confident individual at the Remedy hearing.

Re Rostered Days

50. On termination of the Claimant's employment he had accrued 21 re-rostered rest days – that is, time off work in lieu when he had had to work on rest days. He lost the benefit of these when he was dismissed, as he was not able to take them before dismissal took effect. The Respondent accepted that he had suffered a loss consequent on dismissal by not being able to take these days. The Respondent contended, however, that the Tribunal should not compensate the Claimant for all these days because he would not have been able to take all of them before he might have been dismissed in any event. The Tribunal considered appropriate approach was to apply the 40% Polkey deduction to compensation for these days, to account for the chance that he could have been dismissed in any event and still not had the benefit of the re-rostered days.

REED

51. Since 26 September 2022 the Claimant has been employed through REED employment agency on a temporary contract to work in the MPS on their CONNECT Support Team as a User Support Specialist, p849.
52. The pension scheme for this role is the NEST pension, which is a Defined Contribution scheme.
53. CONNECT is the MPS software platform which encompasses Custody, Case and Property functions. The Claimant's role provides IT support in relation to CONNECT to all MPS staff and external stakeholders on a 24/7 basis. This is a Band E role.
54. Chief Inspector Blears, the Claimant's third line manager, has told Anne-Marie Moore, who gave evidence to the Tribunal and was not challenged on this, that the Claimant performs his role to a satisfactory standard and has not received any negative feedback on his performance.
55. There was a dispute between the parties about how much the Claimant will continue to earn in his REED CONNECT role. The salary for his CONNECT agency employment is about £46,000 gross per annum, excluding overtime.

56. However, the Claimant had worked substantial amounts of overtime between March and August 2023.
57. There had then been a dispute in the CONNECT project about overtime payments, which resulted in overtime being temporarily stopped or reduced for everyone working on the project.
58. The Claimant was also married in August 2023 and has himself stopped working overtime, to spend more time with his new wife and in-laws. As a result, his gross weekly pay in September was, on average £788.26, or £589.68 net. He told the Tribunal that he was likely to start working overtime again towards the end of this year.
59. The Respondent had calculated that, between 3 March 2023 and 29 September 2023, the Claimant had been paid £24,056.03 net, or £801.87 net per week. From his payslip for 29 September 2023, he had been paid £32,148.64 gross over the previous 26 weeks, p2105. That equated to gross weekly pay of £1,236.48, or gross annual pay of £64,296.96.
60. However, the Claimant had also had an overpayment of about £3,000, which is now being deducted from his earnings.
61. The CONNECT REED contract is coming to an end on 14 April 2024, p2012.
62. The MPS has advertised for substantive User Support Specialist posts, employed directly by the MPS.
63. It has already advertised Band E posts and will advertise some Band D managerial posts.
64. The “Band E CONNECT Support Team – User Support Specialist” advertisement stated that the salary for the post would be £39,447, comprising a starting base salary of £30,507, 20% shift allowance, a location allowance of £1,841 and a non-pensionable allowance of £1,000, p2075.
65. The Tribunal was told that the MPS Civilian staff salary from 1 November 2022 for a Band E role was £28,511 - £30,504, the Band D salary was £32,194 - £34,452 and Band C salary was £39,469 - £47,089.
66. Police Officers and Civilian Staff were awarded a 7% pay rise by the Government from September 2023.
67. The Band E salary advertised for the CONNECT User Support Specialist base salary of £30,507 therefore reflected a 7% increase on the base salary for a band E role, to the lowest point on an increased salary band of £30,507 - £32,639
68. The Tribunal observed that, when calculating loss in this case, a police constable’s salary would also need to be increased by 7% from September 2023.
69. At the remedy hearing, the Claimant told the Tribunal that he has now applied for a substantive CONNECT User Support Specialist post, employed directly by the MPS.

Other Posts

70. The Respondent produced evidence of a large number of civilian posts which had been advertised by the MPS in the London area in 2023, including: Case progression officer (p1367): £32,194 - £34,452 per annum; Administrative support officer (p1375): £28,511 - £30,504 per annum; Public access officers (p 1377): £28,511 - £30,504 per annum; Post team

administrator (p 1379): £24,206 - £24,443 per annum; Police Community Support Officer (ps 1381, 1964): £30,232 per annum; Office administrator – Special Escort Group (p 1383): £28,511 to £30,504 per annum; Messenger – Counter Terrorism Policing HQ (page 1385): £25,803 to £27,735 per annum; Intelligence researcher - Anti-Corruption and Abuse Command (p 1387): £28,511 to £30,504 per annum.

71. The Claimant told the Tribunal that he had not applied for any of these posts because they would not have paid as much as his REED CONNECT post. He did not dispute that he had the skills necessary for these other posts. The Tribunal accepted that the Claimant appropriately mitigated his loss by staying in the REED fixed term post and thereby maximising his salary. Staying in that post has also put him in an advantageous position in relation to applying for the substantive CONNECT roles.
72. Agency staff are entitled to apply for MPS internal vacancies once they have been working for the MPS for 1 year. Accordingly, from 26 September 2023, the Claimant has been entitled to apply for any internal vacancies.
73. Anne-Marie Moore, of the MPS Workforce Planning and Deployment Team, told the Tribunal that regular internal vacancies are posted on Oleo, the MPS internal recruitment advertisement system. She produced evidence of 32 different Band E vacancies on Oleo as at 28 March 2023, p839-840. While not every one of these roles would have matched the Claimant's skill set, the number of roles available was indicative of the volume of vacancies in the MPS.
74. Ms Moore told the Tribunal that, of the vacancies available on 28 March 2023 and 5 June 2023, there were a range of Administrator roles, including the Royalty & Specialist Protection role, MO19 Specialist Firearms Command – Firearms Enquiry Team – Administrator/Researcher role, Administrative Support Officer – MO2 Management Support Unit role, MO19 – Firearm Asset Record Management Admin Team Support Officer, Office Administrator, CONNECT – Data and Development Team – system administrator, SO15 – A&R – CATO Administrative Officer and MO2 Met Intelligence – NMPR Administrator (pages 839 and 1812-1814). She told the Tribunal that any Administrator role requires the same sort of work, i.e. managing emails, telephone calls and data entry, of which the Claimant has experience. The role holder would use these components to respond to questions from officers and staff within the organisation, in a similar manner to how the Claimant responds to officers to resolve their issues in his CONNECT role through Reed. Ms Moore told the Tribunal that, sometimes, additional specialist knowledge is required, so an applicant who has that knowledge would be at an advantage, but that this can be learnt and on the job training would be provided. She observed that the Claimant's experience as a police officer would provide valuable context to many administrative roles obtaining a deeper understanding of how these roles support the frontline.
75. The Tribunal accepted Ms Moore's evidence that there are a large number of band E administrative roles available in the MPS and that the Claimant has the requisite skills and experience to carry out many of these roles. Her evidence in this regard was not significantly in dispute.
76. Ms Moore also told the Tribunal that, once employed by the MPS in a civilian role, employees will be assisted to find alternative suitable roles in the MPS if their own roles become redundant. Again, the Tribunal accepted her evidence.

Decision – Likely Future Career

1. Band E CONNECT User Support Specialist role

77. The Tribunal decided that it was likely that the Claimant would be appointed to the substantive MPS Band E CONNECT User Support Specialist role. He has been undertaking exactly the same role for over a year and has been performing well in it. There is no evidence of any diminution in the requirement for CONNECT support staff, once the REED contract for support staff with the MPS comes to an end. The Tribunal considered that it is likely that the vast majority of the REED staff will move across to substantive posts in the MPS, carrying out the same roles as they have been carrying out for REED.
78. The Tribunal decided that the Claimant would not be appointed to a substantive MPS Band D role, when these roles are advertised in anticipation of the REED contract coming to an end. There was no evidence that he has been working at Band D level, or is currently considered by his managers to have the skills and experience appropriate for appointment at that level.
79. The Tribunal considered that it was likely that the Claimant would then remain in the CONNECT support function at the MPS. He has previously shown himself committed to a career in the MPS. The skills, experience and knowledge which he has accumulated in his working life, to date, relate to the MPS. He has not been successful in his numerous applications for posts unrelated to the MPS. The Tribunal concluded that it was most likely that the Claimant would remain in an MPS civilian support role for the rest of his career. He would be assisted to find other suitable posts in the MPS, of which there are many, if he was later made redundant from his substantive CONNECT support role.
80. As the Claimant is committed to a career in the MPS and gave evidence that he is ambitious, the Tribunal decided that he would be likely to seek promotion during his civilian MPS career. It decided that, with further experience in his role, he is likely to be appointed to a Band D post in the CONNECT function, at the latest by 5 years from now.
81. Given that the Claimant is ambitious, the Tribunal considered that it also is likely that he will seek further promotion. He is unlikely to be content to remain at Band D for the rest of his MPS civilian career. He has experience, not just of civilian support roles, but also of being an MPS police officer. The Tribunal therefore considered that he has a wide range of experience which will make him an attractive candidate for further promotion in civilian MPS roles.
82. It decided that, by 10 years from now, the Claimant will be promoted to a Band C civilian role. The Tribunal decided that it was likely that he would remain at that level until retirement. The Tribunal did not have any evidence on which it could decide that the Claimant would be promoted to any higher level.
83. In the CONNECT substantive D posts, it appeared likely that the Claimant would also be entitled to a 20% shift allowance, plus location allowance of £1,841 and non-pensionable allowance £1,000. These posts were similar to the Claimant's current role, but at managerial level.
84. The Tribunal decided that it was likely the Claimant would start his substantive Band E role on 14 April 2024, when the REED contract comes to an end and the CONNECT support function comes "in house" at the MPS.

2. Not Appointed to Band E CONNECT role

85. In light of the Claimant's commitment to the MPS, the Tribunal considered that it was very likely that, even if he is not appointed to the Band E CONNECT role, he will continue to apply for MPS civilian roles. It noted that, for example, he applied for a Police Lecturer (PEQF) position, p544, in November 2021.

86. Furthermore, given that he has considerable experience with the MPS in various respects, and there are many MPS Band E administrative support roles available, it is likely he will be successfully appointed to a Band E administrative support role there.
87. Allowing time for the Claimant to make applications and go through any likely recruitment process, the Tribunal decided that he would likely commence in a Band E police staff role 6 months after the end of the CONNECT contract on 14 April 2024. He will therefore suffer 6 months' loss of earnings between April and October 2024.
88. However, if he is appointed to a Band E role other than the CONNECT role, the Tribunal does not find that he would receive a 20% shift allowance. The CONNECT role provides IT support on a 24/7 basis. Other roles in the hearing Bundle which could be suitable for the Claimant did not require a 24/7 service to be delivered and did not advertise a shift allowance, for example, pp1375, 1367, 1383.
89. The other roles did not advertise a £1,000 non pensionable allowance, either. The Tribunal therefore decided that the Claimant would not receive a non-pensionable allowance in an alternative Band E role.
90. For the same reasons as given in relation to the substantive CONNECT role, the Claimant is likely to seek promotion and be seen as an attractive candidate for promotion. He will achieve promotion to Band D 5 years after commencing in his alternative Band E administrative role and to band C 10 years after commencing in post – that is, 6 months later, on each occasion, than he would have done, had he been appointed to the CONNECT support role.
91. As previously stated, it is likely that he will remain in his police support staff post until retirement. There are very many civilian police staff roles available for redeployment in the MPS.

The Police Pension Scheme

92. The joint expert, Mr T Sture, states in his report dated 7 April 2023, p1250, that it is extremely unlikely that anybody obtaining new employment with a private sector employer could access a defined benefit pension scheme. He also states that, in his opinion, the Police Pension Scheme is probably the most generous for the principal reason that it offers the lowest retirement age with no reduction for retirement before State Pension Age (SPA). He notes that public sector schemes only allow retirement before SPA with actuarial reduction. Therefore, allowing an employee to retire at the age of 60 with no actuarial adjustment is extremely valuable.
93. Police Staff, not Police Officers, may join one of 2 pension schemes: the Alpha Pension Scheme and the Partnership Pension Scheme. Police Staff are enrolled into the Alpha scheme on joining and can opt to move to the Partnership scheme. The Alpha Pension Scheme is part of the Civil Service Pension scheme arrangements and is a Career Average defined benefit scheme. The pension is based on the employee's earnings over their career and is payable at the member's State Pension Age (SPA), currently age 67.
94. The contribution rates (as published online) for the employee and employer are dependent on earnings (p 816-824). Currently, for Band E roles where the pensionable pay is between £30,232 and £32,225 pa, the employee contribution rate is 4.6%. For salary of £32,001 - £56,000, the employee contribution rate is 5.45%.
95. The Partnership Pension Scheme is a defined contribution scheme.

96. The Tribunal decided that the Claimant would join the Alpha Pension Scheme when he is substantively employed in a civilian staff role in the MPS. Mr Athony told the Tribunal, and the Tribunal accepted, that, from his experience, the Alpha scheme would be more generous than the Partnership scheme. The Tribunal noted that it is widely accepted that defined benefit, rather than defined contribution, schemes provide more generous pension benefits. It decided that the Claimant would fail to mitigate his loss if he did not join the Alpha Pension Scheme, so any calculations of loss should be made on the basis of him joining the Alpha Pension Scheme.

NEST Pension Scheme

97. The Claimant's contributions under the NEST scheme at REED are 5% and the employer contributions under this scheme are 3%. Mr Anthony, the Respondent's witness, told the Tribunal that the employer contributions therefore in the MPS arrangements are "far more generous than in the NEST arrangement."

98. The expert report has assessed that, under the Claimant's current NEST pension, the Claimant contributes £38.96 per week (gross) and the employer contributions are at £23.38 per week based on the Claimant's pensionable pay of £779.28 per week (p 588), the total of which would be £3,241.68 pa. Mr Anthony gave evidence that from his experience, even the Alpha scheme would be more generous than this.

Retirement Date

99. The Claimant did not dispute that he is likely now to work until he is 67. The Tribunal agreed. He is likely to retire at 67 because that is the current State Pension age for people born after 5 April 1950. It is also the pension age in many other pension schemes, for example the police staff Alpha pension scheme.

100. However, the Tribunal also found that, if the Claimant had remained in the MPS and had retired at 60, he could also have worked as a civilian officer thereafter – or in another civilian job – until 67, earning more income and pension, but also having the benefit of his police pension.

Principles for Compensating Pension Loss Fourth Edition (3rd Revision) 2021

The Discount Rate

101. When using the Ogden Tables for calculating pension loss the principles advise: "(b) A multiplier is selected depending on the claimant's gender and retirement age. On the vertical axis of the selected table, the multiplier again reflects the claimant's age at the date of the hearing at which loss of pension is to be assessed. On the horizontal axis, the multiplier reflects the discount rate; and, again, the tribunal will use the minus 0.25% column (minus 0.75% in Scotland) found in the supplementary tables.

Life Expectancy

102. On life expectancy the principles comment: (e) ... the Ogden Tables are derived from 2018 mortality data relating to the UK population at large. When calculating loss of occupational pension rights, however, we are dealing with a narrower cohort of individuals: those who have been members of occupational pension schemes and expect to enjoy the associated benefits when retired. It is generally accepted that the wealthier retirements enjoyed by such individuals correlate with increased life expectancy. If we were to apply the Ogden Tables without any adjustment for this factor, claimants would be under-compensated. (f) Having sought advice from the Government Actuary's Department in the light of the eighth edition of the Ogden

Tables, the working group still recommends making an allowance for the expected higher life expectancy of members of occupational pension schemes, compared to the average for the UK population at large.” The principles comment that the Ogden tables are primarily concerned with compensation for personal injury, when medical evidence may also be available and may deal with life expectancy. The principles contrast this with pension loss arising from occupational pension schemes in employment cases and advise, “Whilst recognising that parties will be able to make submissions that a different approach should be taken, an adjustment of two years generally represents the best compromise between accuracy and simplicity.”

Withdrawal Factor

103. Regarding the likelihood that the Claimant would have left the relevant pension scheme in any event, the principles advise: “The explanatory notes to the Ogden Tables make clear that the tables at Section B (dealing with contingencies other than mortality) do not apply to loss of pension rights. ... we do not recommend using the tables at Section B when considering pension loss. ... (i) We propose an alternative approach: to apply what previous editions called a “withdrawal factor”. This factor caters for other contingencies that arise in the case, and which may affect how long employment would have continued but for the unlawful dismissal (i.e. whether the claimant would have “withdrawn” from the pension scheme, for different reasons, at a future date). It is conceptually similar to a “Polkey” analysis, in that the tribunal engages in some speculation”.

Law

Approach to Compensation

104. Compensation for discrimination is to be awarded on the tortious basis. The Claimant is to be put into the financial position he would have been but for the unlawful conduct of the employer *Ministry of Defence v Cannock* [1994] ICR 918, EAT. There is no requirement that the loss suffered be “reasonably foreseeable”; compensation can be awarded in respect of all harm that arises naturally and directly from the act of discrimination, at least in cases where the discrimination was deliberate and overt. *Essa v Laing* [2004] IRLR 313 and *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86, EAT.

Future Loss

105. In assessing future loss, the ET needs to assess the chances that employment would have continued had the discrimination not taken place. This can be done by reference to calculating the percentage probabilities, and not on a simple balance of probabilities, *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, CA; at [32]–[33].

106. In *Wardle v Credit Agricole Corporate and Investment Bank* [2011] EWCA Civ 545, [2011] IRLR 604, the Court of Appeal gave the following guidance to on assessing future loss of earnings after a discriminatory dismissal:

(1) where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach;

(2) in the rare cases where a career-long-loss approach is appropriate, an upwards-sliding scale of discounts ought to be applied to sequential future slices of time, to reflect the progressive increase in likelihood of the claimant securing an equivalent job as time went by;

(3) applying a discount to reflect the date by which the claimant would have left the respondent's employment anyway in the absence of discrimination was not appropriate in any case in which the claimant would only voluntarily have left his employment for an equivalent or better job; and

(4) in career-long-loss cases, some general reduction should be made, on a broad-brush basis (and not involving calculating any specific date by which the claimant would have ceased to be employed) for the vicissitudes of life such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons.

107. Regarding the likelihood of obtaining an equivalent job by a specific date, Elias LJ in *Wardle v. Credit Agricole Corporate and Investment Bank* [2011] ICR 1290 at [52] said, "In the normal case, if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice the speculative nature of the exercise means that the tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide."

Pension Loss

108. A huge discount for withdrawal would suggest that a Defined Benefits pension loss could be better assessed by the contributions method. In *Griffin v. Plymouth Hospital NHS Trusts*, Underhill LJ said that, in such a case [the claimant] would have suffered, perhaps only a year or two later, precisely the same kind of loss as is being claimed for in the proceedings; and it is more appropriate simply to award lost contributions up to that date, as per the simplified approach, rather than embarking on the exercise of valuing rights on retirement which would almost certainly never have accrued and then applying a massive "finger-in-the-air" discount".

Injury to Feelings

109. The Tribunal is guided by the principles set out in *Prison Service v Johnson* [1997] IRLR 162 with regard to assessing injury to feeling awards. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the Claimant, (without punishing the Respondent) only for proven, unlawful discrimination for which the Respondent is liable. Awards that are too low would diminish respect for the policy underlying anti-discrimination legislation. However, excessive awards could also have the same effect. Awards need to command public respect. Society has condemned discrimination because of a protected characteristic and awards must ensure that it is seen to be wrong.

110. Awards should bear some broad general similarity to the range of awards in personal injury cases. Tribunals should remind themselves of the value in everyday life of the sum they have in mind by reference to purchasing power.

111. It is helpful to consider the band into which the injury falls, *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102. In *Vento* the Court of Appeal said that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the grounds of race or sex. The middle band should be used for serious cases which do not merit an award in the highest band and the lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

112. The updated Vento Bands applicable for a claim presented after April in 2021 are: lower band, £900 to £9,100; middle band, £9,100 - £27,400; upper band £27,400 - £45,600 - pursuant to the Joint Presidential Guidance on Employment Tribunal Awards, Fourth Addendum.
113. In *St Andrews Catholic School v Blundell* UKEAT/0330/09 the Employment Appeal Tribunal upheld an appeal against an Employment Tribunal's injury to feelings award of £22,000 and substituted an injury to feelings award of ITF £14,000, plus aggravated damages. In that case, the Claimant was a teacher who was victimised by the head teacher for having brought a sex discrimination claim against the school by: (a) demanding details of the Claimant's complaint about her handling of a complaint about her behaviour by certain teacher governors, (b) assessing the Claimant very negatively following a classroom observation, telling her that everything she had seen was inadequate, that she had grave concerns and her future was under review; and (c) dismissing her. The conduct was not of long duration, its culmination occurring within about four months, but this was a serious case and the claimant suffered a stress related illness and panic attack.
114. In *Da'Bell v NSPCC* [2010] IRLR 19, which was heard at the end of 2009, the EAT adjusted the Vento bands for injury to feelings to allow for inflation. From then the lower band was £500 to £6,000, the middle band was £6,000 to £18,000 and the upper band was £18,000 to £30,000.
115. The award of £14,000 in *St Andrews Catholic School v Blundell* UKEAT/0330/09 was therefore towards the upper end of the middle band in Vento.

Compensation Decision

Past Loss: to Which Polkey Does not Apply

Injury to Feelings

116. The Tribunal considered that the acts of discrimination in this case spanned 3 years and culminated in the loss of the Claimant's job and intended career. That discrimination was significant both in terms of length and nature. The Tribunal accepted that the Claimant was hurt and upset by the lack of assistance during the 3 years and devastated by the loss of his career.
117. For more than a year after his dismissal, he was affected by feelings of stress and anxiety, becoming withdrawn, with difficulty sleeping, and putting on weight.
118. Fortunately, he has been employed since 26 September 2022. He was recently married. He presented as a much more optimistic and confident individual at the remedy hearing.
119. This was a protracted period of discrimination with serious effects on the Claimant's wellbeing for at least 4 years. Happily, however, the Claimant is now working and is much recovered.
120. The appropriate award is towards the upper end of the middle band of Vento.
121. While the 40% Polkey deduction should not be applied to the injury to feelings award, the Tribunal acknowledges that there was a chance that the Claimant might have been lawfully dismissed in any event, so that he would have suffered some feelings of distress in any event. A small downwards adjustment to the injury to feelings award is therefore appropriate.

122. Taking all matters into account, including the possibility that the Claimant might have been lawfully dismissed, the Tribunal awards £22,000 for injury to feelings. That reflects the seriousness of the discrimination and its effects on the Claimant. A higher award is not appropriate, nevertheless, because the Claimant is now working and has regained his self-esteem.

Loss of Earnings for Period during which he would have Undertaken the At Works Test with In- Ear Hearing Aids

123. The Tribunal awarded the Claimant 22 weeks' loss of earnings, without any Polkey deduction, from 12 July 2021 to 13 December 2021. $22 \times £595.34 = £13,097.48$.

124. He received job seeker's allowance in this period at the rate of £149.40 every 2 weeks from 7 October 2021: £74.70 every week. 7 October – 13 December is 9 weeks 4 days, or 9.8 weeks. He therefore received £732.06 JSA in this period, meaning his net economic loss from 12 July – 13 December 2021 was £12,365.42.

Past Loss: To Which Polkey does Apply

125. From 13 December 2021 to 26 September 2022 the Claimant was unemployed. That was a period of 41 weeks. His loss of earnings was $41 \times £595.34 = £24,408.94$.

126. He also received JSA from 13 December 2021 until 11 April 2022 – 17 weeks. Accordingly, £1,269.90 needs to be deducted from his loss of earnings.

127. His net economic loss in the period 13 December – 26 September 2022 was £23,139.04.

128. From 26 September 2022 the Claimant would have been earning a salary of £50,067 gross (including London Weighting, London Allowance 1 London Allowance 2) as a police Constable, or £3,172.33 net per month, or £732.08 net per week.

129. For the period 26 September 2022 - to 26 September 2023, therefore, he would have earned $£3,172.33 \times 12 = £38,067.96$ as a police constable.

130. He actually received £38,897.24 net in his CONNECT role.

131. His income from the CONNECT role dropped significantly in August / September 2022, due to his marriage. The Tribunal accepted that it was natural for the Claimant to take time to settle into married life and not to work as much overtime as previously. From 26 September 2022 to 12 October 2023 is 2.4 weeks. On his average earnings for September 2022, he will actually receive $£589.68 \times 2.4 = £1,415.23$.

132. The total amount the Claimant has received in the CONNECT role from 26 September 2022 to 12 October 2023 is therefore $£38,897.24 + £1,415.23 = £40,312.47$.

133. In his police constable role, from 26 September 2023 – 12 October 2023 he would have received $£732.08 \times 2.4 = £1,756.99$ ($\times 1.07$ – the 7% pay rise) = £1,879.98.

134. He would have been paid a total of $£38,067.96 + £1,879.98 = £39,947.94$, had he remained as a Police Constable.

135. He has made a small net salary gain in his CONNECT role, of £364.53.

136. Therefore, total net economic loss 13 December 2021– 12 October 2023: £23,139.04, less £364.53 (the small increase in salary he received compared to a constable's salary 26 September 2022 – 12 October 2023) = net loss £22,774.51.

137. The Claimant continued to have pension loss, because he is no longer in the Police Pension scheme and the REED CONNECT role provides only a NEST pension scheme.

Overtime

138. The salary band figures for what the Claimant would have earned as a Police Constable, in the future, did not include overtime. The Claimant had earned some overtime payments as a probationary Constable. The Claimant was likely to continue to have had the opportunity to work overtime if he had remained in the MPS.

139. It was not possible, on the evidence, to tell whether he would have worked many hours overtime at a Police Constable in the year 2023 up to August, just as he had done in REED, and whether he would have reduced his overtime hours after he was married, as he had done at REED.

140. The Tribunal did not consider that the Claimant was required, as a matter of law, to work very high levels of overtime, in excess of the overtime he would have worked as Police Constable, in order to reduce his loss.

141. Going forward, therefore, the Tribunal used the comparative base salary, shift allowance and London weighting figures, for Police Constables and Band E support staff, and not notional overtime figures, to calculate future loss.

142. However, given that the Claimant had been able to earn as much as he would have earned in Police Constable salary while working on the REED contract, the Tribunal considered that, over the course of his remaining time on the REED contract, he will earn the same salary as he would have earned as a Police Constable. He will not suffer further salary loss (as opposed to pension loss) during the REED contract.

Future Pension Loss – Correct Approach to Calculation

143. The Respondent argued that, where total remuneration from a new role, even with a less generous pension, exceeds the salary and pension package of the previous role, the contributions method is appropriate for calculating pension loss.

144. It also argued that, given there was a significant chance that the Claimant would have been dismissed in any event, the contributions method was appropriate.

145. The Tribunal noted that, in the Claimant's REED Connect role, his pension was a NEST contributions pension.

146. The Claimant received a small increase, over the whole period of the REED contract, in his salary. The Tribunal considers that the Claimant will, for the remainder of the REED contract, earn the same salary as he would have earned as a Police Constable. However, under the NEST contributions scheme in the REED contract, the employer contributes only 3% pensionable salary.

147. The Tribunal accepted Mr Anthony's evidence that the MPS pension scheme is "far more generous" than the NEST scheme.

148. It also noted that the expert commented in his report, p592,

“I should highlight that it is not surprising that the pension loss is high:

a. NEST employer contributions at 3% of pay and employee 5% of pay above £120 per week. That is a total of 8%.

compared with

b. for PPS2015, as shown on the April 2018 pay slip, employer pension contributions were 24.2% of full basic pay plus London Weighting with employee contributions at 13.44% before tax relief (as from January 2018, see Appendix 3.1), a total of 37.64% of pensionable pay or 4.7x NEST contributions ...”.

149. The Tribunal concluded that it was therefore inconceivable that the total remuneration package from the REED CONNECT role exceeds the Claimant’s MPS Police Constable salary and pension package.

150. Accordingly, the contributions method is not appropriate for calculating pension loss because of the Claimant’s current salary and pension package – the Claimant has a significant ongoing loss of pension in his REED role.

151. Furthermore, this is not a case where there is a huge discount for withdrawal. See further below.

152. The *Polkey* deduction in this case reflects the Tribunal’s original liability finding that it more likely than not – 60% likely - that the Claimant would have passed his probation and would not have been dismissed, if the Respondent had acted lawfully. The Tribunal has found that the Claimant would then have stayed in the MPS until retirement.

153. The Tribunal has not found, therefore, that the Claimant would have suffered, perhaps only a year or two later, precisely the same kind of loss as is being claimed for in the proceedings. This is not a case like *Griffin v. Plymouth Hospital NHS Trusts* a massive “finger-in-the-air” discount” might have to be applied.

154. The substantial, or complex, loss basis, as applied by the expert, is appropriate for calculating pension loss in this case.

Decision: Withdrawal Factor: Likelihood that the Claimant would have left the Police Force Pension Scheme before Retirement

155. This decision applies to the pension loss only. The Tribunal considered that the Claimant was almost certain to continue in some form of employment until retirement age. It considered that it would be very unlikely that he would leave the police force, or other employment, voluntarily, for a job with a lower salary. *Wardle v Credit Agricole* advises that applying a discount to reflect the date by which the Claimant would have left the Respondent’s employment anyway, in the absence of discrimination, is not appropriate in any case in which the Claimant would only voluntarily have left his employment for an equivalent or better job. No discount should therefore be applied to the Tribunal’s future salary loss calculations.

156. However, given that a significant number of police officers do leave the MPS before retirement, the Tribunal accepted that there was some possibility that the Claimant would leave the MPS, perhaps for a better salary and/or better working conditions, but without the benefit of the MPS pension.

157. Given that the Tribunal has already decided that there was a 40% chance that the Claimant would not pass his probation, the Tribunal considered that it had accounted for almost all of the likelihood that the Claimant would not be a successful police officer and might leave for that reason.
158. Taking into account that the Claimant saw the MPS as a career – and that he has continued to seek work with the MPS as a civilian staff member, demonstrating commitment to the MPS – the Tribunal concluded that the Claimant was highly likely to have continued in his MPS police constable position for his whole career. However, taking into account that a significant number of police officers (but far short of a majority) leave early, before ordinary retirement, the Tribunal considered that a small withdrawal factor of 15% was appropriate, in respect of the pension alone.

Discount Rate

159. The discount rate is currently -0.25 %, set by the Lord Chancellor for Personal Injury, under the Civil Liability Act 2018. It is to reflect the interest that can be earned by investing payments, as well as the effects of tax, expenses and inflation on the returns.
160. The Respondent observed that there is no obligation on the Employment Tribunal to use the discount rate of -0.25%.
161. The Respondent argued that the -0.25% discount rate reflects an interest rate return on investment on 15 July 2019, when it was introduced, when the base rate 0.75%. The base rate is now 7 times that, at 5.25%.
162. The Respondent observed that the explanatory notes to the Tables make it clear that if the facts of a case do not correspond with the assumptions on which one of the Ogden Tables is based, an appropriate allowance can be made for this difference.
163. The Respondent contended that the multiplier adopted in this case, on the basis of the discount rate, is far too high against current interest rates.
164. The Claimant pointed out that the joint expert has explained why he adopted the -0.25% discount rate, p1242 - 1245. The expert has explained that, historically, the multiplier was lower than the number of years for which it was calculated because, for many years, the assumed rate of interest / investment returns (in real terms after removing inflation) that a Claimant was assumed to generate on compensation (sometimes described as the discount factor) was 4 – 5%. Recently, however, negative real terms investment returns have been determined to be appropriate for calculating lump sum compensation for Claimants. The current return assumed is -0.25%.
165. The Tribunal decided that the Principles explain why their approach is appropriate to a general case.
166. Furthermore, the expert has explained why he has adopted those Principles. The Tribunal noted that the expert has explained that the Principles apply an “assumed rate of interest / investment returns (**in real terms after removing inflation**)” (emphasis added). It is therefore not appropriate, as the Respondent contended, to assume that the multiplier adopted (because of the discount rate) is too high against current interest rates. That is too simplistic an approach: interest rates are not the only relevant factor in determining the rate of return – inflation is also relevant. In the absence of evidence, or argument, as to the operation of both

current interest and current inflation rates, the Tribunal considered that the -0.25% discount rate adopted by the Principles and the expert was appropriate.

Life Expectancy

167. The Respondent also argued that the multiplier used by Mr Sture, in accordance with the ET Principles for Compensating Pension Loss, resulted in an assumed life expectancy of 87.52 when the Claimant's actual life expectancy was 85.52, and is now 85, according to government figures for life expectancy.
168. The Respondent pointed out that the Principles for Compensating Pension Loss (Third Revision 2021) at § 5.53 h) to g) make clear the general approach is subject to either party contending that adjustment should be greater or less: "(g) This general approach is subject to the right of either party to contend that the adjustment for future mortality should be greater or less."
169. The Tribunal noted that the expert has set out at pp1242 – 1243 why he has used age 87.52 as the Claimant's life expectancy, adopting the approach explained by the Principles for Calculating Pension Loss. People in receipt of an occupational pension have a higher life expectancy than the general population. The expert has explained how he has factored that figure into his calculations, taking into account the 2-year adjustment required by the Principles.
170. The Tribunal considered that the approach adopted by the Principles and the expert to life expectancy was appropriate. The Claimant will be in receipt of an occupational pension and, therefore, is part of a cohort of people with higher life expectancy.

Overpayment of Holiday Pay

171. The Claimant contended that the Tribunal should not deduct the alleged overpayment of salary because the Respondent has not brought a claim for it and the Respondent cannot point to any term of engagement, or other legal right, which allows him to do so.
172. However, the Tribunal decided that, if the aim of tortious compensation is to put the Claimant into the same position he would have been in if the discrimination had not occurred, then the Claimant would not have been dismissed and he would not have received the overpayment of holiday pay on dismissal. In any event, the Tribunal concluded that the Claimant should not be better off, following compensation, than he would have been. Ignoring the overpayment would result in making the Claimant better off than he would have been. The overpayment should be deducted from the compensation.

Addressing Each of the Issues

i. Will the Claimant remain in his current employment with Reed after March 2024?

173. Answer: No. The REED contract is coming to an end on 14 April 2024.

*ii. If not, a) for how long will the Claimant be unemployed, if at all and / or
b) into which role is the Claimant likely to then be placed / employed;*

174. The Tribunal has made its decision on 2 bases.

175. Its primary decision is that he is likely to be appointed to the substantive CONNECT Band E support role on the termination of the REED CONNECT contract, on 14 April 2024. In that

scenario, there will be no break in employment. He will not be appointed to a Band D role on the termination of the REED CONNECT contract, however.

176. The alternative basis for the Tribunal's decision is that the Claimant will be unemployed for 6 months after the end of the REED CONNECT contract. After 6 months, he is likely to have obtained another Band E civilian police role. The MPS is where he has gained his work experience and skills and so he is most likely to be employed there in the future.

c) when, at what salary / income and in which pension scheme?

177. On both bases, he will be in MPS with the benefit of the Alpha Pension scheme

178. In each case, he will be employed at Band E for 5 years and will be promoted to band D 5 years after starting in his substantive band E post and to band C 10 years after starting in his band E substantive post.

179. In the alternative basis for calculation, therefore, his promotions to band D and C will happen 6 months later than if the Claimant is appointed to the substantive CONNECT role.

180. However, he will not have a 20% shift allowance or non-pensionable allowance in the non-CONNECT role.

Will the claimant have any periods of unemployment? If so, when and what length are those periods of unemployment likely to be?

181. The Tribunal decided that the Claimant would not have further periods of unemployment after he starts in either of his MPS civilian staff roles.

182. However, in the Tribunal's second basis for calculation, he will be unemployed for 6 months from 14 April 2024 – 14 October 2024, pending employment in an alternative Band E MPS role.

*Would the Claimant have been promoted to the rank of Sergeant and, if so,
i. when would he have been promoted?
ii. what salary would the Claimant be earning in any such role as Sergeant?*

183. No. The Tribunal has concluded that it is sufficiently unlikely that the Claimant would have been promoted to the rank of Sergeant (or above) that this possibility should be discounted.

8. Would the Claimant have remained serving in the Respondent's Police Force (or another Force) for the whole of his working life (had he completed his probation)? If not, when is it likely he would have left?

184. The Tribunal has decided that the Claimant would have remained serving in the Respondent's Police Force until retirement at age 60.

185. There is evidence that a significant number of MPS officers leave before retirement age. The Tribunal has decided that that should be reflected in a withdrawal factor of 15% applied to pension alone. Even if the Claimant were to leave the MPS in future, before retirement, the Tribunal decided that he would not leave the MPS for a job with a lower salary (as opposed to a different pension). Accordingly, he would not have had a reduced salary if he were to have left the MPS before retirement. No discount should be applied to calculations for future salary loss.

9. *When will the Claimant retire – at age 55 or 60, or later?*

186. The Tribunal has decided that the Claimant will now retire at age 67.

187. It decided that he would have retired at 60 from the police force, but that he would then have been able to continue to work as a civilian officer until 67. He would therefore not have had a lower salary after 60 than he will now have, because he would have been likely to have worked in a civilian role after his retirement from the police force, as he will now do.

10. *What will the Claimant's loss of future income / earnings (other than pension) be on the basis of the above?*

188. The Claimant was born on 26 November 1991.

189. The Tribunal was not provided with the precise net figures for police constable pay after September 2023, nor for civilian MPS Band E or D staff, because there had been a 7% increase in pay applied to all salaries that month. The Tribunal's figures may not therefore be completely accurate, but it has set out the basis for its calculations and the parties can amend the figures slightly applying the precise applicable net figures.

190. First basis for calculation (Claimant is appointed to substantive Band E CONNECT support role from 14 April 2024)

191. 12 October 2023 – 14 April 2024: no loss of salary in current REED role.

192. The Claimant will be employed at Band E from 14 April 2024 – 14 April 2029 (5 years) and then at Band D until 14 April 2034 (another 5 years). From 14 April 2034 until retirement on 26 November 2051 he will be employed at Band C.

193. Loss of earnings: The Claimant's gross pay, following the 7% pay rise for a Constable in London employed for 7 years, would have been £46,044.

194. London Weighting is £2,886. London Allowance 1 is £1,011. London Allowance 2 is £4,327, p2106.

195. The Claimant's total gross pay as a Constable from September 2023 (and therefore in April 2024) would have been £46,044 + £2,886 + £1,011 + £4,327 = £54,268.

196. The Band E annual salary will be £39,447, comprising a starting base salary of £30,507, 20% shift allowance, a location allowance of £1,841 and a non-pensionable allowance of £1,000, p2075.

197. Using an online Net pay calculator and applying 13.44% pension contributions, the Claimant's net Police Constable annual salary would have been £35,490, or £682 per week.

198. Using an online Net pay calculator and applying 5.45 % pension contributions for the Alpha scheme (p816), his net Band E annual salary will be £29,127, or £560 per week.

199. Net annual loss at Band E is £35,490 - £29,127 = £6,363.

200. The Tribunal has not included insurance, Federation subscriptions and student loans in either calculation, as it does not know what figures the Claimant is likely to pay for e.g. Union subscriptions, insurance and student loans in his Band E role. Assuming he would be making

additional payments in both roles, then they can be reasonably safely disregarded in the calculations.

201. Economic Loss for 5 years at Band E from 14 April 2024 -14 April 2029 (5 x £6,363) = £31,815.
202. The MPS Civilian staff salary from 1 November 2022 for a Band D salary was £32,194 - £34,452. As the Band E roles were advertised at the bottom of the new salary band, the Tribunal has taken £32,194 - the bottom of the Band D salary band - as the likely salary point at which the Claimant would be appointed to a Band D post. It added the 7 % pay rise, to give a figure of £34,447.58.
203. Adding 20% shift allowance, a location allowance of £1,841 and a non-pensionable allowance of £1,000 to that salary, the Claimant's gross annual salary at Band D would be £34,447.58 + £6,889.52 shift allowance + £1,841 location allowance + £1,000 non pensionable allowance = £44,178.10.
204. Using an online calculator, and still applying the 5.45% pension contributions, his net income at band D would be £32,137 annually, or £618 per week.
205. His annual loss of earnings at Band D would be £35,490 - £32,137 = £3,353.
206. Economic loss for 5 years at Band D from 14 April 2029 – 14 April 2034 = £ 16,765.
207. The Band C salary is £39,469 - £47,089. Due to the very considerable increase in pay the Band C would represent, the Tribunal has not assumed that a 20% shift allowance would be provided. It is usual for senior managers to be expected to work additional hours as part of their role. The Tribunal has, however, assumed that a location allowance and non-pensionable allowance would continue to apply, as the Claimant would still be working in London.
208. The Tribunal has again assumed appointment at the bottom of the band. It has therefore assumed appointment to the Band C post at around £39,469. Increasing the figure by 7% would take the figure to £42,231.83. Adding £1,841 and £1,000 takes that figure to £45,072.83.
209. Using an online calculator, and still applying the 5.45% pension contributions, his net income at band C would be around £32,707 annually, or £629 per week.
210. Annual loss of earnings on appointment to Band C would be £35,490 - £32,707 = £2,783.
211. However, given that the Claimant would then be in Band C, which has a band spread of £8,000, there would be considerable scope for him increasing his salary in that band.
212. As a result, the Tribunal considered that the Claimant would be likely to achieve the same net earnings level as a Constable within about 5 years of appointment to band C.
213. In the Tribunal's decision, therefore, the Claimant would not have continuing net salary loss from 14 April 2039.
214. In the 5 years at Band C before he achieves the net pay of a Constable, the Claimant will have a net loss of earnings of 5 x £2,783 = £13,915.
215. The Tribunal observes that there is a much smaller difference between net pay figures for Constables and civilian staff, than between their gross pay figures. This is due to the much

higher rate of pension contributions which police officers make to the Police Pension, compared to civilian staff contributions to the Alpha Pension. However, the Claimant continues to sustain the loss of the benefit of his Police Pension, which is a significant loss, and which the pension expert will calculate.

216. On the first basis for calculation, therefore Claimant's future salary loss is £31,815+ £16,765 + £13,915 = £62,495, over the 15 years from appointment to the substantive CONNECT Band E role.
217. **Applying the 40% Polkey deduction, his future salary loss, on the first basis for calculation, is £37,497.**
218. Second basis for calculation (Claimant is appointed to alternative substantive Band E CONNECT support role from 14 October 2023)
219. 12 October 2023 – 14 April 2024: no loss of salary in current REED role.
220. 14 April – 14 October 2024: 6 months loss of earnings: £35,490 / 2 = £17,745 loss.
221. The Claimant will be employed at Band E from 14 October 2024 – 14 October 2029 (5 years) and then at Band D until 14 October 2034 (another 5 years). From 14 October 2034 until retirement he will be employed at Band C.
222. The Tribunal cannot predict any pay rise which might be awarded in about September 2024, so it has used current levels of pay for its calculations.
223. The Band E annual salary would be £32,384, comprising a starting base salary of £30,507, and a location allowance of £1,841. As explained above, the Tribunal found that the Claimant would not receive a 20% shift allowance or non-pensionable allowance in the alternative Band E role.
224. Using an online Net pay calculator and applying 5.45 % pension contributions for the Alpha scheme (p816), his net Band E annual salary would be £24,632.
225. The Claimant's net Police Constable annual salary would have been £35,490.
226. Net annual loss in the alternative Band E role is £35,490 - £24,632 = £10,858.
227. Economic Loss for 5 years at Band E from 14 October 2024 -14 October 2029 (5 x £10,858) = £54,290.
228. The Tribunal has taken £32,194 as the alternative Band D salary, with the 7 % pay rise, to give a figure of £34,447.58.
229. Adding a location allowance of £1,841, the Claimant's gross annual salary at the alternative Band D role would be £34,447.58 + £1,841 location allowance = £36,288.58.
230. Using an online calculator, and still applying the 5.45% pension contributions, his net income at Band D would be £27,117 annually.
231. His annual loss of earnings at Band D would be £35,490 - £27,117 = £8,373.
232. Economic loss for 5 years at Band D from 14 October 2029 – 14 October 2034 = £ 41,865.

233. The Tribunal assumed appointment to the Band C post at £39,469. Increasing the figure by 7% would take the figure to £42,231.83. Adding £1,841 takes that figure to £44,072.83.
234. Using an online calculator, and still applying the 5.45% pension contributions, his net income at Band C would be around £32,070 annually.
235. Annual loss of earnings on appointment to Band C would be £35,490 - £32,070 = £3,420.
236. The Tribunal considered that the Claimant would still be likely to achieve the same net earnings level as a Constable within about 5 years of appointment to an alternative band C role.
237. In the Tribunal's decision, therefore, the Claimant would not have continuing net salary loss from 14 October 2039.
238. In the 5 years at alternative Band C before he achieves the net pay of a Constable, the Claimant will have a net loss of earnings of 5 x £3,420 = £17,100.
239. On the second basis for calculation, therefore Claimant's future salary loss is £54,290+ £41,865 + £17,100 = £113,255 over the 15 years from appointment to the alternative band E role.
240. He would not have further salary loss after 14 October 2039.
241. His future loss on the second basis of calculation is £17,745 (6 months loss of pay April – October 2024) + £113,255 = £131,000.
242. **Applying the 40% Polkey deduction, future loss on the second basis is £ 78,600.**
243. Again, he would continue to have significant pension loss throughout his career.
- 11. Is the appropriate discount to be applied in the pension calculation -0.25? If not, what is the appropriate discount to be applied?*
244. **It should be noted that the Tribunal has decided that the substantial loss method, as adopted by the expert, rather than the contributions method, is appropriate for calculating pension loss.**
245. The appropriate discount is -0.25% rate, as the Principles and the expert explain.
- 12. Does the pension calculation over-compensate the Claimant (for about 2 years) based on the appropriate life expectancy for the Claimant?*
246. No, the calculation does not overcompensate the Claimant. The expert has applied the Principles correctly. There is no good reason for departing from the Principles and the expert's approach.
- 13. What is / will be the Claimant's loss of pension (past and/or future) and what is the value / amount of that pension loss?*
247. [This is a matter for the single joint expert to consider after the First Stage remedy hearing and considering the findings made by the ET]
- 14. What is the appropriate award for injury to feelings?*

248. The appropriate award for injury to feelings is £22,000 (excluding interest and grossing up at this stage).

15. What is the appropriate award for past loss of income?

i. Should this figure be reduced by £1,226.92 and that sum offset against the loss because the Respondent made an overpayment in this amount, having paid the Claimant for 24.5 days of annual leave instead of the 12.5 days he was owed, in July 2021?

249. Yes, otherwise compensation would not put the Claimant into the position he would have been in but for the discrimination – he would be over compensated.

16. Is the Claimant owed payment in lieu of 21 re-rostered rest days which he had outstanding on his termination and was not compensated for?

i. Is this a claim advanced in the Claimant's claim?

ii. Is any such claim in time?

250. Yes the Claimant should be compensated for these days. He would have had the benefit of those days had he not been discriminated against by being dismissed, so they are part of his loss. However, the 40% Polkey deduction should be applied to compensation for these days, to account for the chance that the Claimant could have been dismissed in any event and still not had the benefit of the re-rostered days.

251. The Claimant values the re rostered days at £2,812.98.

17. Is the Claimant owed monies for the cost of insurance for hearing equipment [R agrees this head of loss in principle]?

252. Yes – this is agreed.

18. In relation to any heads of loss and/or findings required to be made, should the ET apply a prospects / chance approach to any such matters? If so, what should any such prospects / chance be assessed at in relation to any such matters? [This is the Claimant's suggested issue in respect of this issue of loss]

19. In relation to any heads of loss and/or findings required to be made, should the ET apply a prospects (balance of probability) or a loss of chance / opportunity approach to any such matters?

253. The Tribunal has not made its decision on a “loss of a chance” approach. The Tribunal has been able to assess loss with sufficient certainty that this is not appropriate. The Tribunal has found that, if the Claimant would have left his MPS employment, he would not have done so for a lower salary.

20. From what point, if at all, should the ET apply the reduction of 40% to any of the Claimant's losses as a result of the ET's finding in the judgment, that if the Respondent had acted lawfully, the Claimant was only 40% likely to fail his probation and be dismissed in any event?

i. On which heads of loss, if any, ought any such reduction be applied

ii. Should it be applied to the Claimant's losses after 11 October 2021, 3 months after termination of the Claimant's probation, allowing time for the Claimant to further undertake the At Work Test;

iii. Should it be applied to the Claimant's losses from some other point in time? If so from when should it be applied?

254. The 40% Polkey deduction should be applied 5 months after the Claimant's EDT. That is the time within which the Respondent would have conducted a non-discriminatory "at works" test and made a non-discriminatory decision on his continued employment.

255. The 40% reduction should not be applied to the injury to feelings award.

Past loss, excluding pension loss, therefore:

256. *Losses to which the 40% deduction should not be applied:*

257. 1. Net economic loss 12 July – 13 December 2021: **£12,365.42.**

258. 2. Injury to feelings: **£22,000.**

259. 3. Cost of insurance for hearing equipment: **£167.44.**

260. *Losses to which the 40% deduction should be applied:*

261. 3. Net economic loss 13 December 2021 -12 October 2023: £22,774.51.

262. 4. Re rostered days £2,812.98.

263. 40% past economic loss: $(£22,774.51 + £2,812.98) \times 0.6 = (£25,587.49 \times 0.6) =$
£15,352.49.

264. Total past economic loss therefore $£12,365.42 + £167.44 + £15,352.49 = £ 27,885.35.$

265. From which needs to be deducted the overpayment of annual leave to the Claimant of £1,226.92.

266. **Total net past economic loss = £26,658.43, having applied a 40% deduction where appropriate.**

267. All figures have been calculated net. Grossing Up and Interest have not been applied. That will be done at the Second Stage Remedy Hearing, when the pension calculations are available.

Employment Judge **Brown**

Date: 20 November 2023

JUDGMENT SENT to the PARTIES ON

20/11/2023

FOR THE TRIBUNAL OFFICE