THE INDUSTRIAL TRIBUNALS

CASE REF: 21722/21

CLAIMANT: **Emma Pauline Bond**

RESPONDENT: **Chief Constable of the Police Service of Northern Ireland**

JUDGMENT

The unanimous decision of the tribunal is that:

(1) the claimant's claim of having been subjected to detriment on the ground that she had made protected disclosures is well-founded;

(2) the claimant's claim of sex discrimination has been brought outside the requisite time limits, but the tribunal considers it just and equitable to extend the time limit; and

(3) the claimant's claim of sex discrimination is well founded.

The tribunal makes declarations to the above effect in the claimant's favour and makes an award to the claimant by way of compensation in the sum of £31,104.72 in respect of the acts of detriment and discrimination which have been established as set out at paragraphs 184 to 202 below.

Constitution of Tribunal:

Employment Judge: **Employment Judge Gamble**

Members: **Mrs G Clarke**
Ms M J McReynolds

Appearances:

The claimant was represented by Mr N Phillips, Barrister-at-Law, instructed by Worthingtons solicitors.

The respondent was represented by Mr A Sands, Barrister-at-Law, instructed by the Crown Solicitor's Office.

BACKGROUND

1. The claimant presented claims to the Industrial Tribunal on 5 March 2021, following Early Conciliation, in which she claimed unlawful sex discrimination and detriment for having made qualifying public interest disclosures.

2. The claimant, prior to lodging her claim, had contacted the Labour Relations Agency on 10 January 2021 and the Early Conciliation Certificate issued on 5 February 2021.

3. The claimant's claims were resisted by the respondent in a response dated 24 May 2021.

STRUCTURE OF THIS JUDGMENT

4. Part A (paragraphs 5 to 7) of this judgment sets out the Issues for determination by the tribunal; Part B (paragraphs 8 to 15) records the sources of evidence and submissions of the parties; Part C (paragraphs 16 to 49) sets out the relevant law (statutory provisions and case law) in respect of the claimant's claims of public interest disclosure detriment and sex discrimination; Part D (paragraphs 50 to 140) sets out the tribunal's findings of relevant facts; Part E (paragraphs 141 to 183) sets out the tribunal's consideration of and conclusions in respect of the claimant's claims; and Part F (paragraphs 184 to 202) deals with remedies.

PART A ISSUES

5. The tribunal was provided with a revised Statement of Legal and Factual Issues, following refinement by the parties, and has had regard to this document in its determination of the claimant's claims. The tribunal has determined the factual issues identified by the parties to the extent necessary to determine the legal issues before it, namely (i) whether the claimant was subjected to detriment on grounds of having made protected disclosures and (ii) whether the claimant was directly discriminated against on grounds of her sex. The tribunal is also required to satisfy itself that it has jurisdiction whether this is raised by the parties or not.

6. The respondent has conceded that a number of disclosures made by the claimant were protected disclosures which qualified for protection (see paragraphs 58 to 66 below). The claimant abandoned her reliance on two instances of alleged disclosure during the hearing. The respondent continued to dispute that one of the disclosures was a qualifying protected disclosure, referred to at paragraph 62 below as "Disclosure 2". As the claimant relied on a series of similar acts in her public interest disclosure detriment claim, it was necessary for the tribunal to analyse each of these acts in turn, and having done so to establish the date of last act, to consider whether the claim had been brought within time. In

considering (i) whether the claimant was subjected to detriment on grounds of having made a protected disclosure(s) the tribunal has considered:

(a) Whether the disputed disclosure (Disclosure 2) was a protected disclosure?;

(b) Whether the claimant was subjected to detriment?;

(c) If so, was it on the ground that she made protected disclosures?

The operation of the burden of proof in public interest disclosure claims is considered at paragraphs 24 to 26 below.

7. As the claimant was relying on an act extending over a period of time in her discrimination claim, it was necessary for the tribunal to analyse the claimant's allegations in turn, and, having done so to establish the end of the relevant period over which the act extended, to consider whether the claim had been brought within time. To the extent it was necessary to determine the claimant's direct sex discrimination claim, the tribunal considered:

(a) Has the claimant been treated less favourably than an appropriate comparator/subjected to detriment?

(b) Has the claimant discharged the initial burden of proof on her?

(c) If so, has the respondent shown that the treatment was no sense whatsoever on grounds of her sex?

PART B SOURCES OF EVIDENCE AND SUBMISSIONS

8. The witnesses provided written witness statements which were adopted as their evidence in chief and gave further oral evidence by way of cross examination, and in some instances re-examination.

9. The tribunal heard oral evidence from the claimant on her own behalf and received expert medical evidence from Dr Sharkey, Consultant Psychiatrist, put forward in his expert report and during cross examination by Mr Sands.

10. The tribunal heard evidence from Inspector Rogers, who prepared a Preliminary Enquiry report regarding Officers in Derry City and Strabane (DCS) district; Chief Superintendent McVea (who was at the material time Head of Justice and Standards within PSNI); Chief Inspector Harrison (who was appointed to investigate complaints against the claimant); Deputy Chief Constable Hamilton; John Armstrong QPM (an independent consultant on Police Regulation, formerly Head of

Professional Standards in Cheshire Constabulary, who assisted Chief Constable Guildford in his review); Ms McClure (who worked in the PSNI's Human Resources Department); Chief Constable Byrne; Assistant Chief Constable Todd (who was the claimant's Line Manager); and Chief Constable Guildford (at relevant time, the Chief Constable of Nottinghamshire Police, who issued a report following the review by Mr Armstrong. The review was carried out on behalf of Chief Constable Byrne).

11. The tribunal granted an application made during the hearing to permit evidence to be adduced on behalf of the respondent by Assistant Commissioner Roberts of An Garda Siochana, formerly a temporary Assistant Chief Constable within the PSNI for oral reasons given at the hearing.

12. The tribunal received correspondence from three other persons wishing to provide documents or give evidence. This correspondence was shared with the parties who confirmed that neither of them wished to call any additional witnesses or adduce additional documentary evidence as part of their respective cases. Two of these persons pursued applications to give witness statements and to be cross examined and the applications were considered under Rule 29 of the Industrial Tribunals and Fair Employment Tribunal Rules 2020, which provides:-

> ***Other persons***
>
> ***29.*** *The tribunal may permit any person to participate in proceedings, on such terms as may be specified, in respect of any matter in which that person has a legitimate interest.*
>
> having regard to Rule 50 of the Industrial Tribunals and Fair Employment Tribunal Rules 2020, the tribunal heard these applications at Preliminary Hearings conducted on 13 March 2023. The tribunal declined the applications, providing its detailed written reasons to the applicants and parties at that time. Nevertheless, having regard to the legal principles which were considered in the determination of the applications and the submissions of one of the applicants that he wished it to be known that he had been willing to be called, the tribunal considers it appropriate to record those applications in this judgment and to record that one of the applications was made by the person who is referred to in this judgment as 'the "first" Appropriate Authority'. In light of the relevant legal principles considered during that hearing, the tribunal considers it appropriate to refer to him by his role, as the tribunal is conscious that it has not had the benefit of hearing from him.

13. The tribunal considered those documents referred to during the course of the hearing, within three lever arch files of documents provided by the parties in advance of the hearing, extending to in excess of 1200 pages.

SUBMISSIONS

14. The parties' representatives provided closing written submissions which were supplemented by helpful closing oral submissions. During the course of the hearing and in closing submissions, the representatives reviewed and further refined the legal and factual issues for determination by the tribunal. The parties were invited to provide further submission on whether the claimant's claim of sex discrimination was in time, and if not, whether the tribunal had jurisdiction to consider it, as this issue potentially went to the tribunal's jurisdiction and therefore must be considered, even if it has not been raised by the parties. The tribunal received written submissions from both parties on this issue. Mr Sands submitted the claimant's sex discrimination claims were out of time and that there was a complete absence of evidence regarding the reasons for the claimant's delay. Mr Phillips submitted that as the issue had not been raised before, the claimant should have the opportunity to put in a short statement regarding it and be cross examined, if required. In these circumstances, the tribunal reconvened the hearing to consider any further evidence adduced by the claimant on this point, and any further consequent oral submission by the parties.

15. The parties relied on the following authorities and commentary:

Claimant:

Jesudason v Alder Hey Children's Foundation Trust [2020] ICR 1226
R (Interim Executive Board of Al-Hijrah School) v Her Majesty's Inspector of Education [2018] 1 WLR 1471
Douglas v Birmingham City Council EAT/0518/02
Bronckaers v Department of Agriculture, Environment and Rural Affairs [2021] NIIT 05980_18IT
Fecitt v NHS Manchester [2012] ICR 372
Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust UKEAT/0047/19
Serco Ltd v Dahou [2017] IRLR 81
Yewdall v Secretary of State or Work and Pensions UKEAT/0071/05
Nagarajan v London Regional Transport [2000] 1 AC 501
Watson v Hilary Meredith Solicitors Ltd UKEAT/0092/20
Royal Mail Group Ltd v Jhuti UKEAT/0020/16
Nelson v Newry and Mourne District Council [2009] NICA 24
Igen v Wong [2005] 3 All ER 812
Bradley v Chief Constable PSNI [2019] NIIT 00533_19IT
The Green Book – Guidelines for the Assessment of General damages in Personal Injury Cases in Northern Ireland
Harvey on Industrial Relations and Employment Law, Division L Equal Opportunities, 6. Remedies, C. Compensation, (10) Calculating the amount, (c) Non-pecuniary Losses, paragraphs 886-902.01

Bowers Whistleblowing Law and Practice 3rd Edition paragraph 5.09
Bowers Whistleblowing Law and Practice 4th Edition
Hendricks v Metropolitan Police Comr [2002] EWCA
Hale v Brighton & Sussex University Hospitals NHS Trust UKEAT/0342/16
Harvey on Industrial Relations and Employment Law, Division PI, Practice and Procedure, 1 G (3)(a) at paragraphs 2777 and 281.01
Miller v Ministry of Justice & Others UKEAT/0003/15/LA
Chief Constable of Lincolnshire Police -v- Caston [2010] IRLR 327

Respondent's Additional Authorities:

Tiplady v Bradford MDC [2020] ICR 965
Blackbay Ventures v Gahir [2014] IRLR 416 EAT
Martin v London Borough of Southwark 2020_000432
Shamoon v Chief Constable of the RUC [2003] UKHL 11
St. Helen's BC v Derbyshire [2007] UKHL 16
Bolton School v Evans [2006] EWCA Civ 1653
Page v Lord Chancellor [2021] EWCA Civ 254
Kong v Gulf International Bank [2022] EWCA Civ 941
Chief Constable of Yorkshire Police v Khan [2001] UKHL 48
London Borough of Harrow v Knight [2003] IRLR 140
Hewage v Grampian Health Board [2012] UKSC 37
Royal Mail v Efobi [2021] UKSC 33
McCorry & Others v McKeith [2016] NICA 47
Bahl v Law Society [2003] IRLR 640
Harvey on Industrial Relations and Employment Law, Div CIII, Ch 5 at paragraph 40
British Coal Corporation v Keeble [1997] IRLR 336
Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021]
Robertson v Bexley Community Centre [2003] IRLR 434

PART C RELEVANT LAW

Police Conduct Regulations

16. **The Police (Conduct) Regulations (Northern Ireland) 2016**

3. "appropriate authority" means—

(a) …

(b) in any other case, the Chief Constable;

…

"disciplinary action" means, in order of seriousness starting with the least serious action—

(a) management advice;

(b) a written warning;

(c) a final written warning;

(d) an extension to a final written warning as described in regulations 36(6)(b) and 54(3)(b);

(e) reduction in rank;

(f) dismissal with notice; or

(g) dismissal without notice;

…

"gross misconduct" means a breach of the Code of Ethics where the misconduct is so serious that dismissal would be justified;

"management action" means action or advice intended to improve the conduct of the member concerned;

"management advice" means words of advice imposed following misconduct proceedings or an appeal meeting;

…

(6) Where the appropriate authority is the Chief Constable, he may, subject to paragraph (7), delegate any of his functions under these Regulations to a member of at least the rank of chief inspector.

…

Assessment of conduct

12.—(1) Subject to paragraph (6) the appropriate authority shall assess whether the conduct which is the subject matter of the allegation, if proved, would amount to misconduct or gross misconduct or neither.

(2) Where the appropriate authority assesses that the conduct, if proved, would amount to neither misconduct nor gross misconduct, it may—

(a) take no action;

(b) take management action against the member concerned; or

(c) refer the matter to be dealt with under the Performance Regulations.

(3) Where the appropriate authority assesses that the conduct, if proved, would amount to misconduct, it shall determine whether or not it is necessary for the matter to be investigated and—

(a) if so, the matter shall be investigated and the appropriate authority shall further determine whether, if the matter were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing;

(b) if not, the appropriate authority may—

(i) take no action; or

(ii) take management action against the member concerned.

(4) Where the appropriate authority determines that the conduct, if proved, would amount to gross misconduct, the matter shall be investigated. (Tribunal's emphasis.)

(5) At any time before the start of misconduct proceedings, the appropriate authority may revise its assessment of the conduct under paragraph (1) if it considers it appropriate to do so.

(6) Where the appropriate authority decides under this regulation to take no action, take management action or to refer the matter to be dealt with under the Performance Regulations, it shall so notify the member concerned in writing as soon as practicable. (Tribunal's emphasis.)

Written notices

16.—(1) The investigator shall as soon as is reasonably practicable after being appointed, and subject to paragraph (3), cause the member concerned to be given written notice—

(a) describing the conduct that is the subject matter of the allegation and how that conduct is alleged to fall below the appropriate standard;

(b) of the appropriate authority's assessment of whether that conduct, if proved, would amount to misconduct or gross misconduct;

(c) that there is to be an investigation into the matter and the identity of the investigator;

(d) of whether, if the matter were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing and the reason for this;

…

(4) Once a written notice has been given in accordance with paragraph

(1), the investigator shall notify the member concerned of the progress of the investigation—

… (Tribunal's emphasis.)

PSNI Code of Ethics

Art. 10.3 Duties of Supervisors

Supervisors have a particular responsibility to secure, promote and maintain professional standards and integrity through the provision of advice and guidance, or other remedial appropriate action.

17. **Public Interest Disclosure**

Employment Rights (Northern Ireland) Order 1996

Meaning of "protected disclosure"

67A. In this Order a "protected disclosure" means a qualifying disclosure (as defined by Article 67B) which is made by a worker in accordance with any of Articles 67C to 67H.

Disclosures qualifying for protection

67B.—(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

….

Disclosure to employer or other responsible person

67C.—(1) A qualifying disclosure is made in accordance with this Article if the worker makes the disclosure ...—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer

Art. 67KA applies the protections regarding whistleblowing to Police Officers.

Protected disclosures

70B.—(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in paragraph (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of paragraph (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

…

(2) On a complaint under paragraph (1), (1YA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done. (Tribunal's emphasis.)

Complaints to industrial tribunal

74.—(1) A worker or former worker may present a complaint to an industrial tribunal on the ground that he has been subjected to a detriment by his employer in contravention of Article 73.

(2) An industrial tribunal shall not consider a complaint under this Article unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) Article 249B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (2)(a).

(3) For the purposes of paragraph (2)—

(a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;

(b) a failure to act shall be treated as done when it was decided on.

(4) For the purposes of paragraph (3), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act—

(a) when he does an act inconsistent with doing the failed act; or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

Extension of time limits to facilitate conciliation before institution of proceedings

249B (1) This Article applies where this Order provides for it to apply for the purposes of a provision of this Order (a “relevant provision”).

…

(2) In this Article—

(a) Day A is the day on which the complainant concerned complies with the requirement in paragraph (1) of Article 20A of the Industrial Tribunals (Northern Ireland) Order 1996 (requirement to contact Agency before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under paragraph (11) of that Article) the certificate issued under paragraph (4) of that Article.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an industrial tribunal has power under this Order to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this Article.

Sex Discrimination

18. **Sex Discrimination (Northern Ireland) Order 1976**

Direct discrimination on the ground of sex

3. In any circumstances relevant for the purposes of any provision of this Order, a person ("A") discriminates against another ("B") if, on the ground of sex, A treats B less favourably than A treats or would treat another person

…

Article 42 establishes that the employer is liable for anything done in the course of employment, subject to a reasonable steps defence.

Burden of proof: industrial tribunals

63A.—(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—

(a) has committed an act of discrimination or harassment against the complainant which is unlawful … the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.

Period within which proceedings to be brought

76.—(1) An industrial tribunal shall not consider a complaint under Article 63 unless it is presented to the tribunal before the end of

(a) the period of three months beginning when the act complained of was done; …

(1A) Article 249B of the Employment Rights (Northern Ireland) Order 1996 (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (1)(a).

(1B) Paragraphs (1) and (1A) shall be treated as provisions of the Employment Rights (Northern Ireland) Order 1996 for the purposes of Article 249B of that Order.

…

(5) A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(6) For the purposes of this Article—

(a) …

(b) any act extending over a period shall be treated as done at the end of that period, and

(c) a deliberate omission shall be treated as done when the person in question does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it were to be done.

Article 84 establishes that Police Officers are treated as employees of the Chief Constable for the purposes of the 1976 Order.

Case Law and Commentary – Whistleblowing

Qualifying Disclosures

19. The EAT in **Martin** rehearsed and endorsed the analysis of the statutory definition of a protected disclosure in **Williams v Michelle Brown AM**:

> *"[9] … First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*
>
> *[10] Unless all five conditions are satisfied there will be not be a qualifying disclosure…."*

Disclosure to Employer

20. **Douglas** established that a disclosure can qualify for protection when the disclosure is made to someone acting *"qua employer".* **Bowers**, commenting on the legislative provisions, states that the GB equivalent of Art. 67C does not ordinarily apply to a disclosure to a more junior colleague or a colleague at the same level of seniority as the worker. However, it may do on particular facts where a colleague's role is such that disclosure to them can properly be regarded as being a disclosure to the employer. This might be the case because the colleague's responsibilities are such that they can be seen as standing in the shoes of the employer on a particular issue.

Detriment

21. In ***Jesudason***, an NHS whistleblower raised serious allegations of professional incompetence, improper practices and cover up to the NHS trust, regulators and to a wider audience. He settled his claims before bringing further detriment proceedings in relation to matters which arose after the compromise of his claims. The Court of Appeal in England and Wales considered whether the claimant had suffered any detriment and summarised the law:

> *"It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment.*
>
> *…*
>
> *Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the Claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective"*

The court found that an observation about a whistleblower made in a letter whose purpose was to put the employer's side of the story could amount to a detriment.

22. The statement regarding detriment in ***Jesudason*** is a restatement of Lord Hope's formulation in ***Shamoon*****:**

> *"Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment'."*

23. **Bowers,** at paragraph 9.12, notes that *"Detriment has a wide meaning and it has been emphasised that showing something is a detriment is not a high hurdle to satisfy."*

Burden of Proof

24. The tribunal was referred to the decision of the EAT in **Chatterjee**, which summarised a line of authorities which included **Yewdall** and **Dahou**. **Chatterjee** observed that:

> *32. … Dahou, which refers to the earlier EAT decision in Yewdall v SSWP, UKEAT/0071/05, Simler J went on to draw attention to the fact that, unlike the burden of proof provisions in the Equality Act 2010 ("EqA"), under these provisions of the ERA, a shifting of the burden, and a failure by the employer then to persuade the Tribunal of its innocent explanation does not automatically lead to a finding in favour of the employee.*
>
> *33. There was no disagreement before me today as to the salient propositions that can be extracted from this body of authority, and I would summarise them as follows. Firstly, it will not necessarily follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the burden under Section 48(2). The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation.*
>
> *34. Secondly, if the burden does shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that may lead the Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from all of the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the employer), and that the*

protected disclosure was not a material influence on the conduct in the requisite sense."

In **Dahou,** the Court observed:

"*Simler J did not hold that it would never follow from a respondent's failure to show his reasons that the employee's case was right. Usually no doubt it will…"*

25. Mr Phillip's submitted, and Mr Sands did not disagree, that the EAT in **Chatterjee** was wrong to have imported into the whistleblowing detriment legislation a requirement for the claimant to show a *prima facie* case which then shifts the burden to the respondent. Mr Phillips commended to the tribunal the statement of Employment Judge Murray in ***Bronckaers***:

"The initial burden is on the claimant to prove that she made protected disclosures and that she suffered detriment due to an act and/or a deliberate failure to act on the part of the employer. If she proves those two elements the burden shifts to the employer to provide an explanation for the detrimental treatment which is not tainted by the fact of the claimant having made protected disclosures. It is therefore for the respondent at that point to prove that the treatment was in no sense whatsoever on grounds of the protected disclosures."

26. ***Bowers*** states at 9.201 that:-

"A more straightforward construction of section 48(2) ERA would be that it places the burden on the employer to show that the ground on which the detrimental act was done was something other than protected disclosure. That may be done either by showing the reason for the adverse treatment or by establishing, whether by direct evidence or inference, that the protected disclosure did not influence the decision (or was not more than a trivial influence). Essentially that was the approach of the EAT in ***Fecitt*** *(2010 ICR 476 (at paragraph 37 and 48)), where it was said that it was 'clear... that the burden of proof is on the employer to prove, in effect, where there has been a detriment that the Claimant was not victimised) and that the effect of section 48(2) ERA is that once protected disclosures and detriment are proved, there is no need for the Claimant to prove further facts from which victimisation can be found.'"*

Deliberate failure to act

27. In ***London Borough of Harrow*** the EAT considered that a deliberate failure to act differed from merely being insensitive or careless.

On Ground that

28. ***Fecitt*** established that the causal link between making a protected disclosure and suffering a detriment will be met if the protected disclosure *"materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."*

29. In ***Nagarajan*** the House of Lords considered the meaning of the phrase "on ground that". In that case, Lord Nicholls observed:

> *"An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. …*
>
> *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 phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating 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 phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

30. ***Bowers***, commenting on ***Nagarajan*** states at paragraph 9.80:

> *"The focus is on the mental processes, conscious or subconscious, of the person whose act or deliberate failure to act is in question. As such, it is to be distinguished from a test of causation, which is a legal conclusion focusing on the consequences attributed to an act or failure to act. On that basis it is aptly referred to as the "reason why" test (**Jesudason –v- Alder Hey Children's NHS Trust [2020] ICR 1226 (CA)** per Elias LJ at paras 30, 31). There is no requirement for any malicious motivation in inflicting a detriment."*

In ***Watson v Hilary Meredith Solicitors Ltd (UKEAT/0092/20/BA)*** Cavanagh J stated:

> *"I accept that, even if a tribunal makes positive findings in favour of an employer regarding conscious motivation, the tribunal may,*

in an appropriate case, have to consider the possibility of unconscious motivation."

Cavanagh J also stated at paragraph 63:

"It is well-known that discriminators and those who subject workers to a detriment on protected disclosure grounds rarely admit as much, and often may not themselves realise that this is why they are treating the worker in a particular way."

31. The Court of Appeal in England and Wales observed in ***Jesudason*** that:

"30 As Lord Nicholls pointed out in ***Chief Constable of West Yorkshire v Kahn [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065****, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a 'reason why' test:*

> *'Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [1999] IRLR 572, 575–576, a causation exercise of this type is not required either by s.1(1)(a) or s.2. The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'*

31 Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under s 47B."

In that case, the tribunal had made an appropriate finding about why the false statements were included in the Trust's various responses. The

Court ultimately concluded that the tribunal was manifestly entitled to find that:

> *"the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire."*

32. In ***Chatterjee*** the EAT observed:-

> *"… the Tribunal correctly and fairly stated the test, as such, as being whether the disclosures were more than a trivial element or had a material influence on the conduct complained of. Various phrases have been used in the authorities over the years, but they all mean the same thing."*

The EAT observed the need for consideration of the mental processes of the individual(s) concerned. These mental processes can be conscious or unconscious.

Separability

33. The respondent may be able to show that the reason for the detrimental treatment may be connected to the response to a protected disclosure but can still be regarded as separable from it. ***Bowers*** provides examples at paragraph 9.96:

> *"…It is not sufficient that the detriment was caused by the disclosure in the sense that it would not have occurred but for the protected disclosure. If a worker were to make a confession as to having been stealing, and was then dismissed because of the act of theft, in one sense a dismissal would be in response to and would not have occurred but for the worker's confession and disclosure but the reason for the dismissal is the theft and not the confession and disclosure….*
>
> *… Where, for example, a distinction is drawn between the disclosure by the worker and the way in which the worker made that disclosure then something more than a finding of "ordinary unreasonable behaviour" is required:* ***Morris –v- Metrolink; Riley –v- Belmont Green Finance Ltd trading as Vida Home Loans (UKEAT/0133/19/BA, 13 March 2020****)."*

34. In ***Bolton School*** the Court of Appeal in England and Wales drew the distinction between the fact of the making of the disclosures and the manner in which they were made, finding that the detriment (disciplinary action) flowed from the latter. The Court held that the disciplinary warning

was given for the claimant's irresponsible conduct (unauthorised access to a computer system), and not for telling his employers, by whatever means, that their system was insecure.

35. In ***Page***, a discrimination case, there was discussion of ***Martin v Devonshires Solicitors*** which held that:-

> *"there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable."*

Martin recognised that such a line of argument was open to abuse and noted that tribunals should be slow to recognise the distinction between the complaint and the way it is made, save in clear cases.

36. In ***Kong*** the Court of Appeal, in allowing the fact of the claimant having questioned a colleague's awareness/integrity to be separated from the disclosure and to constitute the principal reason for the dismissal, observed that:

> *"[59] …In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.*
>
> *[60] All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will 'cry out' for an explanation from the employer, as Elias LJ observed in* ***Fecitt****, and tribunals will need to examine such explanations with particular care.* (Tribunal's emphasis.)
>
> *[61] The legislation confers a high level of protection on whistle-blowers for sound reasons, and the distinction should not be allowed to undermine that important protection or deprive individuals of protection merely because their behaviour is challenging, unwelcome or resisted by colleagues. … Some things are necessarily inherent in the making of a protected disclosure and are unlikely to be properly viewed as distinct from it. The upset that a protected disclosure causes is one example because for all practical purposes it is a necessary part of blowing*

the whistle; inherent criticism is another. There are likely to be few cases where employers will be able to rely on upset or inherent criticism caused by whistleblowing as a separate and distinct reason for treatment from the protected disclosure itself, though I am reluctant to say that it could never occur. The way in which the protected disclosure is made is also, in general, part of the disclosure itself, unless there is a particular feature of the way it is made (for example, accompanying racist abuse) that makes it genuinely separable."

Failure by the employer to show the reason

37. If the respondent fails to satisfy the tribunal regarding the reason for the detrimental treatment, it does not mean that the claimant will automatically succeed, though the tribunal may draw an inference. Following the remitted hearing in ***Jhuti***, the tribunal found against the respondent in the absence of an explanation for the detrimental act and that conclusion was upheld before the EAT. **Bowers** suggests that the tribunal should seek to make positive findings, if necessary, based on the drawing of an inference, as to whether the protected disclosures influenced the detrimental treatment and which will then be dispositive (paragraph 9.217). However, as noted above at paragraph 24, **Dahou** is authority for the proposition that it will usually follow from a respondent's failure to show the reason that the claimant's case was right. This is entirely in keeping with the legislative provisions in Article 70B(2) of the 1996 Order (see paragraph 17 above).

<u>Case Law and Commentary – Sex Discrimination</u>

Burden of Proof

38. In ***McCorry*** the Northern Ireland Court of Appeal stated:-

*"[39] The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in **Wong v Igen Ltd [2005] EWCA Civ 142**. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the Tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld."*

39. In ***Nelson***, the Northern Ireland Court of Appeal held:-

"[23] In the post-Igen decision in ***Madarassy v. Nomura International plc [2007] IRLR 246*** *the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the Igen approach, the Madarassy decision is in fact an important gloss on Igen. The court stated:-*

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts 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: could conclude in Section 63A(2) must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage the Tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment . . ."* (Tribunal's emphasis.)

That decision makes clear that the words "could conclude" is not to be read as equivalent to "might possibly conclude". The facts must lead to the inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be presumed.

[24] This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In Curley v Chief Constable [2009] NICA 8 Coghlin LJ emphasised

the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."

40. ***Igen*** endorsed and revised the detailed guidance in ***Barton***:

"(1) …

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. ....

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
…

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

41. The respondent's representative relied on paragraph 94 of ***Bahl [2003]*** in his submissions. The tribunal has set out the EAT's judgment more fully below:-

"93. There is clear authority for the proposition that a tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably. …

94. It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman that it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does no more than raise the possibility that the employer could have been influenced by unlawful discriminatory consideration. Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made. …

96. … We do, however, respectfully accept that Sedley LJ was right to say that racial bias may be inferred if there is no explanation for the unreasonable behaviour. But it is not then the mere fact of unreasonable behaviour which entitles the tribunal to infer discrimination; it is not, to use the tribunal's language, unreasonable conduct 'without more', but rather the fact that there is no reason advanced for it. … (Tribunal's emphasis.)

…

99. That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental

question is why the alleged discriminator acted as he did. If what he does is reasonable, then the reason is likely to be non-discriminatory. …

100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group.

…

101. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. …" (Tribunal's emphasis.)

On appeal, the Court of Appeal in England and Wales approved the EAT decision, describing it as "*a judgment which is a model of lucidity*" and "*a masterly analysis of the law in a way which has only been challenged on one point on this appeal (relating to an obiter remark of Sedley LJ in Anya)*". The Court of Appeal went on to cite with approval the comments of Sedley LJ at paragraph 101:

"It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it."

42. In ***Hewage***, the Supreme Court warned that:

"it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Time

43. Harvey states (Division PI Practice and Procedure: 1. Employment Tribunals: F. Time limits for Presentation of claims generally: (5) Calculating time limits: (c) Time limits in discrimination and detriment claims):

“[114]

The Court of Appeal in [***Hendricks***] referred back to a previous line of authority and acknowledged that where an employer applies a discriminatory or detrimental 'policy, rule, practice, scheme or regime' which continues to apply over a period of time, this has rightly been held to amount to conduct extending over a period. However, crucially, the court in Hendricks stressed that these are simply examples – and are not exhaustive examples – of what might constitute conduct extending over a period (see Hendricks per Mummery LJ at [51]–[52]). As such, they 'should not be treated as a complete and constricting statement of the indicia' of conduct extending over a period.

[115]

The result is that in cases involving numerous allegations of discriminatory acts or omissions it is not necessary for an applicant to establish the existence of a 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what the applicant has to prove, in order to establish conduct extending over a period, is (a) that the incidents are linked to each other, and (b) that they are evidence of 'an ongoing situation or continuing state of affairs' (Hendricks at [52]). As the Court of Appeal stated in the same paragraph, 'The question is whether that is “an act extending over a period” as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'. …

[118.02]

[***Hendricks***] was applied by the EAT in [***Hale***]*, unreported)* when holding that the various stages of a disciplinary procedure, which culminated in the claimant's dismissal, constituted an act extending over a period rather than, in the words of Mummery LJ, 'a succession of unconnected or isolated specific acts', each with its own time limit. The facts of *Hale* were that the claimant, a hospital consultant, who was white British, was subjected to the hospital's disciplinary procedure following complaints of race discrimination and harassment being made against him by junior doctors for whom he had responsibility, and who were of Asian origin. The respondents instigated a formal investigation, which concluded that the claimant had a case to answer; this in turn led to a disciplinary hearing, which resulted in the complaints being upheld; and the outcome was that the claimant was summarily dismissed, and his subsequent appeal turned down. The claimant brought proceedings for race discrimination, unfair dismissal and wrongful dismissal. … The EAT … held that, although the tribunal was entitled to subdivide the agreed issue into three separate questions, it 'should not have lost sight of the issue as formulated', which indicated that 'the complaint is about a continuing act commencing with a decision to instigate the process and ending with a dismissal' (para 38). He stated (at para 42):-

"By taking the decision to instigate disciplinary procedures, it seems to me that the respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the respondent would subject the claimant to further steps under it from time to time."

The tribunal was therefore wrong to treat the first stage of the process as a one-off act 'when it undoubtedly formed part of an ongoing state of affairs created by the initial decision' (para 43). Choudhury J pointed out that the alternative to treating the exercise of a disciplinary procedure as a continuing act would be to require an employee to issue a fresh claim after each stage as a protective measure, which would impose an unnecessary burden on claimants (see para 44)."

44. In ***Hale*** the EAT held:-

"However, the tribunal here, for reasons already set out, lost sight of the substance of the complaint as defined by the agreed issue. Having done so, it then incorrectly treated the subdivided issue as a one-off, when it undoubtedly formed part of ongoing state of affairs created by the initial decision.

44. That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts -including the medical profession – can take many months, if not years, to complete. In such context, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they rely upon the act extending over a period provision. It seems to me that provision can encompass situations such as the one in question".

Just and Equitable extension

45. It is well established that the just and equitable extension is a wide discretion.

46. Despite that time limits are an exercised strictly in employment cases and that the exercise of discretion is the exception rather than the rule (***Robertson*** per Auld J).

47. In ***Caston*** Sedley LJ commented on ***Robertson*** (at paragraph 31 and 32), stating:-

> *"31*
> *In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them.*
>
> *32*
> *Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it. That, albeit discursively, is what the EJ did here, notwithstanding his passing distraction by a textbook comment of doubtful relevance or weight."*

48. Recourse is often made by tribunals to the factors set out in ***British Coal Corporation -v- Keeble [1997] IRLR 336***. Those factors are:-

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

49. In ***Adedeji*** the English Court of Appeal cautioned against giving ***Keeble*** "a status which it does not have". The ***Keeble*** factors are of assistance but should not be applied in mechanistic way. The Court held:-

> *"Keeble did no more than suggest that a comparison with the requirements of section 33 of the Limitation Act 1980 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list*

should be used as a framework for any decision. However, that was how it had too often been read, and "the Keeble factors" and "the Keeble principles" still regularly featured as the starting point for tribunals' approach to decisions under section 123(1)(b) of the Equality Act 2010. His Lordship did not regard that as healthy. Of course the two discretions were "not dissimilar", so it was unsurprising that most of the factors mentioned in section 33 might be relevant also, though to varying degrees, in the context of a discrimination claim; and the court did not doubt that many tribunals over the years had found Keeble helpful. But rigid adherence to a checklist could lead to a mechanistic approach to what was meant to be a very broad general discretion, and confusion might also occur where a tribunal referred to a genuinely relevant factor but used inappropriate Keeble-derived language (as occurred in the present case). The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) was to assess all the factors in the particular case which it considered relevant to whether it was just and equitable to extend time, including in particular the length of, and the reasons for, the delay. If it checked those factors against the list in Keeble, well and good; but his Lordship would not recommend taking it as the framework for its thinking. His Lordship was not the first to caution against giving the decision in Keeble a status which it did not have. Although the message of the authorities was clear, its repetition might still be of value in ensuring that it was fully digested by practitioners and tribunals."

PART D RELEVANT FINDINGS OF FACT

50. The claimant has a long and distinguished career in policing, spanning twenty-three years. Within the PSNI, she attained the rank of Chief Superintendent. She has attained the rank of Assistant Chief Constable in Police Scotland. She was awarded an MBE in 2019 for services to policing and the community. She co-founded the Women in Policing Association in 2007 and served as its chair, standing down from this role in 2021.

51. The claimant was appointed to the role of District Commander in Derry City and Strabane (DCS) on 20 January 2020. This role was viewed as an important role, with particular threats and challenges, in view of dissident activity. The discussions of the Senior Management Appointment Panel (SMAP) relating to the filling of this post demonstrated the careful consideration given to filling this important role. The claimant was viewed as having the right balance of skills and experience to assume this command role, which had been historically difficult to fill. She was the first female to be appointed to this role. The claimant had a long commute to her new place of work, travelling approximately two hours each way from and to her home.

Covid response arrangements

52. The Covid-19 pandemic caused a national lockdown to be imposed on 23 March 2020. PSNI prepared its response to the pandemic ("Operation Talla"). Strategic responsibility for this operation lay with Assistant Chief Constable Todd. As part of the response, Police Officers in Local Policing Teams were moved to twelve-hour shift patterns in anticipation of significant Covid related absences.

53. On 24 March 2020, the Chief Constable sent an email to all staff following the Prime Minister's announcement. That email stated:-

> *"The Police Service of Northern Ireland is an essential emergency service and we are all part of the delivery of this essential service. However, I fully realise that many of you have deep concerns and that we have a duty to lower the risk of transmission of Covid 19 in the workplace and beyond.*
>
> *Firstly, PHA guidance on shielding of individuals with serious medical conditions was published earlier this week. It advises that anyone with certain medical conditions should stay at home and should follow government advice about self-isolation.*
>
> *…*
> *If this refers to you please inform your supervisor who can advise you on your ability to continue to work from home.*
>
> *Secondly I have asked senior managers in the PSNI to draw up plans by close of play on Thursday for police staff and non-24/7 services to operate at the basis of 1 in 3 members of staff being present in the workplace. I have asked for this to be worked out on a rotational basis.*
>
> *For those of you working in a 24/7 operational role I have asked that numbers be thinned down where possible to reasonable levels and that again people can be sent home in rotation.*
>
> *These decisions will be finalised on Thursday.*
>
> *Police officers not in the shielding category are not self-isolating due to symptoms or infection will be expected to come to work unless you have been issued with a laptop and directed to work from home.*
>
> *Thank you.*
>
> *Simon Byrne*
> *Chief Constable"*

54. In advance of the commencement of the new shift pattern, the claimant emailed the Inspectors and Sergeants within her District on 8 April 2020 clarifying her expectations in connection with the new arrangements introduced in response to the Covid 19 pandemic. By email dated 10 April 2020, the claimant addressed the practice of social distancing. In that email, she stated that the best way to be socially distanced was to keep out of the station on patrol, doing beats, cycle patrols and delivering the visibility the public had been told they could expect. She confirmed her expectation that Inspectors and Sergeants would work together to manage numbers in stations and rooms at any one time. The new shift pattern commenced on 13 April 2020.

55. On 27 April 2020, the claimant was informed by Superintendent McC that Officers within her district, Derry City and Strabane, had not attended for duty and had remained at home, while continuing to be paid. It is not in dispute that the local arrangements which gave rise to this situation were not within the knowledge of or sanctioned by the claimant, as District Commander, or by anyone above her in the chain of command.

Disclosure 1 – to Assistant Chief Constable Todd: failure to attend for work and potential fraudulent claims arising therefrom

56. The claimant escalated the information disclosed to her by Superintendent McC, as set out at paragraph 55 above, to her line manager, Assistant Chief Constable Todd. The matters disclosed to the claimant and escalated by the claimant tended to show breaches of legal duties, as well as potential criminal offences in the event that payments had been sought fraudulently. The claimant had a discussion with Assistant Chief Constable Todd by telephone on the afternoon of 27 April 2020, and this was followed up by text messages informing him that initial enquiries suggested that the issue was occurring to a greater extent than she had first thought, and that her Inspectors had been aware of the situation. She stated that she would get a proper sense of the scale the next day and that Professional Standards Division (PSD) would be brought in. The claimant stated in a text dated on 27 April 2020 at 17:46:-

> *"I'm raging and so embarrassed I would never condone that and so annoyed they've thought not only they could do it but that they'd get away with it."*

In a further text at 20:21 on 27 April 2021 the claimant stated:

> *"I'm also considering re critical incident and have a meeting scheduled with SMT after I rollock the section at 7am to look at closing whatever gaps allowed this to happen. I am mortified that this has happened. Apologies."*

57. Assistant Chief Constable Todd agreed that the actions of the Police Officers who remained at home whilst on duty amounted to a critical incident, in light of the potential reputational damage to PSNI, because

police officers, who should have been on duty assisting with the pandemic response, were reported to be at home rather than being on duty and being paid, whilst other emergency services were extremely stretched. Assistant Chief Constable Todd and the claimant agreed that Assistant Chief Constable Todd would escalate the matter to the Service Executive Team to allow engagement of wider assistance and that the claimant would lead the local response managing staff, stakeholders (including local politicians and community interests) and response to media enquiries. The media interviews conducted by the claimant were given with guidance from corporate communications and Assistant Chief Constable Todd.

58. Assistant Chief Constable Todd agreed with the claimant that it was appropriate for her to meet personally with the affected teams. Assistant Chief Constable Todd was aware of the claimant's proposal to meet the Officers as a section the next morning and to address their actions in a robust fashion (see text at paragraph 56 above referencing her intention to "rollock" the Officers). He was supportive of the course of action proposed by her. The tribunal notes and accepts the evidence of Deputy Chief Constable Hamilton that it was his expectation that senior Officers challenge and address wrongdoing openly within their teams pursuant to Article 10.3 of the Code of Ethics (see paragraph 16 above), and that it was appropriate for the claimant personally to take action to challenge her officers' behaviour.

The respondent concedes and the tribunal is satisfied that disclosure 1 was a protected disclosure within the meaning of Art 67B (see paragraph 16 above).

The staff briefings

59. The claimant called all Officers in the affected sections under her command to two briefing sessions on 28 April 2020; one at 05:30 and one at 07:00. At one of the briefings, the claimant was accompanied by Chief Inspector B. There were 63 Officers at the first briefing and 59 officers at the second briefing. The briefing room was 153 square metres. The tribunal deduces that it would have been difficult to maintain the requisite 2m social distancing requirements, which were known to the claimant, having regard to the numbers attending and the size of the room. The tribunal accepts the claimant's oral evidence that the room was ventilated and surfaces wiped down between the briefings. Complaints were made by some attendees to the Health and Safety Executive (HSE) and the claimant contributed to the response which was sent by Assistant Chief Constable Todd. It appears that HSE was satisfied with the explanations given and that no further action was taken in respect of the briefings.

60. The only person who was present at the staff briefings on 27 April 2020 and gave evidence to the tribunal was the claimant. In her witness statement, she gave a brief account:-

"I outlined my disappointment at what had been brought to my attention and expressed the view that it fell far short of what I expect and that the matter was being referred to Professional Standards for review regarding any potential misconduct."

The claimant provided her notes of the meeting to corroborate her account. During cross examination regarding her conduct at the briefings, the claimant denied that she had prejudged the outcome of any investigation, noting that it was factual that the officers had not attended or paraded for duty, without approval from her or senior management and that she had merely outlined what the potential implications and consequences were. The claimant required the Officers present at the briefings to surrender their notebooks so they could be used as evidence in any investigation. The tribunal finds that the briefings were robust, reflecting the claimant's annoyance and embarrassment at what had transpired under her command. The claimant in cross examination disputed the version of events put forward in the four complaints which were made regarding her behaviour at the briefings. However, the claimant accepted that she had said *"Do you think I got here by being a twat?"* The claimant's candid acceptance of this remark, even though it did not reflect well on her, adds credibility to her account of what occurred at the staff briefings and in the absence of evidence from any other attendee or any internal investigation which established the allegations of the complainants as factual, the tribunal accepts her account. The claimant addressed matters robustly, expressing her dissatisfaction with those under her command. The tribunal deduces that the claimant's line manager Assistant Chief Constable Todd, had no issue with a 'rollocking' being delivered to the section, as he knew in advance of her intention to do so and raised no objection to this course of action.

61. These staff briefings were not the escalation of concerns by the claimant but rather amounted to the claimant disclosing to the Officers below her rank, within her District Command the implications and consequences of their actions. The claimant was the most Senior Officer present at these staff briefings. **The claimant properly conceded during the submissions hearing that these staff briefings were not qualifying disclosures and abandoned her reliance on them. The claimant also abandoned her reliance on a disclosure made to a Federated representative at the conclusion of the hearing.**

Disclosure 2 – Disclosure to 'the "first" Appropriate Authority' for the purposes of the Police Conduct Regulations.

62. On the morning of the 28 April 2020, after the staff briefings referred to at paragraph 59 above, the claimant attended a meeting with Professional Standards Department (PSD) by telephone. The meeting attendees included Inspector Rogers and a Temporary Superintendent within Professional Standards Department (PSD), who was delegated to act as an "Appropriate Authority" for the purposes of the Police Conduct

Regulations (and is hereinafter referred to as 'the "first" Appropriate Authority'). 'The "first" Appropriate Authority' had previously worked in Derry City and Strabane District. The claimant repeated her concerns regarding the actions of those reporting to her, which had been taken without her knowledge or permission to those in attendance at the meeting. As a result, it was agreed by all those attending, including the claimant, that Professional Standards Department (PSD) should initiate a Preliminary Enquiry into the actions of the Officers. The Preliminary Enquiry is a limited fact finding and scoping exercise undertaken to provide a firm basis for the Appropriate Authority to assess whether the subject matter of the allegation, if proven, would amount to misconduct, gross misconduct or neither.

63. Chief Superintendent McVea, the Head of Justice and Standards Branch (which included Professional Standards Department (PSD)), was on leave at the time of this meeting. When he returned on 1 May 2020 he was briefed by 'the "first" Appropriate Authority' about the concerns raised by the claimant in 'the "first" Appropriate Authority's' meeting with the claimant to ascertain the specifics of the concerns, which centred around working practices of the district during Covid: namely that a large percentage of staff were not at work, but were at home, when this had not been authorised by senior management in Derry City and Strabane.

The respondent disputes disclosure 2 was a protected disclosure on the ground that the disclosure was made to a lower ranking officer.

The tribunal's conclusions regarding this disclosure are set out at paragraph 142 below.

Disclosure 3 – to the Gold Meeting of Service Executive Team (SET)

64. On 28 April 2020, after Assistant Chief Constable Todd had escalated the matters to Service Executive Team (SET), as he had agreed to do with the claimant, Deputy Chief Constable Hamilton chaired an extraordinary "Gold" meeting of the Service Executive Team (SET). The claimant was present at this meeting and repeated her concerns, informing the meeting that over 100 officers were involved. The meeting considered the issues raised by the claimant. A potential explanation for the non-attendance of the officers was advanced during the meeting by one of those present (and before any investigation had taken place), in the form of reliance on the Chief Constable's email of 24 March 2020 (see paragraph 53 above). A wide-ranging discussion took place regarding the issues, including lines to take with media enquiries.

65. On 28 April 2020 Superintendent McC (who was based within Derry City and Strabane District) contacted the Derry City and Strabane District Sergeants and Inspectors by email at 17:43 to inform them that Professional Standards Division (PSD) were conducting an assessment of the working arrangements of policing teams introduced under "Operation Talla" and that this would take the form of a Preliminary

Enquiry. On 29 April 2020, it was noted in an internal email from KS to DC (staff within Operational Planning North Area) that an unusually high number of officers were seeking to correct their overtime claims. This was believed to be connected to the wider issue of officers being absent from duty and then claiming rostered overtime. The email chain adduced to the tribunal has been redacted so that it is unclear who approached Superintendent McC at 10:25 on 29 April 2020, stating "Can we discuss.". Superintendent McC sent the email chain to 'the "first" Appropriate Authority", describing it as *"another development … that shall need to be considered as part of the preliminary enquiry"* and confirming that he had asked that no amendments be made in terms of incorrect claims. 'The '"first" Appropriate Authority' replied on 29 April 2020 seeking a conference call with Superintendent McC to agree a position to *"[meet] both our needs re rectifying any claims".* The tribunal did not receive any explanation of what was meant by the meeting of "both our needs".

The respondent concedes and the tribunal is satisfied that Disclosure 3 was a protected disclosure within the meaning of Art 67B (see paragraph 16 above).

Disclosure 4 – further information disclosed to Assistant Chief Constable Todd

66. On 29 April 2020, the claimant had a telephone conversation with Assistant Chief Constable Todd to inform him that by that stage she had been made aware that eight Neighbourhood Policing Team officers had claimed overtime while not at work, and that this may be misconduct or, at worst, amount to criminal behaviour. She informed him that a discussion had occurred within her District suggesting that annual leave could be availed of retrospectively.

The respondent concedes and the tribunal is satisfied that disclosure 4 was a protected disclosure within the meaning of Art 67B (see paragraph 16 above).

67. The Chief Constable, Deputy Chief Constable Hamilton, Assistant Chief Constable Todd and the Head of Strategic Communications, RF, discussed the "working from home" issue in Derry City and Strabane. Deputy Chief Constable Hamilton decided he would keep the issue at the claimant's level for the time being, as well as noting that the Chief Constable's email of 24 March 2020 was being used as a possible defence.

68. The respondent has sought to characterise the claimant as having merely escalated concerns received from others up the chain of line management. The tribunal finds that the claimant in raising the concerns was actively seeking that they be addressed through declaration of the critical incident, and latterly through Professional Standards Division (PSD) discipline. In this regard, the tribunal finds that the claimant was

considered the originator of the complaints, in light of the evidence of Chief Superintendent McVea, who when briefed by 'the "first" Appropriate Authority' on 1 May 2020, was told that the concerns had been raised by her. This is also reflected in the content and tenor of Mr Armstrong's review (see at paragraph 117 below).

The Chief Constable's and the claimant's communications

69. On 2 May 2020, the Chief Constable sent a text message to the claimant:

> *"A heavy week how are you doing, Emma?"*

The claimant sent two messages in reply:-

> *"I'm okay Sir, though incredibly embarrassed by the whole thing. I am so disappointed and just can't reconcile frontline people deliberately sitting at home when they know they should be at work. One would be bad enough never mind the scale they did it to. It has become quite personal with me the alleged problem because I had them in and spoke to them. I've had feedback that I'm being talked about across the org and not in very complementary ways which is a shame when I've always prided myself of my credibility and reputation. Been a tough few days however I'm clear and stand by my position and this is a true test of my leadership and what comes with being a commander. I appreciate the text and can only apologise that this happened at all. I assure you it won't ever happen on my watch again. Happy Sunday.*
>
> *One additional thing that perhaps says a lot about how women in leadership roles are perceived in the organisation and doesn't suggest a respective culture is that someone has said "being in the woman's thing has gone to her head". I do wonder if a male colleague had been in my shoes would they be the subject of such commentary and be questioned on the validity of them exercising their role as a commander."*

70. The Chief Constable spoke to the claimant by telephone the following day, 3 May 2020, having received the texts set out above, which he described in his journal as *"an emotional text about issues on District".* He reassured her that these issues were no reflection on her leadership and counselled her regarding a need for "resilience", suggesting the use of a coach or mentor. He informed her that he did not want to talk about the case given his role in misconduct matters.

71. On 6 May 2020, the claimant texted the Chief Constable stating:-

> *"Sir, it was remiss of me not to mention to you that ACC Todd has been very supportive the past week and I have appreciated that greatly."*

The Chief Constable met with the claimant on 6 May 2020, but no record exists of what was discussed at that meeting.

The Preliminary Enquiry regarding Police Officers' absence

72. On 5 May 2020, Inspector Rogers from Professional Standards Division (PSD) prepared a Preliminary Enquiry report (see paragraph 62 above for an explanation of the Preliminary Enquiry), which he submitted to 'the "first" Appropriate Authority' on 5 May 2020. Inspector Rogers' report found that resourcing decisions in respect of the local policing team had been taken by Inspectors who believed they had delegated authority to do so, that the Inspectors' decisions had been implemented by the Sergeants and that the Constables were "doing what they were told". The report detailed his understanding of "on call" arrangements, namely that officers must be able to be at work within one hour. The rationale for these arrangements appeared to be minimising exposure to the Covid-19 virus. The report concluded:-

> *"…it is evident that the message from the Chief Constable on 24th of March as it referred to "24/7 operational roles" was interpreted by some officers in the broadest possible sense and in a way that extended the interpretation of "sending officers home on rotation" to them not coming into work at all.*
> *…*
>
> *I have received two relevant intelligence documents from ACU [Anti Corruption Unit]. One refers to the claiming of overtime and mileage for duty on days not worked by officers in each district and the other to an officer having posted a picture of himself drinking beer whilst on standby at home. …*
>
> *None of the material made available to me reveals prima facie evidence of dishonesty or neglect of duty on the part of any officer in connection with the standby arrangements that were put in place. It is significant that the Inspectors and Sergeants involved have adopted a unified stance and that they thought what they were doing had been, if not specifically, at least tacitly, approved by senior management in each district and that was something being practised widely in the service."*

73. The Preliminary Enquiry report recommended that the concerns raised by the claimant should be dealt with by way of "management action" to the effect that deviation from normal policy and procedures that relate to "on call" and "standby" working must only be permitted in exceptional circumstances and with explicit senior management team approval. Pursuant to Regulation 3 of the Police Conduct Regulations (see paragraph 16 above), "management action" is not a disciplinary sanction (whereas "management advice" is a disciplinary sanction). The report further recommended an audit of the officers who were on standby in this period regarding both overtime and mileage claims. The report stated:-

"The overtime issue is not a clear-cut one. Officers were given an order to be at home but ready to come to work. This placed them in a status of "on duty" and there is an argument that any such claim would be valid. The situation is sufficiently vague that I think it would be ill-advised to embark upon a misconduct investigation in this connection. The question of mileage is however very clear in my view. Any claim for, acceptance of payment for miles not driven is a clear integrity matter and may also constitute a criminal act…."

74. On 5 May 2020, 'the "first" Appropriate Authority' forwarded his Preliminary Enquiry report along with his draft Regulation 12 assessment to his superior, Chief Superintendent McVea, who in turn forwarded these documents to Assistant Chief Constable McEwan. On 6 May 2020, 'the "first" Appropriate Authority' issued his final report. The conclusion of this assessment stated:-

"In relation to the core working practices of the DSC (sic) sections there is not a basis on which to conduct a formal misconduct investigation. A genuine misunderstanding appears to have been formed that operational officers being at home whilst on duty was acceptable and that this was within the discretion of supervisors to approve. The extent and precise methodology of the arrangements and the fact that the DSC SMT were unaware of them is more a matter for performance and learning than misconduct. If there are individual issues that come to light around notebook completions, mileage claims or any other potential misconduct matters that are detected by DSC they can be assessed as normal and PSD advice sought."

In an email forwarding this report, 'the "first" Appropriate Authority' asked that the outcome be communicated to the affected officers as soon as possible for welfare reasons.

75. Chief Superintendent McVea forwarded the final report and assessment to Assistant Chief Constable McEwan on 7 May 2020, before having a conference call with Assistant Chief Constable McEwan and the claimant. Chief Superintendent McVea was not content with the report and assessment because the totality of the concerns raised by the claimant had not been addressed and the supervisory accounts had been accepted by 'the "first" Appropriate Authority' without challenge. Chief Superintendent McVea emailed Assistant Chief Constable McEwan on 11 May 2020 at 00:22 setting out his view of the shortcomings of the Preliminary Enquiry and his view that a further Appropriate Authority assessment would be required at the conclusion of the enquiries or investigation. He also expressed the view that further enquiries should be taken forward by PSD and not within the DCS District.

Superintendent McVea challenges 'the "first" Appropriate Authority' and replaces him in the DCS investigation

76. By 11 May 2020, following discussions with Deputy Chief Constable Hamilton, it had been agreed that Chief Superintendent McVea would be taking forward the "Appropriate Authority" role, in substitution for 'the "first" Appropriate Authority'. Chief Superintendent McVea met with Professional Standards Division (PSD) at 11:30 on 11 May 2020. This meeting was attended by 'the 'first" Appropriate Authority' and others. It is apparent from the minutes of this meeting that Chief Superintendent McVea (who later replaced 'the "first" Appropriate Authority') did not support 'the "first" Appropriate Authority's' decision-making regarding the officers in Derry City and Strabane. For his part, 'the "first" Appropriate Authority' considered the matter was closed unless reopened by the Chief Constable and that the Derry City and Strabane officers were required to be informed of the outcome of his assessment in line with the Police Conduct Regulations. At the meeting it was agreed that Chief Superintendent McVea would share 'the "first" Appropriate Authority's' Preliminary Enquiry and assessment with the claimant requesting details of any specific concerns that she had. The minutes of the meeting record the '"first" Appropriate Authority' stating *"We need to look at where this is going, what it is going to achieve …"* Chief Superintendent McVea was recorded as stating that either he or the '"first" Appropriate Authority' would act as the Appropriate Authority if the claimant were to outline further concerns. Chief Superintendent McVea emailed the claimant at 14:58 on 11 May 2020, confirming that he would be assuming the role of "Appropriate Authority". He told her that he would direct further enquiries regarding the issue of Covid working practices if additional concerns were forthcoming. He asked her to consider the report and invited her to set out any further concerns she had and identify those individuals whom she would like him to consider. He informed her that he would consider service of Regulation 16 notices against those she expressed concern about and would conduct a further assessment as the "Appropriate Authority". The '"first" Appropriate Authority' was replaced by Chief Superintendent McVea as Appropriate Authority in respect of the investigation against the Officers in respect of their working arrangements on 11 May 2020.

First complaint made against the claimant

77. On 12 May 2020, a complaint dated 11 May 2020 was received from Inspector O, regarding the conduct of the claimant at the briefing conducted by her at 05:30 on 28 April 2020. Inspector O stated:-

> *"I am making this report directly to Professional Standards Department on their advice as it involves a member of Derry City & Strabane Senior Management Team namely Chief Superintendent Emma Bond."* (The tribunal's emphasis.)

The tribunal was not provided with evidence of what advice was sought from or given by PSD to this or any other complainant. The tribunal is concerned regarding complainants receiving advice regarding the bringing of complaints, which would then fall to be investigated by PSD. This is something which the respondent may wish to consider further.

78. The complaint alleged that the claimant:-

> *"lost control, was abusive, threatening and told officers they had committed acts of serious criminality and gross misconduct for which they would face prosecution and there would be dismissals, reductions in rank, discipline and extent of probationary periods. C/Supt. Bond shouted, used inappropriate language and singled out officers by rank and name for personal criticism. The address was inappropriate in its timing and its delivery and content fell far below the standard I would expect from any police officer especially a Chief Superintendent. … The delivery style and tone was aggressive and hostile, with C/Supt. Bond speaking a raised voice and trading places. Her body language was closed and confrontational … and stated that this was the worst day of her policing career."*

The complaint made other allegations including that the claimant had shouted that everyone in the room was a disgrace to the uniform and that they had betrayed her trust and the trust of the people in Derry. Inspector O made reference to his awareness that his own management actions may well come under scrutiny:-

> *"I do not make this report lightly and it is not a reaction to being told off. I am happy that if any wrongdoing is identified in respect of the working practices issue PSD will deal with it appropriately and if I am subject to any subsequent proceedings I will deal with them as necessary."*.

79. 'The "first" Appropriate Authority' acted as the "Appropriate Authority" in respect of this complaint about the claimant, without escalating it further within Professional Standards Division (PSD).

Regulation 12 assessment and Regulation 16 Notice

80. On 12 May 2020, the same day as Inspector O's complaint was received (within a period of about 3 hours), 'the "first" Appropriate Authority' completed a Regulation 12 assessment in respect of the complaint against the claimant and assessed it as potentially amounting to "gross misconduct". The Regulation 12 assessment, having made reference to Article 6.1 of the Code of Ethics, included the following:-

> *"It is further alleged by the member that C/Supt Bond used the phrase ''twat' which could indicate a loss of self-control and could be considered inappropriate terminology."*

81. ‘The “first” Appropriate Authority’ prepared a Regulation 16 Notice in respect of the claimant’s alleged conduct. Having completed the assessment and uploaded it to the system, he emailed Chief Superintendent McVea to inform him and to seek a discussion regarding the appointment of an Investigator and management of next steps.

82. On 12 May 2020, Chief Superintendent McVea received a text from ‘the “first” Appropriate Authority’ alerting him to an email that ‘the “first” Appropriate Authority’ had sent him at 12:45 to inform him of the receipt of Inspector O’s complaint, the completion of the Regulation 12 assessment which had been submitted to the Professional Standards Division administration system. Chief Superintendent McVea met with ‘the “first” Appropriate Authority at 13:27 on 12 May 2020. He brought a minute taker who recorded minutes of the meeting. Chief Superintendent McVea was angry that ‘the “first” Appropriate Authority’ had not briefed him regarding the complaint about the claimant when it was first received, as he had held a meeting with Professional Standards Division (PSD) the previous week, which ‘the “first” Appropriate Authority’ attended, at which he informed ‘the “first” Appropriate Authority’ that any significant matters needed to be escalated and briefed up. This had not occurred in respect of the complaint against the claimant, which was significant given the seniority of the claimant. In addition, the claimant had until one year previously been the Head of Professional Standards Division (PSD), before this role was assumed by Chief Superintendent McVea. Chief Superintendent McVea was of the view that ‘the “first” Appropriate Authority’ was not an appropriate Officer to deal with the complaints against the claimant as he had already been dealing with the complaints that she had made against the Derry City and Strabane Officers and because Chief Superintendent McVea perceived that ‘the “first” Appropriate Authority’ had already sided with the DCS Officers. ‘The “first” Appropriate Authority’ was instructed to have no more involvement in the matter without informing Chief Superintendent McVea and to place all actions on hold. ‘The “first” Appropriate Authority’ commenced a period of sickness absence on 14 May 2020.

Further complaint against the claimant

83. On 12 May 2020, a complaint against the claimant was received from Inspector C. Assistant Chief Constable Todd telephoned the claimant to inform her that complaints had been made against without giving her further details and the Chief Constable was informed that the claimant had become the subject of complaints.

Consideration of complaints

84. On 13 May 2020, Chief Superintendent McVea escalated the complaint from Inspector O and ‘the “first” Appropriate Authority’s’ assessment of that complaint as potentially amounting to “gross misconduct” to Assistant Chief Constable McEwan. He also forwarded the complaint from Inspector C, which had been received after ‘the “first” Appropriate

Authority's' Regulation 12 assessment had been completed. He informed Assistant Chief Constable McEwan that there were fundamental differences between Inspector O's complaint and Inspector C's complaint. Inspector O had alleged that the claimant has said that officers *would* be prosecuted for criminal acts, lose their jobs, lose their rank and have the probation extended, whereas Inspector C had alleged that the claimant had said that these *could* be consequences of their actions. Chief Superintendent McVea proposed that a Preliminary Enquiry should be carried out, and that a further Regulation 12 assessment (see paragraph 16 above) should be carried out once that enquiry had been completed. He informed Assistant Chief Constable McEwan of his view that the Regulation 16 notice should not be served on the claimant until further enquiry had been conducted and a further assessment made. Chief Superintendent McVea asked for consideration to be given as to who should act as the "Appropriate Authority" for this matter, and if appropriate, that the Chief Constable delegate authority to that person. The tribunal accepts Chief Superintendent McVea's evidence given in cross examination that he was reluctant to serve the Regulation 16 notice on the claimant because of an imbalance in the outworking of the assessment.

85. On 13 May 2020, 'the "first" Appropriate Authority' sent an email to Chief Superintendent McVea. It is evident from the email that he had been asked by Chief Superintendent McVea to comment on the date of the report (this is assumed to be a complaint made against the claimant in respect of her conduct). 'The "first" Appropriate Authority' provided an account of Professional Standards Division (PSD) having been contacted by an Inspector and of being informed by an Inspector as to how they could make a complaint against the claimant. 'The "first" Appropriate Authority' confirmed that in previous meetings there were indications that complaints may be made.

Two Further Complaints against the claimant

86. Two further complaints were also received about the claimant's conduct, one from Constable L dated 13 May 2020 and another from Constable M dated 5 May 2020 (which appears from the Guildford report to have been received on 26 May 2020). All of the complainants who raised complaints against the claimant were male.

Chief Superintendent McVea seeks the claimant's views on 'the "first" Appropriate Authority's' assessment of the Officers' conduct

87. At the meeting with Professional Standards Division (PSD) on 11 May 2020, it was agreed by Chief Superintendent McVea and 'the "first" Appropriate Authority' that Chief Superintendent McVea would share 'the "first" Appropriate Authority's' Preliminary Enquiry and assessment with the claimant requesting details of any specific concerns that she had. As noted at paragraph 76 above, Chief Superintendent McVea did so on 11 May 2020, asking her to consider the report and inviting her to set out

any further concerns she had and identify those individuals whom she would like him to consider. He informed her that he would consider service of Regulation 16 notices against those she expressed concern about and would conduct a further assessment as the "Appropriate Authority". The claimant replied by emails dated 12 May 2020 and 13 May 2020, setting out her further concerns. The entirety of that email chain and a summary of the additional issues were forwarded by Chief Superintendent McVea to Assistant Chief Constable McEwan. Chief Superintendent McVea stated:

> *"Please see below for the points of concern from Chief Supt Bond which have not been addressed in the parameters of the original preliminary enquiry conducted by Inspector Rogers and assessed by ['the "first" Appropriate Authority']. There are a number of concerns that need addressed which include:-*
>
> 1. *At least 13 officers received a financial gain through overtime claims.*
>
> 2. *Does the scale of the decision-making amount to a failure of duty and a failure of the duty of a supervisor?*
>
> 3. *How can decisions of this magnitude not be known to the SMT of DCS and what was the reason for an apparent lack of transparency (up to 30 officers per shift not being utilised)?*
>
> 4. *What scale of detectable or preventable crime occurred during this period of time and what consideration did supervisors give to their duty to prevent and detect crime?*
>
> 5. *What was the financial cost of these decisions setting aside the opportunity lost for confidence in policing?*
>
> 6. *What progress had been made to specific tasking such as progressing investigations and those outstanding as priority one persons?*
>
> *…*
>
> *I believe that a further enquiry is required and I would ask that it is further considered by an Appropriate Authority…."*

In his oral evidence, Chief Superintendent McVea confirmed his view that the magnitude and totality of what the claimant had discovered had not been considered in relation to the "harm test" when 'the "first" Appropriate Authority' carried out his assessment.

Replacement of 'the "first" Appropriate Authority' in the disciplinary proceedings against the claimant by Chief Superintendent McVea

88. On 13 May 2020 Assistant Chief Constable McEwan emailed Deputy Chief Constable Hamilton forwarding emails from Chief Superintendent McVea regarding the investigation into Derry City and Strabane. Assistant Chief Constable McEwan agreed with Chief Superintendent McVea that it was not appropriate for 'the "first" Appropriate Authority' to continue as the Appropriate Authority in the matter. He did not impugn 'the "first" Appropriate Authority's' integrity but noted that as 'the "first" Appropriate Authority' had served in the District for some years, it would be more appropriate to appoint another, more senior officer to act as Appropriate Authority in relation to the complaints against the claimant.

89. On 14 May 2020, Deputy Chief Constable Hamilton replied to Assistant Chief Constable McEwan, copied to the Chief Constable's staff officer, Superintendent McC. In this email he asked that Assistant Chief Constable McEwan check any decision to vary the initial decision of 'the "first" Appropriate Authority' in respect of the claimant with PSNI lawyers. Deputy Chief Constable Hamilton confirmed that he had asked questions about the decision making by 'the "first" Appropriate Authority'. He also noted that the Police Ombudsman's office had recommended that "Appropriate Authority" processes should be reviewed and that PSNI should consider having different levels of "Appropriate Authority". He confirmed that he would recommend to the Chief Constable that the role of "Appropriate Authority" could be carried out by others and confirmed his expectation that if the Chief Constable concurred, further guidelines and policy would require to be drawn up as to appropriate levels of alleged conduct that should be considered by each "Appropriate Authority".

90. By email dated 14 May 2020, the Chief Constable's staff officer, Superintendent McC confirmed that he had spoken with the Chief Constable directly, and that having taken account of the information already provided, the absence of 'the "first" Appropriate Authority' and the need to appoint a new Superintendent via the Senior Management Appointment Panel (SMAP) process, there was now an urgent need and justification to appoint an "Appropriate Authority" to ensure the Derry City and Strabane matter was appropriately managed. Accordingly, the Chief Constable was content that Chief Superintendent McVea be appointed as an "Appropriate Authority", replacing 'the "first" Appropriate Authority'. Chief Superintendent McVea therefore replaced 'the "first" Appropriate Authority' in both the matter of the Derry City and Strabane Covid attendance arrangements and in respect of the complaints against the claimant.

Regulation 16 Notice served on the claimant

91. Notwithstanding Chief Superintendent McVea's reservations regarding the Regulation 12 assessment (see paragraph 84 above), he made a

decision, after consultation with Assistant Chief Constable McEwan (who was not called as a witness by the respondent), to go ahead and serve a Regulation 16 Notice on the claimant, based on the Regulation 12 assessment carried out by 'the "first" Appropriate Authority'. It appears that this decision had been made by 15 May 2020, as on the claimant's evidence, Chief Superintendent McVea telephoned her on that date to inform her that a Regulation 16 notice would be served on her. During cross examination, Chief Superintendent McVea provided for the first time a rationale for this decision: (i) the receipt of further complaints which corroborated the original complaint; (ii) a desire to afford the claimant the protections afforded by Regulation 16 notice; and (iii) following legal advice, his concern about deviating from the regulations. The tribunal accepts in principle that Constable L's complaint (but not Constable M's complaint which was not received until 26 May 2020) could reasonably have been viewed as corroborating the details of Inspector O's complaint. Chief Superintendent McVea's understanding that the Regulation 12 assessment carried out by 'the "first" Appropriate Authority' could not be set aside transpired to be incorrect, in light of Mr Armstrong's conclusions in the Guildford Review. Having carefully assessed his evidence and the claimant's evidence, there was a period of consideration and consultation between 12 and 15 May 2020, before Superintendent McVea decided to proceed with service of a Regulation 16 notice, based upon 'the "first" Appropriate Authority's' Regulation 12 assessment. The tribunal is not persuaded by the three factors advanced by Chief Superintendent McVea above as they were not set out in his witness statement. Accordingly, they appeared to the tribunal to be an after the event rationalisation of his actions. Chief Superintendent McVea, for the first time during cross examination confirmed there were discussions with Assistant Chief Constable McEwan about how to proceed, confirming that he was *"absolutely sure"* that there had been discussions between 13 May 2020 and 18 May 2020 and "*that was the direction - to go ahead and serve"*. In light of this evidence, the tribunal is satisfied that the operative reason for Chief Superintendent McVea serving the Regulation 16 notice on the claimant (despite his concerns) was Chief Superintendent McVea's understanding of a direction to go ahead and serve from a higher ranking Officer in the chain of command.

92. On 18 May 2020, Chief Inspector Harrison compiled a Regulation 16 notice and emailed it to Assistant Chief Constable Todd, as the claimant's Line Manager, for service on the claimant. This Regulation 16 notice was based on the Regulation 12 assessment carried out by 'the "first" Appropriate Authority'. It confirmed that the claimant was being investigated for gross misconduct. The allegations were that she had:

- *repeatedly told officers they had committed gross misconduct, would be dismissed, reduced in rank and have their probationary period extended;*

- *accused the Inspectors in the room of lying and told officers in the room that they were disgrace to the uniform they wore;*

- *described Strand Road as a circus and stated that beneath the surface everything was rotten, officers were lazy and that good work postings on social media had been fabricated;*

- *stated she had lost all trust in her Inspectors and Sergeants in front of the Constables who they supervised.*

The notice confirmed that the conduct, if proven or admitted, had been assessed as gross misconduct and that her attendance may be required at a misconduct hearing. The explanatory notes appended to the Regulation 16 notice included information to the effect that the service of the notice was to safeguard the recipient's interests and to allow the recipient the opportunity to secure any documentation or other material or make any notes which would assist in responding to the allegation. The Notice itself referred to attendance at a "Misconduct Hearing". The explanatory notes stated:-

> *"within 10 working days of being served with this notice (starting with the day after this notice is given, unless this period is extended by the investigating officer) you may provide a written or oral statement relating to any matter under investigation and you or your police friend may provide any relevant documents to the investigating officer. In any subsequent misconduct proceedings the persons(s) conducting those proceedings may draw such inferences as appear proper from any failure to mention any fact relied on in your case at any proceedings, being a fact which in the circumstances existing at the time you could reasonably have been expected to mention."*

93. On 20 May 2020, Assistant Chief Constable Todd served the Regulation 16 notice on the claimant. The tribunal finds that when Assistant Chief Constable Todd served the Regulation 16 notice on the claimant, he discussed with her his reservations (caveated by his lack of knowledge of the complaints) as to the categorisation of the charge as potential "gross misconduct", which seemed to him to be excessive. Assistant Chief Constable Todd noted on the paperwork confirming service *"No reply at this time but will fully co-operate with any enquiry".* This clearly anticipated that there would be an investigation, in which the claimant would participate.

94. On 26 May 2020, the claimant texted the Chief Constable, stating:-

> *"Sir sorry to disturb you can I check does my gross misconduct regulation 16 impact on my eligibility for a pnac [Police National Assessment Centre]?"*

The Chief Constable replied:-

> *"I don't think so Emma you just declare it as ongoing proceedings same re-job applications … But will ask [Superintendent McC] to double check"*

The Chief Constable did ask his staff officer, Superintendent McC regarding this, as he had previously acted as Appropriate Authority within Professional Standards Division (PSD).

Proposed trawl of Officers

95. On 26 May 2020, Chief Inspector Harrison telephoned the claimant to inform her that he was the investigator who had been appointed in respect of the matters arising from the Regulation 16 notice which had been served on her. He informed her that he intended, as part of his investigation, to email all officers who attended the briefings on 20 April 2020 and told her that he was content for her to see a draft of the wording of the proposed email. The claimant was horrified by the extent of the proposed trawl to the officers who served beneath her and was worried about her credibility in her role as District Commander.

96. On 26 May 2020, Chief Inspector Harrison undertook a duty status report which did not recommend suspension or repositioning of the claimant.

Regulation 12 assessment of Derry City and Strabane Inspectors and Sergeants recommended by Chief Superintendent McVea, the replacement "Appropriate Authority"

97. On 26 May 2020, Chief Superintendent McVea, factoring in legal advice (not disclosed to the tribunal), drafted a Regulation 12 assessment regarding the role of Sergeants and Inspectors in Derry City and Strabane. He determined that before any further enquiries were carried out, the affected officers should have the protection of rights afforded by the service of a Regulation 16 notice and he asked Inspector Rogers to prepare the relevant notices. The draft Regulation 12 assessment prepared by Chief Superintendent McVea was not disclosed in advance of the hearing. However, it was provided during the hearing and added to the bundle. This assessment included the following:-

> *"… Subsequent to these reports further submissions of concerns were outlined by Chief Superintendent Bond in emails dated 12th and 13th May 2020. I have assessed these additional matters and in doing so considered the totality of the conduct. I note that there appears to be considerable emphasis and reliance on the email from the Chief Constable dated 24th of March 2020 citing 24/7 operational roles numbers to be thinned down where possible to reasonable levels and that officers can be sent home in rotation. I have however considered the Chief Constable's email in totality rather than that one paragraph. The previous paragraph has*

talked about police staff. The natural flow of email clearly infers that the paragraph that references 24/7 operational also relates to police staff and was never intended to be authority to stand 24/7 operational police officers down. The email is very clear when it comes to police officers. Unless shielding or issued with a laptop you are expected to be at work. It is disingenuous to rely on the single paragraph in the Chief Constable's email that reference those 24/7 operational roles and yet set aside the paragraph that speaks directly to police. This potentially fundamentally undermines the source of their authority for their decision-making. The lack of consistency in the approach across the teams also indicates a lack of formal authority in the criteria to be applied. The preliminary enquiry is very narrow and does not address a range of the concerns that Chief Superintendent Bond has regarding the decision. It is unclear as to what consideration if any was given to District priorities such as arrest of wanted persons for domestic abuse, emergency health regulation enforcement, general investigations that remain outstanding by the sections, the severe threat within Derry and the impact on public confidence regarding up to 50% of the detailed police resources being at home. I have viewed the preliminary enquiry as not addressing these critical points. There comes a point when a decision is so flawed that it amounts to gross misconduct and a failure in duty. It is the level of disregard to the core policing duties and tasks and the failure to utilise the resources available to them that may be considered a failure of a supervisor's duty. A preliminary enquiry has been unable to address this aspect. The enquiry and assessment thus far has only considered if the sending home of an officer or placing them on standby amounts to gross misconduct. I have considered if I am able to do further preliminary enquiries to address the additional concerns of Chief Superintendent Bond. To do so at this stage would be unfair on the officers and in essence would amount to an investigation. They therefore need the protection of the rights by the service of a Reg 16 notice. Considerable public money has been wasted given that there was up to 30 officers per shift not being utilised. There is significant public interest generated by this aspect. All supervisors involved in this conduct need to be asked regarding their duties of a supervisor and how key policing tasks were considered."

Deputy Chief Constable Hamilton seeks to pause further notices and 'the "first" Appropriate Authority' raises a complaint

98. On or about 27 May 2020, Deputy Chief Constable Hamilton met the Chief Constable. The Chief Constable's journal noted that Deputy Chief Constable Hamilton had sought the Chief Constable's advice and support in relation to Deputy Chief Constable Hamilton's decision to *"pause/review the Derry/Bond misconduct investigation and issue of notices"* so that the Chief Constable was aware of what was going to be a *"serious reputational issue*". Deputy Chief Constable Hamilton during

cross examination accepted that he had been briefed and had "a controlling hand" regarding all of the Professional Standards Division processes. The meeting of the Chief Constable and Deputy Chief Constable Hamilton was interrupted when the Chief Constable was handed a document which transpired to be a complaint by 'the "first" Appropriate Authority', made under the auspices of whistleblowing legislation. That complaint was dated 27 May 2020.

99. In his correspondence to the Chief Constable, 'the "first" Appropriate Authority' sought redeployment from his roles as Head of Discipline Branch and as "Appropriate Authority", asserting that his position was untenable following a conversation with Chief Superintendent McVea on 12 May 2020, when he was told he would be removed as "Appropriate Authority" and was to have no further involvement in these matters. In the introduction section of his correspondence 'the "first" Appropriate Authority' stated:-

> *"The 250 officers in Derry City and Strabane (DCS) District have been in my view <u>despicably treated</u>… When misconduct processes, which by themselves are inappropriate, are then so grossly mismanaged in the way I will outline, the impact on the officers is unjustifiable. My primary interest is to end the injustice, that I believe the officers in DCS District officers (sic) are experiencing."* (Tribunals' emphasis.)

100. 'The "first" Appropriate Authority' stated that his disclosure related to current and possibly future malpractices, maladministration, unethical conduct, and potentially unlawful conduct, relating to the management of alleged misconduct issues of workforce arrangements in Derry City and Strabane district in April 2020 and the gross misconduct investigation in relation to the claimant. He defended Inspector Rogers' investigation and his own Regulation 12 assessment in respect of the Derry City and Strabane officers, indicating that it was initially well received by Chief Superintendent McVea, whose position changed after meetings with Assistant Chief Constable McEwan and the claimant. He complained that he was not included in these meetings. He raised issues regarding alleged covert monitoring of officers. He alleged that there had been a breach of the Police Conduct Regulations and a failure to inform the officers in Derry City and Strabane of the outcome of the Preliminary Enquiry as required by Regulation 12(6), and that he had been prevented from discharging his statutory functions on behalf of the Chief Constable by Chief Superintendent McVea. He alleged that the organisation had misjudged the seriousness of the conduct of the Derry City and Strabane district officers from the outset and this had led to:-

> *"a ferocious challenge of the officers' integrity and a violation of their dignity, including suggestions of dismissals and demotions; as well as the initial declaration of the service critical incident".*

He suggested that the collective exoneration of the officers was considered too embarrassing by one or more senior leader within the organisation. 'The "first" Appropriate Authority' made a record of his telephone conversation with Chief Superintendent McVea following his completion of the Regulation 12 assessment, in which he described Chief Superintendent McVea as being extremely angry and provided a summary of what was a confrontational exchange. He challenged the appointment of Chief Superintendent McVea as an "Appropriate Authority", on the basis that Chief Superintendent McVea had openly stated that he did not understand the Police Conduct Regulations. He also criticised the terms of a media interview carried out by the claimant on 13 May 2020 which he asserted damaged the perception of a fair and open misconduct regime because of the language used by the claimant. He also asserted that there had been an absence of welfare support considerations for the officers in Derry City and Strabane District. Having set out specifics of his allegations of legislative failures by the organisation, he complained that the claimant had not had duty restrictions placed on her under Regulation 10 of the Police Conduct Regulations.

Regulation 16 notices paused

101. On 27 May 2020, Chief Superintendent McVea received an instruction from Deputy Chief Constable Hamilton to hold the service of any Regulation 16 notices on Officers within Derry City and Strabane District.

102. By 28 May 2020, the Chief Constable had personally intervened in the situation. This is demonstrated when Deputy Chief Constable Hamilton forwarded a direction from the Chief Constable in this regard to Chief Superintendent McVea. The Chief Constable's direction stated:-

> *"DCC Hamilton*
>
> *This direction relates to the ongoing PSD investigation into accusations made against a number of Inspectors, Sergeants and Constables in Derry City and Strabane district.*
>
> *Without prejudice, I am directing that no steps be taken to issue Regulation 16 notices to any officers until further notice.*
>
> *Simon Byrne*
> *Chief Constable"*

103. Following the Chief Constable's direction to Deputy Chief Constable Hamilton on 28 May 2020, the Chief Constable's staff officer, Superintendent McC emailed Assistant Chief Constable McEwan and Deputy Chief Constable Hamilton on 15 June 2020 to provide a form of words that the Chief Constable had given for use in updating officers regarding the Regulation 12 assessment which had been made by 'the "first" Appropriate Authority'. The email confirmed that the Chief

Constable had asked that they arrange for this to be sent from Professional Standards Division (PSD) to all affected officers the next day. The draft wording, which was provided on legal advice, was:

> *"You were informed on 28 April 2020 that Professional Standards Department were conducting a preliminary enquiry into the working arrangements in Derry City & Strabane district during the Op Talla shift arrangements.*
>
> *Thank you for supplying the requested information and documentation to the Professional Standards Department.*
>
> *Having carefully considered the preliminary enquiry report the Appropriate Authority completed an assessment of the conduct under regulation 12 of the Police (Conduct) Regulations (Northern Ireland) 2016. He assessed the conduct was not misconduct and that no further action on this discrete issue should be taken under the misconduct regulations. <u>This preliminary enquiry is now concluded.</u> (Tribunal's emphasis.)*
>
> *However, you should note that, as with any matter of professional standards within the organisation, the situation will be kept under continual review and your full cooperation is to be expected should any further queries arise."*

104. On 17 June 2020, Chief Inspector Harrison sought direction from Chief Superintendent McVea regarding updates which could be provided to the four complainant officers and the claimant. He noted that Regulation 16(4) stipulated a progress update to the claimant was required on 17 June 2020. This was escalated by Chief Superintendent McVea to Assistant Chief Constable McEwan. Assistant Chief Constable McEwan replied to Chief Superintendent McVea on 16 June 2020 with an updated direction which had been provided by the Chief Constable. This direction stated:-

> *"1. <u>All officers within the scope of the preliminary enquiry</u> should now receive the outcome of regulation 12 assessment as worded. <u>Timing to be confirmed with the Chief Constable's office before doing so.</u>*
>
> *2. You may advise CS Bond's solicitor that PSD have been directed by the Chief Constable that no further steps be taken at this time as he is awaiting further legal advice about matters pertaining to her misconduct investigation.*
>
> *3. I have been asked to reconfirm the direction with regard to the draft regulation 16 notices relating to a smaller pool of officers as per 3 below respectfully*

Further in the chain was an email from the Chief Constable's staff officer, Superintendent McC, confirming that the Chief Constable had directed that no further steps were to be taken regarding the draft, unserved Regulation 16 notices for a smaller pool of Officers, as he was awaiting legal advice on that issue.

105. On 19 June 2020, Chief Inspector Harrison wrote to the claimant to inform her that Professional Standards Division (PSD) had been directed by the Chief Constable that no further steps were to be taken at this time as he was awaiting further legal advice about matters pertaining to the misconduct investigation. On 19 June 2020 Chief Inspector Harrison provided an update to Inspector O in similar terms.

External review initiated

106. On 26 June 2020, the Chief Constable spoke to another Chief Constable from a different force, Martin Jelly, who was part of the National Police Chiefs Council and the lead officer for police conduct and ethics, to seek his support in progressing matters.

107. Following the conversation with Chief Constable Jelly, the Chief Constable directed the preparation of a brief for his consideration, which was duly completed and sent on 8 July 2020. This established three terms of reference:

> *1. To enquire into and investigate the circumstances within Derry City and Strabane and Belfast districts concerning the application of overtime by officers including in particular the practice with regard to all claims for overtime during the currency of Op Talla and to make such recommendations as appropriate arising from the conclusions reached thereupon;*
>
> *2. To enquire into and investigate the initial handling by Professional Standards of complaints concerning the alleged conduct of Chief Superintendent Emma Bond on 28th of April 2020, including in particular but not limited to the initial assessment of conduct by the Appropriate Authority, any potential avoidable conflicts of interest having regard to other matters already occupying the same personnel, and to make such recommendations as appropriate arising from the conclusions reached thereupon; and*
>
> *3. To enquire into and investigate the subject matter of correspondence dated 26 May and 3 June 2020 received by the Chief Constable from ['the "first" Appropriate Authority'], and to make such recommendations as appropriate arising from the conclusions reached thereupon. In that he alludes to his potential status as a whistleblower.*

108. On 13 July 2020, Chief Constable Byrne discussed the review with Chief Constable Guildford of Nottinghamshire Police, who suggested that Mr Armstrong would act as the investigating officer. On 14 July 2020 the Chief Constable discussed the terms of reference with Mr Armstrong.

109. On 28 July 2020, the claimant's solicitor emailed Chief Inspector Harrison, the investigating officer in respect of the Regulation 16 notice served on her, with some queries, including whether the claimant's Regulation 16 notice would be rescinded pending the outcome of the enquiry, whether the Chief Constable was of the view that it was appropriate for the claimant to remain under the Regulation 16 notice pending the outcome of the enquiry, when it was anticipated the enquiry would conclude, requesting a copy of the terms of the reference and the identity of the person who would be conducting the enquiry. It is clear from this email that the solicitor and Chief Inspector Harrison had spoken the previous day and that Chief Inspector Harrison had disclosed the existence of the independent review. Chief Inspector Harrison acknowledged receipt of this correspondence; however, no substantive response was ever provided.

110. On 13 August 2020, the claimant was interviewed and was unsuccessful in respect of the role of Temporary Assistant Chief Constable.

111. On 16 August 2020, Inspector O sought information on progress of the investigation of his complaint, whether the pausing of an investigation to seek legal advice lay within the terms of the Police Conduct Regulations and to raise concerns regarding a proposed engagement forum and its potential effect on the investigation. Inspector O received a very prompt reply on 17 August 2020 confirming that a decision to seek legal advice is common practice but sits outside the Regulations. Inspector O sought further information on the identity of the "Appropriate Authority" and again received a very prompt reply. By 19 August 2022 it was clear from an email sent by Chief Inspector Harrison to the Chief Constable's staff officer, that Chief Inspector Harrison considered the Chief Constable to be the "Appropriate Authority" in relation to investigating Inspector O's complaint against the claimant. After the Chief Constable had paused investigation pending legal advice, as far as Chief Inspector Harrison was concerned the Chief Constable had become the decision maker.

112. On 1 September 2020, the claimant's solicitor wrote a letter to the respondent. The letter took issue with the failure of the notice to specify which articles of the Code of Ethics had reportedly been breached or how the conduct allegedly fell below the appropriate standard. The letter recounted the claimant's concern that despite the working practices in Strand Road having been declared a critical incident, 'the "first" Appropriate Authority' had found there was nothing that warranted more than management action following a most cursory investigation, yet he had deemed the claimant's conduct to amount to gross misconduct following complaint. The letter queried whether any preliminary enquiry had been undertaken as there appeared to be a conflict on witness

accounts as to what was said at the briefing. The letter set out the claimant's concerns regarding the involvement of 'the "first" Appropriate Authority'. These were (i) the claimant's involvement in a promotion panel on which he was unsuccessful in March 2020; (ii) the claimant having challenged him as welfare officer regarding comments he had made in April 2020 and (iii) a road traffic collision involving 'the "first" Appropriate Authority's' father in February 2018. Again, this letter was not responded to in any way, but a letter issued to the solicitor on 15 September 2020, following the Guildford review (see paragraph 124 below).

External review report received

113. On 2 September 2020, the Chief Constable received the final report of the assessment and recommendations from Chief Constable Guildford. He accepted these recommendations in their entirety and issued the report to Deputy Chief Constable Hamilton asking him to lead in the implementation of the recommendations.

114. The substance of the report ran to 57 pages, and it had 20 appendices amounting to approximately 190 pages. The claimant was not interviewed by Mr Armstrong nor was any input sought from her to inform the conclusions and recommendations of the report. Likewise, the '"first" Appropriate Authority' was not interviewed, nor was any input sought from him to inform the conclusions and recommendations of the report. The report concluded *inter alia* the following:-

    i. "inbuilt overtime" was included in the revised 12-hour shift pattern;

    ii. ['the "first" Appropriate Authority'] displayed wholly professional judgement in his handling of the preliminary enquiry into the working arrangements of DCS officers and in his Regulation 12 assessment of that conduct;

    iii. there were no grounds to consider that any officer had misconducted themselves in respect of any submission of a claim for overtime relating to any tour of duty where he or she was at home, on duty but conforming to the on-call standby arrangements agreed and endorsed by supervisory officers;

    iv. there were no grounds to consider any further Professional Standards Division (PSD) action in the matter of concerns raised about Derry City and Strabane and Belfast Districts' Operation Talla practices;

    v. on any rational analysis, the claimant's alleged conduct was incapable of being considered as having reached the threshold of gross misconduct;

    vi. ['the "first" Appropriate Authority's'] narrative assessment of the claimant's conduct provided no insight into what consideration, if

any, was given to why the claimant may have made the assertions she did;

vii. there was no evidence of any balanced consideration of the claimant's culpability for alleged misconduct other than reference to the seniority of her rank;

viii. ['the "first" Appropriate Authority's'] assessment provided no insight into whether he considered that the claimant's conduct may have been more appropriately dealt with by way of unsatisfactory performance procedures;

ix. ['the "first" Appropriate Authority's'] assessment provided no insight into whether he considered whether simple misconduct might have been more appropriate;

x. ['the "first" Appropriate Authority's'] assessment had an extremely narrow focus that did not take into account the wider context and circumstances which would have been known to him and which he quite properly could have taken into account;

xi. in completing the assessment, there was significant departure from the methodology of assessing seriousness in line with the guidance provided, and insufficient consideration was given to case law surrounding the thresholds of what constitutes misconduct and gross misconduct;

xii. there was a demonstrable lack of balance in the narrative supporting the determination of gross misconduct;

xiii. the inescapable conclusion drawn was that the assessment of the claimant's conduct as gross misconduct lay outside the bounds of reasonableness; (Tribunal's emphasis)

xiv. assessed at its highest, the alleged conduct of the claimant amounted to prima facie evidence of breaches of Code of Ethics that are capable of amounting to misconduct;

xv. in relation to the email which Chief Inspector Harrison had proposed to send (see paragraph 95 above), it was difficult to contemplate the establishment of any reasonable line of enquiry into the claimant's conduct that would amount to any 'trawl' of Derry City and Strabane officers present at either of the two briefings who would be engaged in ascertaining whether they wished to make a complaint or provide evidence in any ensuing investigation. To have done so would likely have been disproportionate;

xvi. Chief Inspector Harrison had undertaken a duty status report on the claimant and therefore ['the "first" Appropriate Authority's'] concerns regarding failure to consider suspension and repositioning of the claimant were unfounded;

xvii. suspension of the claimant from duty would have been neither proportionate nor warranted;

xviii. Chief Superintendent McVea could have revised the Regulation 12 assessment of the claimant's conduct undertaken by ['the "first" Appropriate Authority'];

xix. there were no grounds whatsoever to consider that [the "first" Appropriate Authority'] had acted with any lack of integrity in assessing the claimant's conduct as gross misconduct and that he acted with complete integrity; and

xx. it was self-evident from the content of the four complaints made about the claimant that her personal conduct during the staff briefings was found wanting and that any decision to take no action against the claimant would be equally disproportionate.

115. In respect of the claimant, the report, having concluded that there were reasonable grounds for a fresh "Appropriate Authority" to consider that the conduct of the claimant as alleged did not reach the threshold to be considered misconduct, recommended (recommendation 4) that the claimant:-

> *"should be informed in writing forthwith that the Regulation 16 Notice of Investigation is withdrawn, she is no longer subject to misconduct investigation, and that she is to be the subject of management action by her line manager in respect of her judgement in bringing together significant numbers of officers into two separate briefings at Strand Road on the morning of Tuesday 28 April, and for the tone and content of those briefings."* (Tribunal's emphasis.)

116. The report also recommended (recommendation 5) that:-

> *"the Appropriate Authority ought to give careful consideration, and in doing so, should consult with [the claimant's] line manager within PSNI Senior Executive Team, as to whether the individual and collective complaints received from O, C, L and M provide sufficient grounds to make [the claimant] the subject of stage 1 of the Police (Performance and Attendance) Regulations (Northern Ireland) 2016 ("the Performance Regulations"). Such a determination will necessarily involve a wider perspective on the performance of [the claimant] in respect of her duties as a District Commander, which goes beyond the scope of this review."*

Tribunal's consideration of the Guildford Review

117. The Guildford report was authored by Mr Armstrong. In the tribunal's view, there are significant limitations with the report, which undermined its conclusions. Despite Mr Armstrong's confident conclusions regarding the existence of "in built" over time, the tribunal is not convinced that the issue of "in built" over time had initially been included in the twelve-hour shift patterns, having considered correspondence between Assistant Chief Constable Todd and the Chief Constable's staff officer on 17 August 2020. The Chief Constable's staff officer sought confirmation that officers "could have been entitled to "inbuilt" over time during the relevant change of shift notice period". Assistant Chief Constable Todd, who was the "Operation Talla" "Gold Commander", stated in his replying email that he did not think there was in built over time and the Chief Constable's staff officer replied: *"I think you're correct."* Mr Armstrong conceded that he had not been sighted of that email when he was preparing his report, notwithstanding that the Chief Constable's staff officer had sought Assistant Chief Constable Todd's views to inform the report which was being carried out by Mr Armstrong. Mr Armstrong further conceded that the existence of inbuilt over time was an important factor in his conclusion that there had been no misconduct by rank-and-file officers. Moreover, he sought information from Superintendent B on this issue on 19 August 2020, which he accepted some months after the event, even though a briefing paper provided to the "Gold Command" by Superintendent B on 24 March 2020 was silent on the issue. In addition, Chief Superintendent McVea's draft assessment (which was only disclosed during the hearing), which confirmed his view that *"considerable public money has been wasted given that there was up to 30 officers per shift not being utilised"* was not before Mr Armstrong. The tribunal also finds it striking that Mr Armstrong's narrative appears to suggest that it was the claimant alone (as opposed to senior management within PSNI) who had found these practices unacceptable (for example see paragraphs 5, 29, 30 and 31 which all make reference to the claimant's views). Mr Armstrong's narrative does not support Mr Sands' submission that the respondent shared the claimant's concerns.

118. The tribunal is unimpressed by Mr Armstrong's conclusions that there were no grounds whatsoever to consider that 'the "first" Appropriate Authority' had acted with any lack of integrity in making his assessment of the claimant's conduct. In the context of a review where an assessment had been made which lay outside the bounds of reasonableness, Mr Armstrong had before him:-

    i. 'the "first" Appropriate Authority's' expressed views that the officers of the district had been treated despicably by the claimant;

    ii. documentary evidence which confirmed Chief Superintendent McVea's view that 'the "first" Appropriate Authority' had sided with the officers;

iii documentary evidence which confirmed Chief Superintendent McVea's view that 'the "first" Appropriate Authority' was not considered impartial in the whole district.

In addition, Mr Armstrong's own findings included that:

iv. 'the "first" Appropriate Authority' had a very narrow focus;

v. 'the "first" Appropriate Authority' had significantly departed from correct methodology in making his assessment;

vi. there was a demonstratable lack of balance in the report; and

vii. the inescapable conclusion that 'the "first" Appropriate Authority' had acted unreasonably.

When this was put to him, Mr Armstrong appropriately conceded that all of those factors raised the possibility of bias on the part of 'the "first" Appropriate Authority'.

119. Further, the tribunal does not consider Mr Armstrong's conclusions regarding the tone and content of the staff briefings conducted by the claimant on 28 April 2020 to be safe in circumstances where they were entirely based upon what were uninvestigated complaints and when he did not have and had not sought the claimant's version of events, nor had he sought the views of Chief Inspector B who was present at one of the briefings.

Claimant receives feedback on her unsuccessful application

120. On 4 September 2020, the claimant met with the Chief Constable in the context of receiving feedback in relation to her unsuccessful Temporary Assistant Chief Constable interview. The claimant became upset during this discussion and challenged the Chief Constable as to whether he still had confidence in her. During the course of the conversation, she discussed the difficulties presented by her new command post in Derry City and Strabane, including the strain of travel and the nature of the accommodation available to her. The claimant also informed him that she had not asked to move when he referred to the upcoming Senior Management Appointment Panel (SMAP) but conceded to him that she dreaded going into work. She referred to how difficult it was for her coping with being under investigation for gross misconduct. However, she also stated that she had a job to do and her record of meeting (which the tribunal accepts) recorded that she had said she could make a real change with the right team.

Guildford review implemented

121. On 10 September 2020, Deputy Chief Constable Hamilton wrote to Chief Superintendent McVea to inform him of the outcome of the Guildford

review. He confirmed that in summary the review had found no grounds to support the "gross misconduct" notice that had been served on the claimant and that a recommendation had been made that the Appropriate Authority review the "gross misconduct" assessment as a matter of urgency. The letter excerpted paragraphs 117 to 157 of the report. The letter concluded:-

> *"Having considered the above extract if you form the view that the Regulation 16 notice should be withdrawn, please do so expeditiously and ensure the officer is informed. Please keep this office fully informed of your actions. Thank you for your assistance with this matter."*

122. On 11 September 2020, Chief Superintendent McVea emailed Deputy Chief Constable Hamilton, stating:-

> *"Please find attached AA assessment for Chief Superintendent Bond following a review as recommended by Chief Constable Guildford.*
>
> *As the AA, I have directed management action and would need to discuss this with ACC Todd upon his return from leave.*
>
> *The regulations would state that I would inform Chief Superintendent Bond of the management action direction. I await guidance from your office as to if and how you wish Chief Superintendent Bond informed. The Regulation 16 notice should be rescinded."* (Tribunal's emphasis.)

123. Deputy Chief Constable Hamilton replied on 11 September 2020

> *"Thank you for the update. As per the regulations please inform C/Supt Bond and also her solicitor as to your decision."* (Tribunal's emphasis.)

In light of this clear and unequivocal direction, there can have been no doubt in Chief Superintendent McVea's mind of the need to advise the claimant, as well as her solicitor, of the decision to take management action.

124. As a consequence of the review report, the claimant's Regulation 16 notice was rescinded. The claimant, who it appears was on annual leave, was not informed directly of this, instead an email was sent to her solicitor by Chief Superintendent McVea on 15 September 2020. The email stated:-

> *"Further to our telephone conversation of this morning, I am writing to inform you that I was asked in my capacity as an Appropriate Authority to undertake a review of the assessment conducted by ['the "first" Appropriate Authority'] which led to the*

issuing of a Regulation 16 notice being served on Emma for gross misconduct.

I have undertaken this assessment and did not consider the allegations made regarding two briefings to amount to either gross misconduct or indeed misconduct. The regulation 16 therefore has been rescinded as of Friday 11th September 2020. There were however a number of issues regarding the location, tone and phrases used that if proven would benefit from a discussion with her line manager. This allows a discussion regarding the impact that meetings had on the officers to be discussed. I have therefore directed "management action" in the form of a discussion with her line manager. This is not a misconduct outcome but does bring the matter to a conclusion and the matter is considered to be closed. (Tribunal's emphasis.)

I will be writing to Emma and informing her of the decision in line with the conduct regulations. I have tried to contact Emma directly as well as Chief Superintendent M in his capacity as "Friend". As she is on annual leave I am unaware if she has been able to pick up the communications. (Tribunal's emphasis.)

I hope you will appreciate that there are a number of complainants who also need to be updated but it was important that Emma is informed first. I would therefore be grateful if you could let me know if you're able to make contact with her which enables us to initiate other communications.

Best regards"

As emphasised above, Chief Superintendent McVea's email intimated that the proving of the allegations was a necessary precursor to "management action" being deemed appropriate.

125. Despite having been directed to notify the claimant and her solicitor, having indicated that further correspondence would issue to the claimant in respect of "his decision" and his knowledge that the Police Conduct Regulations required the claimant to be informed of "management action" direction, nothing issued directly to the claimant from Chief Superintendent McVea.

Disrespectful and misogynist messages

126. In or around September 2020, the claimant was referred to in disrespectful terms by officers in a WhatsApp group. The discussion was caused by one participant stating:-

"apparently Emma Bond sent out an email saying as well if you're in work with symptoms you could be referred to PSD".

Another group participant responded:-

> *"the last disciplinary promotion project went well"*.

A further abusive response stated:-

> *"what a fucking stupid cunt think we all know how she got promoted now"*

Claimant's transfer to Police College

127. The claimant was transferred from her post as District Commander in Derry City and Strabane to another role at the Police College following a Senior Management Appointment Panel (SMAP) which sat on 14, 16 and 18 September 2020. It was attended by both Deputy Chief Constable Hamilton and the Chief Constable. Despite both of them having already received the outcome of the review carried out by Chief Constable Guildford which had recommended that the claimant's Regulation 16 notice be rescinded and despite that notice having been rescinded with effect from 11 September 2020, neither the Deputy Chief Constable Hamilton nor the Chief Constable appear to have disclosed that information to be Senior Management Appointment Panel (SMAP). The failure to do so was a material omission by them. This omission was further compounded by Deputy Chief Constable Hamilton describing to the Senior Management Appointment Panel (SMAP) the service of the Regulation 16 notice on the claimant as "damaging" to her.

128. In advance of the Senior Management Appointment Panel (SMAP) meeting, Deputy Chief Constable Hamilton had a discussion with the claimant's successor in the role, to establish his willingness to be reposted. In advance of the Senior Management Appointment Panel (SMAP), the claimant had also been asked for her views. Her response (made before the Regulation 16 notice was lifted) did not disclose a preference to remain in her current post in DCS but was equivocal. She stated:-

> *"there is significant work required to deliver a change in DCS however this is going to be M/L term. With my plan for PNAC in 2021 I am unclear if my current role provides the opportunity I need to best prepare me for that challenge and the potential adverse impact on local relationships in the district, as my stay may be short-term.*
>
> *If I stay in my current role then I would seek approval for flexibility in working arrangements given my daily commute to Strand Road, 4 hours per day. Obviously my remote laptop provides the ability to work remotely."*

129. In a section relating to "*Any exceptional circumstances"*, the claimant stated:-

> *"April 2020 an issue arose in the district that has resulted in me being served a Reg 16. The matter has had an impact on district relations (see attached report) and my ability to drive forward the changes required, hampered as a result. When Reg 16 was served I stated my position was untenable and given the threat, don't believe PSNI can afford to have a district who do not support and respect the commander. I stand by what I did however am aware of wider implications.*
>
> *My welfare/travel has also been an issue since Jan 2020 compounded by the above."*

130. The claimant contacted Ms C, an HR officer who attended Senior Management Appointment Panel (SMAP) by WhatsApp on 16 September 2020 in relation to transfer. She stated:-

> *"… No particular preference obviously too late now anyway. …"*

However, later that same day, having received an update from PSD via her staff officer, the claimant stated:-

> *"… I am sorry [Ms C] as I said I am not in the best of places so not replying wasn't fair or respectful. I'm sorry. I'll do whatever SET decide however as much as I find the travel tough I feel like DCS is an unfinished job and with the right team I can do the job they sent me to do. My preference is to stay rather than move on again."*

Ms C confirmed that she would update Deputy Chief Constable Hamilton that the claimant's preference was to stay in Derry City and Strabane for the time being.

131. On 18 September 2020, the claimant received a WhatsApp message from a friend informing her that Chief Superintendent J (a male) had been appointed as the new District Commander in DCS. Assistant Chief Constable Todd also messaged her on 18 September 2020 to ask her to contact him in relation to the outcome of the Senior Management Appointment Panel (SMAP) meeting. The claimant queried with her line manager Assistant Chief Constable Todd why she had been moved from post and replaced on 20 September 2020. Assistant Chief Constable Todd told her that the decision was based on a positive assessment of her suitability to head up Police College. He informed her that welfare concerns, related to the travelling distance from her home in North Down to Strand Road Police Station, were taken into account as ancillary considerations. The claimant had not been absent from work throughout the period of the subsistence of the Regulation 16 notice. Despite the evidence of the Chief Constable that he had welfare concerns regarding

the claimant given their discussion at the feedback on 4 September (see paragraph 120 above) and the content of her submission to the Senior Management Appointment Panel (SMAP) panel, the respondent did not refer the claimant for any further Occupational Health assessment, which undermines the respondent's suggestion that there were serious welfare concerns.

132. The claimant's evidence that Chief Superintendent J, her replacement in Derry City and Strabane, lived around the corner from her and therefore had a similar distance to travel, was not challenged and is therefore accepted by the tribunal.

133. On 5 October 2020 claimant transferred to her new role in the Police College, as Head of Learning and Development. This role was at the same grade, Chief Superintendent. Her move was less than nine months after her appointment as District Commander for Derry City and Strabane, which appears to the tribunal to have been a very short tenure.

Claimant seeks an update from Chief Superintendent McVea

134. On 9 October 2020, the claimant met Chief Superintendent McVea at an event at Queen's University, Belfast and asked if she would be getting written confirmation of the end of the process. She also queried the wording of his email of 15 September 2020 (see paragraph 124 above) when it referred to "if proven" and the "discussion". She was reassured that Assistant Chief Constable Todd would merely meet with her to make her aware of the content of the four complaints and reflect on the impact of her actions. Chief Superintendent McVea told her he had been told that he had no option but to recommend management action. The claimant gave unchallenged evidence that her solicitor wrote to Chief Superintendent McVea in light of this discussion and received no reply.

Was the claimant's move decided in advance?

135. On 9 October 2020 the claimant met with then temporary Assistant Chief Constable, now Assistant Commissioner Roberts to discuss her new role and responsibilities within the Police College. The claimant's contemporaneous note of this meeting records:-

> *"He confirmed SMAP move was decided prior to discussion and brought as a proposal by DCC/CC."*

The claimant reflected this in her supplemental witness statement stating:-

> *"T ACC Roberts told me my SMAP move was decided prior to the discussion and brought as a proposal by the DCC and the CC."*

In his account of the meeting, Assistant Commissioner Roberts denied that he had told the claimant that a pre meeting decision had been made. However, he also gave evidence that he did tell the claimant that the

Chief Constable and Deputy Chief Constable were the ultimate decision makers, having sought and considered the views of the other attendees. The tribunal prefers the claimant's account which was supported by her note. In light of both Assistant Commissioner Roberts oral evidence and Assistant Chief Constable Todd's oral evidence that they both separately opposed the claimant's move from Derry City and Strabane to the Police College and would have preferred for continuity in those posts, and Ms McClure's evidence that the claimant's transfer was brought as a proposal to the meeting by the Deputy Chief Constable, (having first explored the successor's willingness to be reposted), the tribunal is satisfied that the decision regarding the claimant was largely agreed upon in advance before it was brought to the Senior Management Appointment Panel (SMAP) for approval.

Purported management action

136. On 18 September 2020, Deputy Chief Constable Hamilton wrote to Assistant Chief Constable Todd, directing him to the areas of the Guildford report which referred to his area of responsibility. Deputy Chief Constable Hamilton instructed Assistant Chief Constable Todd to have a management conversation with the claimant in accordance with the recommendation of the Guildford report.

137. The tribunal accepts Assistant Chief Constable Todd's evidence that when he received the report of Chief Constable Guildford, he noted that no misconduct on the part of the claimant had been identified and he was therefore less than clear what the rationale for having a management conversation was. He knew from his conversations over time that the claimant had reflected on events. On this basis he did not consider it valuable to reopen the conversation with the claimant to any significant degree. The tribunal found his evidence around his conversation to be equivocal. Despite setting out his doubts about the rationale and stating that he did not think it useful to reopen the conversation with the claimant, Assistant Chief Constable Todd stated he had spoken to the claimant about the recommendation of the report when he met her on 16 October 2020. The claimant gave evidence that he did not mention management action or a management discussion. The tribunal prefers the claimant's account, which is supported by a detailed contemporaneous note. There is no mention in that account of her being told that she was being subject to management action. Her contemporaneous written note, which the tribunal accepts as an accurate summary of the meeting, records that Assistant Chief Constable Todd did not agree with all that was in the Guildford report, that it had been written to make things go away, that it was critical of Professional Standards Division process and that it had made a number of recommendations. Assistant Chief Constable Todd told her he did not believe performance management was appropriate and he invited the claimant to reflect, with him, what they would do differently if they found themselves in the same situation in the future.

138. On 19 October 2020, Assistant Chief Constable Todd emailed Deputy Chief Constable Hamilton and stated:-

> *"On Friday 16th October, I met with CS Emma Bond to discuss 'recommendation 5' in the report of CC Guildford & Mr Armstrong and forwarded by your office for action.*
>
> *Prior to this meeting, as recommended I discussed the matter with CS McVea.*
>
> *I discussed with CS Bond the relevant issues and possible points for learning now that there has been some time for reflection. I also informed CS Bond that I had in line with the above recommendation considered as to whether the individual and collective complaints required to be addressed through stage I of the Police Performance and Attendance Regulations. I informed CS Bond that on taking a wider perspective on the matter I did not think this was appropriate and that I considered the matter closed.*
>
> *CS Bond stated that she understood my position and thanked me for concluding the matter. No issues of concern were raised with me.*
>
> *For your information."*

In light of all the evidence before it, including the failure of Chief Superintendent McVea to write to the claimant to inform her of the management action direction, the tribunal finds that the conversation between the claimant and Assistant Chief Constable Todd on 16 October 2020 did not amount to "management action" for the purposes of the Police Conduct Regulations.

The bringing of the claimant's complaint to the tribunal

139. After the claimant was first served with the Regulation 16 Notice, she sought advice through solicitors appointed by the Police Federation. However, they were unable to continue to act due to an apparent conflict of interest. She then sought advice on the disciplinary matters through the Superintendents' Association and Mr Lewis of JMW solicitors in Manchester was retained.

140. The claimant also initiated an enquiry under the auspices of the Data Protection and the Freedom of Information Act on 10 September 2020 and on 9 October 2020. The claimant received an automated response warning of Covid related delays. Following this and subsequent correspondence, the claimant received a response to her FOI request on 4 January 2021, which relied on exemptions under the Act to withhold the information and a response to her Data Subject Access Request on 7 January 2021, which included Assistant Chief Constable's email of 19 October 2020 (see paragraph 138 above). The claimant initiated Early

Conciliation on 10 January 2021. She also spoke to the representative of the Superintendents' Association who informed her that they could not provide legal support for sex discrimination or unlawful detriment. She consulted a firm of solicitors on 22 January 2021 and instructed them to prepare her claim form. The Early Conciliation Certificate issued on 5 February 2021. Due to an issue with financial cover for her case, she instructed her current representatives on 22 February 2021.

PART E DISCUSSION AND CONCLUSIONS

141. The tribunal's further consideration and specific conclusions regarding the issues set out at paragraphs 6 and 7 above are set out below.

Public Interest Disclosure case

142. **Was Disclosure 2 (a "silver meeting" with Professional Standards Division (PSD), including 'the "first" Appropriate Authority' (see paragraph 55 above) a qualifying protected disclosure?**

The tribunal concludes that disclosure 2 was a qualifying protected disclosure. The tribunal is satisfied that the attendance of 'the "first" Appropriate Authority' meant that the claimant was disclosing information to a subordinate "qua employer" for the purposes of **Douglas** (see paragraph 20 above). The tribunal also concludes from the text message at page 355 of the claimant's bundle, that in reviewing what was already known, the claimant disclosed again the information that she had already escalated up in the chain of command which tended to show a relevant matter for the purposed of Article 67B. Chief Superintendent McVea's evidence relayed what he had been told was discussed at that meeting and so the tribunal is satisfied that the claimant had repeated and embedded her earlier disclosures at this time. Given this and given the respondent having conceded that the claimant had the requisite reasonable belief in truth and public interest, this disclosure also qualifies for protection, having regard to **Williams** (see paragraph 19 above).

Was the claimant subjected to detriment, as alleged?

143. The detriments relied on by the claimant are listed below.

144. **The claimant asserts that complaints made against the claimant, initially by Inspector O, then by Inspector C, Constable L and Constable M, arising out of the briefing to B Section and C Section on 28 April 2020 amounted to a detriment.**

The tribunal notes that pursuant to Article 70B (see paragraph 16 above) the respondent is vicariously liable for detrimental acts done by other workers. The tribunal considers that being the subject of complaints amounts to a detriment. The tribunal is not persuaded by the respondent's submission that complaints brought against senior managers are no more than the "slings and arrows of outrageous

fortune". Having regard to ***Jesudason*** (see paragraph 21) and **Shamoon** (see paragraph 22), in circumstances where the claimant takes the view that the receipt of these complaints were to her detriment and a reasonable worker would also take that view, the tribunal is satisfied that the making of these complaints were to the claimant's detriment.

145. **The claimant asserts that the decision to serve the Regulation 16 Notice amounted to a detriment. This included the Regulation 12 Assessment of the claimant's conduct by 'the "first" Appropriate Authority' (Guildford report says this was on 12 May 2020).**

The tribunal concludes that the Regulation 12 assessment in respect of the claimant's conduct and the consequent decision to serve the Regulation 16 notice in respect of "gross misconduct" was reasonably and objectively to the claimant's detriment. The tribunal rejects the respondent's submission that this "*was the start of a process, not the end. These were standard procedures. There can be no prejudice to anyone in carrying out a fair and impartial investigation."* Being subject to a Regulation 12 assessment which categorised the threshold of the claimant's alleged conduct as "gross misconduct", when that assessment was later found on the review commissioned by the respondent to lie outside the bounds of reasonableness, was reasonably and objectively to the claimant's detriment. The later decision to serve the Regulation 16 notice based on the earlier flawed Regulation 12 assessment was also clearly to the claimant's detriment.

146. **The claimant asserts that the decision to have the investigation into matters that had been raised against the claimant paused whilst legal advice was sought, thereby elongating the investigation and elongating the period of time that these matters would have been hanging over the claimant's head, was a detriment. The claimant was advised of this in an email of 19 June 2020.**

The pausing of investigation into matters raised against the claimant, irrespective of the cause of it, had the effect of protracting the process, and this delay would reasonably and objectively be viewed as being to the claimant's detriment.

147. **The claimant asserts that the redeployment of the claimant to a different role was a detriment. Ms McClure's statement on behalf of the respondent states that the Senior Management Appointments Panel (SMAP) Meetings took place on 14, 16 and 18 September 2020.**

The tribunal rejects the respondent's submission that because the move involved no loss of seniority, it could not amount to a detriment. The tribunal concludes that being redeployed to another position, having expressed a preference to stay in the current role, would reasonably and objectively be viewed as being to the claimant's detriment.

148. **The claimant asserts that the ongoing failure to interview the claimant as part of the Regulation 16 process;**

and

the failure of the review carried out by Chief Constable Guildford to speak to the claimant or seek any information from the claimant, between its commissioning on 15 July 2020 and its report on 2 September 2020 were detriments.

The tribunal rejects the respondent's submission that *"the failure to interview the claimant, either during the misconduct process or the Guildford review, could not amount to a detriment to the claimant. On the contrary, it was a point in her favour as matters never got that far and there was no necessity to do so. This is no more than an unjustified sense of grievance."* Regulation 12(4) of the Police Conduct Regulations (see paragraph 16 above) required the respondent to carry out an investigation where it had categorised the conduct as gross misconduct. The tribunal concludes that the failure to make arrangements for interviewing the claimant following service of the Regulation 16 notice would reasonably and objectively be viewed as being to the claimant's detriment. During the currency of the Regulation 16 notice, the claimant was under considerable stress. This would have been ameliorated if the respondent had engaged promptly with her to establish her version of events as part of the mandatory investigation. The tribunal was surprised that the independent review did not engage with either the claimant or 'the "first" Appropriate Authority', given the centrality of their actions within the factual matrix which was under review. The tribunal concludes that that failure would also reasonably and objectively be viewed as being to the claimant's detriment, given that she was denied the opportunity to contribute to conclusions and recommendations which touched upon and affected her, both personally and professionally.

149. **The claimant asserts that the ongoing failure to inform the claimant that there was an independent review taking place was a detriment.**

The claimant was informed that a review was taking place, in light of the content of her solicitor's email dated 28 July 2020 (see paragraph 109 above). In closing submissions, the claimant further refined this detriment: "*the initial detriment was not advising her at an earlier stage that there was an independent review. In addition, and as conceded in Mr Harrison's statement, in the email the solicitor raised a number of queries however it appears that these were not responded to. The solicitor followed this up on 7 September 2020 again without response. This, therefore, ties in with detriment (l), namely that the Claimant was not updated."*

The tribunal is satisfied that there was a short initial delay in informing the claimant of the review. It appears to have been initiated in late June

2020, culminating in the terms of reference communicated by the respondent on 8 July 2020. It is also clear that the claimant's solicitor's email did not receive a response to his correspondence dated 28 July 2020 (see paragraph 109 above) or to his email of 1 September 2020 (see paragraph 112 above). The tribunal is satisfied that this delay would reasonably and objectively be viewed as being to the claimant's detriment.

150. **The claimant asserts that an apparent decision by Chief Superintendent McVea on 11 September 2020 that a sanction was to be imposed upon the claimant by way of management action although ultimately it did not appear to have been implemented amounted to a detriment.**

The tribunal rejects the respondent's submission that because "management action" is defined in the Police Conduct Regulations as action or advice intended to improve the conduct of the member concerned and is not a disciplinary sanction, it could not amount to detriment. It is still action brought under the conduct Regulations and implies that the recipient's actions were below standard and required to be improved. In the particular circumstances of this case, although management action is not a formal disciplinary sanction pursuant to the Police Conduct Regulations, the tribunal nevertheless concludes that being subject to a decision to take management action would reasonably and objectively be viewed as being to the claimant's detriment. The tribunal is confirmed in this view in light of the email dated 15 September 2020 making reference to the need for the issues to be proven before a conversation with management taking place (see paragraph 124 above).

151. **The claimant asserts that the ongoing failure to notify the claimant that an apparent decision had been taken to administer management action amounted to detriment.**

The tribunal has found that the conversation between the claimant and her line manager, Assistant Chief Constable Todd, did not in fact constitute management action (see paragraph 138 above). Nevertheless, Assistant Chief Constable Todd informed his manager that he had spoken to her in the context of the direction to take management action. On this basis, it is clear that, despite Assistant Chief Constable not following through on the direction, that as far as his superiors were concerned, she had been subject to management action. Accordingly, the respondent did not comply with his obligations under regulation 12(6) of the Police Conduct Regulations to notify the claimant of such management action in writing. This failure to notify her of this would reasonably and objectively be viewed as being to the claimant's detriment.

152. **The claimant asserts that the alleged ongoing failure of the Appropriate Authority to advise the claimant that the Regulation 16 Notice had been rescinded was a detriment. In closing submissions**

this was refined to the failure to write to the claimant directly to formally advise her that the Regulation 16 notice had been rescinded in line with the conduct regulations.

The tribunal acknowledges that the claimant ought to have been advised personally that the Regulation 16 notice had been rescinded. Her solicitor was informed in writing in an email dated 15 September 2020 from Superintendent McVea (see paragraph 124 above) that the Regulation 16 notice had been rescinded, however, he also undertook to contact her personally. The failure to do so was also a breach of the Police Conduct Regulations. The claimant raised this with Chief Superintendent McVea on 9 October 2020 and her solicitor also followed up with correspondence, which did not receive a reply (see paragraph 134 above). In these circumstances, the tribunal is satisfied that a reasonable worker would view this ongoing failure as being to the claimant's detriment.

153. **The claimant asserts that if management action was taken by Assistant Chief Constable Todd in a meeting of 16 October 2020, that was a further detriment.**

As noted at paragraph 138 above, the tribunal has determined the actions of Assistant Chief Constable Todd did not amount to management action but appear to have been taken by his superiors as amounting to such. The decision to direct management action and to record that it had been taken would be viewed as being to the claimant's detriment, particularly as Superintendent McVea's communication to the claimant's solicitor made specific reference to the need for issues regarding the location, tone and phrases used by the claimant during her briefings to be proven. Further, the taking of management action on the basis of the conclusions of the Guildford Review report, which was made in the absence of any investigation of the complaints against the claimant, would reasonably and objectively be viewed as being to the claimant's detriment.

154. **The claimant asserts that the ongoing failure to update the claimant during the misconduct investigation and comply with the Police Conduct Regulations (NI) 2016 was to her detriment.**

Regulation 16(4) of the Police Conduct Regulations required the respondent's Investigator to notify the claimant of the progress of the investigation. The claimant and Inspector O were both provided with substantially the same update on 19 June 2020. The claimant's solicitor's emails of 28 July 2020 and 1 September 2020, as well as that sent following the claimant's meeting with Chief Superintendent McVea on 9 October 2020, were not responded to. The failure of the respondent to provide a substantive response to these items of correspondence does amount a detriment. Acting as an industrial jury, the tribunal is satisfied that receiving correspondence from a solicitor in a disciplinary matter involving a high ranking Officer would be difficult to overlook. The failure

to respond to a number of items of correspondence from a solicitor (see paragraphs 108, 112 and 134 above) goes beyond mere carelessness or insensitivity and is highly suggestive of a deliberate decision to not reply (see **London Borough of Harrow** at paragraph 27 above).

Has the claimant raised a prima facie case of whistleblowing detriment?

155. The tribunal, having regard to the legislative provisions (see paragraph 17 above) notes that it is for the respondent to show the ground on which any act, or deliberate failure to act, was done. In Mr Phillips' submission, which Mr Sands did not disagree with, the initial burden is on the claimant to prove that she made protected disclosures and that she suffered detriment due to an act and/or a deliberate failure to act on the part of the employer. If she proves those two elements the burden shifts to the employer to provide an explanation for the detrimental treatment which is not tainted by the fact of the claimant having made protected disclosures. On this basis, and on the basis of its findings at paragraph 141 to 154 above, the tribunal is satisfied that the claimant has discharged the initial burden. It is therefore for the respondent at that point to prove that the treatment was in no sense whatsoever on grounds of the protected disclosures (per ***Bronckaers*** **-** see paragraph 25). However, given the absence of appellate authority in this jurisdiction, in the event that the authorities summarised in **Chatterjee (**see paragraph 24**)** are applicable and require the claimant to do more than this to establish a prima facie case of whistleblowing detriment, the tribunal is satisfied that that burden has been satisfied where:

i. the subject matter of the impugned briefings was also the subject matter of the protected disclosures. The alleged wrongdoing levelled against the officers of DCS was specifically referenced in Inspector O's complaint (see paragraph 77 above);

ii. Inspector Rogers' report which informed the recommendation for "management action" with the Police Officers recorded that Superintendent McA sent an email to all H district Sergeants and Inspectors advising them that a preliminary inquiry had been commenced by PSD and seeking certain information from them on 28 April 2020. Inquiries had been made by Professional Standards Division (PSD) within the district prior to 5 May 2020 (see paragraph 65 above) and responses had been received from within the district by 5 May 2020, therefore those within the claimant's district (including the complainants) would have been aware of the Professional Standards Division (PSD) inquiry going on as a consequence of the claimant's disclosures;

iii. the very rapid assessment (without briefing up and escalation, as 'the "first" Appropriate Authority' had been instructed to do) of the threshold of the claimant's conduct as potentially "gross misconduct" in light of the timing of those complaints, some of

which followed upon the claimant pushing for a more thorough investigation into the alleged misconduct of the officers (see paragraphs 75 to 77 and 87 above);

iv. 'the "first" Appropriate Authority' having sought for the claimant to have been suspended or repositioned (see paragraph 100 above), when the Guildford review found that that was unwarranted;

v. the close factual nexus involving the claimant's disclosures, the parallel investigations against the Officers and the claimant and 'the "first" Appropriate Authority's' complaint made under the auspices of whistleblowing legislation, the instigation and report of the Guildford review and the consequences of it;

vi. the finding (see paragraph 114) that the assessment of the claimant's conduct lay outside the bounds of reasonableness, which in itself means that this assessment "cries out" for an explanation (as per **Fecitt** at paragraph 36);

vii. the reliance on 'the "first" Appropriate Authority's' assessment even though a number of Senior Officers expressed their doubts about it;

viii. the inexplicable finding of the Guildford review that 'the "first" Appropriate Authority' had acted with complete integrity; and

ix. the complaints against the claimant and Regulation 16 notice being a factor in the discussions which led to her redeployment from District Commander DCS to the Police College.

If so, was it on the ground that she made a protected disclosure?

156. Given that the tribunal is satisfied that the claimant has established a prima facie case, it is for the respondent to provide an explanation which is not tainted by the claimant's protected disclosures. Mr Sands submitted that *"all the detriments relied on, if they were detriments, arose due to the events of the two briefings at 5.30am and 7am on 28 April 2020."* The tribunal views this analysis as oversimplistic. In the first instance, Mr Sands did not call any of the four complainants as witnesses or adduce any evidence beyond the complaints themselves to establish that the claimant had crossed any lines in respect of the tenor and content of those briefings. The tribunal has further noted the obvious limitations with the conclusions of the Guildford Review (see paragraphs 117 to 119 above). In those circumstances no question of separability arises. Further, Mr Sands' analysis does not adequately engage with the question of causation. The fact that the actions occurred following disputed staff briefings does not preclude the existence of other factors which motivated the detrimental acts. Mr Sands' analysis does not give rise to an irresistible conclusion that the detrimental acts were not

materially influenced (in the sense of being more than a trivial influenced) by the claimant's whistleblowing. (See ***Fecitt*** at paragraph 28 and ***Chatterjee*** at paragraph 32 above)

The complaints

157. The tribunal notes Mr Phillips' submission that it was not simply coincidence that the first complaint was lodged the day after:-

(i) the assessment of 'the "first" Appropriate Authority' that was helpful to the officers was questioned by Chief Superintendent McVea (see paragraph 75 above); and

(ii) 'the "first" Appropriate Authority' who had been sympathetic to the officers was replaced by Chief Superintendent McVea (see paragraph 76 above).

The tribunal considers that the timing of the complaints gave rise to a circumstance which required to be explained by the respondent. In addition to these factors, the tribunal notes the fact that "advice" of some nature was being provided by Professional Standards Division (PSD) to Inspector O (see paragraph 77 above). The claimant was regarded as the originator of those complaints by 'the "first" Appropriate Authority' (see paragraph 68 above). The respondent did not call the complainants as witnesses to enable them to put forward their evidence and allow the tribunal to consider their conscious and unconscious motivations in bringing the complaints. The tribunal did not receive an explanation for the apparent delay between the impugned briefings carried out by the claimant and the bringing of complaints. Further, the respondent did not establish as a matter of fact that the claimant was guilty of having misconducted herself, as alleged by Inspector O or the other complainants. Mr Armstrong's review, with its limitations (see paragraph 117 to 119 above) did not establish misconduct. In the absence of any other witness giving evidence to the contrary, the tribunal accepted the claimant's account of a robust, but not improper briefing. Accordingly, the respondent has not satisfied the burden upon it to show that the claimant's disclosures were not a more than trivial cause of the detrimental treatment of the claimant. Whilst the drawing of an adverse inference does not automatically follow on the respondent's failure, it will usually do so and in the circumstances of this case, the tribunal is satisfied that it is appropriate to do so.

'The "first" Appropriate Authority's' Assessment of the claimant's conduct as gross misconduct

158. The respondent did not call 'the "first" Appropriate Authority', even though when the evidence was almost completed, it became apparent that 'the "first" Appropriate Authority' was willing to and desired to give evidence. The tribunal accepts that once complaints had been made against the claimant, the respondent was required to consider them and assess

whether the threshold of misconduct had been met. However, that is not the end of the required analysis. 'The "first" Appropriate Authority's' assessment of the claimant's conduct was later found by the independent review carried out by Mr Armstrong and commissioned by the respondent to lie outside the bounds of reasonableness. This obviously "cries out" for an explanation from the respondent (per ***Fecitt***, see paragraph 36 above). None was received by the tribunal. The tribunal rejects the respondent's submission that the tribunal should focus on the letter from the claimant's solicitors dated 1 September 2020 (see paragraph 112 above). This letter provides insight into what the claimant's thoughts were at that time, but it does not advance any reason for the impugned treatment by 'the "first" Appropriate Authority'. Consequent upon this failure by the respondent to satisfy the tribunal as to the reason for the treatment, per the legislative provisions of Article 71 (see paragraph 17 above), the tribunal, as it is entitled to do per ***Dahou*** (see paragraph 24 above), draws an inference against the respondent that the detriment visited upon the claimant was as a result of the claimant's protected disclosures. 'The "first" Appropriate Authority' stated that the Officers had been treated despicably and that the misconduct processes which followed upon the claimant's disclosure and escalation of information were inappropriate (see paragraphs 99 and 100 above). He regarded the claimant as the originator of those complaints (see paragraph 68 above). Accordingly, the tribunal is satisfied that it is appropriate in all of the circumstances to draw an inference against the respondent that the impugned assessment was made on the ground of the claimant's protected disclosures when she raised the complaints about the officers.

The service of the Regulation 16 Notice

159. In analysing the decision to proceed with a Regulation 16 Notice based upon a flawed assessment, the tribunal notes that Chief Superintendent McVea had grave reservations regarding the assessment of allegations about the claimant's conduct as gross misconduct as at 13 May 2020. Those reservations were separately shared by others, including Assistant Chief Constable Todd (see paragraph 93 above). As noted (see paragraph 91 above), Chief Superintendent McVea disclosed in cross examination that he discussed the issue with Assistant Chief Constable McEwan and understood himself to have received a direction from Assistant Chief Constable McEwan to go ahead and serve the notice. Assistant Chief Constable McEwan was not called and the tribunal received no evidence about and could not consider his motivations in giving his direction to go ahead and serve the notice. Further, Deputy Chief Constable Hamilton also accepted that as a more Senior Officer he had a controlling hand in these matters, to which he made no reference to in his witness statement. Moreover, the claimant who had made disclosures, had been continuing to repeat her concerns and push for the matters to be fully investigated. This was a situation that Deputy Chief Constable Hamilton referred to as amounting to *"a serious reputational issue"* (see paragraph 98 above). Chief Superintendent McVea's decision to serve the notice was based upon a

direction from above him in the management chain, for which the tribunal has received no explanation. Deputy Chief Constable Hamilton's concern about the reputation of the Police Service of Northern Ireland does raise the support the conclusion that the claimant's disclosures and their consequences were at very least a subconscious motivation for what followed in the service of the Regulation 16 notice. The tribunal has not been satisfied that the claimant's disclosures and her pursuit of them had not materially influenced (in the sense of being more than a trivial influence) the decision, made by Chief Superintendent McVea following escalation to his superiors and discussion with them, to go ahead and serve after 13 May 2020 (see ***Fecitt*** at paragraph 28 and ***Chatterjee*** at paragraph 32 above.) In addition, the decision to serve that Regulation 16 Notice was based upon and thus materially influenced by 'the "first" Appropriate Authority's' assessment (in respect of which the tribunal has drawn an adverse inference against the respondent). Chief Superintendent McVea's directed reliance upon the flawed and unreasonable assessment means that his actions on behalf of the respondent were on ground of (in the sense of being materially influenced by) the claimant's protected disclosures.

Initial failure to interview the claimant

160. The initial failure to make arrangements to interview the claimant, between the service of the Regulation 16 Notice on her on 20 May 2020 and the decision to initiate the review in late June 2020, has not been explained by the respondent. This is to be contrasted with the proposal to carry out an inappropriate trawl of all Officers present at the meeting (see paragraph 95 above). Whilst the drawing of an adverse inference does not automatically follow on the respondent's failure (see ***Chatterjee*** and ***Dahou*** at paragraph 24 above), in the circumstances, where it has received no satisfactory explanation from the respondent and in the context of the tribunal's other conclusions, the tribunal is satisfied that it is appropriate to draw an inference that the claimant's protected disclosures were a material (meaning more than trivial) influence on this failure.

Pausing of the investigation against the claimant

161. From the evidence before the tribunal, it appears that the pausing of the investigation into the claimant's conduct was consequent upon the receipt of 'the "first" Appropriate Authority's' complaint, and the respondent's desire to take legal advice generally. Serious allegations had been made by 'the "first" Appropriate Authority' implying that he was being interfered with and hindered as he carried out his statutory functions as an Appropriate Authority for the purposes of the Police Conduct Regulations. The respondent has adduced evidence which has satisfied the tribunal that this was the reason why the investigation was paused, and it does not appear to the tribunal that the Chief Constable had any other motivation other than to secure advice following the

allegations which had been raised by 'the "first" Appropriate Authority' which gave rise to the Guildford review.

The claimant not being interviewed by the review

162. Mr Armstrong did not interview the claimant as part of the independent review. The tribunal views this as a material shortcoming with his methodology. Having had the benefit of hearing from and seeing Mr Armstrong as he gave his evidence, the tribunal is satisfied that he was taking forward his review of the terms of reference in a professional manner, albeit subject to the serious criticism and limitations identified by the tribunal at paragraphs 117 to 119 above. As such it lacked rigour. The tribunal accepts his oral evidence given under cross examination that he took the view having received all records that there was no need for him to speak directly to any of the key individuals or seek written input from them as this was a review and not an investigation. Notwithstanding this, it is clear that he did speak to a Superintendent about the overtime issue. He also sought further information about the overtime issue, directing enquiries through the Chief Constable's Staff Officer, Superintendent McC. The tribunal notes that his engagement with key personnel in this regard was in relation to Covid 19 duty arrangements, a matter which in the context of the proposed service of Regulation 16 notices on Supervisory Officers had been termed by Deputy Chief Constable Hamilton in his discussion with the Chief Constable as "a serious reputational issue" (see paragraph 98 above). Mr Armstrong's methodology was inconsistent and there were significant and unexplained limitations regarding the Chief Constable's Staff Officer failure to communicate material information regarding Assistant Chief Constable Todd's view that there was no in-built overtime during "Operation Talla" (see paragraph 117 above). These limitations undermined Mr Armstrong's conclusions about the conduct of the Derry City and Strabane Officers' working arrangements. The limitations and shortcomings which have been identified by the tribunal have caused the tribunal to conclude the report amounted to a damage limitation exercise for the respondent's organisation. Notwithstanding this, the tribunal is satisfied that the claimant's protected disclosures were not a factor in Mr Armstrong's decision not to interview her. In that regard, the tribunal notes that 'the "first" Appropriate Authority' was not interviewed either and this confirms the tribunal in its view that the claimant not being interviewed was merely a consequence of Mr Armstrong pursuing, in the main, a paper review methodology. Accordingly, the respondent has satisfied the tribunal as to the reason for the detrimental treatment (Mr Armstrong took a decision about how to carry out the review) and that the claimant's protected disclosures were not a material, meaning more than trivial cause in his decision making.

SMAP and the move to Police College

163. The tribunal adopts the criticism made by the claimant of the limitations of the Senior Management Appointment Panel (SMAP) minutes in failing

to advance any detailed rationale for the decisions taken in them. Both the Chief Constable and Deputy Chief Constable Hamilton knew the outcome of the Guildford report from 2 September 2020, some twelve days before the Senior Management Appointment Panel (SMAP). Neither disclosed the outcome to the Senior Management Appointment Panel (SMAP). Handwritten notes relating to the Senior Management Appointment Panel (SMAP) discussions which were provided by the respondent shortly before the hearing commenced showed that Deputy Chief Constable Hamilton had informed the panel that the Regulation 16 Notice had been "damaging" to the claimant. The tribunal found it surprising that neither the Chief Constable nor the Deputy Chief Constable Hamilton advised the Senior Management Appointment Panel (SMAP) that the independent investigation had:-

(i) found that the gross misconduct conclusion was beyond the bounds of reasonableness; and

(ii) recommended that the Regulation 16 notice should be withdrawn and the Claimant informed in writing forthwith.

Assistant Commissioner Roberts' evidence confirmed the involvement of the Chief Constable and Deputy Chief Constable Hamilton in the movement of the claimant. The Chief Constable gave evidence that he was concerned about the claimant's welfare. The tribunal is not persuaded that the Chief Constable had serious welfare concerns regarding the claimant in the absence of an Occupational Health referral. In addition, the Senior Management Appointment Panel (SMAP) was allowed by the Chief Constable and Deputy Chief Constable Hamilton to complete its decision making in ignorance of a material factor (the rescission of the Regulation 16 notice). The Senior Management Appointment Panel (SMAP) process proceeded on the basis that a "damaging" Regulation 16 notice was still extant. The tribunal has not received a satisfactory explanation of why the Senior Management Appointment Panel (SMAP) were not informed of the true position. That failure to explain was significantly compounded Deputy Chief Constable Hamilton expressly drawing attention to the Notice which was "damaging" to the claimant (see paragraph 127 above). That notice was grounded upon and materially influenced by complaints and a Regulation 12 assessment, in respect of which the tribunal has drawn inferences that they were done on ground of the claimant's protected disclosures. Deputy Chief Constable Hamilton had described the actions following upon the claimant's continued concerns about the Derry City and Strabane Officers as a *"serious reputational issue"* (see paragraph 98 above). The move was not supported by either the transferring or the receiving line manager. The claimant's tenure in post was strikingly short. All of these circumstances support the conclusion that that move was materially influenced by the claimant's disclosures. Accordingly, the respondent has failed to prove that the decision to move the claimant was not on the grounds of her protected disclosure in the sense that it was not more than a trivial influence, and the tribunal is satisfied that an

inference that the claimant's disclosures were a material (meaning more than a trivial) influence, should be drawn.

Management Action

164. Notwithstanding that Assistant Chief Constable Todd did not follow through on the direction to issue management action in his discussion with the claimant, the tribunal is satisfied that Chief Superintendent McVea made a recommendation for management action and that Assistant Chief Constable Todd recorded that he had met with the claimant in the context of implementing that recommendation (see paragraph 122 and 136 to 138 above). The reason for the taking of this action was the outcome and recommendations of the independent review.

165. Those recommendations were materially influenced by the information which Mr Armstrong was provided with and which he uncritically reviewed.

166. Chief Superintendent McVea's draft assessment (which was only disclosed during the hearing), which confirmed his view that *"considerable public money has been wasted given that there was up to 30 officers per shift not being utilised"* was not before Mr Armstrong. The tribunal agrees with Mr Phillips' submission that *"Mr Armstrong's conclusions on the issue of potential misconduct of the officers smoothed over the issue within the district. It made the potential for reputational damage much less likely. It affirmed the Chief Constable's decision when he had personally intervened."*

167. Information regarding Assistant Chief Constable Todd's views that there was no in built overtime was not passed on to Mr Armstrong and the tribunal did not receive any explanation for this (see paragraph 117 above).

168. Standing back and looking at the conclusions and recommendations of Mr Armstrong's report (whilst making no criticism of the author's professionalism), there were serious flaws in the report's conclusions regarding 'the "first" Appropriate Authority's' actions having "complete integrity". The decision to recommend management action, when the matter had not been investigated, the claimant's views and the views of Chief Inspector B had not been sought, was one that technically was open to him, but one which was manifestly unreasonable and unfair. He accepted the information disclosed in the complaints regarding the briefings on 28 April 2020 as factual, when there had been no fact-finding investigation and his conclusions were made in the absence of any input from the claimant. He did not seek any reason for the experienced '"first" Appropriate Authority' carrying out a rushed assessment of the claimant's conduct, which he himself concluded lay outside the bounds of reasonableness.

169. Mr Armstrong's conclusions and recommendations, due to the material shortcomings and limitations above, were shaped by the information he was provided with by the respondent as well as the information which was not shared with him. Mr Amstrong accepted the uninvestigated complaints against the claimant at face value and then failed to properly consider the wider context in which an assessment, which lay outside the bounds of reasonableness, had been made. In doing so, he was subject to unconscious motivations and the respondent's organisation materially influenced and shaped the outcome of his report and consequently it was tainted by matters in respect of which the tribunal has already drawn an adverse inference, and consequently by the claimant's underpinning disclosures. Chief Superintendent McVea appears to have been fully aware of the need for a factual basis for management action to have been established, as demonstrated by his letter to the claimant's solicitor dated 15 September 2020 (see paragraph 124 above). Applying ***Nagarajan*** (see paragraph 29 above), the management action recommendation which Chief Superintendent McVea then progressed on behalf of the respondent, was subject to unconscious motivations and was materially influenced by the claimant's underpinning disclosures. The claimant's note of the meeting of 9 October 2020, as the referred to in her supplemental witness statement, which the tribunal accepts, stated that Chief Superintendent McVea said he was told he had no option but to recommend management action (see paragraph 134 above). All of these circumstances support the conclusion that the management action was materially influenced by the claimant's disclosures, a situation that Deputy Chief Constable Hamilton, who accepted that he had exercised a controlling hand, referred to as amounting to *"a serious reputational issue"* (see paragraph 98 above). Accordingly, the tribunal concludes that the claimant's protected disclosures had a material (meaning more than trivial) influence on the decision to take management action.

Last Act

170. The last act in the series of whistleblowing detriments identified by the claimant and upheld by the tribunal was the purported management action against the claimant on 16 October 2020. In the factual circumstances that the tribunal has found, the tribunal further finds that they formed part of a series of similar acts or failures for the purposes of Art. 74 (see paragraph 17 above) and, accordingly, all of these complaints were presented in time and the tribunal does have jurisdiction to hear them. In the absence of Early Conciliation procedures, the claimant's claim ought to have been lodged by 16 January 2021. However, due to the operation of Article 249B(4) of the Employment Rights (Northern Ireland) Order 1996, the time limit for so doing was extended to one month beyond the date of receipt of the Early Conciliation certificate. The claimant contacted the Labour Relations Agency on 10 January 2021 and the Early Conciliation Certificate issued on 5 February 2021. The date for lodging the claim was therefore extended to 5 March 2021, and the claim was therefore brought within time.

Sex Discrimination claim

171. The claimant also pursued allegations of sex discrimination arising from the same facts. Mr Phillips' closing submissions refined and narrowed the scope of the claimant's sex discrimination claims. It was clarified on the claimant's behalf that she was not alleging that the actions of Inspector Rodgers, Mr Armstrong and Chief Constable Guildford and Assistant Chief Constable Todd were gender based.

Appropriate Comparator?

172. The claimant relied on Superintendent Haslett as an actual comparator and in the alternative relied on a hypothetical comparator whose circumstances were the same or not materially different from the claimant, who raised the same issues as the claimant but was male. The Industrial Tribunal in the case of **Bradley v Chief Constable of PSNI** concluded that:-

> *"Superintendent Haslett had stated on more than one occasion that the group of supervisory officers had been "too cock heavy" and "too male dominated". No one had reasonably taken offence at these remarks and no one had been intimidated by these remarks. Those remarks had not been made to violate anyone's dignity. No complaints were made at the time. Some of the language may not have been suitable for use in a cloistered convent, but this had not been a cloistered convent."*

173. The respondent submitted that the comparison with the Haslett case was inapposite as Mr Haslett made remarks which were in an entirely different context to the present case, that the two situations are not comparable and the complaints about the claimant were not simply limited to the use of crude language. The tribunal agrees with the respondent's submission that Superintendent Haslett is not appropriate as an actual comparator, as his circumstances were not sufficiently similar. However, whilst the Regulation 16 notice which was served on the claimant did not raise any issue with the claimant's use of the word "twat", 'the "first" Appropriate Authority's' Regulation 12 assessment did specifically consider that the claimant's language could be an appropriate terminology in reference to Article 6.1 of the Code of Ethics (see paragraph 80 above). In the circumstances, the respondent's failure to take any action regarding Superintendent Haslett's comments is not irrelevant. The claimant also relied on the treatment of the male Officers in her District against whom disciplinary action was considered, the male complainant Inspector, Inspector O who received timeous responses to his queries, and the male Chief Superintendent with the same travelling distance who replaced her as District Commander in Derry City and Strabane. It is well established in law that the tribunal may consider the treatment of others as being of evidential value in inferring how a hypothetical comparator would have been treated. The tribunal considers that a hypothetical comparator is appropriate in the allegations raised by the claimant.

The revised scope of the claimant's sex discrimination claim

174. As a result of the claimant refining the scope of her allegations of sex discrimination in Mr Phillips' closing submissions, it appeared to the tribunal that a time point jurisdictional issue which had not been raised by the parties would require to be addressed.

175. The claimant in closing submissions relied on the matters set out below by way of a continuing act to ground her direct sex discrimination claim. The tribunal has considered whether the claimant can establish an act extending over a period, to enable it to determine the last day of that period. The claimant relied on the matters set out below:-

(i) the complaints made against her. The claimant compared herself to Superintendent Haslett, who was referred to in **Bradley v Chief Constable of PSNI**. In that case the tribunal found that he had stated that a group of supervisory officers were "too cock heavy" and "too male dominated", but received no complaints in respect of these comments. These comments were reported in the press. She further noted that none of the female Officers who were present during the briefings lodged any complaint in respect of her behaviour. The claimant gave unchallenged evidence of having spoken to two named male colleagues in the Superintendents Association who had exerted a strong management position including the use of expletives on occasions and who had not been subject to complaint or investigation.

Finding: The tribunal is satisfied on the balance of probabilities that the claimant was treated less favourably than a hypothetical comparator in relation to complaints being made against her. The claimant in her witness statement gave unchallenged evidence having spoken to male colleagues in the Superintendents' Association who were unable to fathom why she was subject to investigation on the basis of the circumstances she had outlined. Her evidence was that her peer Chief Superintendents suggested they themselves had exerted a strong management position, including the use of expletives on occasion, and had not been subject to complaint or to investigation. When the tribunal takes account of this, bearing in mind that neither of the named Chief Superintendents were called to give evidence, and of the fact that the claimant's line manager, Assistant Chief Constable Todd, was informed in advance of the claimant's intention to "rollock" her section, as well as Deputy Chief Constable Hamilton's evidence that he would have expected the claimant to address the issues personally with her section, the tribunal is left with the impression that in a disciplined organisation robust management of the section was something that on occasion may occur, and would not have been expected to have been the occasion of a complaint. Mr Phillips submitted that:-

"The claimant was the first female Commander of DCS. Her case is that in addition to being motivated by her disclosures, those who lodged complaints did not appreciate being spoken to in firm terms by a female superior."

The tribunal has evidence before it of misogyny and disrespect from within the lower ranks in the form of the WhatsApp messages disclosed at paragraph 126 above. In this context, the tribunal agrees with the claimant that it is noteworthy that no female officer complained about the claimant following the briefing.

The last of these complaints was received on 26 May 2020.

(ii) **The Regulation 12 assessment that led to the service of the Regulation 16 notice upon her and the failure to revise assessment.** The claimant compares herself to Superintendent Haslett whose comments were reported in media coverage. However, he was not subject to any investigation nor was management action taken against him. On this basis, the claimant submits that a different standard was applied by the respondent when judging comments of a male senior officer to those of the claimant. No evidence was adduced by the respondent to explain why no disciplinary action was taken against Superintendent Haslett. The claimant also relies upon an alleged unexplained volte-face by Chief Superintendent McVea, in deciding to proceed with service of Regulation 16 notice. In her closing submissions, the claimant compared her treatment to the treatment of the Sergeants and Inspectors, whose conduct was assessed by Chief Superintendent McVea as being gross misconduct, but who had no action taken against them.

Finding: The tribunal is satisfied that the claimant was less favourably treated than a hypothetical comparator in relation to the Regulation 12 assessment of her conduct and the service of the Regulation 16 notice. The tribunal relies on the failure of the respondent to subject Superintendent Haslett to any discipline for his use of inappropriate terminology, which was reported in the media as evidence of less favourable treatment of the claimant. The tribunal notes that one of the matters referred to by 'the "first" Appropriate Authority' was the use of the claimant's use of the word "twat" (see paragraph 80 above). This does suggest that a different standard was applied to the claimant. The tribunal also relies upon the disparity in treatment between the claimant, on being served with a Regulation 16 notice in circumstances where Chief Superintendent McVea had serious reservations (and, as it transpired upon the independent review, entirely appropriate reservations) regarding that assessment, and the Inspectors and Sergeants, whose conduct was assessed by Chief Superintendent McVea as potentially amounting to gross misconduct and who received no Regulation 16 notice, following a personal intervention by the Chief Constable (see paragraphs 102

and 103 above). In addition, there was a failure to revise the Regulation 12 assessment, despite the well-founded concerns regarding it.

The Regulation 12 assessment was carried out on 12 May 2020 and the Regulation 16 Notice was served on 20 May 2020 and subsisted until the claimant was informed, via her solicitor, of its rescission on 15 September 2020.

(iii) The alleged failure to update the claimant during the investigation/review.

Correspondence from the claimant's solicitor during the period of the review went unanswered (see paragraphs 108, 112 and 134 above). The review was completed by 2 September 2020. The last communication received in respect of the review was the email sent to the claimant's solicitor on 15 September 2020 (see paragraph 124 above).

Finding: The tribunal is satisfied that the correspondence from Inspector O received a very prompt response on behalf of the respondent, whilst correspondence sent on behalf of the claimant was largely ignored and that the claimant did not receive the prompt replies that Inspector O enjoyed.

Mr Phillips accepted that this failure ended upon the conclusion of the investigation on 2 September 2020.

(iv) The decision to move the claimant from District Command of DCS to Police College. The claimant relies on a hypothetical comparator and highlights a perceived lack of resilience by the Chief Constable and Deputy Chief Constable Hamilton. She relies on the fact that she was replaced by a man and that welfare considerations were put forward as a reason, including the impact of travel. The man who replaced her as District Commander of DCS lived close by and had a similar travel distance.

Finding: The tribunal is satisfied that a hypothetical male comparator whose circumstances were the same or not materially different from those of the claimant would have been treated differently from the claimant and would not have been moved from the DCS District command post. The tribunal considers that the term "resilience" by itself is not imbued with any gender specific quality. The tribunal notes that this word was used in Chief Constable Guildford's review when describing the change of shifts in response to the Covid-19 pandemic to provide workplace resilience. However, when it is considered with the unwarranted reference to the claimant's text messages as "an emotional text" (see paragraph 70 above) the reference to resilience becomes tainted with considerations of gender stereotyping. The claimant's perceived lack of resilience was used to justify moving her

against the expressed preferences of her own Line Manager and the Line Manager to whom she would transfer. The claimant's expected tenure was cut short.

The tribunal pauses to note that the claimant did not take time off work despite the adversity of the circumstances that she was facing. If anything, the claimant had demonstrated her resilience in the face of the most adverse situations presented by an assessment of her conduct as potentially amounting to career ending misconduct.

The decision to move the claimant was as a result of the SMAP process which took place from 14 to 18 September 2020.

(v) The failure to formally serve any notification in writing on the Claimant that the Reg 16 notice had been rescinded (para 157 written submission); and

(vi) the failure to write to the Claimant to formally advise her that the Reg 16 notice had been rescinded in line with the conduct regulations.

Mr Phillips accepted that (v) and (vi) above were essentially the same complaint.

Finding: The tribunal is satisfied that this matter amounts to detrimental treatment of the claimant (see paragraphs 152 and 153 above), per **Shamoon**. The tribunal considers that the disparate approach to communication with the claimant's solicitor compared to the prompt replies provided to Inspector O and the update personally directed by the Chief Constable as evidence of how a hypothetical comparator would have been treated. In light of its other findings set out at sub paragraphs (i) to (iv) above which are evidence of ongoing less favourable treatment of the claimant, the tribunal is satisfied that this failure also required an explanation from the respondent.

The tribunal invited Mr Phillips to identify evidence in support of his contention that this constituted a deliberate omission for the purposes of Art 76(6) (see paragraph 18 above), as opposed to an oversight. Mr Phillips referred the tribunal to the wording of Chief Superintendent McVea's email of 15 September 2020 (see paragraph 124 above), contending that his commitment to write formally to the claimant supported a conclusion that the failure to do so was a deliberate omission flowing from an active decision on his part. The tribunal has found that the ongoing failure to reply to correspondence from the solicitor went beyond carelessness or insensitivity and is highly suggestive of a deliberate decision to not reply (see paragraph 154 above).

The tribunal invited submissions from both Counsel as to the appropriate date to be attributed to this failure. In Mr Phillips'

submission, the appropriate date was four weeks' after Chief Superintendent McVea had indicated that he intended to write to the claimant formally. He further noted that the claimant had given evidence of having spoken to Chief Superintendent McVea on 9 October 2020 and of her solicitor having written to Chief Superintendent McVea in light of this conversation and of having received no further reply. In Mr Sands' submission, Chief Superintendent McVea would have been expected to send formal confirmation within a few days of 15 September 2020 at most. Having considered the claimant's note of the meeting of 9 October 2020, which she referred to in her evidence, the tribunal is satisfied that the date of the failure to reply for the purposes of Art. 76(6) extends beyond the date of that discussion on 9 October 2020, and beyond at least 16 October 2020 having regard to the unanswered correspondence from her solicitor.

Has the claimant discharged the initial burden of proof on her?

176. The tribunal concludes that the claimant has discharged the initial burden of proof on her in respect of the complaints made against her and in respect of the Regulation 12 assessment, the Regulation 16 notice being served, the failure to revise that assessment, the move to Police College and the failure to communicate personally to her the outcome of the review and the rescission of the notice. Having regard to all the evidence adduced in this case, the tribunal is satisfied that the claimant has proved facts from which a tribunal could conclude on the balance of probabilities that there had been sex discrimination. In this case the "something more" is drawn from:-

(i) all the complainants being men;

(ii) the disrespectful, undisciplined, abusive comments made about the claimant in the WhatsApp group;

(iii) the lack of any explanatory evidence adduced by the respondent in respect of the reason for 'the "first" Appropriate Authority's' Regulation 12 assessment, which was found to lie outside the bounds of reasonableness;

(iv) the perceived lack of "resilience" (in the context of an earlier perception of her being emotional) being used as a justification for her move; and

(v) against all of these background circumstances, an abject failure to communicate with the legal representatives of a very Senior female officer or provide her with formal written outcomes for which no explanation has been advanced. The tribunal has had regard to **Madarassy** (see paragraph 39 above) in assessing all of the evidence, including the evidence adduced by the respondent in contesting the case and to **Bahl** (see paragraph 41 above) when the Court of Appeal in England and Wales held that:

> *"…sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it."*

The tribunal draws such a prima facie inference of sex discrimination in respect of the cumulative unreasonable treatment afforded to the claimant and finds that it is enough to discharge the burden upon her to proves facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent that she had been discriminated against in all respects.

Has the respondent shown that the treatment was no sense whatsoever on grounds of her sex?

177. The respondent did not call any of the male complainants to give evidence, thus depriving the tribunal of any opportunity to properly assess their motivations in making their complaints. In respect of the complaints, the respondent has therefore failed to show that the complaints were in no sense whatsoever on grounds of the claimant's sex. Likewise, the respondent did not call 'the "first" Appropriate Authority' to give evidence and therefore the tribunal was unable to assess his motivations when he assessed the conduct of the claimant as gross misconduct, an assessment which the review commissioned by the respondent found lay outside the bounds of reasonableness. The respondent has therefore failed to show that Regulation 12 assessment was in no sense whatsoever on grounds of the claimant's sex.

178. In relation to the decision to serve the Regulation 16 notice, the tribunal did not hear from Assistant Chief Constable McEwan who gave the direction to go ahead and serve (see paragraph 91 above) and was therefore unable to assess his motivations in giving that direction. The tribunal did not receive any satisfactory explanation for the ongoing failure to revise the notice, in the face of grave reservations from a number of very Senior Officers about that assessment and the existence of an express power to revise the assessment contained in the Regulations, as confirmed by Mr Armstrong in his report. By contrast, the Chief Constable and Deputy Chief Constable both personally intervened in proceedings when it affected the Officers in Derry City and Strabane (see paragraphs 98 and 101 -102 above). The respondent has therefore failed to show that the service of and failure to revise the Regulation 16 assessment was in no sense whatsoever on grounds of the claimant's sex.

179. The tribunal did not receive any satisfactory explanation as to why the respondent organisation was so concerned about welfare considerations pertaining to the claimant, and why these did not apply to her male replacement whose journey time was equivalent, or as to why he would not attract the same concerns regarding resilience. The respondent has

therefore failed to show that the transfer of the claimant at the SMAP was in no sense whatsoever on grounds of the claimant's sex.

180. The tribunal did not receive any satisfactory explanation as to why the correspondence from the claimant's solicitor went consistently unanswered or why she was not formally informed of the rescission of the Regulation 16 Notice or informed of the management action taken against her. The respondent has therefore failed to show that these matters were in no sense whatsoever on grounds of the claimant's sex.

181. Accordingly, on the operation of the statutory burden of proof, the claimant must succeed in respect of these claims. The tribunal is also mindful of the need to avoid viewing the claimant's allegations of unlawful discrimination in isolation from the whole relevant factual matrix out of which the claimant alleges unlawful discrimination, per **Nelson** (see paragraph 30 above). Keeping in mind the fact that the claim put forward by the claimant is an allegation of unlawful sex discrimination and standing back and focusing on the issue of discrimination, the tribunal is satisfied that the claimant was discriminated against on grounds of her sex, and that the treatment she complained of would not have been afforded to an equivalently senior male Officer.

Was there a course of conduct and has the claimant's sex discrimination claim been brought within time?

182. The date of the last act of discrimination (a deliberate omission) in the course of conduct relied on by the claimant has been established as occurring after the 16 October 2020, for the purposes of Art. 76(6) (see paragraph 17 above). The tribunal is further satisfied having regard to ***Hendricks*** and ***Hale*** (see paragraphs 43 and 44 above) that the matters complained of by the claimant in relation to her sex discrimination claim amount to an act extending over a period of time and that her claim has therefore been brought within time.

183. Even if the tribunal has erred in this conclusion as to the date of the last discriminatory acts in the series the tribunal has a discretion to extend time where it is satisfied that it is just and equitable to do so. The tribunal is satisfied that in those circumstances, it would have been just and equitable to extend time, because having heard all of the evidence and submissions in the case, no issue of prejudice arises to the respondent. Having regard to the ***Keeble*** factors, in as far as they are relevant, no issue of cogency of evidence arises. Taking a broad view, the claimant cannot be faulted for having narrowed the scope of her claim once she had heard all the evidence. She is to be commended for doing so. Nor can she be criticised for having waited for the conclusion of the events, as she saw them, or for having sought a better understanding of them through information requests, before initiating legal action. A claimant cannot reasonably be expected to have applied the minute analysis required by final judgment to every element of their claim. It is not always reasonable to expect an employee to take his employer to a tribunal at

the first opportunity. Such an approach would only lead to the multiplicity of claims warned against in ***Hale*** (see paragraph 44 above).

PART F Remedies

184. The tribunal has found in the claimant's favour in both her claim of being subjected to detriment on grounds of having made protected disclosures and her claim of unlawful sex discrimination. The Employment Rights (Northern Ireland) Order 1996 provides the following in respect of remedy for public interest disclosure detriment;

Remedies

76.—(1) Where the industrial tribunal finds that a complaint under Article 74 is well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure complained of.

(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the infringement complained of; and

(b) any loss sustained by the complainant which is attributable to the act or failure which infringed his right.

…

185. The Sex Discrimination (Northern Ireland) Order 1976 provides the following in respect of remedy for sex discrimination:

Remedies on complaint under Article 63

65.—(1) Where an industrial tribunal finds that a complaint presented to it under Article 63 is well-founded the tribunal shall make such of the following as it considers just and equitable—

(a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;

(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court to pay to the complainant if the complaint had fallen to be dealt with under Article 66;

(c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.

…

(4) Where compensation falls to be awarded in respect of any act both under the provisions of this Article and under any other statutory provision, an industrial tribunal shall not award compensation under this Article in respect of any loss or other matter which has been taken into account under that other statutory provision by the court in awarding compensation in an action in respect of that act. (Tribunal's emphasis.)

Declaration

186. The tribunal, in light of its conclusions in respect of the claimant's public interest disclosure detriment claim and her sex discrimination claim, makes a declaration that the claimant's claims public interest disclosure detriment claim and sex discrimination are well founded in accordance with Article 76(1)(a) of the 1996 Order and Article 65 of the 1976 Order.

Compensation

187. In addition, both Article 76 of the 1996 Order and Article 65 of the 1976 Order provides that the tribunal may make an award of compensation to the claimant. Article 65(4) requires the tribunal to avoid double compensation in making its award.

188. ***Harvey*** on Industrial Relations and Employment Law at Division L Equal Opportunities 6. Remedies C. Compensation (8) More than one cause of action states at paragraph [870]:-

> "Similar issues may arise in cases that involve multiple forms of prohibited discrimination. In Al Jumard v Clwyd Leisure Ltd [2008] IRLR 345, EAT, the employment tribunal had found that there had been discrimination on grounds of both race and disability and made a single, composite award for injury to feelings. On appeal the EAT ruled that this was not the correct approach as, in this case, the acts complained of fell separately into the different categories of discrimination and should, therefore, have been considered separately with respect to those acts. Where more than one form of discrimination arises out of the same facts, however, the EAT recognised that it could be artificial to ask to what extent each separate head of discrimination has contributed to the injury to feelings and a single, composite award might well be appropriate. The correct approach will depend on the particular facts of the case, although at the end of any such exercise a

tribunal must 'stand back and have regard to the overall magnitude of the global sum to ensure that it is proportionate and that there is no double counting in the calculation':-

> *"50. However, where, as in this case, certain acts of discrimination fall only into one category or another, then the injury to feelings should be considered separately with respect to those acts. Each is a separate wrong for which damages should be provided. Apart from that, it will help focus the Tribunal's mind on the compensatory nature of the award. We would suggest for example, that it would not at all follow that the level of awards should be the same for different forms of discrimination. The offence, humiliation or upset resulting from a deliberate act of race discrimination may quite understandably cause greater injury to feelings than, say, a thoughtless failure to make an adjustment under the Disability Discrimination Act.*
>
> *51. Having said that, the courts have emphasised on a number of occasions, not least in Vento itself (para 68), that at the end of the exercise the tribunal must stand back and have regard to the overall magnitude of the global sum to ensure that it is proportionate, and that there is no double counting in the calculation."*

189. **Harvey** on Industrial Relations and Employment Law at Division DII Detriment; 22. Remedies for Detriment; E. Remedies for detriment—money compensation; (2) Injury to feelings states at paragraph [466]:-

> *"In the case of **Virgo Fidelis Senior School v Boyle [2004] IRLR 268** (followed in **Commissioner of Police for the Metropolis v Shaw [2012] IRLR 291**, EAT) the EAT held that in whistleblowing detriment cases the tribunal is entitled to make awards for injury to feelings, aggravated damages and exemplary damages (the amount of the injury to feelings award to be in accordance with the Vento guidelines (see L [887] ff))."*

190. **Vento** is also the basis of assessing injury to feelings in sex discrimination claims. Mummery LJ noted:

> *"50. It is self-evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. …*

51. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury. …"

191. The **Vento** bandings in place at the relevant time (claims presented after 6 April 2020, but before 6 April 2021) were:

— a lower band of £900 to £9,900, for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;

— a middle band of £9,900 to £27,000, for cases that do not merit an award in the upper band; and

— an upper band of £27,000 to £45,000, for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race;

— the most exceptional cases might be capable of exceeding £45,000.

192. In ***Forose v Geraighty 2023 NICA 2***, the Northern Ireland Court of Appeal observed that in a case where the tribunal had made separate awards for psychiatric injury and injury to feelings that:-

"*[34] Where the court has much greater difficulty is with the awards for injury to feelings and psychiatric damage as well as the simple addition of the sums awarded under those two headings. While the Tribunal acknowledged at para 41 of its decision the risk of double counting by awarding damages under different headings and then simply calculating the total, that appears to the court to be what it in fact did.*

[35] At paras 137-140 of its decision the Tribunal considered that on the basis of Dr Best's report, and by reference to a recent High Court award of £10,000 for psychiatric injury, the appropriate award to the claimant was £20,000. Regrettably, it did not then stand back and reflect on the fact that Dr Best's report had already been considered at length and quoted in the context of the injury to feelings award. That has led this court to conclude that there has been an element of double counting.

The Court of Appeal in that case decided to award a total for injury to feelings, including psychiatric injury.

Medical Evidence

193. Extracts from the claimant's GP notes and records were before the tribunal and Dr Sharkey provided expert medical opinion on behalf of the claimant. His report provided a summary of the index events in relation to a claim. The report confirmed that the claimant regarded being moved to the Head of Learning and Development at the Police College as being downgraded, as she was keen to be a serving active police officer and that the Police College position was not on her wish list. She informed Dr Sharkey that a sideways move after being in a role for only 10 months was very unusual and that she felt abandoned and scapegoated by the organisation. She viewed the move as a vote of no-confidence and felt embarrassed and felt her credibility and reputation had been undermined. [*The tribunal notes the evidence of the claimant's credibility and reputation being affected in the disrespectful and misogynistic text messages set out at paragraph 129 above*.] She contrasted this with the officers who had engaged in unreasonable attendance behaviour who did not have any action taken against them and she considered that the treatment of her was a reward for the tactical actions of the complaining officers. At the time of the report in March 2022, the claimant reported that whilst her mental health had improved from its worst point, but she had still not returned to the pre-incident level. Dr Sharkey confirmed that the claimant had been struggling with her emotional well-being prior to the index events and he reviewed relevant GP notes and entries in this regard. On this basis he opined that her symptom profile best fitted with the diagnosis of dysthymia, a low-grade mood disorder which has many of the characteristics associated with clinical depression but generally does not reach the intensity or severity to warrant this diagnosis. Dr Sharkey confirmed that the claimant had a deterioration in mental health arising as a result of the emotional impact of the events described in his report which met the diagnosis of an Adjustment Disorder, for perhaps 6 months thereafter in his opinion, the diagnosis of dysthymia applied again, although it was likely to have been exacerbated by the emotional upset associated with the index events. During his oral evidence in cross examination, Dr Sharkey confirmed that the claimant's account had been credible and that she felt she had not been treated fairly. In his view it was a significant factor the claimant was a person who put a great deal into work and therefore expected a great deal in return and that she felt very let down. The GP notes and records dated November 2020 recorded that her mood was a good deal better. Dr Sharkey opined that this did not equate to the claimant having recovered to the extent that she was back to where she was before the index events.

194. Mr Phillips also made reference to the Green Book on Personal Injuries in Northern Ireland. The Green book sets out a number of relevant factors in assessing general damages for psychiatric injury in personal injury cases. These are listed as:

(i) Ability to cope with life, education and particularly work

(ii) Effect on relationships with family, friends and those with whom he comes into contact etc.

(iii) Extent to which treatment would be successful

(iv) Future vulnerability

(v) Prognosis

(vi) The extent and/or nature of any associated physical injuries

(vii) Whether medical help has been sought.

195. Mr Phillips submitted that the relevant bracket to consider was the bracket marked subsection (c), moderate psychiatric damage. Under this heading, (c) Moderate Psychiatric Damage, injuries within this bracket are valued in the range of £12,000 to £48,500. The description states:

> *While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.*

196. The Green Book provides a further bracket in respect of minor psychiatric damage. The descriptor for this provides:

> *The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep are affected.*

Such injuries are valued at up to £15,000.

197. The tribunal rejects Mr Philips' submission that the tribunal should have regard to further guidance contained within the Green book relating to duration of symptoms for Post Traumatic Stress Disorder, as the claimant has not been diagnosed with Post Traumatic Stress Disorder.

198. The tribunal is satisfied that an Adjustment Disorder falls within the bracket of minor psychiatric damage. Having regard to the guidance in ***Forose*** and having had the benefit of hearing and seeing the claimant as she gave her evidence, the tribunal is satisfied that it is appropriate and proportionate to make an award for injury to feelings which includes psychiatric injury. The tribunal considers that the appropriate and proportionate award in this case is the sum of £25,000.00 as a global figure, per ***Forose***, to compensate her injury to feelings including her psychiatric injury in respect of the treatment she sustained from the respondent, which represents a figure falling within the mid **Vento** range. The claimant has succeeded in both her public interest detriment and the sex discrimination claims, arising from the same facts. The tribunal has carefully considered that there should be no double compensation of the claimant.

199. In assessing the injury to the claimant's feelings caused by the respondent's conduct, the tribunal has taken into account the claimant's own circumstances as a dedicated, high-ranking and long serving police officer with a distinguished career, the duration of the detriment sustained, which extended over a number of months, and impact on the claimant of the high handed manner in which the respondent organisation dealt with her, once the complaints were made. She did not receive information about the review, letters from her solicitor were routinely ignored, she was kept in the dark about the terms of reference for the review and the identity of the person carrying it out. She was essentially denied any knowledge of or right of reply in respect of matters which pertained to and affected her. The tribunal in fixing the amount of the global award has also taken into account that the claimant had been subjected to both detriment for public interest disclosure and sex discrimination. From the evidence before it, both the public interest disclosure detriment and the sex discrimination were operative factors in the injury to feelings sustained by the claimant. The effect on the claimant has not been lessened by the respondent's robust defence of her claims. In setting this figure, the tribunal has taken into account the expert psychiatric evidence that the claimant developed an Adjustment Disorder and that her underlying mental health symptoms were exacerbated for a period of time thereafter.

Interest

200. Damages for injury to feelings for discrimination can attract interest in accordance with the Industrial Tribunals (Interest on Award in Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996. The Regulations require the tribunal to consider the award of interest without the need for an application from a party in the litigation. The claimant is receiving an award which includes her injury to feelings arising from the sex discrimination that she was subject to.

201. The amount of the compensation awarded for public interest disclosure detriment cases shall be such as the tribunal considers "just and equitable" in all the circumstances. The tribunal therefore considers that, in the interests of providing a "just and equitable" remedy as required by Art. 76 of the 1996 Order, interest should be awarded on the entirety of the injury to feelings award, without any notional apportionment, which would be an entirely artificial exercise. There is no indication that serious injustice would be caused to the respondent by calculating interest on the relevant portion over this period.

202. Interest at 8% is therefore awarded on the entirety of the award for injury to feelings from 16 October 2020 to date.

Interest at 8% per annum £2,000.00 per year

16 October 2020 to 3 November 2023 inclusive equals 1,114 days at £5.48 per day = £6,104.72

203. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990 and the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996.

Employment Judge:

Date and place of hearing: **9 – 13 January 2023, 16 – 17 January 2023, 19 January 2023, 27 January 2023, 13 March 2023, 17 April 2023 and 23 October 2023, Belfast.**

Date judgment recorded in register and issued to parties: