EMPLOYMENT TRIBUNALS

Claimant:	**Miss Tracey Bocking**
Respondents:	**The Chief Constable of Greater Manchester Police**
Heard at:	**Manchester Employment Tribunals**
On:	**27 November 2023 to 8 December 2023 and 18 December 2023**
Before:	**Employment Judge G Tobin**
Non-Legal members:	**Ms C Neild** **Mr R Cunningham**

Appearances

For the claimant:	**Mr H Menon (counsel)**
For the respondent:	**Mr S Gorton KC (counsel)**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. **The respondent was liable for the acts of ACC Green, under s109(2) Equality Act 2010.**

2. **The claimant was directly discriminated against by ACC Green, pursuant to s13 Equality Act 2010, on the grounds of her sex.**

3. **The claimant was not harassed by ACC Green, pursuant to s26 Equality Act 2010, on the grounds of her sex.**

4. **The claimant was not victimised by ACC Green, pursuant to s27 Equality Act 2010.**

5. **The respondent did not aid ACC Green in his direct sex discrimination of the claimant, pursuant to s112 Equality Act 2010.**

6. **The claimant was constructively dismissed by the respondent in breach of s95(1)(c) Employment Rights Act 1996.**

7. **The respondent did not directly discriminate against the claimant or harass her on the grounds of her sex, nor did it victimise her, in breach of s26, s13 and s27 Equality Act 2010 respectively.**

REASONS

Proceedings

1. Proceedings were originally commenced on 3 June 2021, after a short period of ACAS early conciliation. The claimant's claim was made against Merseyside Police and Greater Manchester Police ("GMP"), and she claimed sex discrimination The claimant's claim was linked with that of her colleague, DCS Emily Higham. DCS Higham subsequently settled her claim through judicial mediation. Proceedings were withdrawn against Merseyside Police and dismissed by order of Employment Judge Shotter on 21 February 2022. The claimant issued a further claim on 18 April 2023 against the respondent only; this claimed sex discrimination and also unfair dismissal.

2. The case underwent 5 preliminary hearings, and the proceedings are helpfully summarised by Employment Judge Leach following a hearing on 15 November 2021; Employment Judge Johnson on 10 May 2022; and Regional Employment Judge Franey following a hearing on 1 September 2023. Judge Franey helpfully drafted a List of Issues for this hearing, which I set out below.

List of Issues

3. The issues for the Tribunal to decide are as follows:

Case number 2408158/2021 (First Claim)

Liability for acts of Assistant Chief Constable ("ACC") Green – s109(2) Equality Act 2010 ("EqA")

1. Is the respondent precluded by reason of an issue estoppel/res judicata arising out of the Judgment of Employment Judge Serr dated 16 March 2022 from arguing that he was not liable for the actions of ACC Green of Merseyside Police as his agent under s109(2)?

2. If not, was the respondent so liable for the actions of ACC Green?

Harassment related to sex – s26 EqA

3. Did any of the following alleged acts by ACC Green amount to unwanted conduct related to the sex of Chief Superintendent/DCS Coffey (formerly Higham)[1] which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

    1. Without the claimant's knowledge, raising with GMP the question of an email dated 9 January 2021 from the claimant to CSupt Higham;

[1] We refer to Chief Superintendent/DCS Coffey as CSupt Higham throughout this judgment as that is how she was referred to at the time of the matters under scrutiny and how she was referred to in proceedings.

2. Alleging that the claimant compromised the effective operation of the North West Regional Organised Crime Unit ("NWROCU");

3. Accusing the claimant of dishonesty;

4. Accusing the claimant of undermining trust and confidence in her;

5. Failing to provide the claimant with any opportunity to defend charges against her, in breach of natural justice;

6. Deliberately and frequently booking meetings with CSupt Higham to clash with C/Supt Higham's pre-booked time off, and in particular her childcare commitments, which had already been explicitly booked in advance in her diary?

7. Deliberately failing to follow GMP's performance and conduct procedures and policies as required by the secondment agreement, including failing to abide by the recommendation from GMP's Professional Standards Branch that the matter ought to be dealt with locally as a performance issue;

8. Failing to consult with GMP before terminating the claimant's secondment to NWROCU, and

9. Terminating the claimant's secondment to NWROCU on or about 9 April 2021.

Associative direct sex discrimination – s13 EqA

4. Insofar as any of the matters alleged above as 3(1)-(9) did not constitute harassment related to sex, did they amount to less favourable treatment of the claimant, because of the sex of C/Supt Higham, than the claimant would have received had C/Supt Higham been a man?

Note: in what follows the allegations at paragraphs 3(1)-(9) are referred to as the "alleged unlawful acts of ACC Green"

Victimisation – s27 EqA

5. Did the claimant or CSupt Higham do a protected act by doing anything for the purposes of or in connection with the EqA in the following:

PD1: In the claimant attempting to devise a code between her and CSupt Higham for entries in EC's diary for time already booked off, and in particular time booked off for childcare, as evidenced by and/or contained in an email dated 8 January 2021 from the claimant to EC?

~~PD2: In CSupt Higham doing any act condoning or approving C's attempt to do so, and/or in CSupt Higham failing to report the same to ACC Green?~~[2]

~~6. Insofar as the claimant relies on PD2, can the claimant rely on a protected act done by another person?~~

7. If there were one or more protected acts on which the claimant can rely under s27 EqA, did any of the alleged unlawful acts of ACC Green amount to acts subjecting the claimant to a detriment because of a protected act?

Aiding contraventions – s112 EqA

8. Insofar as there has been a basic contravention in relation to the alleged unlawful acts of ACC Green, did the respondent (through GMP officers/staff members) knowingly help

[2] Withdrawn at the outset of proceedings.

ACC Green to do that contravention by failing to take steps to challenge his decision to terminate the claimant's secondment to NWROCU?

9. Can the respondent be liable under s112 EqA for acts or failures to act which occur after the basic contravention(s) committed by ACC Green, if any are established?

10. If so, did R knowingly help ACC Green to commit a basic contravention by failing to take steps to implement the recommendation in the Fairness at Work ("FAW") report authored by ACC Hartley that the claimant ought to be reinstated to her position in NWROCU, by failing to give official and public recognition of the claimant's exoneration by that report of the charge of dishonest/bad faith, and/or by failing to take any other steps to alleviate, remedy or reverse the effect on the claimant of contraventions by ACC Green, including but not limited to the matters set out at paragraph 14(10)-(14) below?

Case number 2404486/2023 (Second Claim)

<u>Unfair Dismissal</u>

11. Can the claimant establish that the following alleged acts or failures to act by the respondent, taken individually or cumulatively, amounted to a fundamental breach of the implied term of trust and confidence in her contract of employment?

    (1) Failing to reinstate the claimant to her post in NWROCU, despite the FAW report's recommendations;

    (2) Not telling the claimant what steps had been taken by GMP in relation to her reinstatement, despite the FAW report's recommendations;

    (3) Despite repeated requests, not giving the claimant any information about what progress or action there was in connection with the recommendation that the findings of the FAW investigation be shared with Merseyside Police;

    (4) Failing to take any steps to acknowledge publicly within GMP that the claimant's secondment to NWROCU was terminated unfairly and that any allegations of dishonesty made against her were without foundation;

    (5) Informing the claimant by email of 7 November 2022 that she should be redeployed at grade G, meaning that she could be redeployed to a post two grades lower or that her employment might be terminated if she was on the redeployment register but no suitable vacancy could be found;

    (6) Failing to ensure that line managers assisted the claimant in finding a suitable post in the redeployment process;

    (7) Following the claimant's return to work in December 2021, keeping the claimant "in limbo" in a temporary post on a temporary grade, without information about the post and what action was to be taken about her complaint and the recommendations in the FAW report;

    (8) Terminating the counsellor's contract after the counsellor failed to attend the last appointment with the claimant in July 2022, and not rearranging any counselling sessions;

    (9) Failing to inform the claimant that her line manager, Ms Emma Gilbert, had left the Force Contact Centre and was no longer her line manager, until June 2022, and not informing the claimant who her new line manager would be;

    (10) Failing to ensure that the claimant was supported, and that managers checked on her welfare and how she was coping at work, and

(11) Failing to respond to an email from the claimant to Ms Carol Brady of Human Resources on 11 November 2022 asking about what steps had been taken in respect of recommendations in the FAW report and about her proposed redeployment, on which the claimant relies as the "last straw", if required.

12. If there was a fundamental breach of contract, was that a reason for the claimant's resignation?

13. If so, can the respondent show that the claimant lost the right to resign by affirming the contract after any fundamental breach, whether by delay or otherwise?

Note: If the claimant establishes that her resignation should be construed as a dismissal, R does not argue that there was a potentially fair reason.

<u>EqA complaints</u>

14. Did any of the following alleged actions or failures to act on the part of the respondent under the heading "Allegations in Second Claim" amount to contraventions of the EqA in the following respects:

(a) Contravening s26 EqA by being unwanted conduct related to the sex of CSupt Higham which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant;

(b) Contravening s13 EqA by being less favourable treatment of the claimant because of the sex of CSupt Higham than the claimant would have received had CSupt Higham been a man; and/or

(c) Contravening section 27 by subjecting the claimant to a detriment because of one or more protected acts set out in the first claim as PD1 ~~and PD2~~?

<u>Allegations in Second Claim</u>

(10) Failing to take adequate steps to implement the recommendation in the FAW report that the claimant ought to be reinstated to her position in NWROCU;

(11) Failing to keep the claimant informed of what progress had been made in reinstating her to the NWROCU;

(12) Proposing that the claimant would be moved back to grade G from grade F/G;

(13) Not acknowledging publicly within GMP that the claimant's secondment to NWROCU was terminated unfairly and that allegations of dishonesty made against her were without foundation, and

(14) If constructive dismissal is established (issues 11-13 above), by dismissing the claimant?

<u>EqA time limits</u>

15. Insofar as any of the matters for which the claimant seeks a remedy under the EqA occurred more than three months prior to the presentation of the claim, allowing for the effect of early conciliation, can the claimant show that they form part of conduct extending over a period ending less than three months before presentation?

16. If not, can the claimant nevertheless show that it would be just and equitable to allow a longer period for presenting a claim?

The relevant law

Discrimination - Protected characteristics

4. Under s4 Equality Act 2010 ("EqA"), a protected characteristic includes the claimant's sex. So, an employee should not be discriminated against on the basis of her sex.

Associative direct sex discrimination

5. S13(1) EqA precludes direct discrimination:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

6. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

7. Direct discrimination can occur when an employee is treated less favourably because of a protected characteristic that the employee does not personally possess. This is commonly known as discrimination by association or associative discrimination. *Coleman v Attridge Law and anor 2008 ICR 1128 ECJ*, held that the EU Equal Treatment Framework Directive (No.2000/78) protected those who, although not themselves disabled, nevertheless suffer direct discrimination or harassment owing to their association with a disabled person. The EqA standardised matters by applying the concept of discrimination by association to all the protected characteristics (with the exception of marriage and civil partnership).

8. The Equality & Human Right Commission Employment Code states that this form of discrimination can occur in various ways, e.g. where the employee is the parent, son or daughter, partner, carer or friend of someone with a protected characteristic (see paragraph 3.19). It adds that the association with the other person need not be a permanent one (because the protected characteristic and causation is the key). Strictly speaking, there is no need for an "association" at all, as long as the protected characteristic is the reason for the less favourable treatment.

9. In this case, the claimant must prove that Detective Chief Superintendent ("DCS") Higham's protected characteristic of sex was the reason for her (i.e. the claimant's) treatment: effectively the "reason why" enquiry. So, the association that matters to the Employment Tribunal is the one made in the mind of the alleged discriminator. In *Bennett v MiTAC Europe Ltd 2022 IRLR 25, EAT*, the EAT observed that use of the term 'associative discrimination' is not the key to the analysis of whether a claimant has been directly discriminated against contrary to s13 EqA by reason of his or her association with someone else who has a relevant protected characteristic. The real question for the Tribunal to determine is whether the protected characteristic of the other person was an effective cause of the treatment of the claimant.

10. In practice, being able to point to a close association between the claimant and a person or group possessing a protected characteristic is likely to bolster the

allegation that this characteristic was the reason the claimant was treated less favourably. However, in *Lee v Ashers Baking Co Ltd and ors 2018 IRLR 1116, SC*, the Supreme Court overturned the decision of the Northern Ireland Court of Appeal (NICA) that a bakery which cancelled an order for a cake displaying the message 'Support Gay Marriage' had treated the customer less favourably because of his association with the gay and lesbian community. Lady Hale, giving the unanimous judgment of the Court, rejected the contention that because the reason for the less favourable treatment had something to do with the sexual orientation of some people, the less favourable treatment was 'on grounds of' sexual orientation. In her view, a closer connection was required. However, she said it would be 'unwise in the context of this particular case to define the closeness of the association which justifies such a finding'. In addition, Lady Hale disagreed with the NICA that the benefit from the message on the cake was one which could only accrue to gay or bisexual people. It could also accrue to the benefit of the children, parents, families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring.

Harassment

11. The definition of harassment is set out in s26 of EqA:

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
> (a)A engages in unwanted conduct of a sexual nature, and
> (b)the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if—
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—
> - age;
> - disability;
> - gender reassignment;
> - race;
> - religion or belief;
> - sex;
> - sexual orientation.

Victimisation

12. Victimisation under s27(1) EqA is defined as follows:

> *A person (A) victimises another person (B) if A subjects B to a detriment because –*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*

13. A "protected act" includes bringing proceedings under the EqA, as well as giving evidence or making allegations that a person has contravened the EqA. There is no need to find a comparator for victimisation as it is only the treatment of the victim that matters in establishing causation; it is possible to *infer* from the employer's conduct that there has been victimisation.

The burden of proof and the standard of proof

14. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

15. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-strage approach:

b. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

c. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

16. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of sex and that these are not merely two unrelated factors: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

17. So, the burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination, see *Madarassy v Nomura International plc [2007] EWCA Civ 33* at paragraph 56. The court in *Igen* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent *could have* committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which

a Tribunal *could conclude* that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It was confirmed that the claimant must establish more than a difference in status (e.g. sex) and a difference in treatment before a Tribunal will be in a position where it *could conclude* that an act of discrimination had been committed.

18. Even if the Tribunal believes that the conduct of a third party or respondent requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to sex. In *B and C v A [2010] IRLR 400 EAT* at paragraph 22:

> The crucial question is on what evidence or primary findings the tribunal based its conclusion that C would not have feared further violence from a female alleged aggressor (and so would have accorded her due process). As we have already noted (paragraph 19), the tribunal does not spell out its thinking on that point. There was no direct evidence on which such a conclusion could be based; no such situation had ever occurred, and the tribunal refers to no admission by C, or other evidence of his attitudes, that might have supported a view as to how he would have behaved if it had. It is of course true that the tribunal was in principle entitled to draw appropriate inferences from the nature of the behaviour complained of. C's behaviour was certainly sufficiently surprising to call for some explanation: in the public sector in particular, it is second nature to executives to follow appropriate procedures, and the explanation offered by C for his failure to do so in the present case – namely that he was seeking to avoid repeat violence (see paragraph 16 above) – is irrational since he could have mitigated the risk to precisely the same extent by suspending the claimant. But the fact that his behaviour calls for explanation does not automatically get the claimant past 'Igen stage 1'. There still has to be reason to believe that the explanation could be that that behaviour was attributable (at least to a significant extent) to the fact that the claimant was a man. On the face of it there is nothing in C's behaviour, all the surrounding circumstances, to give rise to that suspicion.

19. It is not sufficient to shift the burden onto the respondent, that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. In *St Christopher's Fellowship v Walters-Ellis [2010] EWCA Civ 921* at paragraph 44:

> The respondent's bad treatment of the claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination. Non-racial considerations were accepted as the explanation for the respondent's similar treatment of the claimant in the other instances in which the claimant alleged race discrimination in relation to participation in recruitment. In the case of Ms Hayward, the respondent made a genuine mistake about the nature of the relationship, which they would not have made if they had properly investigated the nature of the relationship with the claimant and communicated with her, but their failure to do so was accepted to be the result of a genuine belief. The fact that it was mistaken could not, in the context of scrupulous attention to recruitment procedures, reasonably be held to have the effect of indicating the presence of racial grounds and so shifting the burden of proof to the respondent to prove that he had not committed an act of race discrimination.

20. In the case of *Nagarajan v London Regional Transport [2000] 1 AC 501*, Lord Nicholls stated at 512-513:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phases, as well as subtle distinctions, are better avoided. So far as possible. If

> racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

21. Employment Tribunal's adopt the civil standard of proof, which is on the balance of probabilities, i.e. more likely than not.

Time limits for discrimination proceedings

22. Claims of discrimination in the Employment Tribunal must be presented within 3 months of the act complained of, pursuant to s123 EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month period if they think it *just and equitable* to do so, under s123(1)(b) EqA. The timer limit in the EqA is extended by ACAS Early Conciliation pursuant to s18A and 18B Employment Tribunals Act 1996.

Constructive unfair dismissal

23. Section 95(1) ERA provides that an employee is dismissed by her employer for the purposes of claiming unfair dismissal if:

> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

24. An employee may only terminate her contract of employment without notice if the employer has committed a fundamental breach of contract. According to Lord Denning MR:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.*

25. In *Courtaulds Northern Textile Ltd v Andrew [1979] IRLR 84* the Employment Appeal Tribunal ("EAT") held that a term is to be implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

26. Brown-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)* described how a breach of this implied term might arise:

> To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

27. *Western Excavating* established that a *serious* breach is required. *In Brown v Merchant Ferries [1998] IRLR 682*, the Court of Appeal accepted that if the employer's conduct is seriously unreasonable, this may provide evidence that there has been a repudiatory breach of contract, but, on the facts, held that the conduct in question fell

far short of a repudiatory breach by the employer. Mere unreasonable behaviour is not enough.

28. In *Hilton v Shiner [2001] IRLR 727* the EAT confirmed that the employer's conduct must be without reasonable and proper cause. *WA Goold (Pearmak) Ltd v McConnell and another [1995] IRLR 516* held that an employer's obligation to address an employee's grievance may amount to an implied contractual term existing in all contracts of employment. In *Malik and another v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606* the House of Lords held that a failure to respond to an employee's grievance can amount to a breach of the implied term of mutual trust and confidence. Thus, a failure by an employer to address an employee's grievance could itself amount to a breach of contract and entitled the employee to resign and claim constructive dismissal. According to *Morrow v Safeway Stores [2002] IRLR 9* if a breach of mutual trust has been found, this implied term is so fundamental to the workings of the contract that its breach automatically constitutes a repudiation – a Tribunal cannot conclude that there was such a breach but, on the facts, hold that it was not serious.

29. *Claridge v Daler Rowney Ltd [2008] IRLR 672* held that for an employer's mishandling of a grievance to amount to a breach of trust and confidence, it was necessary for the employee to show that the conduct complained of was calculated or likely to destroy or seriously damage the employment relationship. On the facts of that case, it was held that a delay of 4½ months in notifying the employee of the outcome of the grievance was not a fundamental breach of contract.

30. If an employee contends that a particular matter amounted to a "last straw" entitling him to resign, the "last straw" must not be entirely innocuous. It need not be in itself a breach of contract, but it must contribute to the series of events alleged to amount to a breach of the mutual trust and confidence term: *Waltham Forest London Borough v Omilaju [2005] ICR 418.*

31. We should consider whether the claimant has established, in the respects alleged by her, a breach of the implied term of mutual trust and confidence. We will need to analyse not only the individual 11 allegations but also the cumulative effect of these.

32. The employee must accept or rely upon the breach within a reasonable period following the fundamental breach of contract to avoid being taken as having affirmed the contract and waved to breach. In *Munchkins Restaurant Limited & Another v Karmazyn & Others UKEAT/0359/2009* the employees in these unusual circumstances put up with the employer's behaviour for several years. So mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. In *Fereday v South Staffordshire NHS PCT UKEAT/0513/10* the claimant invoked the grievance procedure, which resulted in a decision adverse to her on 13 February 2009, nevertheless she resigned, by letter dated 24 March 2009. The EAT upheld the Employment Tribunal's decision that the respondent had repudiated contract of employment, but that the claimant had affirmed the contract by her delay. A prolonged delay of nearly 6 weeks between the last breach of contract (the grievance decision) and the claimant's resignation was an implied affirmation in

that instance, but if the breach is still ongoing or "live" then there may not be affirmation.

33. So delay is one of many factors to9 which the Tribunal may have regard to when deciding whether the contract has been affirmed. Other facts might be illness, whether a grievance has been raised and remains unresolved and whether there is an ongoing dialogue as to whether some accommodation might be reached. The key question is whether, in all the circumstances the employee conduct had demonstrated an intention to continue the contract: see also *Adjei-Frempong v Howard Frankl Ltd EAT/0044/2015*.

34. The employee's acceptance of the breach must be unambiguous and unequivocal: see *Atlantic Air Ltd v Holt UKEAT/0602/2007.*

The evidence

35. After a short case management conference and a review of the list of issues, we (i.e. the Tribunal) retired to read the witness statements and the documents that had been identified for preliminary reading.

36. We were provided with an agreed bundle of documents, prepared by the respondent, consisting of over 2000 pages in 8 files (including a statement file). The respondent had also prepared a chronology and a cast list, which was agreed. The Employment Judge advised the parties at the commencement of the hearing that, as a matter of course, Employment Tribunals do not read the entire hearing bundle. If a document is important and relevant then that document needed to be referred to us, either in a witness statement or being specifically referred to the Tribunal at the hearing.

37. We heard direct (i.e. oral) evidence from the following.

37.1 The claimant, who was at the outset of events the Personal Assistant to the Command Team at NWROCU.

37.2 Detective Chief Superintendent ("DCS") Emily Higham, the operational lead of NWROCU and was also described as the Head of NWROCU.

37.3 Deputy Chief Constable ("DCC") Christopher Green, who was at material times Assistant Chief Constable ("ACC") of Merseyside Police and line Manager of DCS Higham.

37.4 Chief Constable Serena Kennedy, who was at all material times Deputy Chief Constable of Merseyside Police.

37.5 DCC Maboob (or Mabs) Hussain, who was an ACC at the relevant time and took responsibility for the respondent's dealing with the claimant and DCS Higham during the termination of their secondments and thereafter.

37.6 Ms Sarah Harrison-Gough, a senior Human Resources Partner who supported ACC Hartley in investigating the claimant's grievance.

37.7 Ms Cheryl Chadwick, a HR Strategic Business Partner and was the respondent's Head of HR Operations

37.8 Ms Mary Shaw, welfare officer

37.9 Ms Carol Brady, HR caseworker

We read witness statement from

37.10 Lynn Hughes, an inspector at the respondent who line managed the claimant from April 2021 to November 2021

37.11 Laura Hindmarch an inspector at the respondent who line managed the claimant between November 2021 and January 2022.

37.12 Emma Gilbert, an inspector at the respondent who line managed the claimant between January 2022 and May 2022.

37.13 Nichola Williams, was a temporary Superintendent and allocated Inspector Gilbert to manage the claimant. When inspector Gilbert stopped being the claimant line manager Superintendent Williams thought that the claimant might be managed by DCS Higham.

38. Having now heard the totality of the evidence, we assess the witnesses as follows.

39. The claimant was clear in her accounts of events. During her cross-examination she remain consistent in her account of the events which were the subject of our enquires and her evidence was consistent with the contemporaneous correspondence and records of events. The claimant appeared confused in answer to one or two questions but that was understandable because the claimant (unlike Police Officers Higham, Green, Kennedy and Hussain) did not have experience of giving evidence in a formal or judicial environment. The claimant did not appear to embellish events and we regarded her as an accurate historian and an honest witness. Her version of events was entirely credible. The claimant became upset on occasions, but this never seemed inappropriate, and she acted professionally throughout.

40. DCS Higham was clear and professional throughout. She answered questions clearly and did not appear to exaggerate. Her account of her role in NWROCU was both credible and consistent with the documentation. She explained her actions following the pivotal email and the termination of both the claimant's and her secondment. We regarded DCS Higham as an impressive witness.

41. Where there was a conflict in the evidence between DCC Green and DCS Higham we preferred the evidence of DCS Higham. We did not find DCC Green entirely reliable and key to making such a determination was the following:

d. DCC Green contended that he was operational lead on the NWROCU. The general agreement and collaboration agreements set up a more constrained strategic or oversight role, broadly in line with the other direct reports that (the

then) ACC Green oversaw. He clearly did not undertake the role that was set out in the policy and procedural documents and considerably expanded this role. That was entirely consistent with DCS Higham account and the contemporaneous evidence. In evidence ACC Green contended that he was the Collaboration Manager. He may have commandeered this role but the documentation was clear, at the material times DCS Higham was (officially) the Collaboration Manager or Head of Titan. His seniority and the fact that ACC Green formerly occupied this role, as a DCS before his promotion to ACC, convinces us that he could not be confused or mistaken about such a fundamental point.

e. DCC Hussain was clear in his account that initially ACC Green informed him that following seminal email he was told by ACC Green that false diary entries had been created (presumably to make the issue sound more serious). ACC Green denied saying this to ACC Hussain, but we prefer DCC Hussain's account because: (i) his account was clear; (ii) we found him to be generally an honest historian; (iii) this account was more consistent with the momentum in the paper-trail; (iv) it explains ACC Hussain's muted response or role in dealing with his officer and employee; and (v) we do not think that DCC Hussain would mislead the Tribunal about such a clear point.

f. DCC Green's attempt to cast the claimant in a bad light by suggesting impropriety in her appointment, the use of her job title and her working relationship with DCS Higham. So far as we could tell, none of those issues were pursued at the material times and they read petty and deflective. In the circumstances of this case, this unfounded mud-slinging questioned ACC Green's judgment and his rectitude.

42. We were concerned with the evidence of Chief Constable Kennedy.

a. Chief Constable Kennedy contended that the operational charts were inaccurate. She sought to rely upon later charts, which were not admitted as evidence, but in any event were after our period of scrutiny and may have reflect the reality that ACC Green had got his way, ousted DCS Higham, and was thereafter in operational control of NWROCU.

b. She seemed not to accept the clear and obvious point that under the terms of the secondment agreement the claimant and DCS Higham should have been treated differently.

c. Chief Constable Kennedy seemed not to question ACC Green's report of DCS Higham's supposed substandard performance and/or poor management style. Given that DCS was in a key position, it is just not credible that if ACC Green's complaints were true that no action was taken sooner to address this.

d. She refused to accept the outcome of the claimant's grievance and ACC Hartley's recommendation for no good reason other that, we assess, the outcome confuted her stance in support of ACC Green.

It seemed to us that DCC Kennedy supported her lower-ranking senior colleague despite his unjustified criticism of DCS Higham. This may have been to support the chain of command or because she did not want her Force to lose face to Greater Manchester Police or perhaps out of misplaced loyalty to a close colleague. In any event DCC Kennedy threw her lot in with ACC Green and this was clearly an error.

43. DCC Hussain was a cautious witness. He appeared keen to steer clear of controversy. That probably reflected his approach in dealing with DCC Kennedy and ACC Green. We believe that he was broadly a reliable witness. We note that he did not seem to adopt a challenging attitude to the senior Merseyside Police officers. In his evidence at the hearing, he obviously disagreed with the way the claimant and DCS Higham were treated and whilst we believe he questioned the high-handed, dismissive way both were treated, had he spoke up louder at that time then things may not have developed the way that they did and the claimant may not have needed to treat herself as constructively dismissed. The only significant dispute on his evidence was whether he told DCS Higham that (both her post and) the claimant's post would be left open pending the grievance outcome. On balance we prefer the evidence of DCS Higham on this point because the absence of corroborative contemporaneous correspondence tended to support more DCS Higham's version of events and, more important, the claimant was clearly under the misapprehension that this dispute might get sorted out in her grievance as she obviously laboured under the misapprehension that she might return to the job she loved for some considerable time thereafter.

44. Ms Harrison-Gough, Ms Chadwick Ms Shaw and Mrs Brady were clearly sympathetic to the claimant's predicament. Their evidence was not controversial. There was some disagreements or differences in recollections, but these were not significant and we determined was not necessary to resolve the veracity of the witness evidence. The respondents did not call Inspectors Gilbert, Hughes, Hindmarch and Superintendent Williams. Their accounts were not controversial; their narrative merely explained important parts of the chronology.

Our findings of fact

45. We set out the following findings of fact, which were relevant to determining whether or not the claims and issues identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

46. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis (and drew appropriate inferences) on the absence of documents that we expected to see as a contemporaneous record of what occurred. Witness statements are, of course, important. However, these stand as a version of events that were completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard the witness evidence with some degree of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation.

47. The claimant commenced working for the respondent on 10 January 2000 as a Communications Officer grade C-E [HB980].

48. Between 2 May 2014 and 1 July 2014 the Policing Bodies (Police and Crime Commissioners) for Cheshire, Cumbria, Greater Manchester, Merseyside, Lancashire and North Wales together with the relevant Chief Constables made a Collaborative Service General Agreement [HB1308-1336]. This was known as the General Agreement, and it enabled the provision of joint policing initiatives, so it was over-arching in its application. The agreement made clear the Disciplinary Arrangements at clause 10.4 [HB1325]:

> 10.4.1 All complaints, grievances and conduct issues raised by or against officers or staff working within a specific collaboration arrangement will be dealt with by their employing/appointing Force (unless otherwise agreed) in accordance with their respective Professional Standards Units's operating protocol or police staff discipline policies.

49. Section 14 of the General Agreement dealt with Resolution of Disputes

> 14.1 Any disputes arising from the day to day management of a specific collaboration arrangement shall initially and immediately be referred to the Collaboration Manager.
> 14.2 If the dispute cannot be resolved successfully by these means it will be dealt with in accordance with the provisions of the specific collaboration arrangement.
> 14.3 If a resolution still cannot be agreed the matter shall be referred to the NWJOC whose decision shall be final and binding.

50. Under definitions:

> Collaboration Manager – The officer appointed on each specific collaborative arrangement to carry out the functions specified in the General Agreement otherwise known as centre manager or operational manager.
>
> North West Joint Oversight Committee (NWJOC) – A joint oversight Committee of Police and Crime Commissioners formed to secure the efficient and effective governance of collaboration arrangements agreed between the participating parties pursuant to section 23 Police Act 1986 as amended, and the Home Office Statutory Guidance for Police Collaboration.

51. At all material times the Collaboration Manager for NWROCU was DCS Higham (as explained below).

52. On 16 September 2016 a Collaboration Agreement came into force for a Regional Organised Crime Unit, called Titan (although for consistency sake we call this NWROCU throughout this determination) [HB1337-1493]. The Collaboration Lead Force was identified as Merseyside Police [HB1337] and the Collaboration Lead was defined as "the Chief Constable of the Force appointed as Collaboration Lead [HB1340]. The Collaboration Manager was the Head of Titan [North West Regional Organised Crime Unit]. According to section 4.2 Appendices 1 and 2 of the Schedule annexed to the Agreement provided the governance and management structure charts [HB1349]. Section 6 of the Collaboration Agreement said:

> 6.2 The Collaboration Manager shall be the head of TITAN who will have day to day management responsibility for TITAN…
>
> 6.5 Officers and staff will be subject to the policies and procedures of their own Force in respect of Conditions of Service, Sickness, Performance, Grievance and Misconduct Procedures. All matters of performance and conduct will be managed initially by or on

> behalf of the Collaboration Manager, within TITAN, and may be referred to the relevant collaboration partner where appropriate to do so.
>
> 6.6 Police officers and staff will at all times remain under the employment of their collaboration force chief constable and subject to the terms and conditions of the service and regulations of that Force…

53. Appendix 1 identified strategic governance at 5 ascending levels [HB1359].

> Level 1: Collaboration Manager. Head of TITAN. Det Chief Supt.
> Level 2: TITAN ACC Lead. Chair of Management Board.
> Level 3: Management Board. ACC Crime for each Collaboration Partner.
> Level 4: North West NPCC. Chief Constables.
> Level 5: North West Joint Oversight Committee. Police and Crime Commissioners for the Collaboration Partners.

54. So, for strategic governance, we identify DCS Higham at level 1 above and ACC Green at level 2. The Collaboration Agreement did not clearly define a role for the TITAN ACC Lead [ACC Green] because, we determine, this was not an operational role within NWROCU. The Collaboration Agreement reads to us that the ACC Lead was a nominal position with strategic overview but no operational role, which is why this position was called ACC Lead and not called "Operational Lead". The Management Board was said to meet once every 8 weeks to provide strategic management and the chair of the Management Board [ACC Green] was responsible to ensure appropriate reporting to level 4 and 5.

55. Appendix 2 identified the management structure in a detailed flow diagram [HB1360]. The Head of TITAN was identified as, effectively, the chief operational officer and this was identified as "Det Chief Supt". i.e. DCS Higham.

56. On 23 March 2020 the claimant commenced her secondment to NWROCU as a Personal Assistant. The Merseyside Police grade was E, which was equivalent to the respondent's grade G, so this secondment represented a promotion for the claimant [HB266].

57. In the spring of 2020 DCS Higham and ACC Green had a meeting which is important in determining subsequent events. DCS Higham said that the meeting occurred on 27 April 2020, ACC Green says the meeting occurred on 24 March 2020. We determine that the actual date of the meeting is not determinant to subsequent events, it is the substance that is relevant. The parties believe the meeting date is important because it goes to the credibility of either concerned; but we do not share this view. We made credibility findings in determining this matter elsewhere, and the evidence on the date of this meeting was inconclusive. ACC Green brought his daybooks to the Tribunal, and we asked to have a look at these in their original form. The daybooks had a number of insertions of documents, but the meeting in question was on a regular numbered page so it does run in sequence. That said, there were blank pages in the daybook and the meeting in question stands out as unusual because of the amount of detail that ACC Green goes into in recording this meeting which stands at variance with other entries in the daybook. The claimant has similarly provided contemporaneous documents that she said support her version of events. The implications of providing a false account of when the meeting occurred might have far-ranging consequences outside this Tribunal and we are reluctant to make such a determination on the evidence submitted primarily because we do not, in our view,

need to make such a finding and it was not on the list of issues as needing to be resolved.

58. If the respondent's chronology was correct, the relationship between DCS Higham and ACC Green broke down within a week of ACC Green returning to NWROCU (albeit in a more senior capacity). If the claimant's chronology is correct, then it was just over a month later. Anyway, it is the substance of the meeting that the Tribunal is more concerned with. It is not disputed that the claimant gave ACC Green feedback at this meeting and the respondent's notes describe the claimant feeling suffocated by ACC Green's management style. The claimant's evidence was that matters changed after the meeting.

59. DCS Higham said in evidence that she regretted raising these matters with ACC Green as after this meeting he took away her decision making, led more meetings, and humiliated her at meetings by talking over her and speaking to and about her in a manner that was disrespectful.

60. DCs Higham contended, and we accepted, that the other collaborations did not receive the same amount of intrusive management from ACC Green. She said, and we accept, that she oversaw those collaborations whilst ACC Green was away from Merseyside Police and that she put in place a management system for monthly reviews and despite some problems with the motorway network policing identified in a HM Inspectorate of Constabulary ("HMIC") report and various changes of leadership within those collaborations, governance and frequency of meetings for those collaborations did not significantly alter. In essence, those operational leads were left by ACC Green to run their own departments. Furthermore, the ACC governance under ACC Critchley, who was ACC Green's predecessor, was in accordance with the documented regime set out in the collaborative agreements, with formal review meetings every 6 weeks, telephone updates every 2 weeks.

61. DCS Higham received a formal 121 Personal Development Plan ("PDP") meeting on 21 September 2020 which gave good feedback, although not confirmed in writing. We accept there were no performance problems, or concerns, raised with DCS Higham because there are no documents to corroborate this and the correspondence thereafter does not support such a finding.

62. DCS Higham had raised with ACC Green concerns that ACC Green's personal assistant/secretary had been taking Fridays off work and that this was having an effect on the workload of the claimant as the Command Team's Personal Assistant. ACC Green dismissed these concerns out of hand and told off DCS Higham for raising this matter. He then spoke to his own secretary, who said that she was willing to compromise about her working from home/holiday on Fridays, although she raised complaints about the claimant. So, as well as there being some tensions between the DCS Higham and ACC Green, it appears that this spread to their personal assistants/secretaries also.

63. On Friday 8 January 2021 the claimant sent an email to DCS Higham at 5.50pm headed "Jon Rooke" [HB405]. The email said as follows:

> Hi,

> We need a code. So if you see something purple in your diary that says blocked for Jon Rooke then it's so Lisa doesn't fill it.
> Likewise if you want to block off some time put Jon's name in and I know you want to keep it free.
> Have a good weekend,
> T

64. DCS Higham did not respond to this email in writing, over the weekend or at all. The claimant and DCS Higham were consistent in their evidence, which we accept, that on the Monday morning, DCS Higham discussed the trigger for the claimant's email, the wider circumstances and decided they did not need a code and that they would speak more often about DCS Higham's diary.

65. ACC Green said that he was told of the email by his PA on 11 January 2021. He said that he gave the matter a great deal of thought (though did not speak to the claimant and/or DCS Higham) and then "*I felt I had little trust in the claimant or DCS Higham*".

66. ACC Green said that he was informed of the "Jon Rooke" email by his personal assistant Lisa Lennon on 8 January 2021. It is not clear how Ms Lennon came to discover this email as she did not come to the hearing to give evidence. In contrast to ACC Green's assertion, we cannot see how such an email could come to the attention of his Personal Assistant in the normal course of Ms Lennon's duties. In any event, we note that ACC Green took surprising and unfounded offence at this unexceptional and seemingly private correspondence. On 13 January 2021 ACC Green approached DCC Kennedy regarding the claimant's email and raised concerns [HB1770, 1777].

67. ACC Green's statement makes clear that on 19 January 2021 "*I felt that I had lost trust and confidence in both the claimant and in DCS Higham*" and, significantly, he goes on to say "*no matter what the outcome was from the PSD conduct referral and assessment*". At that stage he had not spoken to either the person who wrote the email or the recipient.

68. In an email of 19 January 2021 to the respondent's temporary Chief Constable, DCC Kennedy reported that following ACC Green's protestation she had referred the matter to the Head of Merseyside Anti-Corruption Unit [HB1777-1779]. This is extraordinary given the narrative of this email contended that neither ACC Green or his PA either "opened" or "fully opened" the index email and it was readily apparent that no criminal offence had been committed. Nevertheless, at the behest of ACC Green and/or DCC Kennedy an anti-corruption investigation ensued into long-standing and exemplary officer and employee of a neighbouring police force, in circumstances where both the claimant and DCS Higham were oblivious to the fuss, because they had not been asked for any explanation of the email. Indeed, DCC Kennedy questioned the ethics of both DCS Higham and the Head of the respondent's Profession Standards Branch because, she said, they had a friendship, such that she felt compelled to request that Merseyside Police deal with the matter.

69. In any event, DCC Kennedy reported Merseyside anti-corruption police as identifying a chain of emails between the claimant and DCS Higham as "unprofessional, over-familiar and not appropriate". We are puzzled how the Merseyside anti-corruption police supposed came to this conclusion because they did not ask the claimant and DCS Higham for their explanations of the context of this email

chain. However, significantly, DCC Kennedy reported the anti-corruption police's assessment that the emails "would not be classified as misconduct" [HB1778].

70. Anyway, DCC Kennedy reported a clear breakdown in the relationship between ACC Green and DCS Higham [HB1778-1779]. She said that ACC Green "had been managing a difficult relationship" with DCS Higham for over 12 months and that, an external consultant/coach had identified "issues" that was said to impact other command team members. Furthermore, Command team members were reported to say that they found DCS Higham difficult to work with or for and that a number of other Police Forces reported that they were not happy with DCS Higham's approach. DCS Higham was oblivious to this negative assessment of her. Importantly, such purported poor performance was addressed by ACC Hartley in his investigation and rejected.

71. On 19 January 2021 DCC Kennedy agreed with the respondent's Temporary Chief Constable Ian Pilling that the claimant's email was not misconduct. However, it was portrayed as "verging on honesty and integrity" which we did not read as being culpable. Nevertheless, DCC Kennedy and TCC Pilling "agreed" it was untenable for the claimant to remain as Command Secretary at NWROCU. This seemingly private email was determined to be "undermining to the relationships across the command team but especially between [DCS Higham] and [ACC Green]" [HB1779]. The 2 senior officers decided that the claimant's secondment should be ended and DCS Higham was found culpable of a "performance issue" and was to be placed upon a development action plan, perhaps as a way to manage her out of the unit. Notwithstanding the decision had been made, DCC Kennedy said that she would refer the claimant's email to the Greater Manchester Police's anti-corruption unit [less emotively call Professional Standards Branch ("PSB")] for investigation and that DCC Mabs Hussain would deal with the claimant and find her a post to return to with the respondent.

72. On 27 January 2021 a Complaints Manager from the respondent's Profession Standards Branch replied with an initial assessment that gave short shrift to ACC Green's complaint [HB437]. The manager assessed that "this was not a matter which would require investigation by the PSB" and that it would normally be dealt with locally through the unsatisfactory performance and attendance procedures (UPP). The manager said "There are numerous more appropriate management method to deal with this type of issue…" So, supposedly taking the complaint at its highest (because, again, at that stage no one had spoken to the key protagonists), the respondent's Complaints Manager "[did] not feel that this matter should be dealt with as a miss-conduct matter by the PSB". Addressing DCC Kennedy's concern, there was no evidence, and indeed it was not pursued, that the Head of the respondent's PSB had interfered in this assessment in DCS Higham's favour.

73. Jonathan Chadwick (Head of PSB for the respondent) passed the PSB outcome on to DCC Hussain stating that this was a matter to be passed back to local supervision to deal with [see HB438-439].

74. On 29 January 2021 DCC Hussain was clearly unaware of the decision already made to terminate the claimant's secondment because he impressed ACC Kennedy that the matters be addressed through the GMP HR policy and the secondment agreement [HB1784]. He said in the email if the secondment was ended then the respondent would finds a role for the displaced secondee but he went on to say that

he wanted to be present for any NWROCU process. In evidence, DCC Hussain said that he did not regard the emails as unacceptable, he could not understand the fuss. He said he was unaware of any decision already made to end the secondment and he anticipated some dispute or resistance over a development plan which is why he wanted to be involved.

75. The note of 2 February 2021 [HB1889-1890] records a meeting with ACC Green, DCC Kennedy and Caroline Ashcroft (we believe the head of the Merseyside Police legal department). The meeting recorded the claimant's emails as "unprofessional, undermining, trust – performance", the codewords being "Dishonest behaviour. Integrity. Position of trust". Relatively early in the note it refers to the "DCC view" and "untenable Tracey C/T secretary". The Equality Act is referred to and then a breakdown of trust and confidence. Towards the end of the note there is reference to Weightmans' advice, but it seems clear to the Tribunal that trust and confidence had been raised prior to Merseyside Police's external solicitors, Weightmans advising on this matter. It then appears as if Weightmans' Solicitors were instructed, their attendance note starting from 11 February 2021, which includes a telephone call for 30 minutes followed by a review of the relevant papers. The clear response of ACC Green at the hearing was that trust and confidence as a reason for termination of the secondment was raised by Weightmans' Solicitors.

76. ACC Green thereupon pursued the matter directly with the external solicitors. On 11 February 2021 and 17 February 2021 ACC Green obtained advice from Weightmans [HB1892, 1893]. There was an ongoing dialogue between ACC Green and Weightmans solicitors and various drafts of the letters terminating the claimant's and DCS Higham's secondment. We were not at all satisfied that we were presented with a clear and complete picture of what was discussed between ACC Green and the external solicitors. We were told that Weightman's solicitors did not keep proper notes, either about the advice that they gave ACC Green or what was discussed. This advice was billed so we just do not believe that a regulated firm of solicitors would not have kept such records.

77. On 15 March 20221, which was almost 10 weeks after the seminal email, and at least 7 or 8 weeks after the decision had been taken to terminate the claimant's secondment, ACC Green informed the claimant that her secondment was terminated. He handed her the pre-prepared letter giving her 28-days' notice [HB515]. This was the first time that the claimant heard that her email had purportedly caused offence and it was the first time she was made aware of her removal from NWROCU. So, for the claimant, this termination had come out of the blue.

78. On 22 March 2021 the claimant raised a formal grievance, which was in this instance a Fairness at Work Step 2 Complaint [HB532]. She complained that she had not been treated fairly, based in inaccurate information, without any attempt to establish the facts surrounding situation and before imposing the most severe sanction. The claimant complained that the decision was taken outside her management structure and that she should have been managed via the respondent's processes. In any event, she contended that the procedure adopted (such as it was) was unfair. She made clear in her grievance that she would like to remain in post until the grievance had been resolved [HB538-539].

79. The respondent referred the claimant's grievance (and that of DCS Higham's) for investigation by a senior Police officer outside the respondent and Merseyside Police forces. On 12 April 2021 the claimant returned to the respondent, her home Force.

80. On 6 August 2021 David Hartley, Assistant Chief Constable for South Yorkshire Police upheld the claimant's grievance [HB916-921, and 903 & 1826 for the outcome letter to ACC Green]. The overview report is in the hearing bundle at page 923 to 928. Letter to c 916, letter to ACC Green 903.

81. This report was from an independent Senior Police Officer of the same rank as ACC Green and was extraordinarily damning in the circumstances. ACC Hartley would have been familiar with the pressures placed on an Assistant Chief Constable and would have, no doubt, shared a similar outlook to his senior colleagues, and have been familiar with the demands and pressures upon his senior colleagues. He said as follows in the Fairness at Work Step 2 – Resolution Finding directed to ACC Green:

> I have satisfied myself that the actions taken and experienced were unfair, lacking any reference to or adherence of policy and procedures and lack any sense of natural or organisational justice.

82. He described the circumstances in which the email was sent and the fact that DCS Higham evidenced ACC Green's secretary scheduling 168 meetings over the preceding 11 months. ACC Hartley referred to ACC Green's decision not to open the email in question but to send this to Professional Standards for review, and being told that it did not meet the threshold for misconduct with a breach of the policy and procedure as well as not dealing with this matter as a local issue as a advised by Merseyside's own Professional Standards Bureau. He then dealt with ACC Green approaching external solicitors and not speaking to the individual concerned as being the first critical process where he saw fairness and proportionality was not demonstrated. He went on to say:

> You describe your personal view that this is so serious that a performance intervention is not appropriate. You do not follow PSB assessment but attach your own severity assessment which you describe as dishonest attempt, seriously breaching trust and confidence.
>
> This clearly is in direct contravention of PSB AA [Appropriate Authority] Assessment.
>
> At this point I break from the 'grievance in common' approach to highlight that EH has dealt with the 'code' suggestion on the next working day, and has not encouraged, invited or incited the suggestion. It is quickly closed off and a more accurate title of 'wellbeing' appointment taken into use some weeks later.
>
> I see no justification for the contrary assessment to PSB AA that this action is in anyway demonstrating dishonest attempt or breach in trust and confidence. While there may well have been learning and management advice for TB as the author of the email, I see no justification for any negative reference to EH. The matter is dealt with quickly and professionally. If she had been provided opportunity, she could have explained her actions. She was not asked to explain her actions, the termination of secondment was the sanction applied.
>
> *Upon reviewing the legitimate reasons for terminating the secondment as outlined in NWROCU Secondment Agreement, you did not provide any evidence that there was a legitimate basis for so doing. No evidence was provided for any performance issues and GMP PSB clearly states the manager did not meet the threshold for misconduct.* [Our emphasis]
>
> …

> My findings are that no diary entries have been falsified and no dishonesty has been displayed.
>
> …
> DCC Hussain presents that whilst he was informed that there was a 'performance issue' he was also told that EH's position was untenable, he was not given any explanation of the detail of the performance issue nor why her future role was untenable. DCC Hussain describes being informed of the decision made and he then enabled the return to GMP post termination of secondment. DCC Hussain is clear he was not consulted on the decision to terminate and was not provided with the detail and rationale supporting it.

83. DCC Hartley then went on to say about the termination of secondment meeting and the process:

> In view of the fact that they were not advised in advance as to the nature of the meeting… they were not offered a companion to support them in what was a difficult meeting, and they were not provided with any opportunity to respond or give an explanation or appeal the decision, I do not believe they were treated with respect and courtesy.

84. In respect of alleged bullying by ACC Green, ACC Hartley said:

> Having considered the decision made by yourself to terminate both EH and TB's secondment and the evidence available to you to support this view, contrary to the direction provided by GMP PSB that the matter should be dealt with as performance, you do appear to have imposed your own sanction without adherence to relevant policy and procedures.
>
> Therefore, I conclude fairness, proportionality and transparency of decision making have not been demonstrated.

85. In respect of a resolution, ACC Hartley was blunt:

> I see no opportunity for reflective learning as you maintain your original mindset and decision making.

86. ACC Hartley made the following recommendations:

> I recommend that both EH and TB are reinstated back into role.
>
> The process has been one of grievance resolution and the information gathered has been consistent with that process. The aggrieved raised the issue of discrimination and of bullying in their Stage 2 grievance. Determination of those factors are not within the scope of this resolution and will be determined as appropriate by the relevant Force.

87. We are in no doubt that this Assistant Chief Constable would have been aware of the practical and political difficulties in reinstating the claimant back into this role. Nevertheless, he felt this was appropriate in these circumstances.

88. ACC Hartley had the benefit of very senior human resources support and his recommendations were wholly consistent and proportional with the evidence he heard and the findings he made.

89. In the Management Toolkit for Fairness at Work it emphasises [HB1602]:

> Actively look for solutions that'll satisfy the employee but which are also appropriate for the organisation and other team members.
> Be prepared to challenge decisions or previous actions that are unacceptable.
> Take any necessary follow-up action.

90. The Management Toolkit goes onto deal with recommendations:

> If you are going to include 'recommendations' ensure these can be implemented.

91. The report was discussed by Chief Constable Kennedy and ACC Green and, so far as we can tell, both resolved not to do anything about it, so seemingly both Chief Constable Kennedy and ACC Green ignored the report, its outcomes and recommendations. We note that the claimant's former role at NWROCU was still vacant at this time.

92. ACC Hartley's report was also sent to ACC [as he had reverted to that rank by that stage] Hussain and Ms Harrison-Gough for Greater Manchester Police. ACC Hussain forwarded on the grievance outcome and material to DCC Pilling but thereafter we cannot see any substantive action taken by the respondent to return the claimant to her secondment.

93. By 28 September 2021 it was clear the respondent did not have anywhere to deploy the claimant at the Force's Operations Centre or elsewhere [see HB950].

94. Throughout this time the claimant was unaware of what was happening in respect of her role. She was initially redeployed to work with DCS Higham in a temporary role. Ms Chadwick raised this matter in October 2021 and received an updated from Ms Harrison-Gough stating that DCC Pilling had now left the Force and she was unsure which senior officer in GMP was dealing with the matter [HB975].

95. The claimant was off sick from August 2021 until December 2021. The claimant asked what was happening with her return to NWROCU with her various line managers, initially Inspector Lynn Hughes. The claimant in her evidence says that she chased up her Fairness of Work outcome with Ms Hughes on numerous occasions. She then pursued this with Ms Chadwick in early October 2021. In her statement Inspector Hughes said that she spoke with the claimant on 21 October 2021 and the claimant was concerned about her position and asking when she was to return to NWROCU.

96. Inspector Hughes met the claimant on 27 October 2021 when the claimant again raised her concerns about the position at NWROCU being filled so that this could preclude her return. On 29 October 2021 in an email to Ms Chadwick asking again what was happening with the Fairness at Work outcome [HB973] the claimant's position was that if a suitable role could not be found at Greater Manchester Police, then she felt she would need to formally request returning to NWROCU. Inspector Hughes said that she had taken up the lack of HR contact with the claimant with Ms Chadwick.

97. The claimant resumed work in December 2021, and she was deployed temporarily to work with DCS Higham in Wigan. By December 2021 the claimant was managed by Inspector Laura Hindmarch. On 15 December 2021 Inspector Hindmarch said to the claimant that she was chasing up Ms Chadwick for an update on what was happening with her job/role. In her statement Inspector Hindmarch said that she was told on 24 December 2021 by Rachel Turned of the respondent's human resources department that the claimant would continue with her role supporting DCS Higham for three months which would coincide with the end of her secondment date.

98. Ms Chadwick chased up this matter on 4 January 2022 and on 16 January 2022 was told by Terry Woods that Merseyside Police had refused to allow the claimant to return to her role at NWROCU [HB1165].

99. Inspector Hindmarch said that she met with the claimant on 7 January 2022 where they discussed (amongst other things) the claimant's concerns over the lack of updates and her return to work. The claimant explained about the effects of these events upon her health. Inspector Hindmarch recognised the claimant's problems and was sympathetic to her situation so she tried to intercede to see if she could give her some answers, even though early January 2022 she had handed over line managerial responsibility to Inspector Gilbert.

100. Inspector Gilbert spoke to the claimant by telephone on 20 January 2022 and further corresponded with her on 31 January 2022. She informed the claimant that she was still continuing to chase decisions from Human Resources [HR1186]. The last contact that Inspector Gilbert had with the claimant was on 18 or 19 May 2022 prior to inspector Gilbert moving on to a promoted role. There was no substantive progress made in respect of reverting to the claimant with any clear indication of what was happening with the recommendations of her grievance.

101. On 27 February 2022 the respondent received an automated notice that her secondment was due to end on 23 March 2022. The claimant then wrote to Ms Chadwick stating that she had repeatedly asked for an update on what action was taken as a result of her grievance outcome and when she could be reinstated to her role at NWROCU. She asked what would be happening after 23 March 2022 [HB1199]. Ms Chadwick responded to the claimant that day, confirming that the claimant would remain on her current salary until the respondent had worked through the next step, and she apologised for the lack of clarity.

102. On 16 March 2022 Cheryl Walker, a Greater Manchester Shared Service Operator, sent the claimant a letter to confirm that her external secondment had been extended by three months [HB1210]. This preserved the claimant’s pay and grade. The claimant signed the extension on 27 April 2022.

103. On 6 June 2022 Inspector Hindmarch emailed the claimant wondering how she was and who was managing her [HB1226]. The claimant said in evidence that was how she discovered, in passing, that Inspector Gilbert had been promoted and was no longer her line manager. A few days later, the claimant expressed her feelings that her case was not getting anywhere, and that she was just stuck in limbo [HB1226]. Superintendent Hindmarch took this up with Temporary Superintendent Nicola Williams on 10 June 2022 [HB1228].

104. The claimant said, which we accept, that no-one formally informed her of her change of line manager and that she did not have a line manager for the remaining period of her employment. This appears to be corroborated by the statement of Superintendent Williams who said she assumed that the claimant was being managed by DCS Higham but, so far as we could see, that was not formally or properly arranged. DCS Higham stepped in to fill a vacuum so that the claimant could, at least, have some form of support. [See HB1232, 1270].

105. The claimant's external secondment extension end date appeared to have come and gone on 23 June 2022 with no action.

106. On 28 June 2022 Lucy Hayes, HR Caseworker, wrote to Carol Brady asking for an update with the claimant's case. Nothing appeared to have been resolved about the claimant's grievance outcome at this stage, and it appears to us and the evidence of Ms Chadwick was that they needed to resolve the claimant's outstanding employment status by redeploying her.

107. By 4 August 2022 the claimant wrote to DCS Chadwick [HB1242]. She complained that her pay had reverted to her pre-secondment grade and that her pay, her grade, the grievance outcome and re-instatement at NWROCU together with her bullying complaint against ACC Green had not been addressed. She added:

> I am extremely upset, and frustrated at the lack of transparency and feel extremely let down by GMP. Since returning to GMP I have had 4 line managers, 2 of which I have never met. My last line manager retired and I currently have no idea who my line manager is. My mental health counsellor did not turn up for my last appointment, and I have since learned that his contract has been terminated, leaving [me] with absolutely no support whatsoever.
>
> Quite frankly I feel like I have been put through 18 months of ill, been fobbed off, ignored, with a complete lack of meaningful support or inclusion. My return to work paperwork and stress risk assessment have been completely ignored.
>
> Please could you let me know as soon as possible what is happening with my pay/grade…

108. Ms Chadwick responded that day to say that the claimant's pay should not have altered and that she would sort this. She said that the claimant had been patient and that she will endeavour to arrange a meeting as soon as possible to discuss the next steps.

109. Things when quiet after this exchange. The claimant said in evidence that she started to lose confidence in her employer in August 2022.

110. We understand that during this period there was judicial mediation and that this had concluded before the following step.

111. The respondent clearly did not know what was formally going on with the claimant, so on 1 November 2022 Ms Brady wrote to DCS Higham saying that Ms Chadwick informed her that the claimant should be on the re-deployment register and that the respondent should be looking for a role for her at her substantive grade G. Ms Brady asked DCS Higham to let he know what the claimant was working on and who her line manager was [HB1270].

112. DCS Higham's reply seemed to have summed up the claimant's position succinctly [HB1270]:

> Tracey submitted a grievance and won hands down. Her ET case is still not resolved and is still being negotiated by the force. Tracey has never really had any updates from anybody, despite her contacting numerous people. I have spoken to Cheryl a couple of times about her but you are the first to contact me about any plan around her, so the below had defo come out of the blue.

> Her substantive role at E grade is within OCB but at present she is a G grade, as the force have kept her on that grade whilst all this was sorted out.
>
> She is currently working for the SLT at Wigan, in a staff officer role and also supporting me with all the forcewide meetings that I chair for command. I am her line manager as the force said she could work from Wigan under me, until this was resolved.
> …

113. On 7 November 2022 Ms Brady wrote to the claimant asking her to register for the redeployment register (at grade G) [HB1281].

114. On 11 November 2022 the claimant wrote to Ms Brady asking what steps were being taken in respect of her recommendations for her grievance outcome and she posted a whole list of questions in respect of possible redeployment as she said she wanted to prepare for a meeting on this point [HB1280].

115. The claimant had applied for a job with the National Crime Agency ("NCA") in November or December 2021. She was then placed into a pool for which she had to wait. She received a conditional job offer pending vetting in October or November 2022. The claimant said that by mid-January 2023 she received a formal offer of employment which she accepted at the end of January 2023.

116. The claimant then resigned by email on 1 February 2023 and her termination of employment took place on 3 March 2023. Her start date with the National Crime Agency was 6 March 2023.

117. The claimant said that she had waited weeks following her email of 11 November 2022 for a response. She said that she gave her employer extra time over Christmas, but she genuinely felt that she was not going to get a response from her employer about her grievance. The claimant said believed that she was not going to get another suitable job through the redeployment register and saw this as a device which her employer effectively would utilise to exit her from the organisation.

118. The claimant's resignation email is detailed [HB1296-1298]. She complained about a lack of response to her email of almost 2 months earlier. The claimant referred to her grievance outcome and complained about the lack of action and despite repeated requests she had been given no information about what was happening. The claimant expressed her concern about redeployment, which had the potential to place her 2 grades lower than her current grade. She said that she had no confidence in her managers assisting her as she had no real input from her several managers for months and she did not know who her current line manager was. The claimant said that if she could not find a vacancy then her employment could be terminated. The claimant referred to her ill-health following the termination of her secondment and the lack of support which had left her physically and mentally exhausted. She referred to her circumstances as a blatant case of sex discrimination, misogyny and abuse of position by yet another serving male police officer. She said as a result she had no confidence with the respondent and the relationship had irrevocably broken down. The claimant resigned treating herself as constructively dismissed, her employment ending on 3 March 2023.

119. It was somewhat ironic that after many months of the claimant not hearing any acceptable response from her employer, Ms Brady subsequently acknowledged the claimant's resignation within a few minutes [HB1296].

Our determination

Liability for acts of ACC Green: s109(2) EqA - Issue 1 and 2

120. S109 EqA deals with liability of employers and principles and states as follows:

> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
> (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
> (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A –
> (a) from doing that thing, or
> (b) from doing anything of that description.
> (5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

121. This issue was partially dealt with by the Judgment of Employment Judge Serr dated 16 March 2022 [HB118-128]. Employment Judge Serr addressed this issue through the respondent's application to strike out the claimant's claim. Sometimes such applications are made because the claim advanced on this point is weak, sometimes the respondent makes such application for tactical reasons. Judge Serr did not make any strike out order. The issue surrounded the concept of agency and specifically whether or nor Merseyside Police and/or ACC Green could be held liable under s109 EqA for the alleged associative discrimination of DCS Higham and the cancellation of the claimant's secondment. Judge Serr did not determine the substantive issue. He merely addressed whether there were sufficient merits to the respondent's argument that the claim has no reasonable prospects of success or little reasonable prospects of success on this point. Judge Serr considered a substantial bundle of documents, a supplemental bundle, witness statement, skeleton arguments and oral submissions. He did not hear evidence as he said the witness statement were largely uncontentious. He made a limited number of factual determinations.

122. It is clear to us that Judge Serr did not determine the agency point, i.e. the substance of the matter was not determined and that is clear from paragraphs 48.1 and 49 of the Serr Judgment [HB126]. As the substantive argument was not determined by the Tribunal, there is no valid argument of issue estoppel/res judicata. Judge Serr determined this issue through the prism of an application to strike out, and he determined the claim at its highest evidential point. Judge Serr determined that the claim did not reach the threshold of having no reasonable prospects of success or little reasonable prospects of success, so the underlying substantive point was not determined. Accordingly, we now determined the substantive issue.

123. Mr Gorton's submission is cogent. NWROCU is not an independent legal entity. It was set up by agreement (the Titan Agreement) between 6 police forces (the

collaborators). NWROCU was funded by all collaborators, although Merseyside Police was the collaboration lead. The respondent contended that ACC Green and Merseyside Police in terminating the claimant's secondment did not act in any way that could be said to resemble an agency arrangement. He was not, and never did, act on behalf of the respondent. The respondent did not nor could not ratify his actions. He acted independently of the respondent as a Merseyside Police officer and as a NWROCU officer. ACC Green made his decision abruptly without reference to GMP. The only reference he made to the respondent was to refer the claimant (and DCS Higham) through the Professional Conduct Scheme. When he was told that his substantive complaint was not so serious, he circumvented all further engagement with the respondent and effectively took it upon himself to procure his own legal advice through Merseyside Police's reference to their own external solicitors. The respondent contended that they were, in fact, blameless so far as ACC Green's behaviour was concerned because they sought to have the claimant returned to her secondment post, but this was refused by ACC Green and Merseyside Police.

124. Mr Menon's submission was particularly forceful in asking the Tribunal not to construe a disobedient agent with a negation of the agency arrangement.

125. We need to commence our analysis at the employment locus of the claimant, and it is quite clear to us that that the claimant was an employee of the respondent, she was engaged in NWROCU (the non-legal entity) and Merseyside Police was the lead Force or coordinating Force.

126. The corroborative agreement sets out strategic governance [see HB1337-1636]. This document was signed by all of the Chief Constables. This arrangement has very clear indicators of agency. The claimant remained as an employee of the respondent, The strategic governance was made quite clear – that there is a management board populated by an Assistant Chief Constable for each collaboration partner. ACC Green occupied a clearly defined role in the governance structure. ACC Green was answerable in turn to the 6 chief constables, who were signatories to the agreement, through the management board.

127. The 6 Chief Constables sit above that level and ultimate responsibility lies in the North West Joint Oversight Committee ("NWJOC"), which is the Police and Crime Commissioners (i.e. the signatories) for the collaboration partners. So, although Merseyside Police was the lead Force, it was not anything more than Collaboration Lead, on behalf of the respondent and others.

128. The claimant was an employee at all material times. S39 EqA provides that the employer is prohibited from discriminating against the employee. Was not subject tho thew contended detriments outside the employment relationship.

129. We agree with Judge Serr, it cannot have been intention of Forces to leave their officers and employees with no effective remedy and indeed the various agreements suggest the opposite.

130. The general principle that a police officer in Force A can be an agent of Force B when managing an officer or staff member of Force B was established in *v Weeks UKEAT/01201/2011*.

131. The common law principles of the principal-agent relationship should apply to our analysis: see *Yearwood v Commissioner of Police for the Metropolis & another & other cases 2004 ICR 1660 EAT and Ministry of Defence v Kemeh 2014 ICR 625 CA.*

132. In determining whether there is an agency relationship regard must be had to what, if anything, the putative agent was authorised to do. In *Unite the Union v Nailard 2017 ICR 121* Unite authorised the official to carry out core work on its behalf. That was clearly the case in this instance as the various formal General and Collaboration Agreements envisage

133. We determine the agency relationship is established, so it then needs to be determined whether the agent was 'acting with the authority of the principal': s109(2) EqA. *Kemeh* held that would be the case where the agent "discriminates in the course of carrying out the functions he is authorised to do". Therefore, the principal can be liable even though it has not authorised the act of discrimination itself and despite the act having been done without the principal's knowledge or approval. This is made clear by s109(3) EqA which expressly states that the principal will be liable irrespective of whether it knew or approved of the act of discrimination. *Nailard* endorsed the formulation that 'the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do'. This equates the circumstances in which a principal may be liable for the acts of an agent with the 'course of employment' governing the liability of employers for the acts of their employees under the EqA, which makes good sense.

134. Mr Gorton attached the decision of *Bailey v The Chief Constable of Greater Manchester Police*. The decision was made at Employment Tribunal level, so it is not binding. We are not sure that this case assists us and we prefer to rely upon the analysis above.

Associative direct sex discrimination: s13 EqA – issue 4

135. Of the prohibited conduct alleged, we deal with this point first because that was the claimant's principal argument at the hearing.

136. It is worth repeating at the outset of our analyses that the substantive email of 8 January 2021 was innocuousness. We determine that this email could not reasonably be said to be offensive by anyone other than someone looking to take offence. It is remarkable that such an unremarkable email was able to cause such uproar.

137. The associative sex discrimination claim is based upon the less favourable treatment of the claimant based upon the sex of DCS Higham in comparison to the treatment the claimant would have received had DCS Higham been a man. The claimant's case is that she was effectively caught in the crossfire; ACC Green was out to get DCS Higham, and this was sex discrimination. She (i.e. the claimant) was collateral damage in ACC attempt to dislodge DCS Higham from NWROCU. It is also worth noting that we were sceptical of this contention at the outset.

138. There was less favourable treatment of DCS Higham contended in usurping and/or undermining her in her role, double-booking DCS Higham the claimant and orchestrating an excessive meeting workload and then terminating the secondments of both DCS Higham and the claimant based on, at best, a flimsy transgression with no proper or fair process undertaken.

139. The evidence of both the claimant and DCS Higham, which we accept, is that ACC Green overstepped his management functions. The claimant (and DCS Higham) contended that ACC Green micromanaged DCS Higham and that this was inappropriate in the circumstances, and he exceeded his role and also his authority.

140. ACC Green had formally been the DCS who occupied the claimant's role in NWROCU. He left this role for career advancement, and he had been absent from NWROCU for a period of around 6 months. He returned in a more senior position. He was the ACC Lead In 4 collaborations: motorway network; underwater search teams; firearms training; and NWROCU. Yet he sought to effectively run NWROCU. NWROCU was described as an elite unit and the appointments of both DCS Higham and ACC Green were prestigious. DCS Higham was the first female Head of NWROCU. DCS Higham used the word "oppressive" to describe ACC Green's management approach, and she said that in her 31 years as a Police Officer she had never been managed in such a controlling and overbearing style. This is surprising criticism emanating from a dedicated and, we determine, excellent Police Officer. It is also surprising emanating from an officer at such a high level. ACC Green disputed this. He said that he was in operational control of the NWROCU, which is contrary to all the documentation in place in the secondment agreement and the documentation for the collaboration agreement.

141. DCS Higham's evidence was clear on this point. ACC Green was overbearing and dismissive and she felt suffocated. Not long after he came back to the unit, she asked him whether she was doing anything wrong as she told us she felt this was impairing the proper functioning of the unit.

142. By autumn 2020 a management consultant, Alison Williams, fed back to DCS Higham [HB1847] that there was dysfunctionality at the Senior Leadership Team. We have not seen that report and we do not know the basis upon which Ms Williams was instructed, although there was an issue, and likely some tension, around the clarity of roles against ACC Green's expansion into DCS Higham's operational role.

143. ACC Green said that the relationship was professional and hierarchical, and it was his responsibility to take the operational lead. This was also at odds with the professional relationship that DCS Higham said that she established with ACC Critchley (ACC Green's predecessor) which appeared entirely consistent with the Secondment Agreement and Collaboration Agreement. It was never contended by ACC Green that he worked to such an arrangement with his ACC Lead when he was the DCS in charge of NWROCU.

144. We find that there was no poor performance issue with Higham. It is difficult to give any credence to ACC Green's negative assessment of DCS Higham (although adopted by DCC Kennedy) when DCS Higham was kept in the dark and we have not seen a shred of collaboration (contemporaneous or otherwise). In contrast, DCS Higham's dispute on this and the matter was address by DCC Hartley in his grievance investigation. He wrote to ACC Green [HB1830]:

> Despite EH participating in the PDR process and regular 121's with you, at no point were any performance or conduct issues raised or recorded and no action plans set or concerns raised.

145. The index email and the emails on pages 401-402 is entirely consistent with the claimant and DCS Higham expressing their concerns about ACC Green's management style. He chose to ascribe this as an honesty and confidence matter. We pondered why this could be seen as an honest or integrity issue as the email merely suggested a strategy to wrestle back some control of DCS Higham's diary. It might have properly been a matter to note or question the claimant and DCS Higham about but the action undertaken by ACC Green appeared out of all proportion to the possible infringement. John Rook was a code to override ACC Green's disregard of the DCS Higham's other diary commitments and we are surprised that ACC Green did not reflect upon why such a senior officer's admin support might want to do this, but he did not.

146. We have no doubt that DCS Higham and the claimant's diary were scrutinised thoroughly as was their emails and nothing further was uncovered. There was never any evidence that DCS Higham was utilising this time for anything other than sound operational or other legitimate reasons.

147. The email suggested that a code be used to block out the appointments. DCC Hussain said that he regularly blocks out matters in his diary through his PA, and this was a frequent practice. We note that DCC Hussain was a senior male police officer and that he was not operating in a unsympathetic work environment.

148. We accept the evidence of the claimant and DCS Higham that DCS Higham spoke to the claimant on the Monday morning. The email was sent just before 6pm at the end of the working week (as staff at this level did not normally work in the office at weekends). DCS Higham said that she read the email either during the evening of Friday 8 January 2021 or on the Saturday morning. She said the email made her smile

and that the email was trying to keep her diary free for lunch, reading and email catch-ups. In her statement, DCS Higham said:

> *I didn't think anything further of the email at all, I didn't read this email as corrupt, or putting fake meetings in, it was merely a worried PA who had seen I was struggling with the amount of meetings, trying to give me a lunch break and ensuring that I had sufficient time to get to meetings after childcare and my diarised childcare wasn't booked over.*

149. DCS Higham's response to the email on the Monday morning was sensible, proportionate and entirely consistent with good management practice. The contemporaneous fact that no such appointments were booked (and it was many, many weeks before either individual became aware that such a matter was under scrutiny) reinforces our finding that there was little substance to the fuss created by ACC Green. Our determination is a hardworking and supportive PA attempted to ameliorate the unpleasant or unsupportive working environment created for her boss by ACC Green. This was plainly not some form of nefarious activity designed to undermine the organisation.

150. Had ACC Green, or anyone else, asked these 2 individuals about the email then they would have appreciated the inoffensive nature of this exchange. ACC Green and the relevant officers at Merseyside Police and Greater Manchester Police were detectives and/or professional investigators so their failure to gather the most important evidence, i.e. the accounts of the email sender and the email recipient concerned us greatly and spoke volumes. ACC Green appears not to have wanted to cloud the issue. He looked for fault and we believe he felt that he had found it. This was no more than a device to oust DCS Higham.

151. Mr Gorton put to DCS Higham the tone of another email around this time, which used the word "fizzin" in respect to ACC Green's behaviour. DCS Higham said in hindsight she would have used a different word but in the overall context of what was going on, we assess, that this sentiment was not inappropriate. We do not share Mr Gorton's umbrage at the word "fizzin". This was not rude. It suggests that DCS Higham was frustrated about the way that she was being managed and adds credence to her concerns about ACC Green's behaviour. This was entirely consistent with her approach. Her language was not disproportionate to any conceivable extent. It displays an honest and exasperated reaction in these particular circumstances. Irrespective of DCS Higham in hindsight wishing that she had used even more anodyne language, we do not see how any reasonable manager could take offence at such expressions and we reject ACC Green's contention that this was dismissive of him, his role or his responsibility. Such a senior officer seemed to have remarkably thin skin where DCS Higham was concerned. So far as DCS Higham, ACC Green seemed to take offence at the slightest opportunity.

152. ACC Green spoke to DCC Kennedy on 13 January 2021, although the note of what was discussed has been redacted. In her evidence to the Tribunal, DCC Kennedy said that when she spoke to ACC Green, he had made a decision that the matter was serious, that dishonesty was involved and that the matter needed to be referred upwards, and that she would brief her Chief Constable. This response was surprising in the circumstances. We are not clear what DCC Kennedy was told, but it seems extraordinary that busy very senior police officers became preoccupied by such a trivial email. This meeting was an opportunity for DCC Kennedy to effectively nip it in the bud or even direct ACC Green to speak to the 2 individuals concerned, but she did

not do so. Instead DCC Kennedy referred the matter to the Merseyside Police Anti-Corruption Unit in clear circumvention of the proper process.

153. Anyway, the Anti-Corruption Unit investigation demonstrated that DCS Higham had not responded to the email and that there had been no appointments made under the guise of John Rook. No truancy or other inappropriate activity was ever identified in either of the 2 investigations. Despite asking both ACC Green and DCC Kennedy why the claimant and DCS Higham were not asked about the emails when they came to light, or during the course of the Anti-Corruption Unit investigation, or whilst ACC Green and DCC Kennedy were contemplating how to deal with the matter, the Tribunal was never given a satisfactory answer as to what was, plainly, an obvious step. Mr Gorton said Merseyside Police relied on Police Regulations providing for an investigation without raising this in respect of the claimant. Irrespective of Police Regulations' applicability to DCS Higham, they did not apply to the claimant and there appears to be no justification for this obvious and glaring breach of this principle of natural justice.

154. The fact that DCC Kennedy jumped to conclusions without hearing the claimant's and DCS Higham's version of events concerned us. We are not sure what she was told and when, but we were concerned that she seemed to be acting entirely on the advice of ACC Green, one side of the story, albeit her senior officer.

155. Anyway, on 19 January 2021 DCC Kennedy reported that the claimant's email was not misconduct and was "verging on honesty and integrity" (which we read as meaning it was not dishonest) although this contrasted with ACC Green opinion as he maintained throughout, we determine irrationally, that this email was dishonest. Verging on breaking the speed limit does not mean someone is guilty of breaking the speed limit, so "verging on honesty and integrity" is a begrudging admittance that the claimant (and DCS Higham) was not dishonest.

156. However, DCC Kennedy determined that it was untenable for the claimant to remain as the command secretary at NWROCU: *"…as it was undermining to the relationship across the Command Team but especially between Emily and Chris."*

157. So on 19 January 2021 DCC Kennedy noted that the claimant's secondment should be ended, and that DCS Higham should be placed on a developmental action plan (although we are not sure whether this is because of the claimant's email, because no-one had bothered to ask her how she responded) or whether it was because of what ACC Green had described about their working relationship [HB1777-1779]. We cannot understand the logic of referring the email recipient for as development action plan as the index event seemed wholly unsuited for such a measure. We conclude that the reference to a development action was some form of pecuniary measure or disciplinary warning and a device to manage DCS Higham out of the unit.

158. On 27 January 2021 Greater Manchester Police Professional Standards Branch replied that this is not a matter requiring a misconduct investigation. It was somewhat telling – and very significant for the Tribunal – the response from the complaint manager's assessment was that: *"There are numerous more appropriate management methods to deal with this type of issue…"* These were, no doubt, busy

individuals with little time for this type of tussle. Nevertheless, they referred inexplicably to an action plan which suggest that they saw it as a minor censure.

159. On 2 February 2021 DCC Kennedy discussed the matter with ACC Green and Caroline Ashcroft (Merseyside Police's head of legal department Head of Legal) and at this point that there is a record of there being a "total breakdown of trust and confidence" [HB1793]. Although somewhat perplexingly, there is no reference to any email. The discussions seemed to centre on ACC Green's relationship with DCS Higham and the claimant.

160. According to ACC Hussain, his conversations with ACC Green were initially about the claimant's purported misconduct and DCS Higham's purported misconduct. ACC Hussain had the role of overseeing DCS Higham's (and we believe the claimant's) secondment on behalf of the respondent. When asked whether he was concerned about 2 secondees being returned to force, ACC Hussain said in evidence that he was surprised that Professional Standards confirmed that there was no conduct issue to address because, from his dealings, he thought that there was more substance to ACC Green's complaint than turned out to be the case. When pressed about what he understood to be the substance of the complaints, he said that he was initially told be ACC Green that there were false diary entries. When none were discovered, he appeared not to understand now what the fuss was about because, he said, he had enough time for various diary and child-care commitments and senior officers should be able to organise their diaries so this should not have been problematic.

161. DCC Hussain said in evidence that he had not read any of the secondment agreements relating to the claimant and DCS Higham. He did not regard the matter as a conduct issue, and it needed to be dealt with locally i.e. as a minor matter, if possible. He appeared to recognise the stance of ACC Green, supported by DCC Kennedy, that they may not want the claimant and DCS Higham to stay at NWROCU so he indicated in his email of 29 January 2021 that GMP would not force the issue. He indicated that this was not intended to give Merseyside Police the go-ahead or any authority to terminate the secondments; according to DCC Hussain, it just reflected the realities of the situation. Two senior and influential officers at Merseyside Police did not want the claimant and DCS Higham to continue to work at NWROCU; Merseyside Police was the lead force so irrespective of the rights or wrongs of the situation, the respondent would redeploy its employees if they were sent home.

162. DCC Hussain emphasised that good practice dictated that a conversation should have happened with the two individuals before any decisions were taken. As far as DCC Hussain was aware, no decision had been taken in respect of returning the claimant and DCS Higham to the respondent force at that time. In evidence, DCC Hussain said that he wanted GMP to be involved in any such decision to end the secondment, but they were not. DCC Hussain was keen to distanced himself from the decision made by ACC Green (and DCC Kennedy) and he was keen to emphasise that no-one from the respondent was involved in this decision. He did not know that TCC Pilling had been approached by DCC Kennedy nor did he know of this senior officer's involvement.

163. Neither DCC Hussain nor anyone else at the respondent did ever see the legal advice supposedly provided by Weightmans, solicitors. His said at the Tribunal: *“we were just left with the fallout”.*

164. ACC Green’s advice is rather confusing. He says that he was advised that his concerns about the claimant's integrity/dishonesty was properly identified as a reason to end her secondment by Weightmans and he relied upon Weightmans’ advice. Clearly, legal advice does not exist in isolation, and to date, we have never been given a copy of the legal advice from Weightmans’ Solicitors So, we cannot assess what was said and what factors were taken into account in coming to the decision. This is both puzzling and concerning. The solicitor’s billing guide has been produced [HB1895-1898] and the Tribunal was told that Weightmans Solicitors did not produce any written advice at the time or (despite asking) have not provided a record of advice given. This is odd, as the Tribunal is aware that in order to comply with its professional practice obligations, a written record of all solicitors’ advice given should be made and/or kept. We were told that the respondent did not raise legal privilege on such advice but that no attendance notes had been forthcoming because, we are told, Mr Lee Rogers from Weightmans Solicitors had not made any record of his dealings with ACC Green, which is all the more perplexing given that Weightmans’ solicitors billed Merseyside Police for such advice yet, we are told, there was no written record of the work. In any event, we reject the content of the legal advice ACC Green said that he got because, primarily, the advice does not sound logical with the absence of a record of the advice (contemporaneous or subsequent).

165. In evidence ACC Green emphasised that he moved from addressing DCS Higham supposed wrongdoing from one of dealing with the matter by way of performance to returning her to her home Force and ending the secondment agreement because, he said, Weightmans Solicitors advised him to treat both DCS Higham and the claimant the same. The claimant had sent the offending email, which was apparently her misdemeanour. DCS Higham’s misdemeanour was, at the highest, that she did nothing, or not enough, about this email; so to contend that the alleged transgressions are the same is preposterous. We note that the decision to terminate made no reference to the “fizzin” in the email train, this was only raised at the Employment Tribunal as an attempted after the event justification.

166. Anyway, we were referred to various drafts of the termination of secondment notice but there was no evidence made available to us of any contemporaneous discussions. So we reject ACC Green’s contention that it was only following his discussions with the solicitors that he decided to end DCS Higham’s secondment. In coming to this view, we are mindful that we did not hear evidence from Mr Rogers in circumstances where we would have expected him to give an account. In drawing together all of these threads, we believe ACC Green referred to Weightmans Solicitors with the specific instruction of terminating the secondments and Weightmans’ Solicitors thereafter tried their best to formulate this in some form of justification.

167. The index email demonstrates that there are problems with the claimant's diary and in particular there were problems with DCS Higham’s accommodating the appointments initiated by ACC Green’s PA/secretary around her childcare responsibilities and overall work demands.

168. It is clear that the relationship between DCS Higham and ACC Green was strained but we could see no reason other than ACC Green transgressed upon DCS Higham role and appeared not to let her do the job she was appointed to do. However, that does not necessarily lead to sex discrimination. ACC Green led NWROCU for 5 years. He clearly led the unit well because his career progressed, and he achieved a significant promotion. He returned to the unit in a more senior position, so it could be that he was somehow, unwilling to let go his previous responsibility for this unit, particularly when DCS Higham did a good job whilst he was away.

169. Mr Menon referred to ACC Green's positive relations with the male Superintendents in NWROCU. However, these were in the tier below DCS Higham in the Command Team so they are not direct comparators with her circumstances under s23 EqA. Nevertheless, we accept DCS Higham's evidence that ACC Green behaved differently and was less critical and dismissive of senior male subordinate officers, so this evidence is useful in constructing a hypothetic male comparator, of the same grade as DCS Higham. DCS Higham says that she was undermined by ACC Green from the outset. She said that she regretted raising this at an early point because ACC Green made her life difficult – and we believe this. DCS Higham's evidence was credible, convincing and most importantly, consistent with the contemporaneous material.

170. We determine that ACC Green was looking for the opportunity to get rid of DCS Higham. We have not heard evidence from ACC Green's PA as to the circumstances of discovering the email. We find that ACC Green was looking for an excuse to get rid of his senior female officer (DCS Higham) and when this email was brought to his attention, he found his catalyst.

171. In respect of a hypothetical comparator, the key question is would ACC Green have treated a man in similar circumstances. The evidence from DCS Higham was that the other operational leads for the smaller collaborations were not subjected to the same level of scrutiny as DCS Higham but this was a mix of males and females and these potential comparators changed quite a lot due to retirements and promotions. We accept DCS Higham's unchallenged evidence that ACC Green raised issues of deficient performance about her 2 male Superintendents within NWROCU, yet he maintained a jovial and friendly relationship with them; and that ACC Green was harder on 2 female Command Team colleagues and a previous female Superintendent than underperforming male colleagues. We accept DCS Higham's evidence that conversations with senior female officers were business-like without much pleasantries. Furthermore, a male superintendent and three male Detective Chief Inspectors with similar childcare issues were never subjected to negative comments when they missed meetings, left early or arrived late due to childcare. ACC Green never tried to take over the meetings of these males, for example Strategic Governance Groups. We accept that not once did any of DCS Higham's senior male colleagues have to sit in another office whilst the meeting was ongoing, space was always left for them, or they came into the meeting. This presents a picture where ACC Green was harder and less flexible towards female senior officers and, from this, we infer that a hypothetical male DCS at NWROCU would not be treated in the same manner as DCS Higham. Ultimately, ACC Green takes particular, and unjustifiable umbrage against DCS Higham and we cannot see any good reason other than her sex.

172. These are all primary facts to shift the burden of proof.

173. ACC Green said "*we had a professional relationship, which we were able to work through*" yet there was clearly a breakdown in relationship between DCS Higham and ACC Green which developed due to ACC Green's desire to have greater control over the activities within the NWROCU and DCS Higham feeling that her authority has been effectively usurped.

174. At the hearing, ACC Green took issue with the claimant describing herself as PA to Emily Higham. The claimant's secondment description described her as a Personal Assistant. She was effectively the Personal Assistant to the Command Team. DCS Higham was in charge (or should have been in operational charge) of the Commend Team and if there was any confusion then this was largely irrelevant. This criticism of the claimant, and implicitly DCS Higham, gave ACC Green little credit and appears to be a way of trying to find fault with his former female operational lead. The criticism of the claimant going on a short break with DCS Higham and other colleagues to New York so as that they were getting too pally is a ludicrous criticism which undermines ACC Green further. It seems to us that ACC Green would use anything to try to cast DCS Higham in a bad light.

175. In terms of shifting the burden of proof, the respondent's/ACC Green's explanation is that his response to the email was a matter of trust and confidence was wholly unconvincing on this point. When we probed him further, he said it was an honesty/integrity matter. The claimant and DCS Higham could not be relied upon. We do not accept this. The claimant made a proposal. The email fell well short of a dishonesty or an integrity matter. ACC Green resented the steps seemingly being mooted to side-step his efforts to micromanage the claimant, on the face of it, with the suggestion of alternative meetings. DCC Hussain said that he could not see what the problem was and DCC Kennedy in her contemporaneous note said that it was not a dishonesty matter because he virtually fell short of breaking the speed limit.

176. ACC Green's decision to remove DCS Higham from her post seemed so inexplicable and arbitrary in the way that he dealt with her that we really struggled to see legitimate motives, other than he wanted DCS Higham out of NWROCU. We can see no other motives that the alleged sex discrimination. ACC Green could not deal with or somehow felt undermined by strong professional women in his former leadership role.

177. Ms Harrison-Gough (who was a senior HR Partner) gave evidence that during the Fairness at Work grievance hearing, despite being pressed, ACC Green could not provide a rational explanation for the termination of the claimant's engagement. We pressed Ms Harrison-Gough she explained that he just was not forthcoming. Ms DCS Chadwick echoed this frustration with Merseyside Police in general and ACC Green in particular and said (in evidence) that she was never given a proper explanation as to why the claimant could not return to her secondment.

178. The claimant was returned to her Force before DCS Higham. This does not persuade us that the claimant's circumstances were materially different from those of DCS Higham. DCS Higham was a serving Police Officer, she was subject to Police Regulations, and the Superintendents Association became involved. Her return to Force was therefore delayed.

179. We accept the claimant's contention that ACC Green was keen to remove DCS Higham. He thought the email gave him this opportunity and his route to such a removal was via the claimant's removal also. He elevated the claimant's indiscretion to a dishonesty matter, along with that of DCS Higham which provided the apparent justification for the removal of DCS Higham.

180. The claimant raised a grievance on 22 March 2022 which was a step to a Fairness at Work complaint [HB532-HB539]. We note that the Fairness at Work registration form provides for a section that asks how the matter can be resolved.

181. The respondent home Force was put in a difficult position by the senior Merseyside Police officers. ACC Hussain had a number of conversations with both DCC Kennedy and ACC Green about the termination of this engagement. ACC Hussain was in no doubt that these two senior Merseyside Police Officers would not countenance DCS Higham and the claimant working at NWROCU for any longer. According to ACC Hussain, this was stated in a text message of 12 March 2021 which was before the claimant's secondment had ended. ACC Hussain said that he referred to HR Manager Emily Ashworth on how to deal with this, but Merseyside Police had made their decision quite clear, and they would not budge. We note that ACC Hussain was not in agreement with such a course of action, but there was little he could do. A senior police officer and her administrative support work had been returned to Force and he said that he needed to put in appropriate support so that both could transition back to Greater Manchester Police. A stronger officer from Greater Manchester Police in ACC Hussain's position may well have been more insistent; however, the fact that ACC Hussain did not demand that the claimant be put back in post underlines the strength of feeling of ACC Green, supported by DCC Kennedy, irrespective of correct processes and trivial contended infraction.

Harassment related to sex: s26 EqA – Issue 3

182. Harassment and direct discrimination claims are usually mutually exclusive, because the kind of conduct that could amount to harassment is usually the kind of conduct that amounts to a detriment for the purpose of bringing a direct discrimination claim: see s212(1) EqA.

183. In addition, victimisation and harassment claims are always mutually exclusive, given that s27 EqA specifically refers to detriment as part of the definition of victimisation. A complainant cannot, therefore, succeed in claims under both heads in respect of *the same course of conduct*. The purpose of s212(1) EqA is to prevent double recovery, i.e. to prevent a claimant being compensated twice, under two different causes of action, for the same conduct. Where conduct could feasibly fall under both 'detriment' and 'harassment', then just because a Tribunal finds that the conduct is more readily defined by one label should not mean that a claim brought under the other label should be rejected. Rather, the claimant should have a choice between the two causes of action. Furthermore, there would seem to be no reason why a claimant should be prevented from bringing both claims in the alternative, on the understanding that both cannot succeed. A claimant bringing a complaint of harassment should be able to argue less favourable treatment or, where appropriate, victimisation in the alternative, giving the claimant a second bite at the cherry if the harassment claim fails, and vice versa.

184. The claimant has succeeded in her claim of direct discrimination on the basis of the protected characteristic of DCS Higham. Therefore, as both claims cannot succeed, we reject her claim of harassment.

Victimisation: s27 EqA - issues 5 to 7

185. We will deal with this claim briefly because we do not think much of it. It was the claimant's case that she sent the email of 8 January 2021 in order for her to help her boss/colleague/friend manage her diary and have some time off for childcare and work-related activities. The claimant was not marking or seeking protection from any discrimination action.

186. We note that the definition of *doing any other thing for the purpose of or in connection with the EqA* under s27(2)(c) EqA ought to be given a wide definition following *Aziz v Trinity Street Taxi Ltd & Other 1988 ICR534 CA*. However, Mr Menon's definition stretches this beyond breaking point. This was not a protected act under s27(2)(c) EqA because if we consider this provision so widely then the protection would be so wide as to become virtually meaningless and that would undermine the purpose of the anti-discrimination legislation.

187. If we are wrong on this point (any we do not think we are) then the claimant's case fails on causation. She was not subject to any detriment because of her protected act. We are satisfied that ACC Green did not perceive the claimant as doing anything for the purpose or in connection with the EqA. The claimant was caught in the crossfire between ACC Green and DCS Higham. That was her primary case, and we accepted it. ACC Green sought to get rid of DCS Higham. The email presented the opportunity. He also needed to get rid of the sender of the email because her purported misdemeanour was greater than the recipient and if he ignored the claimant, then that would undermine his case to end DCS Higham's secondment. So, it was essential to punish the claimant as well as DCS Higham and that was not because of an alleged protected act.

Aiding Contraventions: s112 EqA – issues 8, 9 and 10

188. S111 EqA makes it unlawful for a person to instruct, cause or induce someone to discriminate, harass or victimise another person on any of the grounds covered by the EqA. This is the *basic contravention*.

189. S112(1) provides that the GMP officers/staff members must not 'knowingly' help ACC Green discriminate. *Allaway v Reilly and anor 2007 IRLR 864, EAT*, held that discrimination need not be the GMP officers/staff members intention or motive. Rather, '*it is enough that, on the evidence, the conclusion can be drawn that discrimination as the probable outcome was within the scope of his knowledge at the time. It would not need to be in the forefront of his [or her] mind nor would he need to have specifically addressed his [or her] mind to it*.' This point is reflected in the EHRC Employment Code, which states that the helper must know that discrimination, harassment or victimisation is a probable outcome, but does not have to intend such an outcome.

190. There is no evidence and no basis to assume that anyone from the respondent's helped (as in assisted) ACC Green in the discrimination. ACC Green

contended that his act and his decisions were made of his own judgment and volition. Mr Menon did not challenge any of the GMP officers or staff member that they helped ACC Green in the alleged discriminatory acts.

191. The position of ACC Hussain and the respondent's HR representatives were that they disagreed with ACC Greens actions but that they believed that they were powerless to stop it. Failing to take steps to challenge ACC Green's decision to terminate the claimant's secondment cannot be said to help or aid discrimination. That requires an active role in the discrimination.

192. In any event, Mr Gorton is correct, a person cannot have helped to do any act when the act occurred in the past. That does not make sense.

Constructive unfair dismissal – issues 11 to 13

193. ACC Hartley provided an outcome report to the claimant's grievance or Fairness at Work complaint following an extensive investigation. ACC Hartley was a senior police officer so he knew the culture, the workplace demands and had the skills to undertake a thorough enquiry. The outcome was remarkable. He engaged with the issues and gave a robust conclusion. This was not a case of senior police officers covering each other. It was remarkable that Merseyside Police as the lead force did not take action and remarkable that the respondent, did not pursue this. We can only conclude that the respondent felt that they would not get anywhere with Merseyside Police so they did not make a fuss.

194. We are in no doubt that ACC Hartley would have been aware of the practical and political difficulties in reinstating the claimant back into her role. Nevertheless, he felt this was appropriate in these circumstances. Both Chief Constable Kennedy and ACC Green said that these recommendations went too far and that they were inappropriate and disproportionate in the circumstances. We resoundingly reject this contention. We determined both Chief Constable Kennedy and ACC Green did not reappoint the claimant (nor DCS Higham) because they did not like the outcome. There is a significant difference between not liking the restitution for bad behaviour and regarding someone acting beyond their remit. ACC Hartley dealt with the grievance. The Fairness at Work form and the grievance procedure both provide reference for resolution/recommendation [see HB1540].

195. Chief Constable Kennedy and Assistant Chief Constable were steadfast in their refusal to countenance the claimant's return. Senior GMP officers appeared to be hamstrung, unable as they saw it to force the issue because of the practical consequences , and throughout this time no-one had told the claimant anything.

196. The claimant relies upon 11 acts of failures to act as individually or cumulatively amounting to a fundamental breach of the implied term of trust and confidence in her contract of employment.

197. We determine that issues 11(4) and 11(8) either individually or when added to other components could not amount to a repudiation of her employment, such that she was entitled to treat herself as constructively dismissed.

198. It was difficult for us to understand what publicly the respondent could have done to acknowledge that the claimant's secondment was terminated unfairly and that any allegation of dishonesty against her were without foundation. The claimant made no proposals at the time. The Fairness at Work outcome acknowledge the unfairness and confirmed no dishonesty, so the claimant's criticism is unfair. Whatever the claimant's expectations of publicity were, and we think this is hindsight argument, we regard them as unrealistic. Employers are hamstrung by a duty of confidentiality. Publicity is both provocative and uncontrollable. If the respondent thought about this then they would have been cautious so as not to risk inflaming the situation or of it backfiring against the claimant or DCs Higham or any of their other officers or staff. So, of course, they were cautious on publicity. It is not credible for the claimant to argue otherwise. The respondent did not have a duty in these circumstances to publicly criticise senior Merseyside Police officers.

199. Any dispute about the termination of counselling did not feature as a dispute or significant concern in the contemporaneous correspondence. The claimant overstate this issue and she was nor well served by her representatives adding this to a "tick box" list.

200. We do not determine that 11(6) was significant because the claimant did not join any redeployment process. She may have assumed, on past experience, that the respondent managers might not be of great assistance in helping her find a suitable post, but she resigned before this came about. We determine that the respondents were generally well-disposed towards the claimant so it was premature to say that they would not assist if, or more likely, when her job was on the line. We do not regard issue 11(9) and 11(10) as particularly significant in themselves because the claimant had little contact with her designated line managers. She worked with her DCS Higham in a reasonably conducive environment despite the prevailing uncertainty.

201. In all other aspects: 11(1), 11(2), 11(3), 11(5), 11(7) and 11(11) the claimant succeeds. The claimant's grievance concluded favourably to her on 6 August 2021. The grievance recommended that the claimant be reinstated at NWROCU. Despite her arbitrary, dismissive and grossly unfair treatment by ACC Green the claimant wanted to pursue reinstatement. She loved her job and did not want to leave under a cloud. ACC Hussain was passive and did not sufficiently stand up for either DCs Higham or the claimant. No doubt he did not want to risk wrecking relationship with the senior Merseyside Police officers as ACC Green and DCC Kennedy were adamant that they would not allow the claimant to return. ACC Hussain or his subsequent replacement at the respondent could have brought matters to ahead, because ultimately the General Agreement provided for a resolution through NWJOC. So, we say the respondents were not entitled to say that there was nothing further they could do. They chose not to escalate matters for fear of damaging relationships at the NWROCU host Force and possible wider damage. So, in effect, ACC Green and DCC Kennedy got away with their intransigent behaviour. Both refused to budge, and the respondent backed down from confrontation.

202. We understand the respondent's predicament. However, the claimant had been employed for 22 years. She was a longstanding employee. She had a right to expect to be treated in accordance with her contract, proper procedures and to have the treatment of ACC Green put right. The claimant had the right and a reasonable expectation to be reinstated to NWROCU following ACC Hartley's recommendations.

Those issues were to remain live until the respondent told the claimant clearly and definitely that Merseyside Police would not have her back and that she needed to give up on any idea of reverting to NWROCU. It is obvious to us in hindsight that that would not happen from, say, late 2021 onwards. However, this was not said to the claimant. If the respondent had explained the predicament to the claimant, then matters may well have been brought to a head a long time before, but HR and seemingly the claimant's line managers had a great deal of sympathy for the manner that the claimant had been treated by Merseyside Police, by ACC Green and DCC Kennedy.

203. Despite this matter making the claimant ill as demonstrated by her sickness absence, no-one brought matters to ahead with the claimant. Mediation was tried without success, but that was on a without prejudice basis, so we do not know what was said. Anyway, the fact that the claimant made repeated requests in respect of the Fairness at Work recommendations demonstrate to us that she was told nothing but did not regard this as a lost cause. So she was kept in limbo from December 2021 in a temporary role on a temporary grade. We do not believe that the claimant affirmed her contract under such circumstances.

204. It was only when redeployment was raised in November 2022 that the claimant knew, or ought to have known, that she would never be permitted to go back to NWROCU. The claimant promptly asked for clarification/confirmation of her FAW recommendations and how redeployment would affect her. The claimant demonstrated no passivity or intention to merely continue in the contract. No response was forthcoming, and this was the last straw entitling her to treat herself as constructively dismissed.

205. The claimant wanted to coincide her resignation taking effect with starting a new role in the NCA and this afforded the respondent even more opportunity to revert to the claimant with a substantive response to her enquiries of 11 November 2022.

206. The claimant said that she was worried about her future employment. If she was able to keep her job through redeployment, then she faced the real possibility of a pay cut because her hold on the grade G band was tenuous. The claimant said in evidence that she needed to pay her mortgage and her bills, and she was worried about this. We are very clear that she was place in this situation because of ACC Green’s behaviour and because the claimant’s employers effectively let her down and failed to stand up for her. The fact that the respondent did not address the substance of the claimant’s concern even in the extra period allotted over Christmas and the New Year 2023 convinces us even more that this was an ongoing breach, alive at the time, and was not going to be remedied.

207. The claimant said in evidence, which we accept, that she did not think she would get through the vetting for the NCA job. In any event, the claimant said by around that stage she felt that she could not continue any further. She said that she would have resigned after Christmas. Mr Gorton contended that the claimant was looking for some form of “trigger” to justify resignation. Whether the claimant was looking for a trigger or not, the respondent provided ample justification by not providing straightforward answers to what were long awaited straightforward questions. Had the respondent responded to the claimant's enquiries before or even promptly after her email of 11 November 2022 it may have been likely that the Tribunal might have

accepted the difficulty in its position and the fundamental breach of contract may not have been maintained.

208. We also have some sympathy with Ms Chadwick's predicament in that she could not redeploy the claimant to another job and maintain her salary and grade indefinitely for an appointment that could not objectively justify such treatment. So the eventual reference to the redeployment policy brought matters to a head and the claimant saw this as the final opportunity of either waiving or accepting the ongoing fundamental breach of contract. She opted for the latter course. Her resignation letter was clear and unambiguous. The claimant's resignation was an acceptance of the respondent's repudiation of her employment.

Addition Equality Act complaints – issue 14

209. We will deal with these issues briefly. As can be seen above, the claimant has provided no basis upon which we could possibly conclude a connection between the unfavourable or less favourable treatment contended in the Allegations in Second Claim was related her sex. The claimant did not establish a protected act, so the victimisation complaint did not get off the ground either.

Equality Act time limits – issue 15

210. Neither party deals with this issue in their submissions, so apparently not much importance is attached to this matter. This only applies to the associative discrimination complaint. The claimant's secondment with NWROCU was terminated on 15 March 2021 and that is when the claimant became aware of the allegations. The ACAS Early Conciliation was entered on 7 May 2021 and the Certificate was issued on 27 May 2021. Proceedings were commenced on 3 July 2021, so the claim is brought within the statutory time limit as extended by ACAS Early Conciliation.

Summary

211. We find that the claimant was directly discriminated against on the grounds of ACS Higham sex by a third party for which the respondent is liable. We also find that the claimant was constructively unfairly dismissed. We do not find the claimant was harassed or victimised nor that she was discriminated on the grounds of her sex by her former employer.

212. We hope that the parties may now be able to resolve all outstanding matters without the necessity of a further hearing. However, we will issue case management orders in due course to provide for remedy should such resolution not be possible.

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Employment Judge Tobin

Date: 29 April 2024

JUDGMENT SENT TO THE PARTIES ON

1 May 2024

FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/