EMPLOYMENT TRIBUNALS

Claimant: Mrs R Kalam

Respondent: The Chief Constable of West Midlands Police

FINAL HEARING

Heard at: Birmingham **On:** 8 & 9 January 2024

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

REASONS

Introduction

1. These are the written reasons for the decisions made unanimously by the full Tribunal at the hearing, set out in a written Judgment signed by the Employment Judge on 11 January 2024. Oral reasons were given at the hearing itself and written reasons were requested by the Claimant.

2. For ease of reference, our – the Tribunal's – Judgment was as follows:

    1. *The Respondent accepts that as a result of the Reserved Judgment dated 15 October 2023 ("Reserved Judgment") the Claimant is entitled to at least £723,378 in compensation and damages – not including interest – in addition to the sums specified in that Reserved Judgment and in the Judgment by Consent sent to the parties on 15 September 2023 ("Judgment by Consent").*

    2. *The Claimant accepts that as a result of the Reserved Judgment she is entitled to not more than £840,697 in compensation and damages – not including interest and if and only if her compensation and damages are non-taxable – in addition to the sums specified in the Reserved Judgment and Judgment by Consent.*

3. £17,319 paid as a lump sum to the Claimant in respect of injury benefit should not be set off against / deducted from her compensation and damages.

4. The Claimant's compensation and damages should be assessed as if there were a 40 percent chance of her not commuting her PPS 2015 pension for the maximum tax-free lump sum when she retired from the Police in 2043 in the scenario where the discrimination, victimisation and detriments set out in the Judgment by Consent had not occurred. The Claimant and Respondent agree that the money value of this is £40,000: 40 percent of an agreed figure of £100,000.

5. Interest to the date of this hearing is agreed in the sum of £7,023.

6. The compensation and damages and interest awarded to the Claimant are non-taxable and have been calculated on that basis.

7. *The Claimant is therefore awarded, and the Respondent must pay her, in addition to the sums specified in the Reserved Judgment and Judgment by Consent, a total sum, inclusive of interest to the date of this hearing, of* ***£787,720.00*** *(£723,378 + £17,319 + £40,000 + £7,023).*

3. This decision is given at what is effectively part two of a remedy hearing, the first part of which was in July 2023. We refer to the Reserved Judgment of October 2023 by way of background.

4. This hearing is to deal with all remaining issues that have not been agreed between the parties in light of the Reserved Judgment. There are only two or (depending on how you count them) three of them.

Injury benefit

5. The first of those remaining issues we shall deal with is whether a sum of £17,319 in respect of injury benefit is something for which the Claimant must give credit. In other words, should £17,319 be deducted from what the Claimant's damages would otherwise be? That sum is identified at internal page 3 of the accountancy[1] experts' joint statement dated 17 July 2023 by Mr Sture, the Claimant's expert.

6. Mr Sture also identified a sum of £13,805 for ill-health pension. The Claimant, through counsel, concedes that she has to give credit for that sum.

7. The Respondent[2] has a scheme which gives valuable benefits to individuals who are injured in the course of their duties. It is contained in Regulations. Under the part of it with

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[1] We'll refer to them as accountancy experts, although one of them is an accountant and the other an actuary.

[2] As in our previous decision: we note that the Respondent to the Tribunal claim is necessarily the Chief Constable for technical legal reasons and that no wrongdoing by the Chief Constable himself

which we are concerned, the injured person receives a lump sum and an annual payment indefinitely into the future. The £17,319 was the lump sum.

8. The lump sum was not part of any pension. Pensions, including the £13,805 ill-health pension, are paid under separate Regulations.

9. We note the following about the lump sum:

   9.1 no part of it would have been paid to the Claimant had she not been injured;

   9.2 there is no direct connection between the amount of the lump sum and the amount of the annual payments for the injury. The amount of those payments can in fact go up and down over time, but if that happens, it doesn't affect the lump sum, which is not retrospectively reduced, or anything like that. Similarly, the amount of the annual payments is not affected by the fact that the lump sum has been paid – they are separate and distinct things.

10. There is a general rule that a claimant – or plaintiff as it would have been at the time this rule came into being – in an action for damages for personal injuries has to give credit for sums received that they would not have received but for those injuries. That general rule is mentioned in **Longden v British Coal Corporation** [1998] AC 653, *per* Lord Hope at page 662:

> *The purpose of the award of damages is to compensate him* [the claimant or plaintiff] *for his loss, not to enrich him. It should leave him no worse off than he was before, nor should he be any better off. … Financial gains which accrue to the plaintiff which he would not have received but for his accident are prima facie to be taken into account in mitigation of the losses which he has sustained. The principle is that compensation which he receives by way of the payment of the sum of money is damages should as nearly as possible put him in the same position as he would have been in if had he not sustained the wrong for which he is to be compensated.*

11. There are exceptions to that general rule. In relation to the £17,319 injury benefit, we are concerned with what might be called the 'insurance exception'. The first case, or one of the first cases, where this was articulated was **Bradburn v Great Western Railway Co** (1874) LR 10 Ex 1. It was held that in an action for injuries caused by the defendant's negligence, a sum received by the plaintiff on an accident insurance policy should not be deducted from damages. The rationale for this seems to be that the defendant should not get the benefit of an insurance policy that the plaintiff had prudently entered into with a third party insurer and had paid for.

12. The insurance exception was applied in **Parry v Cleaver** [1970] AC 1. The plaintiff was a police officer who was severely injured in a car accident and became entitled to a police pension when he was discharged from the police force for disablement. The House of

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or his predecessors is alleged as part of this claim; "the Respondent" will be used interchangeably to mean the Chief Constable and West Midlands Police and, meaning no disrespect to the Chief Constable, we'll refer to the Respondent as "it" rather than as "him".

Lords decided that that pension should be ignored in assessing the plaintiff's losses up to the date when he would, but for the accident, have retired. Lord Reid explained the decision in this way (at pp 20-21):

> *As regards police pension, his loss after reaching police retiring age would be the difference between the full pension which he would have received if he had served his full time and his ill-health pension. It has been asked why his ill-health pension is to be brought into account at this point if not brought into account for the earlier period. The answer is that in the earlier period we are not comparing like with like. He lost wages but he gained something different in kind, a pension. But with regard to the period after retirement we are comparing like with like. Both the ill-health pension and the full retirement pension are the products of the same insurance scheme; his loss in the later period is caused by his having been deprived of the opportunity to continue in insurance so as to swell the ultimate product of that insurance from an ill-health to a retirement pension. There is no question as regards that period of a loss of one kind and a gain of a different kind.*

13. In **Smoker v London Fire Authority** [1991] 2 AC 502, a similar issue came before the House of Lords in cases where the ill-health pension was provided by or via the defendants. At pages 543 to 544 of the Appeal Cases report, Lord Templeman said:

> *In the present case, counsel for the defendant sought to distinguish the decision of this House in **Parry v Cleaver** on the grounds that the defendants are in the triple position of employers, tortfeasors and insurers. In my opinion, this makes no difference to the principle that the plaintiff has brought his pension which is … "the fruit, through insurance, of all the money which was set aside in the past in respect of his past work." The fruit cannot be appropriated by the tortfeasor.*

14. At the previous hearing, in July 2023, the Respondent had been suggesting that **Smoker** was wrong or was in some way distinguishable. We disagreed. It was part of our reserved judgment of October 2023 that, "*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.*" That decision remains in place – it hasn't been appealed[3] and there has been no application for reconsideration of it. The respondent accepts that in light of it, subject to **Longden**, the £17,319 injury benefit with which we are concerned is akin to the proceeds of insurance and falls within the insurance exception.[4]

15. That brings us to **Longden**. In **Longden**, the House of Lords set some limits to the insurance exception. The plaintiff took ill-health retirement from his employment with the defendant at the age of 37 because of an injury caused by negligence for which the defendant was liable. Upon his retirement, he received an incapacity pension and a lump

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[3] The Respondent confirmed near the end of the present hearing that it would not be appealing any part of the Reserved Judgment of October 2023.

[4] At least we understand that concession to have been made; and whether it is made or not, it is unarguably so.

sum in accordance with a scheme provided by the defendant to its employees. Had he not been injured, he would on retirement – at age 60 – have been entitled to a larger pension and a larger lump sum.

16. The plaintiff claimed the whole of the lump sum he would have received on retirement aged 60 and the difference in annual pension from that age. His fall-back position was that the lump sum should be apportioned between the pre- and post-retirement periods. The defendant argued that he should give credit for the whole of the lump sum he had in fact received and for the incapacity pension payments he would receive up to the age of 60.

17. The House of Lords rejected the defendant's arguments and accepted the plaintiff's fall-back position. As regards the pension payments, Lord Hope said this (at p 667 and pp 669-670):

> *… it would make no difference whether the incapacity pension was or was not derived from the same scheme as the retirement pension which the plaintiff claims to have lost … The effect of* ***Parry v Cleaver*** *and* ***Smoker v London Fire and Civil Defence Authority*** *[1991] 2 AC 502 is that incapacity and disability pensions fall outside the general rule that prima facie all receipts due to the accident must be set against losses claimed to have arisen because of the accident. It is impossible to reconcile the defendants' argument that at the end of the whole exercise one must stand back and assess the net loss, and in doing so make the deduction for which they contend, with the decision in those cases that these payments cannot be deducted against a claim for loss of income arising in the same period. The only reason why incapacity and disability pension payments received after the normal retirement age must be brought into account in computing the claim for loss of pension after that age is that the claim at this stage is for loss of pension, so one cannot properly calculate the loss of pension arising in this period without taking into account receipts of the same character arising in the same period.*

18. So far as concerned the argument between the parties about the lump sum, Lord Hope said:

> *The answer to the argument is to be found in an analysis of the nature and purpose of the lump sum. The scheme is quite clear on these matters. Where a lump sum is paid at the commencement of the man's retirement, its effect is to reduce the amount of the annual pension which he will thereafter receive for the whole of the period for which the pension is to be payable. It is a commutation in part of the annual pension to which the contributor is entitled under the scheme to which he has contributed. Thus the effect of the lump sum which the plaintiff actually received in this case was to reduce the amount which he has received and will continue to receive for the rest of his lifetime by way of his annual pension. The fact that things might have turned out differently if his accident had occurred at a later date is irrelevant, because the calculations to arrive at the net loss must be directed to what has actually happened as a result of the accident for which the plaintiff is claiming damages. Thus the effect of the lump sum will be felt not only during the period up to the plaintiff's retirement age but also during the period after that age when he would, but for the accident, have been receiving his retirement pension.*

> *It is not being suggested by* [plaintiff's counsel] *that the whole of the lump sum of £10,185.91* [actually received] *should be deducted from the lump sum of £33,242 which the plaintiff would have received had he continued to work until he reached the normal retirement age. These two lump sums represent for the most part commutations of pension payments arising in different periods. But there is clearly an element of overlap during the period after the normal retirement age. The incapacity pension which the plaintiff will receive during that period will be less than it otherwise would have been as a result of the payment to him of the lump sum. The claim is for the difference between the periodical payments reduced by the lump sum and the periodical payments which he would otherwise have received, similarly reduced by the lump sum to which he would have been entitled on reaching the normal retirement age, but without bringing anything into account to make up for the effect of his lump sum on his incapacity pension after that age.*
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> *I think that it is clear that, in order to compare like with like, the plaintiff should be required to set against his claim for the loss of the retirement pension an appropriate portion of the lump sum which he received on his retirement on the ground of incapacity. This is for the same reason as that which explains why the annual payments by way of the incapacity pension must be brought into account. These annual payments will be received as income during the same period as that to which the claim for loss of pension relates. So it is right also to bring into account that part of the lump sum which represents the commutation of a part of the annual payments which he would otherwise have received as income during the same period.*

19. In summary, in a case where the claimant's employer is the respondent / defendant:

    19.1 where the claimant is paid, or will be paid, some kind of injury award in respect of an injury caused by the respondent's / defendant's wrong;

    19.2 whether that award is a lump sum or a periodical payment;

    19.3 where it is paid under a scheme that is a benefit of employment;

    19.4 where it is paid before the age at which the claimant would, but for the respondent's / defendant's wrong, have retired –

    the insurance exception applies to that award except to the extent that it is a commutation of the annual pension that would in the normal course of events have been paid to the claimant upon retirement at their normal retirement age[5]. (A commutation being a payment which is effectively an advance payment of some or all of a pension, reducing the pension's value). Where the award is a commutation payment, it must be apportioned between the period up to the claimant's normal retirement age and the period after normal retirement age and the claimant must give credit for the amount apportioned to the latter period.

[5] By which we mean the age they would have retired, but for the respondent's / defendant's wrong.

20. We shall refer to this (as it might be termed) **Longden** limitation to the insurance exception as the "**Longden** limitation".

21. The Claimant submits that the insurance exception applies to the £17,319 injury benefit lump sum, relying on **Parry v Cleaver** and **Smoker**. The Defendant submits that the **Longden** limitation (or some version of it – see paragraph 24 below) applies.

22. We reject the Defendant's submission. **Longden** does not support it to any extent. It is of the essence of **Longden** that the sum or sums in issue, or part of them, represent commuted pension payments that would, but for the injury, have been paid post-normal retirement age. In the present case, no part of the claimant's £17,319 injury benefit lump sum: would have been payable but for the injury; is referrable to a payment that would otherwise have been made (in some way, shape or form) following the Claimant's retirement age 60.

23. One way of testing whether the **Longden** limitation applies to the injury benefit lump sum in the present case is to try to perform an apportionment calculation and to ask: what portion of the £17,319 represents "*a commutation in part of the annual pension to which the*" Claimant would anyway have been entitled? On the facts before us, the only possible answer to that question is: none of it. Even the Defendant does not seem to be suggesting otherwise.

24. In a way we found rather difficult to follow, Mr Basu KC argued on the Respondent's behalf that the **Longden** limitation was not restricted to the situation where the sum paid represents commuted pension payments that would, but for the injury, had been paid after normal retirement age. He suggested it was, instead, part of some novel rule or principle we could not identify and for which there was no discernible precedent, under which credit had to be given in the following situation:

    24.1 the claimant has suffered injury in the execution of their duties;

    24.2 this has caused them to have to retire early;

    24.3 there is a scheme by the employer under which, because of early retirement through injury, the claimant is awarded a lump sum and another scheme (or another part of the same scheme) under which the claimant is awarded periodical payments / a regular income.

25. If the Respondent were right in its argument, this would drive a coach and horses through **Parry v Cleaver** and **Smoker**. When considering whether credit needs to be given for a lump sum received, or part of it, no logical or principled distinction can be drawn on the basis of whether the claimant also receives some other type of payment; and that is not what **Longden** says. The distinction drawn in **Longden** is between sums which, wholly or partly, represent commuted pension payments and sums which do not.

26. The £17,319 injury benefit lump sum falls within the insurance exception and is not a commutation payment. Accordingly, the Claimant does not need to give credit for it and it

is not to be deducted from her damages. That is the effect of **Parry v Cleaver** and **Smoker**, which are legal precedents we are bound to follow.

Grossing-up

27. We have made no allowance for tax on any of the sums we have awarded and are awarding. This is explicitly on the basis that as a matter of law our award is not taxable; and that HMRC will not decide that any part of it is taxable.

28. We understand that the Claimant, through her solicitors, raised a concern about 'grossing-up' shortly before this hearing. She is apparently worried that HMRC might decide that her award is taxable and she doesn't want to have to bear the risk of that happening. However, there is not in reality anything for us to decide here. She and the Respondent agree that as a matter of law the award is not taxable. We – the Tribunal – agree too. We endorse the statement of the law which is set out in paragraphs 38 to 42 of the Respondent's submissions:

> *Awards for scarring and injury to feelings / pain, suffering and loss of amenity*
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> *38. The Claimant's award for scarring and her combined award in respect of injury to feelings / pain, suffering and loss of amenity do not amount to earnings. Further, they relate to the period before the termination of her employment (which took place just after the remedy hearing) and so cannot fall into the description, "*payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of a person's employment*", so as to be chargeable pursuant to s.403, read with s.401, of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA").*
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> *Awards for post termination loss of earnings and pension*
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> *39. The Claimant's awards in respect of loss of earnings and pension as a result of her "*compulsory retirement on grounds of permanent medical unfitness*" pursuant to Reg 82 of the Police Pensions Regulations 2015, are plainly "*a payment or other benefit provided … on account of injury to, or disability of*" the Claimant, so falling into the s.406 ITEPA exemption – like every other personal injury claim involving post-termination losses.*
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> *40. Dealing with identical words (to those in s.406 ITEPA) in s.188 of the Income and Corporation Taxes Act 1988, Lightman J set the test out in this way in* ***Horner v Hasted (Inspector of Taxes)*** *[1995] STC 766, 800h–j:-*
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> > *"… for the exemption to be available it must be established: (1) that the disability alleged by an employee is a relevant disability, that is to say, a total or partial impairment (which may arise from physical, mental or psychological causes) of his ability to perform the functions or duties of his employment; and (2) that the person making the payment does so not merely in connection with the termination of employment (compare the language of the exemption of payment made on the*

death of an employee) but on account of the disability of the employee. In short, there must be established as an objective fact a relevant disability and as a subjective fact that the disability is the motive for payment by the person making it."

Note that ***Horner*** *concerned disability rather than injury.*

*41. In the present case, Reg 82 of the 2015 Regulations only permitted "*compulsory retirement *[of the Claimant]* on grounds of permanent medical unfitness*" – determined by a selected medical practitioner. The previous regulations used the similar term, "*permanent disablement*". Medical unfitness is defined by Reg 74(1) in this way:-*

"(1) In these Regulations—

"infirmity" means a disease, injury, or medical condition, and includes a mental disorder, injury or condition;

"injury" includes any injury or disease, whether of body or of mind; and

"medical unfitness" , in relation to a member of a police force or a former member of a police force, means inability occasioned by infirmity of mind or body—

(a) to perform the ordinary duties of a member of the police force; or

(b) to engage in any regular employment."

*42. The ill health retirement of a police officer is a paradigm case of loss of employment causing loss of earnings and pension "*on account of injury to or disability of an employee*" and payment of compensation awarded by a court or tribunal in this sort of personal injury claim is very obviously "*a payment or other benefit*" so provided. There are examples of tribunals grossing up awards in respect of claims of unfair and unlawful dismissal and constructive dismissal. This is not one of them. The Claimant's compensation is not otherwise taxable. Indeed, as Mr. Sture points out, the Claimant's injury award and injury gratuity are not taxable. Nor is her ill health pension or lump sum*.

29. The Claimant has in relation to the taxation of awards referred us to **Orthet Ltd v Vince-Cain (No. 2)** [2005] ICR 374, in which the EAT stated that: "*In practice, where a dispute arises between the parties, we accept that it is resolved by an indemnity given by the paying party that if the Revenue attacks the award in the hands of the receiving party, the paying party will make good. Alternatively, as here, a power to seek review can be sought and given at the Employment Tribunal itself.*" The Claimant's case is not, though, one where a dispute between the parties arises as to the tax position; nor is there any doubt as to the tax position from our point of view.

30. We cannot compel the Respondent to give a tax indemnity. In addition, we do not think it would be appropriate for us explicitly to give the Claimant permission to apply for

reconsideration. It would effectively cast doubt on the correctness and finality of our decision and, notwithstanding the EAT's *obiter* comments in **Orthet Ltd v Vince-Cain (No. 2)** that we have just quoted, were we to invite a reconsideration application in this way we would potentially be indicating a bias in favour of the Claimant in relation to any such reconsideration application she made. We agree with the submissions made on the Respondent's behalf to the effect that the Claimant would not be automatically entitled to reconsideration as soon as a tax demand was made and that the Respondent would be entitled to argue, for example, that the Claimant should at the very least challenge such a demand through the tax system.

31. Further, we are not sure how legally meaningful it would be for us to make an order that the Claimant was at liberty to, or had permission to, make a reconsideration application in the event that HMRC decide the award is taxable. The Claimant could do that whatever we ordered. Applying for reconsideration is a right. There is a time limit for making an application, but the Tribunal has an unlimited discretion to extend time where it is in the interests of justice to do so. It would be wrong for us to fetter our own discretion by suggesting that we would (or would not) extend time in any particular situation.

32. When making a net award we are making an assumption about something – whether HMRC will decide the award is taxable – which is uncertain. We have no power over HMRC. We cannot force HMRC not to tax the award. HMRC has been known to do unexpected things. But there is nothing unusual about our decision in this respect. If, in the present case, HMRC does something that no one is expecting and says to the Claimant that she needs to pay tax on the award, she would have the same options as anyone else who faced an unexpected demand for tax in relation to a Tribunal award that had been made on the basis that it was not taxable. She could appeal the HMRC assessment and/or apply in the Employment Tribunal for reconsideration out of time and/or appeal out of time on the basis of new evidence. In practice, the chances are that she would do all three at the same time, just in case. The point we are making is that she is in the same position as thousands of other claimants. The only difference between her and a typical successful Employment Tribunal claimant is the amount of money awarded to her.

Commutation of the PPS 2015 pension

33. We now move onto the question of what the Claimant would have done in terms of commutation of one of her pensions in the 'but for' scenario, i.e. when she retired from the Police aged 60 as a Superintendent in the scenario where there was no discrimination, victimisation or detriments.

34. The Claimant has two pensions: one under Regulations of 2006 ("2006 pension") and one under Regulations of 2015 ("2015 pension"). It is the latter we are concerned with. What we are being asked to decide is whether or not she would, in relation to the 2015 pension, have taken a lump sum on retirement. The lump sum would have been over £142,000, but taking it would mean lower monthly pension payments.

35. It is relevant that in this but for scenario the Claimant would have been getting a £34,000 lump sum on retirement aged 60, come what may, under the 2006 pension.

36. Given life expectancy, the fiscally rational thing to do in relation to the 2015 pension would have been not to take the lump sum. For the Claimant to be better off foregoing the lump sum and taking the higher pension, she would only have had to get to her early 70s. A woman aged 60 would expect to live well into her 80s. What that means is that if we make our award on the basis that she would definitely not have taken the lump sum, the Claimant should get an extra £100,000 (an agreed figure).

37. Also agreed is that (if we deal with this issue – something the Respondent argues we should not do: see below) we should approach this on a percentage chance basis, i.e. we should assess how likely we think it is that the Claimant would have foregone the lump sum and award that percentage of £100,000. The Respondent, through leading counsel, reluctantly accepted that there was at least a 10 percent chance that the Claimant would not have taken the lump sum, and therefore would be due a minimum of £10,000 extra. The Claimant contends for something over 50 percent.

38. The Respondent submits that we should not entertain this point, on the basis: that it should have been raised and pursued at a previous hearing – the hearing in July last year – if it was to be raised and pursued at all; that we gave a comprehensive judgment on all points of principle in October 2023 following that hearing; that by raising this point after that judgment – it was first raised in December 2023 – the Claimant is effectively pursuing an out of time reconsideration application. There is a related argument, relying on oft-cited case law about the importance of lists of issues, that this point should have been included in the agreed list of issues used at the July 2023 hearing and annexed to our Reserved Judgment at the previous hearing.

39. We disagree with the Respondent's submissions. This is a continuation of the July 2023 hearing. That hearing was turned into a pure remedy hearing at the eleventh hour. A week before it started, the Respondent was still, on the face of it, pursuing time limits points and those points were conceded a matter of days before the hearing started. In the reasons for our Reserved Judgment, we outlined the way in which this had affected the evidence, and in particular on the fact that everything was rather last-minute and that expert evidence and expert joint statements were coming in during the course of the hearing itself. We thanked the parties and their legal teams for facilitating this, without which the hearing might well have had to have been postponed.

40. The last-minute expert evidence included the accountancy expert's joint statement, already referred to. This was presented to us, if memory serves, on or about day 2 of the July 2023 hearing. On paper, that hearing had been set up for us to deal with all remedy issues. In other words, the intention was originally not for us to do what we have in fact done, which is to deal with some issues of principle then and have a further hearing now to deal with everything the parties could not agree in light of the decisions we made following the July 2023 hearing. At the hearing in July, however, the decision was quickly made that the accountancy experts would not give evidence, that we would not consider the many disputes arising between them on the face of their joint statement, and that we would not attempt to quantify the Claimant's claim for pecuniary losses. The reason for that decision was that they could not in practice finalise their evidence and the figures until we – the Tribunal – had made the main decisions we had to make: as to the Claimant's

actual and 'but for' career paths. Accordingly, we told the parties that we were not going make any decisions about things on which we would or might need the accountancy experts' input. Respondent's leading counsel's suggestion in submissions that we could legitimately have reached a final decision on everything following the July hearing without going back to the parties first is not one we can accept. It seems to us it would have an error of law for us to do that.

41. It is right that what we were aiming to do following the July 2023 hearing was to issue a judgment that would resolve enough of the disputes there were between the parties so as to enable them to negotiate a settlement agreement without the need for a further hearing. To that end, we asked the parties to endeavour to identify for us all points of principle on which they disagreed. Unfortunately, the only points of principle relevant to the accountancy experts identified in the list of issues were what discount rate should be used and the issue connected with the **Smoker** case referred to in paragraph 14 above. In the accountancy experts' joint statement, there were numerous other disputes and disagreements between them. The Respondent cannot credibly suggest it thought the parties were shut out from arguing about any of those other matters on which the accountancy experts' did not agree because neither it nor the Claimant highlighted them to us.

42. That brings us to the agreed list of issues. The relevant issue identified in is was: "*What pecuniary loss has been caused to Detective Inspector Kalam by the admitted prohibited conduct? This issue will include* [our emphasis] *consideration of:- a. salary and pension but for the admitted prohibited conduct; b. actual future salary and pension;* [the two specific points of principle just mentioned, labelled c. and d.]". We did not in our October 2023 Reserved Judgment decide what pecuniary loss has been caused to the Claimant. All we decided were the specifically highlighted subsidiary issues a. to d. Ideally, the matters now raised by the Claimant would have been identified before the July 2023 hearing. Had that happened we would have decided them then. But we made no order requiring the parties comprehensively to identify all issues of principle, nor did we say, expressly or by implication, that the only points of principle we would decide at any stage would be those identified before or during the July 2023 hearing.

43. A submission has been made on the Respondent's behalf to the effect that the present hearing was purely for us to deal with arithmetic. That is not so. If all that was left was 'number crunching' then we would be asking the parties why they were wasting the Tribunal's time and resources on something that they ought to be able to agree between themselves. We would certainly not have listed this hearing for two days. The reason we listed a further two day hearing after the July 2023 hearing was that we thought just the kind of thing that has in fact happened might well happen: that when the experts attempted to quantify the claim in light of our Reserved Judgment, disputes on points of principle would come to light that the parties could not resolve without our input.

44. Given that context, the Respondent's suggestion that the Claimant is making some kind of reconsideration application does not withstand scrutiny. In submissions, I asked Mr Basu KC (for the Respondent) to identify what the judgment was which the Claimant was supposedly asking for reconsideration of. He could not provide us with a substantive

answer. Further, we are not departing from an agreed list of issues because the things the Claimant wants us to deal with are part of the issue: "*What pecuniary loss has been caused to Detective Inspector Kalam by the admitted prohibited conduct?*" We have given no judgment on that issue. Similarly, we have made no case management order to the effect that the parties cannot raise a subsidiary issue that was not identified in the agreed list of issues; and reconsideration only applies to judgments anyway.

45. In so far as the Respondent is arguing that what the Claimant is doing is an abuse of process akin to **Henderson v Henderson**[6] abuse of process, we disagree. **Henderson v Henderson**-type abuse of process arises where a claimant brings one claim and, having had that claim decided, brings another claim which could and should have been included as part of the first claim. Here we are dealing with a single claim. We dealt with part of it in July 2023. We are now dealing with another part of it.

46. Something else the Respondent seems to be arguing is that the Claimant is amending her claim and that she may not do so without getting permission to amend. This is on the basis that the Claimant went into the July 2023 hearing with a Schedule of Loss which was based on figures in her accountancy expert's – Mr Sture's – initial report. In that report, Mr Sture made an assumption that the Claimant would have taken the lump sum and the reduced monthly payments in relation to the 2015 pension. It turns out that that what Mr Sture wrote was not based on any instructions from the Claimant but on the fact that in his experience, the "*vast majority*" of people take lump sums. The Schedule of Loss did not say that that was what the Claimant would do, although by using Mr Sture's figures it could reasonably be assumed that that was her case. Even if that had been written in terms in the Schedule of Loss, in the Employment Tribunals, unlike in the County and High Court, schedules of loss are not pleadings / statements of case, nor are they supported by statements of truth. It is routine in Tribunals for schedules of loss to be updated and changed during remedy hearings and for Tribunals to make awards on the basis of the claimant's oral evidence on oath even where that is different from what their case on paper – in their schedule of loss – is. Of course, claimants who say something different in the witness box from what they said in their schedule of loss may damage their credibility and can expect to be cross-examined as to why their case has changed, but there is no rule that a claimant may not depart from what is in their schedule of loss without the Tribunal's permission.

47. The reason we are dealing with this commutation issue at all is not – at least not directly – anything the Claimant has done within the proceedings but is instead the result of Mr Sture having a change of heart, in a report of December 2023. There, for the first time in either expert's evidence, the notion that the Claimant would not have taken the lump sum is entertained. It was also the first time in these proceedings that anyone gave a figure for how much more the Claimant's award would be were we to decide that she would not have opted to take the lump in the but for scenario. The reason for his change of heart was that on her medical retirement on 31 July 2023, the Claimant had, in relation to one of her pensions, to choose between taking a lump sum and lower periodical payments and not taking a lump sum and having higher periodical payments and she chose the latter. Mr Sture wrote in relation to this: "*the Claimant has indicated by her actions that she will be*

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6 **Henderson v Henderson** (1843) 3 Hare 100.

rational in her decision making. With a life expectancy of 30+ years from retirement at 55 she would be better off not converting each £1 of PPS 2015 income for £12 of tax free lump sum. I had assumed she would take a lump sum with her ill-health pension but she did not;".[7]

48. It is fairly obvious to us that the reason this issue was not raised sooner was simply that it was overlooked; no one thought about it. It was overlooked in circumstances where at and in the run-up to the July 2023 hearing, both sides were dealing with masses of things at the last minute, where the experts' joint statement was not ready until part way through the hearing, and where at the very time it was ready, it was being decided that we would not consider the accountancy experts' evidence, including that joint statement, at the hearing. The reason why this commutation issue was not identified as something to deal with at the July 2023 hearing was, then, not particularly good; but it was not particularly bad either. We certainly do not accept, insofar as this is being suggested on the Respondent's behalf, that the Claimant has cynically changed her case because she now realises that if she does not do so it could cost her up to £100,000.

49. What all this means is that we have a case management decision to make: would it be in accordance with the overriding objective to allow the claimant in January 2024 to raise this commutation issue that could and arguably should have been raised in July 2023? Our answer to that question is: yes it would.

    49.1 All other things being equal, we think it is better for a court or a tribunal to decide a case on its merits and on the basis of all available evidence rather than on some other basis, e.g. by forbidding one side or the other from arguing a point because they raised it late in the day.

    49.2 What the Claimant has done is, at worst, failed fully to act in accordance with the overriding objective. She has not breached any of the other Rules of Procedure or any order.

    49.3 The balance of prejudice tips a long way in the Claimant's favour. If we prevent her from arguing this commutation point, she will be undercompensated by £10,000 even on the Respondent's case. In fact, given our decision below on that point itself, she would be undercompensated by £40,000. No discernible prejudice has been caused to the Respondent by this point being taken in December 2023 rather than it having been taken in or before the hearing in July 2023. The only thing the Respondent says in relation to this is to the effect that if we had decided the point following the July 2023 hearing, as part of our Reserved Judgment of October 2023, this would have facilitated settlement. That's as may be, but we cannot explore what happened in any without prejudice negotiations that took place between October 2023 and now and if the Respondent wants to say that the Claimant's conduct has led to costs being expended unnecessarily, that would be more relevant to a future costs application than to what we are dealing with now. Moreover, the fact that we did not decide the point in October 2023 did not prevent it being discussed in

[7] From paragraph 5 c. of Mr Sture's report dated 12 December 2023.

settlement negotiations before the present hearing. Given the Respondent's (realistic) acceptance that the point is worth a minimum of £10,000, we would expect it to have been.

50. For all of those reasons, we reject the Respondent's submission that the Claimant should be prevented from raising this commutation issue. We shall now decide that issue.

51. The decision we have to make is of a similar kind to a number of the decisions we made as part of our Reserved Judgment of October 2023, in that we are asking ourselves what would have happened in the future had the Claimant suffered no discrimination, victimisation and detriments. We are not even predicting what will happen in twenty or so years' time, but instead speculating as to what might have been in an alternate world. No one – the Claimant included – can possibly provide us with an authoritative answer.

52. The evidence we have on which we can properly base our decision is scant, and necessarily and unavoidably so.

53. First, we have Mr Sture's evidence in the joint statement that in his experience "*the vast majority of individuals take the maximum tax free cash even if that does not give them the best total receipts*". We have already explained that so far as the Claimant herself is concerned, he now expresses the view that she would or might not be part of that "*vast majority*", on the basis of what she did when she retired from the Police last year. However, although his experience of what most people do can properly be characterised as expert evidence which we should take into account, in so far as he is venturing an opinion as to what the Claimant herself would have done in light of what she did do in July 2023, he is going beyond his remit as an expert and is encroaching on our – the Tribunal's – turf.

54. The Claimant's decision not to take a lump sum when she retired is relevant evidence, but it is of limited value. This is because the circumstances that pertained in 2023 were vastly different to the circumstances that would have pertained in the but for scenario in 2043. Apart from anything else, in 2023 the Claimant could expect to receive a substantial lump sum in damages that we would award.

55. Also relevant is the Claimant's witness evidence at this hearing that her intention had been not to take a lump sum. She gave clear oral evidence to that effect, albeit she was unable to finish her evidence, and therefore was not fully cross-examined, after Mr Basu KC made an unnecessary remark when he was questioning her that (predictably) upset her and with which she became rather fixated.

56. In addition, we, as a panel of three, take into account our collective knowledge and experience of many people of our close acquaintance making decisions of the kind the Claimant would have been making aged 60 in the but for scenario. Whether on retirement to take a large lump sum and a reduced pension, or instead to take a smaller or no lump sum and a larger pension, is a very common decision for people to have to take. Based on our experience and knowledge, such a decision can in practice only be taken rationally near the retirement date. We have just used the word "*rationally*" because it is a decision that will be made on the basis of the individual's particular circumstance and what anyone's

particular circumstances will be in several years' time – let alone 20 years' time – cannot be predicted with any precision.

57. Things that might arise in the future that could well influence someone in the Claimant's position (in the but for scenario) to take a lump sum even where they would be better off in the long term not doing so include the factors mentioned in the Respondent's written submissions. For example, there is the fact that in 2043 the Claimant's children will be in their early 20s and it is not uncommon for children in their early 20s to want cash lump sums from their parents, if their parents have got it, for house deposits etc. An example of something that might influence a decision the other way is the fact that in 2043, when the Claimant is 60, potentially that might coincide – unhappily but in practice realistically – with the death of elderly family members who might provide an inheritance. It is not difficult to envisage plausible scenarios which would virtually dictate a decision to take a lump sum; or those where it would be completely irrational, or almost so, to take one.

58. When discussing this issue during our deliberations, we imagined a pension scheme that sought to change its rules to force its members to make final, binding decisions 20 years before retirement as to whether or not to take lump sums when they retired. A change in the rules like this would face strenuous objections by the members, who would undoubtedly complain that they could not reasonably be expected to make such decisions in their 40s. The reason they would complain about it is that they would want to make their decisions on the basis of at least some knowledge of what their circumstances would be at retirement age, something almost impossible to know that far in advance.

59. Another factor we bear in mind is that if you were to ask someone aged 30 to 40, "In 20 or 30 years' time, when you retire, will you make a fiscally rational decision or an irrational one?", we would expect the great majority to reply that they would behave rationally. (We refer to someone aged 30 to 40 because the Claimant prays in aid in support her contention that she would not have taken the lump sum evidence of discussions she had with a financial advisor in 2012 and 2013). Their replies would be honest, in that they would genuinely believe that they would behave in that way. This is one of the reasons why the Claimant's own evidence as to her intentions is not particularly weighty. It is not that we think she is lying to us – far from it. It is simply that she is talking about something she does not know as a fact: how an alternate world version of her future self would have behaved. She is also making assumptions that she and we cannot with confidence make, namely that this version of herself would aged 60 have behaved perfectly logically and rationally and that nothing would have happened in the intervening years to make it desirable and not unreasonable to take the lump sum when the time came to retire.

60. What all that leaves us with is a very limited evidential basis upon which to decide this issue. Experience, reflected in Mr Sture's evidence, suggests that at normal retirement age, most people don't make fiscally rational decisions, in that most people choose to take the maximum available lump sum. His evidence is something to which we attach some substantial weight: that "*the vast majority of retiring Police take the maximum tax free lump sum, whether or not that is rational*" (as he put it in his 12 December 2023 report). Unfortunately, he does not say what a "*vast majority*" means in terms of percentages; he doesn't give any figures. It could mean anything over about 65 percent or 80 to 90 percent.

There is also the possibility that Mr Sture was to an extent being rhetorical and/or that he does not have the exact figures. We think we can, though, reasonably safely say that most people – significantly more than a bare majority – opt for the lump sum.

61. In addition to what the Claimant elected to do about her pension in 2023 and what she told us about her own intentions, which have limited but still some evidential value, there is the fact that she would have been getting a lump sum of around £32,000 from her 2006 pension and we understand that her husband, a Police Officer and apparently within the same age bracket as her, would also be due a lump sum from his 2006 pension when he retired. This is not, then, a case where the Claimant would be choosing between getting a lump sum and getting nothing at all, or between getting a large lump sum and getting one of just a few thousand pounds.

62. That is the beginning and end of the evidence on which we can properly base our decision.

63. There is no one right answer. After debating it at length between the three of us, the figure that we have eventually come to is that there is a 60 percent chance that the Claimant would have taken a lump sum. That is largely based on the fact that the substantial majority of people do so. We have reduced the percentage down below what it would otherwise be to take into account in particular the factors referred to in paragraph 61 above. Even taking those factors into account, we think there is still a significantly greater chance that she would in practice have taken a lump sum than that she would not have done so.

64. The parties agree that a 60 percent chance means she is due additional compensation of 40 percent of £100,000: £40,000.

EJ Camp

19th March 2024