Neutral Citation Number: [2022] EWHC 2514 (KB)

Case No: QB-2019-000477

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 October 2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

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Between :

KSO **KWS** **I KBS & ORS**	**Claimants**
- and -	
COMMISSIONER OF POLICE OF THE METROPOLIS & ORS	**Defendants**

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Mr M Westgate KC, Ms S Crapper and Mr P Kuhn (instructed by **Pattinson and Brewer Solicitors**) for the **Claimants KSO and KWS**
Mr B Cooper KC and **Ms R Snocken** (instructed by **Slater & Gordon LLP**) for the **Claimant KBS**
Mr J Beer KC and **Mr J Dixey** (instructed by **Weightmans LLP**) for the **Defendant Commissioner**

Hearing dates: 25, 26, 28 January, 1 – 4 February and 19 – 22 July 2022

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Approved Judgment

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Approved Judgment

Mrs Justice Heather Williams:

Introduction

1. KSO, KWS and KBS are the lead claimants in respect of a large number of claims concerning police officers' entitlements under the Police Regulations 2003 (SI 2003/527) ("PR 2003") and the Secretary of State's Determinations made under the regulations. KSO is a serving police officer at all material times holding the rank of constable. KWS was a constable until her retirement. Unlike the other lead claimants she worked part-time. KBS held the rank of inspector until her retirement. Claims were initiated by more than 1,200 officers from a number of police forces. Some of these claims have been resolved. The claims have been case managed together and are referred to collectively as the Police Overtime Claims Litigation ("POCL"), pursuant to the order of HHJ Freeland QC dated 30 April 2018 (prior to the transfer of the claims to the High Court by order dated 25 January 2019).

2. KSO and KWS were handlers of Covert Human Intelligence Sources ("CHIS") and KBS was a controller. The claims relate to work undertaken outside of their scheduled periods of duty for which they say that they were not paid the allowances due to them and/or granted the additional leave days that they should have received.

3. In *Allard v Chief Constable of Devon and Cornwall* [2015] EWCA Civ 42, [2015] ICR 875 ("*Allard*") the Court of Appeal held that CHIS handlers were recalled to duty in a number of identified scenarios and that a requirement to do duty or a recall to duty did not have to be as a result of an express instruction, but could occur on an occasion "which, as a result of his current orders, requires the officer to carry out a particular task" (para 21). The contemporaneous documentation indicates that pre-*Allard* it was not fully appreciated within the MPS that this kind of out of hours contact between a handler and a CHIS would amount to a recall to duty thereby potentially giving rise to a right to overtime payments and other entitlements. *Allard* was primarily concerned with when a recall to duty occurred; this litigation addresses the entitlements that arise under the PR 2003 and the Determinations when there has been an out of hours recall to duty or a requirement to duty.

4. There are 7 species of claim for pay or allowances before the Court:

   i) Overtime claims arising from duty undertaken on normal working days between two tours of duty. This only applies to constables and sergeants as officers of the rank of inspector and above cannot claim overtime;

   ii) Duty undertaken on a rest day – all officers;

iii) Duty undertaken on a public holiday – all officers;

iv) Duty undertaken on an annual leave day – all officers;

v) Duty on a free day – only applicable to part-time officers, such as KWS;

vi) On call allowance – all officers;

vii) Unsocial hours allowance – all officers.

Other than the on call allowance, the entitlements are said to arise from times when out of hours work amounting to a recall or a requirement to do duty was undertaken. The on call allowance is said to be payable because officers had to remain contactable out of hours in order to deal with these instances.

5. The claims for outstanding pay and allowances are brought as statutory debts. The claims arising from an alleged failure to grant additional leave in consequence of the officer having undertaken duties on rest days, public holidays, free days and/or days of annual leave are brought as actions for breach of statutory duty and, in the alternative, injunctive relief is sought (where the officer remains in service) and/or a quantum meruit. The defendant denies that any viable claim arises in these circumstances (in addition to taking issue over various aspects of the qualifying criteria).

6. There were originally seven lead claimants, but four of those cases have since settled. There is no Group Litigation Order, but the intention (as reflected in the order of 30 April 2018) was that, between them, the lead claims would raise all of the principal disputes of law, so that the Court's judgment in the trial of those claims would facilitate the resolution of the other cases. In light of the reduced number of lead claimants, there are some issues that were previously identified by the parties that did not arise for resolution in this trial. Nonetheless, a substantial number of disputed issues were before the Court. These issues primarily relate to the correct construction of the material provisions of the PR 2003 and the Determinations and the remedies that arise. As the 30 April 2018 order contemplated, the Court is also asked to provide guidance on a number of evidential areas. In general terms these relate to how claimants are to prove the number of recalls to duty and requirements to do duty and their duration in circumstances where the available records are not comprehensive. I detail the agreed list of issues below. The outstanding claims are stayed pending resolution of the lead claims. (Save where the context indicates that I am referring to the wider cohort of claimants, I will from now on refer to the three lead claimants as "the claimants".)

7. Whilst the legal issues continued to evolve and develop during the course of the trial (as described below), the essence of the claims were set out in the Re-Amended Particulars of Claim (KSO), the Amended Particulars of Claim (KWS) and Particulars of Claim (KBS). The defendant's responses were contained in the Amended Defence (KSO) and in the Defences (KWS and KBS). In each instance the defendant also raised a counterclaim which is no longer pursued. Parts of each claim were admitted. The claimants have served detailed schedules of loss and the defendant has provided counter schedules in response. I am not asked to quantify the claims at this stage; the parties hope that with the benefit of this judgment, they will be able to agree the

figures. Nonetheless it was useful for me to see how resolution of the issues before me impacted on the value of the claims. Excluding interest and leaving aside questions of taxation, KSO's schedule totals £58,442.84; KWS's schedule totals £58,311.53; and KBS's primary way of putting her claim in her schedule amounts to £171,503.26. The comparable figures from the defendant's counter-schedules are £20,325.00 (KSO), £14,401.74 (KWS) and £363.68 (KBS).

Open justice and anonymity

8. By orders dated 30 April 2018 and 15 March 2019, HHJ Freeland and Senior Master Fontaine, respectively, ordered that all cases in the POCL would be anonymised and the claimants referred to by ciphers. Anonymity orders were subsequently made in respect of a number of the defendant's witnesses. By order dated 15 March 2019, Senior Master Fontaine ordered that no non-party could access the court file without her consent or the consent of the parties.

9. As the assigned trial judge, I heard the defendant's application for the trial to be heard in private on 16 December 2021. Broadly speaking, the claimants were in agreement with the Commissioner's application. I heard the parties' submissions and gave an *ex tempore* judgment (subsequently transcribed). As set out in the Court's order dated 22 December 2021, I rejected the proposition that the entire trial should be heard in private, but I accepted that the evidence should be heard in private. In short summary, I was satisfied that this course was necessary pursuant to CPR 39.2(3)(b) (c) and/or (g), given that the evidence would involve detailed reference to the defendant's covert management systems and procedures regarding officers' contact with CHIS and to operational details and tradecraft. Furthermore, in these cases, the nature of the very serious criminality under investigation meant that there were risks to the safety of the CHIS themselves and to the officers involved in working with them if they became identifiable as a result of evidence given in open court. I was also satisfied that the evidence that needed to be heard in private could not be effectively disentangled from that which could be heard publicly. However, I rejected the proposition that open and closing submissions should be heard in private and I adopted the parties' fallback position, that submissions would be heard in public save that no public reference was to be made to any of the matters listed at para 1(i)-(xvi) of the Court's order. Reference should be made to the 22 December 2021 order for the full list, but it included names of CHIS and officers, dates of contacts, the units to which the claimants were attached, systems used for recording contacts with CHIS and methodology used in the management of CHIS. I concluded that this was the proportionate course to take given that much of the submissions would be legalistic in their content and I was satisfied that counsel would be able to organise their material so as to avoid reference to the listed matters in open court. I ordered that the parties' open and closing written submissions should be open to public inspection save for reference to any of the matters listed in the order.

10. At para 5 of the 22 December 2021 order I directed that non-parties could not obtain or inspect the trial bundles or any closed skeleton arguments filed by the parties without my permission or the permission of Senior Master Fontaine (any such application to be made in writing and on notice to the parties).

11. The order dated 22 December 2021 was published on the judiciary website. Paragraph 10 provided that any person who was not a party could apply on notice to set aside or vary it. No such applications were made.

12. In the event, most of the opening and all of the closing submissions were heard in public and it proved unnecessary for the Court to go into private session during these parts of the proceedings as counsel were able to make their submissions without explicit reference to the matters listed in the order. As I foreshadowed when I gave judgment on 16 December 2021, the arrangements for hearing the witness evidence were kept under the review and in the event it was possible for one of the defendant's witnesses, Mr O'Sullivan of BTS Holdings to give his evidence in public. Counsel helpfully prepared both public and private versions of their opening and closing written submissions (in line with the terms of my order).

13. I have taken as open an approach as it is possible to adopt in relation to the contents of this judgment. As with the parties' written submissions, the only text that I have not made publicly available concerns the matters listed in para 1(i)-(xvi) of the 22 December 2021 order and other details that could lead to the identification of the claimants. These appear in an Annex to this judgment which is confidential to the parties. The material passages are indicated by a cross-reference in this judgment in the form "[Annex 1]", "[Annex 2]" and so forth.

The course of the trial

14. KSO and KWS each provided two witness statements. (As with all witnesses, I will refer to their statements in the form "KSO1", "KSO2" and so forth). KBS provided a statement from herself and one from her witness KKPA (who had also worked as a controller). The defendant served statements from the following: DCI TP (who had investigated KSO's claim; and KSO had worked under for a period); DI KTJ (who was primarily involved in investigating KBS's claim); retired D/Supt KHP (who KBS had worked under for a period); retired DI KMT (who had dealt with disclosure primarily in relation to KSO); retired D/Supt KKV (who had not supervised any of the claimants, but who addressed working practices more generally in relation to CHIS); and Daniel O'Sullivan of BTS Holdings (who had investigated records relating to a mobile telephone used by KBS). Although the defendant originally intended to call each of their witnesses to give oral evidence, it emerged that KKV had emigrated and accordingly a hearsay notice dated 27 June 2022 was served in respect of his statement.

15. In addition to the witness evidence, there was an agreed bundle of documents comprising 1,628 pages and electronic spreadsheets setting out the data that had been assembled in respect of each of the claims.

16. The trial was due to start on Tuesday 25 January 2022 (after a reading day) and to be completed by Friday 4 February 2022. It was to be held in person, although provision had also been made for video-link facilities in the order dated 29 November 2021 which was made by Yip J at the pre-trial review. In the event Mr Cooper KC, leading counsel for KBS, had to attend remotely, via CVP, on 25 January 2022 as he had recently tested positive for COVID-19. He indicated that he was well enough to proceed with opening submissions as planned and these were heard over 25 and 26

January 2022, with Mr Cooper making his submissions via CVP and other counsel attending in person.

17. On the morning of 26 January 2022, having had the opportunity to take instructions overnight, Mr Beer KC objected to the remote link being used during the private hearings of the witness evidence, given the highly sensitive nature of the topics that would be covered and the related substantial security concerns. He explained that the difficulties would not be alleviated by using an alternative remote platform. Counsel for the claimants did not dispute the basis of the concerns raised by Mr Beer, but they proposed that some evidence, for example some of the claimants' evidence, could be heard with the remote link in use. Mr Beer did not accept that the evidence could be divided in this way and emphasised that the Court had accepted the proposition that it would be very difficult for witnesses' evidence to be disentangled between the sensitive and the non-sensitive when giving the ruling on 16 December 2021.

18. Having reflected on the position I gave my decision after the conclusion of oral opening submissions on 26 January 2022. With some reluctance, I accepted that in light of the Commissioner's concerns it would not be appropriate to proceed by way of a hybrid hearing in relation to evidence that I had already ruled should be heard in private. (And in light of that earlier ruling no additional open justice considerations arose at this stage). As matters stood this meant that the witness evidence could not be heard until Mr Cooper was able to attend the trial in person. At that stage it was hoped that he would be testing negative and able to do so by the start of the second week. I asked counsel to liaise to see what, if any, progress could be made via a hybrid hearing in the interim. Following further discussion it was agreed that we would not sit on the following day, but that on Friday 28 January Mr O'Sullivan would give evidence, as it was now accepted that this could be heard in open court and then closing oral submissions would be delivered on Issue 2, as it was not dependent on the evidence that would be called.

19. In the event, for the reasons I explain below, it was not possible to hear Mr O'Sullivan's evidence on 28 January. I did hear closing submissions on Issue 2.

20. Unfortunately on the following Monday Mr Cooper was still testing positive and thus was unable to attend the trial in person. This continued to be the position throughout the second week (during which time Mr Cooper continued to indicate that he felt well enough to participate in terms of evidence that could be heard remotely). In the event, counsel arrived at a helpful plan that meant at least some of the remaining witnesses could be heard that week. I am grateful to Mr Cooper and to his junior Ms Snocken, for the flexibility that they showed in relation to this.

21. The agreed plan involved KSO, KWS, KBS and KKPA giving their evidence with no remote link and thus no attendance from Mr Cooper. He did not anticipate needing to ask any questions of KSO or KWS and Ms Snocken would be present in court and able to ask them questions if anything arose. I indicated that I would give her time to consult with Mr Cooper (by telephone) should she wish to do so. In the event Ms Snocken had no questions for either KSO or KWS. When it came to KBS giving evidence, Ms Snocken had no supplementary questions by way of evidence in chief and after Mr Beer's cross examination, I permitted an extended lunch break so that she could discuss her proposed re-examination with Mr Cooper. She then asked questions on a number of topics. A similar format was adopted in relation to KKPA

(although on this occasion there was no re-examination). Mr O'Sullivan then gave evidence in open court, meaning that Mr Cooper was able to attend remotely and to conduct the cross examination of this witness. That concluded the evidence that could be heard at that stage and, unavoidably, I had to adjourn the trial part-heard. Due to counsel's pre-existing professional commitments, it was not possible to hold the resumed hearing until July 2022. Over the week commencing 19 July 2022 all counsel attended in person and I heard the evidence of the remaining defence witnesses and then closing submissions.

22. The reason that Mr O'Sullivan was unable to give evidence on Friday 28 January 2022 as had been anticipated, was because he had very recently realised that some of the available data concerning outgoing calls and texts from KBS's phone had been overlooked and thus not included within the relevant spreadsheets and analysis (which, in turn, had been relied upon by the defendant as evidencing her out of hours work). Plainly the further material needed to be disclosed and the legal teams needed to have an opportunity to consider it. Mr Cooper expressed some consternation at the situation, given that his team had been pointing out apparent gaps in the data for some time. In the circumstances Mr Beer accepted that in addition to disclosure of the further data, the defendant should file and serve: (i) a further witness statement from Mr O'Sullivan addressing the nature and parameters of the searches he had undertaken to identify the additional telephone data; and where gaps in the telephone data remained; and (ii) a statement addressing the nature and parameters of the searches previously carried out in respect of the telephone data, explaining why the additional telephone data had not been identified or disclosed at an earlier stage. I made an order in these terms, requiring Mr O'Sullivan's statement to be served by 1 February 2022 and the further witness statement by 2 February 2022, with a view to Mr O'Sullivan then giving evidence on 4 February 2022. Witness statements were duly served from Mr O'Sullivan and KTJ addressing these matters and, as I have already noted, Mr O'Sullivan gave evidence on the second Friday of the trial.

List of issues

23. At the outset of the trial I was provided with an agreed revised list of issues dated 17 January 2022. In light of the defendant not pursuing a counterclaim and the settlement of some of the lead claims, a number of the original issues were marked as deleted. During the course of the January – February 2022 hearings it became apparent to me that the list of issues required further updating. The document did not fully reflect some significant matters of dispute (for example, what became issue 7A) and also included matters that were now agreed or I was not being asked to decide at this stage. I asked counsel to prepare an updated list that clearly identified the issues that the parties asked me to decide, to be available for the start of the resumed hearing in July 2022. A further revised list was prepared that was dated 18 July 2022. However, on considering the same it was apparent to me that some of the outstanding matters had not been addressed. Accordingly, I discussed the document in some detail with counsel during the hearing on 20 July 2022. Their helpful explanations confirmed that the list still required substantial updating and I asked that a fully updated list be provided for closing submissions.

24. This did not happen as it emerged during the process of preparing and delivering written and oral closing submissions that there were yet further matters in dispute concerning the correct construction of the Determinations, which had previously not

been appreciated and/or advanced. In particular issues 1C, 10AA and 10A only emerged, or at least only clearly emerged, during Mr Beer's closing submissions. In consequence, the finalised list of issues remained a work in progress whilst leading counsel were addressing their closing arguments to me. The finalised version of the list was only provided to the Court on 22 July 2022, the final day of the hearing, at around 4.40 pm immediately after Mr Beer had concluded his reply (although the document is dated 21 July 2022). This was a less than ideal situation. It meant I only had limited time to consider and discuss this iteration of the list of issues with counsel and it has resulted in a more unwieldy document than would likely have been the case had it been finalised by counsel at an earlier stage under less pressure of time.

25. My description of these circumstances is not intended to be read as a criticism of counsel. I received very considerable assistance from all counsel in this complex matter in the form of very high quality written materials and oral submissions. In addition to the opening and closing written submissions that I have already referred to, I was supplied with helpful schedules, notes and appendices on a variety of relevant topics. The late emergence of certain issues was likely reflective of the scale of the parties' cases and the text of the Determinations, the interpretation of which is, at times, less than straightforward. Nonetheless it is important to record the circumstances in which the issues were identified. As well as a delayed finalised list of issues, it also meant that whilst I received very detailed submissions on topics that had been the subject of long-term disputes (such as Issues 1, 4 and 8 – 10) and topics that had at least clearly emerged by the time of the opening submissions (such as Issue 7A), the newer issues were inevitably dealt with more briefly by counsel, without, for example, much reference to the history of the particular provisions.

26. Mr Westgate KC raised some concerns in his closing oral address over the lateness of the newly emerging issues. In each of these instances I have considered carefully whether it is in fact appropriate for me to decide the issue at this stage. On the one hand, given the intended role of the lead claims, the (unavoidable) delay that has already occurred in concluding this trial and the costs and court time that has been expended, it is highly desirable that I resolve as many of the disputed issues as it is reasonably possible to do at this stage, in particular where they involve points of construction unrelated to the evidence and where the new point is closely linked to an existing issue – so that a comprehensive understanding of the operation of a particular provision or set of provisions can be arrived at. On the other hand, it is important that no party is prejudiced by the late emergence of an issue and that the relevant material is before the Court. I have borne all these considerations in mind when approaching each of the newer issues (as I discuss when I consider each of them individually).

27. I have reproduced below the parties' finalised list of issues as it was provided to me, save that in respect of the issues I do not have to decide at this stage I have simply referred to the issue number and the reason for this in bracketed italicised text. To avoid confusion I have retained the parties' numbering of the issues. (I have also made a few minor stylistic changes to the parties' text purely for clarity and consistency.)

28. The finalised list of issues was as follows:

> "<u>Application of the 4 hour minimum</u>

1. *Relevant to the sergeants and constables*: Under the following paragraphs of the determinations where periods of are to be deemed to have been for a minimum of 4 hours:

    - Overtime – Annex G para (1)(h)(iii) until 31 March 2012
    - Rest Day Working – Annex H para (3)(h)
    - Public Holiday Working – Annex H para (3)(h)
    - Free Day Working – Annex H para (3)(h) (for part-time workers)

    How is the 4 hour minimum to be applied?

    Claimants: The claimants to be deemed to have worked for 4 hours for each recall of less than 4 hours but where there can be no double counting.

    Defendant: Officers are entitled to treat a recall to duty or a requirement to do duty as being for a minimum period of 4 hours irrespective of the actual time spent doing the duty, however any further recall or duty within those 4 hours does not attract further payments of 4 hours.

1A. Length of recall

a. How long did recalls last and in determining this issue what use should be made of the estimates given by KSO and KWS as to the average work involved?

b. In determining whether several duty activities constitute a single recall or more than one recall is the Constable Claimants' approach to clustering appropriate?

c. In quantifying KWS's claim is she entitled to rely on the uplift adopted by her in her schedule of loss at 2.3.1(a) to take account of longer than average recalls?

1B. Whether a contact amounts to a recall to duty or a requirement to do duty

Relevant to the controllers: Is a controller recalled to duty or required to do duty where that recall is not in respect of urgent contact with or about a CHIS?

1C. *Relevant to constables and sergeants*: For the purposes of Annex G (overtime) and H (duty on a rostered rest day, duty on a public holiday or duty on a free day), is it necessary for an officer to have completed 15 minutes of duty before the entitlement to an allowance arises?

Defendant: The entitlement only arises where an officer has completed 15 minutes of duty.

Claimants: For rest days, public holidays and free days: no, by reason of the operation of Annex H (3)(h). For recalls to duty between two rostered tours of duty: until 31 March 2012, no by reason of the operation of Annex G (1)(h)(iii); 1 April 2012 and after, yes.

Effect of under-compensation through time off in lieu of an allowance

2. *Relevant to the sergeants and constables*: For the purposes of Annex G and H, where an officer has made an election for time off in lieu which has not been granted in full does the officer remain entitled to an allowance in respect to the shortfall?

Claimants: Yes

Defendant: As this issue…does not arise on the facts of the current Lead Claims, the Court should be cautious about determining [issue 2].

Without prejudice to the foregoing: No. The payment of an allowance is an alternative to the time off in lieu. When an officer has elected to receive the time off in lieu, they cannot now recover the balance of any untaken leave. There is no cause of action entitling the payment of damages as an alternative to accrued but not taken days of additional leave. In the alternative, if such a claim can be made, any claim must be brought within a reasonable period of time and therefore does not fail by reason of delay and /or laches.

[*Issue 3: deleted by the parties*]

On call allowance

4. In what circumstances is an officer like a CHIS Handler and a controller of CHIS Handlers 'on call' for the purposes of Regulation 34 and Annex U (for the on-call allowance introduced from 1 April 2013 onwards)?

Claimants: An officer in on call for the purposes of paragraph 13 of Annex U when they are required to be available to perform their duties as CHIS Handler/Controller outside their rostered tours of duty.

Defendant: An officer is 'on call' for these purposes when they are rostered as such so that they must be fit and able to return to duty and undertake police duties.

5. Is each Claimant owed a statutory debt in respect of unpaid on call allowance?

[*Issues 6 and 7 as formulated related to the unsocial hours allowance. The parties accepted that there were no issues of principle requiring resolution at this stage. There are some outstanding matters of calculation*.]

Additional leave in lieu of duty on public holidays and rest days for inspectors

7A. What are the entitlements of Inspectors in respect of Rest Days and Public Holidays under Annex E (4)(b) and Annex H (1)(g)?

Claimant: Inspectors are entitled to two rest days per week and public holidays free from all requirements of duty, except where that is precluded by the exigencies of duty, in which case they are entitled, so far as the exigencies of duty permit, to a day in lieu or another rest day free from all requirements of duty within the next 12 months.

Defendant: So far as the exigencies of duty permit, inspectors are (i) allowed a day's leave on each public holiday, and (ii) be granted two rest days in each week. Where the exigencies of duty have precluded the allowance and/or grant, the inspector is, so far as the exigencies of duty permit, to be allowed or granted a day's leave in lieu within the next 12 months. Annex H (1)(g) does not permit an inspector to claim compensatory leave or damages for work performed on public holidays or rest days where the duty is performed by reason of a recall or requirement which arises on the day itself.

Additional leave claims

8. Does failure by a chief officer to grant additional leave accrued under the following provisions give rise to a right to claim damages for breach of statutory duty:

- Annual Leave: Regulation 33 and Annex O
- Public Holidays: Regulation 26 and Annex H
- Rest Days: Regulation 26 and Annex H

Claimants: Yes, if the chief officer fails to grant that additional leave within (in relation to Inspectors under Annex H (1)(g): see issue 7A the following 12-month period, or (in relation to all other provisions) a reasonable time period then the chief officer is in breach of the statutory duty upon him to grant the officer compensation for the interruption of annual leave days,

public holidays and rostered rest days as set out in the 2003 Regulations and the Determinations made thereunder.

Defendant: No. The payment of an allowance is an alternative to additional leave. There is no cause of action entitling the payment of damages as an alternative to accrued but not taken days of additional leave. In the alternative, if such a claim can be made, any claim must be brought within a reasonable period of time and therefore does not fail by reason of delay and/or laches. KBS as an inspector is not entitled to claim anything for work performed on public holidays or rest days (see issue 7A).

9. Alternatively, does failure by a chief officer to grant additional leave accrued under the [*provisions listed in issue 8*] give rise to a right to restitution or an award of quantum meruit?

Claimants: Yes

Defendant: No

10. If so, does a time limit apply to this financial compensation for accrued leave?

Claimants: The time limit for a breach of statutory duty claim is 6 years, which for claims under all provisions other than Annex H (1)(g) runs from the expiry of a reasonable time for the date when the requirement to grant additional leave arose and for claims in relation to Annex H (1)(g) (relevant to Inspectors only) runs from the end of the relevant 12 month period.

Defendant: The time limit for a breach of statutory duty claim is 6 years, but if this is an equitable claim then it is subject to equitable principles of delay and laches. Whilst that period will be fact-sensitive, any claim must – in the context of 'employer' planning duty rosters – be brought within a relatively short period of time.

10AA. For the purposes of Annex O, paragraph 5 is it necessary that the officer be recalled to duty for 1, 2, 3 or more days before the entitlements arise?

Defendant: Yes, the entitlements only arise where an officer has been called to duty for 1, 2, 3 or more days as opposed to merely performing some duty however short on such a day.

Claimants: No, it is only necessary for an officer to be recalled to duty on a qualifying day of annual leave, namely a day of annual leave (or a weekend in the middle of an annual leave period) or day when the officer is taking TOIL which is part of a three day absence from duty.

10A. What compensation is an officer entitled to receive when they are recalled to duty from a period of absence to which Annex O paragraph 5 applies?

Defendant: Where the officer was recalled to duty **for** 1 or 2 days (whether or not in the latter case those days formed a single period), an additional 2 days' annual leave or if he/she so chose, 1 day's annual leave and 1 day's pay at double time, in lieu of each such day for which he/she was recalled.

Where the officer was recalled to duty **for** 3 or more days (whether or not they formed a single period): (i) 2 days' annual leave or if he/she so chose, 1 day's annual leave and 1 day's pay at double time, in lieu of each of the first 2 such days for which he/she was so recalled; and (ii) 1 1/2 day's annual leave or if he so chose, 1 day's annual leave and ½ day's pay at double time, in lieu of each such day for which he was so recalled thereafter.

Claimants: If the officer is recalled to duty on a qualifying day then they are entitled to the compensation outline above. The Claimants do not accept that an officer is required to perform a normal duty day before the entitlement to compensation arises.

11. If an officer is recalled to duty or required to do duty on a day of annual leave which does not fall within Annex O paragraph 5, what compensation are they entitled to for that recall to duty?

Claimants: If *leave* is taken it should be equivalent to the *length of the interrupted day* (i.e. if the day was 9 hours, it should be 9 hours); and If *pay* is taken it should be calculated by reference to the same number of hours (i.e. 9 hours at double-time).

Alternatively, if the leave day is interrupted then the leave day is cancelled and the officer is entitled to have the leave day restored to them and to claim damages, a declaration, injunction and/or an award of quantum meruit for D's failure to restore that day.

Defendant: None, because such a recall to duty or requirement to do duty falls outwith Annex O, paragraph 5.

12. What other potential remedies may the Court order in respect of the additional leave claims?

Claimants: Declarations and mandatory injunctions

Defendant: None

[*Issue 13 deleted by the parties*]

14. Does the doctrine of laches or acquiescence apply to any of the claims brought?

Claimants: Yes, insofar as any of the remedies sought by the claimants are equitable but the claimants deny that laches or acquiescence should operate to defeat their claims in the circumstances of these cases and, in any event, a detailed factual enquiry will be needed on a case by case basis to determine whether they should act as a bar to recovery in each case. It is not clear what is intended by the reference to the 'arrangements that were in place' in each of

the Amended Defences and the Defendant is required to particularise the same in order that the nature and extent of this issue can be identified in each case before trial.

Defendants: Yes. The reference to 'arrangements that were in place' refers to the particular arrangements which operated to make payments to the claimants for work done outwith their rostered tours of duty / shifts and/or where the claimants were permitted to take time off from their rostered tours of duty / shifts in lieu of work done outwith their rostered tours of duty shifts.

[Issue 15: although retained on the List, the parties agreed that this does not arise in relation to the claims before the Court.]

16. For the purposes of the following determinations which involve election by the officer to additional days of leave and/or time in lieu of payment:

- Annual Leave / TOIL – Annex O, para 5
- Free Day Working (Part-time officers) – Annex H para 2

a. When does such election need to have been made?

Claimants: The election can be made at any time whilst the chief officer is able to grant additional days leave.

Defendant: The election must be made within a reasonable period of time of the officer incurring the right to make the election (i.e. when they in fact undertake the work).

b. If not made before, can it be made within the pleadings?

Claimants: Yes

Defendant: The cause of action must have accrued before the issue of the claim form.

[*c. is not a live issue, as the parties agreed that the election could not be made after the officer had left the police force at which the entitlement accrued*.]

[*Issues 17 and 18 concerned specific factual and calculation issues that were not before the Court at this stage*.]

[*Issues 19 and 20 were deleted as they related to the now withdrawn counterclaim*.]

[*Issues 21 and 21A concerned interest and tax, respectively, and were not before the Court at this stage*.]

[*Issue 22 did not concern the lead claims and had been deleted*.]

Quantification and disclosure issues:

23. For the purposes of quantifying the claims:

[a. *The parties agreed that not each and every occasion of duty outside an officer's rostered tour of duty need be proven by witness or documentary evidence*.]

b. Otherwise, can the claims be quantified by:

(i) demonstrating general and/or average frequencies and/or durations of out of hours duty; and/or

(ii) demonstrating a representative number of occasions on which such duty was worked, for example by dip sampling?

Claimants: Yes to both. (i) is likely to be the only practical means by which the claims can be quantified where documentary records of out of hours duty are not or no longer available or the defendant has failed to provide any or has provided incomplete disclosure and inspection of the relevant records.

Defendant: No to (i), yes to (ii). The Court must quantify the claims on the basis of witness and/or documentary evidence rather than estimates or guesses as to the frequency and/or duration of out of hours contact.

[*The parties agreed that sub-issue c. relating to disclosure in other cases does not require the Court's determination at this stage*.]

Additional issues arising in specific cases:

[Issues 24 – 33 concerned lead cases that have now settled or, in the case of KBS, points that are now covered by other listed issues.]

KWS

[*Issue 34: the parties agreed that Monday was the day of the week fixed by the chief officer for the purposes of Annex G (3)(a).]*

[*Issue 35 involves factual questions in relation to particular periods of duty which the parties agreed the Court does not need to resolve at this stage*.]

[*Issue 35A: the parties agreed that any deemed hours and actual time worked on normal working days and free days counted towards the 8 hours and 40 hours thresholds in Annex G*.]

36. What compensation was KWS entitled to for additional duty she performed when recalled to duty between tours if she had not worked 8 hours in a day or 40 hours in a week?

KWS: Compensation at plain time, until those thresholds were reached, and payment at plain time plus enhancement of a third when the thresholds were reached.

Defendant: Compensation at plain time, until those thresholds were reached, and payment at plain time plus enhancement of a third (i.e. 1/12th of an hour's pay) for each completed 15 minutes in excess of 8 hours on any day during that period on which she was on duty for more than 8 hours.

36A. In respect of a recall to duty prior to 1st April 2012 if KWS was entitled to payment at plain time (not having met the 8 or 40 hour condition) then does a 4 hour minimum apply by reason of Annex G(3)(m) and (f)?

KWS: Yes

Defendant: No

37. It being relevant to KWS as a part-time officer on any occasion where duty was performed on a free day, was it reasonably practicable for the duty to have been done by any other officer?

KWS: Yes, as a matter of generality it was always reasonably practicable for the duty KWS performed on her free days to have been performed by KWS's co-handler or a full-time handler within her unit.

Defendant: No. On the evidence, responding to contact(s) from a CHIS could not have been done by any other officer.

37A. If it was not reasonably practicable for the duty KWS performed on a free day to have been done by another officer what compensation is KWS entitled to for that duty?

KWS: If KWS was on duty for more than 40 hours during the week it occurred, an allowance at time and a third for each completed period of 15 minutes of duty. In any other case, KWS is entitled to pay at plain time for the hours she worked (subject to the 4 hour minimum) time off equal to the total length of those periods which can be claimed as damages for breach of statutory duty for D's failure to grant the time off.

Defendant: If KWS was on duty for mor than 40 hours during the week in which the free day occurred, an allowance at time and a third for each completed period of 15 minutes of duty. In any other case, time off equal to the total length of those periods. The Defendant's position on breach of statutory duty is repeated.

KSO

38. Has the Claimant shown that he was required to do duty or recalled to duty on the occasions specified in his schedule of loss where they do not appear on the Defendant's schedule, in particular where he relies on his diary to evidence the fact that he was required to do duty?

KSO: Yes, the diaries accurately reflect occasions of out of hours contact.

Defendant: No. KSO's diaries are not the best evidence available and cannot safely be relied upon as evidence of out of hours contact(s)."

CHIS handlers and controllers and recalls to duty

29. CHIS are individuals who are recruited by police and other security agents, often the associates of known criminals, to provide intelligence, commonly for the payment of money. All CHIS are registered by the police force for whom they operate and their use is subject to Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA"), national guidance and force procedures. Section 26(8) RIPA defines a CHIS. Pursuant to s.29(2)(c) RIPA, use and conduct authorities for CHIS shall not be granted unless arrangements exist for the source that satisfy the requirements of s.29(5), which includes ensuring that there will at all times be a person – a handler – who will have day-to-day responsibility for dealing with the source on behalf of the relevant investigating authority and for the source's security and welfare; and a person – a controller – who will at all times have general oversight of the use made of the source. A CHIS handler is usually an officer of the rank of constable or sergeant; and a CHIS controller is usually an inspector or a sergeant. Each CHIS has a co-handler as well as their main handler and both handlers attend face to face meetings with the CHIS. Authorities for CHIS are granted by officers of the rank of superintendent, who must be satisfied that it is necessary for one of the reasons identified in s.29(3) and that the conditions set out in s.29(5) are satisfied.

30. Codes of Practice concerning CHIS are published pursuant to s.71(4) RIPA. The 2014 edition explains the roles of handler and controller as follows:

> "6.7 The person referred to in section 29(5)(a) of the 2000 Act (the 'handler') will have day-to-day responsibility for:
>
> - Dealing with the CHIS on behalf of the authority concerned;
> - Directing the day-to-day activities of the CHIS;
> - Recording the information supplied by the CHIS; and
> - Monitoring the CHIS's security and welfare.
>
> 6.8 The handler of a CHIS will usually be of a rank or position below that of the authorising officer.
>
> 6.9 The person referred to in section 29(5)(b) of the 2000 Act (the 'controller') will normally be responsible for the management and supervision of the 'handler' and general oversight of the use of the CHIS. "

31. The defendant admits that he owed a duty of care to CHIS registered to the Metropolitan Police Service ("MPS") and that, amongst other things, this required that CHIS were able to make contact with a CHIS handler at any time of the day or night (for example, para 6 of the Amended Defence admitting para 8 of KSO's Re-Amended Particulars of Claim). In his oral opening Mr Beer indicated that the Commissioner recognised the necessity for CHIS to be able to contact an officer at all times of the day or night for 365 days of the year. Whilst arrangements and telephone systems differ between police forces, CHIS would be provided with a dedicated

telephone number to use as the means of making contact with their handler. The claimants emphasise the importance of calls being taken by the CHIS's dedicated handler, as opposed to another officer, given the delicate relationship of trust carefully built up over time between the two and the fact that the handler is aware of the full history and particular sensitivities. They also emphasise that until an out of hours call was answered or a message returned, it was not possible to know whether contact from a CHIS was raising something that was urgent or simply routine.

32. The defendant also admits that, save when he was on annual leave, KSO had to answer or return telephone calls and text messages from CHIS when he was not rostered for duty (para 9 of KSO's Re-Amended Particulars of Claim and para 6 of the Amended Defence.) This was also accepted by KTP and KTM when they gave evidence. A similar admission is made in respect of KWS (paras 7 – 8, Amended Particulars of Claim and para 2, Defence) save that in this instance the defendant asserts that there was a rotating pattern of cover so that handlers took it in turns to be responsible for CHIS calls. The extent to which, if at all, the introduction of the rota made a practical difference is a matter of dispute, to which I will return. The defendant does not assert that KWS was subject to a rota prior to [*Annex 1*].

33. As regards the controllers, the defendant admits that following initial contact from a CHIS, a handler was required to contact a controller for direction, authorisation for further contact and authorisation in respect of the dissemination of information obtained as a result of that contact and any other consequential action (paras 9 & 11 of KBS's Particulars of Claim and para 2 of the Defence). It is also admitted that KBS was required to be available to make and receive telephone calls and perform other consequential duties at any time of the day or night regardless of her tours of duty, save that again it is averred that there was a rotating pattern of cover, so that controllers took it in turns to be responsible for handlers' calls (para 14 of KBS's Particulars of Claim and para 2, Defence). The practical effect of the rota arrangements is in issue here too. The defendant admits that the role of controller included (amongst other things) management and authorisation of all meetings and contacts with CHIS; assessing and grading intelligence obtained from CHIS; and determining, authorising and managing the dissemination of such intelligence (paras 9 & 11 of KBS's, Particulars of Claim; and para 2, Defence).

34. As the claimants describe and as Patten LJ recognised (at para 3) when giving the leading judgment in *Allard*, CHIS frequently make contact with their handlers outside of normal working hours, either out of necessity or simply due to their chaotic lifestyles. I accept that this occurred despite handlers encouraging their CHIS to make contact within normal working hours where possible, as the claimants described in their evidence to me. Furthermore, mindful of not revealing information about herself, KWS did not inform her CHIS that she worked part-time or which days she usually worked so that she received calls from CHIS on her free days.

35. In the circumstances I accept (as the claimants submit) that contact outside of rostered tours of duty between a CHIS and their handler was both commonplace and unavoidable and fell to be dealt with by the CHIS's handler unless effective alternative provision was made.

36. In *Allard* the Court of Appeal agreed that eight of nine hypothetical scenarios that were discussed before the judge below involved a recall to duty, rejecting the Chief

Constable's submission that a recall only occurred where a handler was expressly directed to return to duty. These eight scenarios were:

> "I Contact from a CHIS where the information given indicated that there was a risk to the welfare of a CHIS or to members of the public which meant that it was necessary for the handler to meet with the CHIS.
>
> II Contact from a CHIS where the information provided was immediately actionable but there was no necessity for the handler to meet with the CHIS.
>
> III Contact from a CHIS where the information provided was not immediately actionable.
>
> IV Contact from a CHIS where no information was given e.g. the CHIS made a request to meet at another time or to ask about a result or a payment.
>
> VI During a rostered tour of duty, a handler arranges a meeting or discussion with a CHIS which is to take place between two tours of duty, on a rostered rest day or a public holiday.
>
> VII Handler telephones a CHIS between two tours of duty, on a rostered rest day or on a public holiday using an authority which had been obtained from the CHIS controller whilst the handler was on duty during a rostered tour of duty.
>
> VIII Handler attempts to contact a CHIS between two tours of duty, on a rostered rest day or on a public holiday but where the attempts at contact have not been successful, e.g. because a telephone call made by the handler is not answered.
>
> IX Handler receives and deals with a call from a CHIS on a rostered rest day or public holiday because he uses his work mobile (as permitted) as a personal mobile telephone."

37. The crux of Patten LJ's reasoning appears in the following passages:

> "21. The question therefore in every particular case is whether the officer was required to carry out the duty which he performed…an officer may be recalled to duty or be required to do duty for the purposes of regulation 25 and 26 without receiving an express summons…if an occasion arises during what would otherwise be a rest or holiday period which, as a result of his current orders, requires the officer to carry out a particular task.
>
> …..

> 23. I do not therefore accept Mr Johnson's submission that a recall to duty depends on the handler receiving some specific instruction from the controller to contact the CHIS or to take some other kind of positive actions. On the judge's findings which are not challenged in this appeal, the handlers were required to respond to requests for contact by the CHIS if they were available to make the call. For these purposes I can see no reason for distinguishing between scenario III, where useful information is passed during the conversation with the CHIS, and scenario IV, where the reason for the call is a request for payment or some other non-urgent welfare issue…..
>
> 24. For the same reasons, the handlers in scenarios VI-IX were required to do duty."

38. By contrast the Court of Appeal found that scenario V ("a CHIS requests contact but the request for contact is declined by the controller") was not a recall to duty. The evidence had indicated that this situation concerned a CHIS who is de-registered and classed as dangerous, so that any request for contact is referred to and determined by the controller. Contact between the handler and controller for that purpose was "a pre-requisite to any contact with the CHIS and has to be regarded as preliminary to any recall to duty": per Patten LJ, para 24.

39. In the present proceedings the defendant does not dispute that an out of hours contact between a CHIS and a handler (where sufficiently evidenced) amounts to a recall to duty or a requirement to do duty, capable of triggering, as relevant, the entitlements in Annexes G, H and O of the Determinations (if the necessary qualifying criteria are satisfied). The evidence of both KSO and KWS was that they regarded themselves as under a duty to take a call from a CHIS whenever it was received and – subject to the rota point considered in more detail below – this was not generally challenged in cross examination or by the defendant's witnesses. In any event, I accept their evidence on this matter. A specific point was raised in the questioning of KWS as to whether she was required to (as opposed to believing that she was required to) take calls from CHIS on her free days. I accept her evidence that this was the expectation that was conveyed to her, for example when she was interviewed for the role as a part-time officer she was specifically asked if she would be willing to take calls on her non-working days.

40. In general a handler does not require an authority from a controller before speaking by telephone with a CHIS but the officer does require a controller's authority before meeting with them in person. A telephone or other remote contact will be authorised after the event by the controller, using the office-based system. Consistent with the responsibilities I have already summarised, if intelligence provided in a contact from a CHIS requires or may require dissemination or other consequential actions, it may be necessary to obtain the controller's authority before doing so, depending on the sensitivity of the particular information, the context and the extent of the autonomy that the particular handler is permitted by his or her controller. Where the matter is pressing, that authority will be sought by the handler making contact with the controller outside of working hours.

41. The defendant agrees that KBS received out of hours calls from handlers in relation to contact they had with CHIS and also that her role would have entailed other out of hours contact. However, the Commissioner contends that it is only those communications that concerned urgent contact with or about a CHIS that amounted to a recall to duty or a requirement to do duty. This dispute is reflected in Issue 1B.

42. I now turn to the particular roles undertaken by each of the claimants.

KSO's role in relation to out of hours contacts

43. KSO worked as a full-time CHIS handler within [*Annex 2*] from [*Annex 3*] and then in a [*Annex 4*] until [*Annex 5*]. The former involved working in a [*Annex 6*] During his time in the latter he worked on [*Annex 7*]. His claim spans the period [*Annex 8*]. He was rostered to work eight hours a day Monday to Friday, although he would change his hours to accommodate the needs of his role.

44. When KSO worked in [*Annex 9*] the structure of the particular unit he worked in comprised [*Annex 10*]. The arrangements for CHIS making contact with their handlers were as follows. [*Annex 11*] There was no rota at this time.

45. In KSO1, KSO described how he would make hand-written notes on a piece of paper when he received an out of hours call from a CHIS. Sometimes his note would be verbatim and on other occasions it would take the form of bullet point notes. Handlers are required to make a record of each contact with a CHIS and the next time that he was in the office he would type up the record onto [*Annex 12*], which was only accessible from the office. KSO said that if intelligence provided by the CHIS during the contact was simple to deal with, he would make the decision about dissemination himself, but he would call the controller to make the decision if there were additional risks involved. He called the controller less in relation to out of hours contacts as he became more experienced. If the intelligence required speedy dissemination then further out of hours calls to effect this would be required.

46. When KSO was in [*Annex 13*] the personnel comprised [*Annex 14*]. The arrangements that applied in relation to out of hours contacts with CHIS [*Annex 15*]. KSO explained that he would always take the call as it either related to his CHIS or he was being called because other handlers could not be contacted. No-one was specified to be on call, so no officers were stood down from being obliged to take the call. KSO said this applied and he took such calls even if he was on annual leave, save when he was abroad. He accepted that on the [*Annex 16*] CHIS would generally call during the day. He was responsible for [*Annex 17*]. KSO would take rough notes during the out of hours contact and then make the formal record when he was next in the office. This entailed [*Annex 18*]. In relation to his [*Annex 19*], KSO often received lengthy emails out of hours and, as KPT confirmed in his evidence, it was KSO's responsibility to review this material as soon as possible.

KWS's role in relation to out of hours contacts

47. KWS worked as a CHIS handler in [*Annex 20*] from [*Annex 21*]. She worked a part-time 0.8 week as four eight hour days and Wednesday was usually her free day. She would flex her start and finish times in order to accommodate the work that needed to be done. Her work entailed [*Annex 22*]. The arrangements in relation to out of hours

contacts with CHIS were as follows. [*Annex 23*] KWS says that she was expected to have her phone with her at all times and that she would answer calls between rostered duties or return the call as soon as she could if she was indisposed at the time when it was received. She did the same in relation to text messages. The main handler was the main point of contact for the source and the co-handler ran their own CHIS and did not routinely cover calls from other CHIS. However, there were occasions when she was on extended leave or, for example, attending a special occasion such as a wedding, when she would pre-arrange for her co-handler to take the calls instead and switch her phone off. If KWS initiated contact with a CHIS between her rostered duties it was generally because she had been tasked by someone else to make the contact.

48. KWS would take rough notes during the out of hours calls and after it had concluded. She would call the controller to gain authority to act where this was needed and, if the information required it, she would then spend time disseminating the material. As she could not access certain office-based systems from home she would sometimes call someone else in the unit who could undertake the necessary research.

49. When the new telephone system was introduced a formal system was implemented whereby one handler dealt with all calls in the off duty period. However, this only applied to KWS for a limited period before her retirement.

KBS's role in relation to out of hours contacts

50. KBS's claim relates to the period [*Annex 24*] when she worked as a controller holding the rank of inspector. Throughout this time she worked in [*Annex 25*]. The unit comprised [*Annex 26*].

51. KBS expected the handlers that she was responsible for to contact her before disseminating any information provided by a CHIS and before taking any further action, save that she authorised a few of her more experienced handlers to disseminate low level intelligence without her authority. This applied to [*Annex 27*] and in some instances they would contact her anyway to double check. She required her other handlers to come through her each time to obtain authority to disseminate information. The defendant's witnesses confirmed that they were not in a position to dispute this account and KHP accepted that she was an effective controller and that it was open to her to set these parameters, which were reasonable given the high level of intelligence that was involved. Accordingly, I accept her account in this regard.

52. KBS's MPS issued mobile phone was her preferred point of contact, though occasionally officers who knew the number used her personal mobile. The work-related calls that she made were always from her MPS mobile. She would also send and receive out of hours text messages on her MPS mobile. KBS says that she answered calls and text messages out of hours including when on annual leave as she was the best placed to make informed decisions in relation to the handlers that she managed. The [*Annex 28*] system indicated who was the designated controller in respect of each CHIS. KBS explained that changing the controller involved a detailed handover that she estimated took an hour or two. She only arranged for her designation as controller to be changed to a colleague when she was on periods of extended leave.

53. In addition to calls from handlers concerning contact with CHIS, it is accepted that KBS would also receive and deal with other work-related calls out of hours. However, as I already indicated the defendant does not accept that these amounted to a recall or requirement to do duty (Issue 1B). In summary these were:

    i) Calls from other police units and from outside agencies relating to CHIS and/or their intelligence. By way of example [*Annex 29*]; and

    ii) Calls raising managerial and welfare issues in relation to the handlers that she was responsible for.

The legal framework

54. Police officers are office-holders, rather than employees, and their terms and conditions derive from statute, currently the Police Act 1996 ("PA 1996") and the instruments made thereunder. It is common ground that officers cannot contract out of entitlements under the statutory scheme.

55. The PR 2003 were made pursuant to s.50(1) and s.50(2)(j) PA 1996. Section 50(1) gives the Secretary of State a general power to make regulations as to "…conditions of service of police forces" and s.50(2)(j) gives a specific power to make regulations as to the "…hours of duty, leave, pay and allowances of members of police forces".

56. Before regulations could be made, s.62(1)(a) PA 1996 required the Secretary of State to take into account any recommendations made by the Police Negotiating Board ("PNB") and to supply the PNB with a draft of the regulations. With effect from 1 October 2014 the PNB was abolished and replaced by the Police Remuneration Review Body. The purpose of the PNB, as identified in s.61, included the consideration by representative bodies (including persons representing the interests of members of police forces) of questions relating to hours of duty, leave, pay and allowances. Where parties to the PNB could not agree, provision was made for referral to a Police Arbitration Tribunal ("PAT").

Police Regulations 2003

57. The PR 2003 came into force on 1 April 2003. Earlier regulations made under the PA 1996 and predecessor primary legislation contained detailed provisions in relation to officers' duties, pay, allowances and expenses. The immediately preceding regulations were the Police Regulations 1995 (SI 1995/215) ("PR 1995"). However, the PR 2003 marked a change of approach in that it conferred broad powers on the Secretary of State to provide the detail of these matters by way of Determinations. As McCombe J observed in *R (Barwise) v Chief Constable of West Midlands Police* [2004] EWHC 1876 (Admin) ("*Barwise*") at para 19:

> "It appears to have been thought more desirable that detailed matters of the present type be regulated, rather than in the Regulations themselves, by 'determinations' which perhaps may be more readily changed or altered administratively."

58. I will summarise the relevant PR 2003 provisions.

Duty

59. Regulation 20 places a duty on every member of a police force to carry out all lawful orders. Regulation 22 makes provision for "duty". It requires the Secretary of State to determine: the normal periods of duty of a member of a police force: reg.22(1)(a); the manner and timing of the publication of duty rosters and the matters to be contained therein: reg.22(1)(c); and the circumstances in which travel time may be treated as duty: reg.22(1)(e). Regulations 22 also permits the Secretary of State to confer discretion on chief officers of police to fix the time at which a normal period of duty commences: reg.22(2) and 22(1)(a); and fix the limit on travel time which is to be treated as duty: reg.23(3)(a) and 22(1)(e).

Pay

60. Regulations 24 makes provision for pay, requiring the Secretary of State to determine the pay of members of police forces: reg.24(1).

61. Regulation 25 makes provision for overtime, requiring the Secretary of State to determine (amongst other things):

i) The circumstances and manner in which a member of a police force shall be compensated in respect of time for which they remain on duty after their tour of duty ends: reg.25(1)(a);

ii) The circumstances and manner in which a member of a police force shall be compensated in respect of time for which they are recalled between two tours of duty: reg.25(1)(b); and

iii) The circumstances and manner in which a member of a police force shall be compensated in respect of time which forms part of a tour of duty which they are required to begin earlier than the rostered time without due notice and on a day when they have already completed their normal daily period of duty: reg.25(1)(c).

In all three instances this time is referred to as "overtime". The present case is concerned with the second of these forms of overtime, namely recalls.

62. Regulation 26(1) provides:

> "(1) The Secretary of State shall determine the circumstances and manner in which a member of a police force shall be granted leave or otherwise compensated in respect of time spent on duty on-
>
> (a) public holidays, or
>
> (b) rostered rest day:
>
> and in this regulation, '*rostered rest day*' in relation to a member of a police force who is required to do duty on that day means a day which according to the duty roster was, immediately before he was so required to do duty, to have been a rest day for the member."

63. Regulation 26(2) permits the Secretary of State to confer a discretion on chief officers to fix the time at which or the day on which a period commences; to fix the period within which time off in compensation for time spent on duty is to be granted; and to fix a limit on the time occupied by a member of a police force in travelling to and from their place of duty which is to be included in a period of duty for the purposes of the determination.

Leave

64. Regulation 33 provides (as relevant):

> "(1) Every member of a police force shall, so far as the exigencies of duty permit, be granted in each leave year such annual leave as may be determined by the Secretary of State and in this regulation '*leave year*' means that period of 12 months beginning on such date as may from time to time be determined by the police authority.
>
> (2) In making a determination under paragraph (1) the Secretary of State may confer on the chief officer discretion-
>
> (a) to grant such additional days of annual leave in any leave year in such circumstances and subject to such conditions as the Secretary of State may determine; and
>
> (b) subject to such conditions as the Secretary of State may determine, to allow days of annual leave granted under this regulation to be taken as a single period, or as single days, or in periods of more than one day or as half days.
>
> (3) In a determination under paragraph (1) the Secretary of State shall make provision for the compensation of a member of a police force for being recalled to duty during a period of annual leave granted under this regulation.
>
> (4) Annual leave granted under this regulation shall be additional to the days on which the member is not required to perform police duties in accordance with a determination under regulation 26."

Allowances

65. Regulation 34 makes provision for "allowances", requiring the Secretary of State to determine the entitlement of members of a police force to any allowance. By reg.34(1)(a) the Secretary of State may confer functions on chief officers in relation to any condition to which the allowance is made subject in the determination.

Determinations

66. In the version of reg.46 in force until 31 March 2015, the Secretary of State was required to take into consideration any recommendation made by the PNB: reg.46(1); supply the PNB with a draft copy of the determination: reg.46(1); and supply the

Police Advisory Board with a draft copy of the determination and take into consideration any representation made by the Board: reg.46(2).

The Determinations

67. The Secretary of State's Determinations first came into force on 1 April 2003. They have been amended and added to on various subsequent occasions. Significant changes were made following the Independent Review of Police Officer and Staff Remuneration and Conditions conducted by Sir Thomas Winsor, who reported in March 2011 ("Winsor 1") and March 2012 ("Winsor 2"). It will be necessary to refer to aspects of these reports when I consider issues 1 and 4 below. Save for subsequent amendments in relation to the four hour minimum and the introduction of the unsocial hours and on call allowances, I was referred to the consolidated version of the Determinations as at May 2009.

68. The claims before me are directly concerned with the entitlements under Annex G - overtime; Annex H - duty on public holidays, rest days and free days; Annex O - leave; and Annex U - allowances, although it will also be necessary for me to refer to Annexes E and F.

Annex E: duty

69. Annex E was made pursuant to reg.22 PR 2003. Paragraph (1) applies to full-time constables and sergeants: para (1)(a). The normal daily period of duty, save for those working in accordance with variable shift arrangements, is eight hours: para (1)(b). As far as the exigences of duty permit, the normal period of duty is to be performed in one tour of duty: para (1)(c)(i).

70. The chief officer of police must cause duty rosters to be published for constables and sergeants: para (3)(a). For the purposes of the Determinations, it is the duty rosters which determine whether a day is a rest day in terms of calculating whether a constable or a sergeant has been required to do duty on a day which is a rest day: para (3)(a)(i).

71. Inspectors do not have normal hours of duty and their working hours are not set out in duty rosters.

72. Paragraph 4(a)(i) provides that "so far as the exigencies of duty permit" a constable or sergeant "shall be allowed a day's leave on each public holiday and be granted rest days at the rate of two rest days…in respect of each week". Paragraph 4(b) states:

> "Every member of a police force of the rank of inspector or chief inspector shall, so far as the exigencies of duty permit, be allowed a day's leave on each public holiday and be granted rest days at the rate of two rest days in each week."

Annex F: pay

73. Annex F was made pursuant to reg.24 PR 2003. Full time members of a force receive an annual salary as set out in tables at paras (2)-(10).

74. Part-time members are paid at an hourly rate being 6/12520th of the appropriate annual rate of pay: para (11). The allowances arising under Annex G and H are payable in addition to the basic rate of pay.

Annex G: overtime (recall between two tours of duty)

75. Annex G was made pursuant to reg.25 PR 2003 and came into force on 1 April 2003. It does not apply to officers of the rank of inspector and above, who are not entitled to be compensated by way of overtime pay: para (1)(b). Paragraph (1) applies to full-time officers. Para (1)(a) provides that constables and sergeants shall be compensated in respect of time known as "overtime", that is to say time: (i) for which they remain on duty after their tour of duty; (ii) for which an officer "is recalled between two tours of duty"; and (iii) which forms part of a tour which the officer is required to begin earlier than the rostered time without due notice and on a day when they have already completed their normal daily period of duty. As I have already noted, this case is concerned with the second of these scenarios. An officer is not compensated under this determination for overtime for which an allowance is payable under reg.26 PR 2003 and Annex H: para (1)(c).

76. The correct construction of para (1)(d) in terms of the reference therein to completed periods of 15 minutes of overtime and the inter-relationship between this provision and para (1)(h)(iii) (the four hour minimum provision) is central to the resolution of Issue 1C. Issue 2 concerns the effect of paras (1)(e) and (1)(f) which address circumstances where an officer elects to be granted time off in lieu of an allowance for overtime worked. The operation of the four hour minimum period provision, provided for by para (1)(h)(iii) in relation to full-time officers, is the subject of Issue 1. It was removed with effect from 1 April 2012. It is agreed that after 1 April 2012 the overtime allowance was a 1/24th of a day's pay (time and a third) for each completed period of 15 minutes of overtime.

77. In light of their relevance to the disputed issues it is necessary to set out these parts of para (1) in full:

> "(d) Subject to para (e) and (g), a full-time member of a police force of the rank of constable or sergeant shall be granted an allowance in respect of each week at the rate of a twenty-fourth of a day's pay for each completed period of 15 minutes of overtime worked by him on any occasion during that week, except that on each of the first four occasions on which overtime in respect of which the member was not informed as mentioned in paragraph (g) is worked during a week 30 minutes of the overtime worked is to be disregarded.
>
> (e) Where such a member of a police force of the rank of constable or sergeant, before the expiry of any pay period, elects in respect of specified overtime worked by him during the weeks ending within that period to be granted in lieu of an allowance time off subject to and in accordance with paragraph (f), and in accordance therewith receives time off in respect of any overtime, no allowance in respect thereof shall be payable under paragraph (d).

> (f) Subject to the exigences of duty, where by virtue of an election under paragraph (e) time off falls to be granted to a member of a police force of the rank of constable or sergeant in respect of any overtime worked by him in any week then, within such time (not exceeding 3 months) after that week as the chief officer of police may fix, he shall grant to the member time off equal, subject to paragraph (g), to the period of that overtime worked by him during that week and, in addition, for each completed 45 minutes of such overtime, an additional 15 minutes off, except that on each of the first 4 occasions on which overtime in respect of which the constable or sergeant was not informed as mentioned in paragraph (g) is worked during a week 30 minutes of the overtime worked is to be disregarded."

78. Paragraph 1(g) has no application to the circumstances that I am concerned with as it relates to a period of overtime worked at the end of a rostered shift (as opposed to a recall between shifts).

79. The opening words of para (1)(h) state that: "In computing any period of overtime for the purposes of this determination" and then there are a number of sub-paragraphs, which include:

> "(iii) where a member is recalled to duty between two rostered tours of duty (or in the case of a member working variable shift arrangements, shifts) and is entitled to reckon less than 4 hours of overtime in respect of any period for which he is recalled disregarding any overtime reckonable under regulation 22(e) and the determination made under that regulation, he shall be deemed to have worked for such period 4 hours of overtime in addition to any overtime reckonable by virtue of regulation 22 (e)."

80. The reference in this text to regulation 22(e) relates to travelling time. I am not concerned with members working variable shift arrangements.

81. The position of part-time constables and sergeants is addressed in para (3) of Annex G. The provisions I set out below are central to the resolution of Issues 1 and 1C as regards the application of Annex G overtime to part-time officers. The four hour minimum period provision was removed with effect from 1 April 2012. The parties are agreed that there is a lettering error in relation to the first five sub-paragraphs of para (3). In short, the first sub-paragraph has no assigned letter and the second sub-paragraph is denoted as "(a)" when it appears from the content of para (3) that it was intended to be "(b)"; the third sub-paragraph is denoted as "(b)" when it should read as "(c)" and so forth. The correct lettering is used from sub-para (f) onwards as there is no sub-paragraph (e). They are also agreed that there is a further error in that the text of sub-para (f) was intended to refer to the first unlettered sub-paragraph, rather than to sub-para (b). As the parties are agreed on these matters, it is unnecessary for me to detail the reasoning that led to these conclusions. It will suffice to say that I agree with it. I will denote the first unlettered sub-paragraph with an "x" and refer to

it as para (3)[x] hereafter, in the interests of clear identification and avoiding confusion.

82. The material provisions are as follows:

> "[x] A part-time member of the rank of constable or sergeant who has been on duty for more than 40 hours in any period of 7 days beginning with a day fixed for the purposes of this determination by the chief officer (a relevant week) is entitled to an allowance at the rate of one twelfth of an hour's pay for each completed 15 minutes in excess of 8 hours, on any day during that period on which he was on duty for more than 8 hours, exception that on each of the first 4 occasions on which overtime in respect of which the constable or sergeant was not informed as mentioned in paragraph (1)(g) is worked during a relevant week 30 minutes of the overtime worked is to be disregarded.
>
> (f) For the purposes of sub-paragraph… [x] a period of duty:
>
> (i) which resulted from a member's being recalled and returning to duty between two rostered shifts, and
>
> (ii) the length of which, after deducting any travelling time counting as a period of duty by virtue of regulation 22, was less than 4 hours;
>
> counts as a period of duty lasting for the aggregate of 4 hours and any period counting by virtue of regulation 22 (travelling time treated as duty)."

83. Paragraph (3)(b) and (c) (intended to be sub-paras (c) and (d)) concern the situation where an officer elects to receive time off in lieu of an allowance for overtime. They are broadly comparable, although not identical to paras (1)(e) and (1)(f) and thus are relevant to Issue 2.

84. The construction of para (3)(m) is central to Issue 36A. It states:

> "(m) For the purposes of Regulation 24(1) (pay) any extra period of duty in respect of which time off is granted under sub-paragraph (d) or (i) counts as one and one third times the number of completed quarters of an hour comprised in the extra period of duty and a period falling within sub-paragraph (f)(i) and (ii) counts as one of 4 hours."

85. Paragraph (3)(i) and (intended) para (3)(d) relate to circumstances where an election has been made to receive time off in lieu of payment of an allowance in respect of overtime.

86. The parties are agreed that for the purposes of calculating whether the threshold hours requirements in para (3)[x] are met, the number of hours on duty is calculated by

adding together: (i) the average number of hours the officer was contracted to work in a relevant week; (ii) the number of hours (if any) they worked on any rest day during the that period; and (iii) the number of hours (if any) they worked on any public holidays during that period: para (3)(b).

87. It is agreed that after 1 April 2012 the allowance was 1/12th of an hour's pay (time and a third) for each completed 15 minutes in excess of eight hours on any day during the week in question when the officer was on duty for more than eight hours and that the number of hours undertaken is to be computed as I have summarised in the previous paragraph. It is also common ground that the eight hour requirement was removed by PNB Circular 2014/9 dated 24 April 2014 in order to ensure compliance with the Equality Act 2010 and the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

Annex H: duty on rest days, public holidays and free days

88. Annex H was made pursuant to reg.26 PR 2003 and came into force on 1 April 2003.

89. The amount of allowance that an officer is entitled to under Annex H is informed by the number of days' notice they receive of the requirement to do duty. The parties are agreed that the lower of the notice periods applies to all of the situations covered by the present claims and thus I will only refer to those provisions.

90. Paragraph (1)(a)-(f) address the position where constables and sergeants are required to do duty on rest days or public holidays. Paragraph (1)(a) provides that if they are required to do duty on a rostered rest day where less than 15 days' notice of the requirement has been given, the officer is entitled to an allowance at the appropriate rest day rate. For full-time officers, where less than five days' notice of the requirement has been given, the rate is 1/16th of a day's pay (double time) "for each completed 15 minutes of duty": paras (1)(b) and (c).

91. In relation to a part-time constable or sergeant, "for each completed 15 minutes of duty" on a rostered rest day for which the officer received less than five days' notice of the requirement, the appropriate rest day rate is a quarter of an hour's pay (double time): paras (2)(a) and (b).

92. Where a constable or a sergeant is required to do duty on a public holiday and receives less than eight days' notice of the requirement, the officer is to be granted "(1) an allowance at the appropriate rate and, in addition, (2) another day off in lieu which shall be notified to him within 4 days of notification of the requirement, and which shall be treated for the purposes of this determination as a public holiday": para (1)(d). The "appropriate rate" for a full-time constable or sergeant is 1/16th of a day's pay (double time) "for each completed 15 minutes of duty": para (3)(c); and the "appropriate rate" for a part-time constable or sergeant is one half of the member's hourly rate of pay "for each completed 15 minutes of duty": para (3)(d).

93. A four hour minimum period applies to the calculation of entitlements arising where a constable or sergeant is required to do duty on a rostered rest day, public holiday or free day by virtue of para (3)(h). Unlike the four hour deeming provisions in Annex G it has remained in force. The correct interpretation of this provision is raised by Issue 1. The inter-relationship between this provision and the references to completed

periods of 15 minutes of duty (which I have already identified in relation to rostered rest days and public holidays) is the subject of Issue 1C. Paragraph (3) says that: "For the purposes of this determination":

> "(h) where a member is required to do duty, or is recalled to duty, for a period of less than 4 hours on a public holiday, or a rostered rest day or, for a part-time member, a free day, such period or each such period shall be treated as though it were a period of 4 completed hours. The only exception to this is where a period of not more than one hour of duty on a rostered rest day or, for a part-time remember, a free day immediately follows a normal period of duty (or, in the case of a part-time member or a member working in accordance with variable shift arrangements, a rostered shift). In this instance the period of not more than one hour of duty counts as the number of period of 15 minutes actually completed."

94. Paragraph (1)(e) and (f) gives constables and sergeants who are required to do duty on a public holiday or rostered rest day, the opportunity to elect within 28 days of the duty in question to receive time off in lieu of an allowance. The correct interpretation of these provisions is raised by Issue 2.

95. During closing submissions, a dispute emerged as to whether the para (1)(d) entitlement to a day off in lieu where the officer is required to do duty on a public holiday, was only triggered if the officer took the positive step of communicating these circumstances to the person responsible for granting the day in lieu (the chief officer). The defendant submitted that this was the case, in order to make the provision workable in practice. The claimants submitted that there was no such notification requirement in the wording of the provision and that to imply this obligation would be to invert the operation of the provision which places the duty upon the chief officer to provide the additional day. I do not propose to resolve this matter. So late did this dispute arise that Mr Beer largely dealt with it in his short reply at the end of closing submissions and it does not appear on even the most up-to-date list of issues provided at the conclusion of submissions. I have earlier noted the desirability of addressing as many issues as it is reasonably possible to do at this stage. However, in these particular circumstances I am not satisfied that the issue has been identified with sufficient clarity or precision or that I received sufficiently full submissions on this matter to enable me to make a fair and comprehensive determination.

96. Where a part-time constable or sergeant is required to do duty on a free day and receives less than 15 days' notice of this requirement, then where they have worked for more than eight hours on the free day and for more than 40 hours in the relevant week, the officer is entitled to an allowance of $1/12^{th}$ of an hour's pay (time and a third) "for each completed period of 15 minutes of duty" done on the free day where "the duty is of such a nature that it would not in the circumstances have been reasonably practicable for it to be done by any other member": para (2)(d) and (e). However, where the latter criterion (specified in para (3)(d)(iii)) does not apply, the officer is entitled to an allowance at a higher rate, previously a quarter of an hour's pay (double time): para (2)(f). The rate was changed to $1/8^{th}$ of an hour's pay (time and a half) with effect from 1 April 2012. In their submissions, the parties have

referred to payment at the higher of the two rates as "Type A" and to payment at the lower rate, applicable where it would not have been reasonably practicable for the duty to have been undertaken by another officer as "Type B".

97. An officer who is required to do duty on a free day may within 28 days of that day elect to receive time off in lieu of these allowances pursuant to para (2)(h).

98. The application of the Type A rate is the subject of Issue 37. Issue 36 raises the equivalent point to Issue 1C in relation to the part-timers provisions in Annex H.

99. It is agreed that for the purposes of the hours worked thresholds that apply in respect of the Type B rate, the number of hours is calculated by adding together: (i) the average number of hours the officer was contracted to work in a relevant week; (ii) the number of hours (if any) they worked on any rest day during the period; and (iii) the number of hours (if any) they worked on any public holiday during that period.

100. Paragraph (1)(g) addresses the position in relation to inspectors (and chief inspectors). The way in which this provision is interpreted makes a substantial difference to KBS's claim, as the defendant's position is that it does not give rise to any entitlement when out of hours work is performed in the kind of circumstances that arise when a CHIS controller responds to communications. This is the subject of Issue 7A. The provision states:

> "(g) Where the exigencies of duty have precluded:
>
> (1) the allowance of a day's leave on a public holiday, or
>
> (2) the grant in any week of two rest days,
>
> to a member of a police force of the rank of inspector or chief inspector, he shall, during the next following twelve months and so far as the exigencies of duty permit be allowed or (as the case may be) granted a day's leave in lieu of any such day not allowed or granted."

101. Equivalent provisions to para (1)(g) apply in respect of officers of the rank of superintendent or chief superintendent: para (1)(h). And a similar provision applies to officers above the rank of superintendent, save that the period referred to is three months rather than 12 months: para (1)(i).

Annex O: annual leave

102. Annex O was made pursuant to reg.33 PR 2003. It also came into force on 1 April 2003.

103. Paragraph (1)(b) provides that "every member of a police force holding a rank below that of superintendent shall be granted annual leave entitlement (expressed in 8 hour days) in each leave year" as appears in the table that is then set out. The amount of days of leave set out in the table depends upon the officers' years of service.

104. Pursuant to para (3), the chief officer has a discretion, subject to the exigencies of duty, to permit officers of a rank not higher than chief superintendent to carry over untaken leave to the following leave year up to a maximum of five days (save that this maximum does not apply where the chief officer is satisfied that there are exceptional circumstances and it is the interests of efficiency).

105. The key provision for the purposes of the disputed issues between the parties is para (5). It applies to inspectors as well as to sergeants and constables. It says:

> "(a) Where a member of a police force has been recalled to duty from a period of absence from duty to which this paragraph applies he shall be granted, in compensation for being recalled to duty on any day during that period which is a day of annual leave or a day taken off in lieu of overtime-
>
> (i) If he was so recalled to duty for 1 or 2 days (whether or not in the latter case those days formed a single period), an additional 2 days' annual leave (or, if the member so choose, 1 day's annual leave and 1 day's pay at double time) in lieu of each such day for which he was so recalled; or
>
> (ii) If he was so recalled to duty for 3 or more days (whether or not forming a single period), 2 days' annual leave (or, if the member so choose, 1 day's annual leave and 1 day's pay at double time) in lieu of each of the first 2 such days for which he was so recalled, and 11/2 days' annual leave (or, if the member so choose, 1 day's annual leave and ½ day's pay at double time) in lieu of each such day for which he was so recalled thereafter.
>
> (b) This paragraph applies to a period of absence from duty of 3 or more days, where at least one of those days is a day of annual leave and the other days, if not days of annual leave, are rostered rest days, days taken off in lieu of overtime, public holidays, free days (or days taken off in lieu thereof) or monthly leave days, or any combination thereof.
>
> (c) This paragraph applies in the case of a member of a police force who is required to work on a day scheduled to fall in a period of absence from duty to which this paragraph applies as it applies in the case of a member who is recalled to duty from such a period."

106. Issues 10AA and 10A relate to the qualifying conditions under this provision. Issue 11 concerns the entitlement, if any, where an officer is recalled to do duty on annual leave which does not fall within this provision, for example because the period of absence is not long enough. Issue 16 relates to the time when the choice as to payment in lieu has to be made.

Annex U: allowances

107. The unsocial hours allowance was introduced by Home Office Circular 010/2012 with effect from 1 April 2012. I will not detail the provision, as I do not have to resolve any issues in respect of that aspect of the claims.

108. The on call allowance was introduced by the addition of para 13 to Annex U through Home Office Circular 007/2013 with effect from 1 April 2013. The text provides:

> "(1) A member of the rank of Constable, Sergeant, Inspector or Chief Inspector shall receive an allowance of £15 in respect of each day on which he spends any time on-call.
>
> (2) In paragraph (1) 'day' means a period of 24 hours commencing at such time or times as the chief officer shall fix after consultation with the joint branch board, and the chief officer may fix different times in relation to different groups of members."

109. From 1 September 2019 the rate was increased to £20 per day. The application of this provision is the subject of Issues 4 and 5.

Construction of the Determinations

110. The Determinations are a species of delegated legislation (albeit not "subordinate legislation" for the purposes of s.2(1) Interpretation Act 1978). The parties were largely agreed upon the principles of construction that I should apply.

111. The courts should approach the interpretation of the Determinations by reference to the ordinary cannons of statutory interpretation. The general principles of interpretation that apply to Acts of Parliament apply equally to delegated legislation, with the additional consideration that since the delegated legislation derives its authority from the enabling legislation it must be interpreted in light of that: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edition (2020) ("*Bennion*"), para 3.17. Accordingly, the court's task is to ascertain the legislative intention by determining the intention reasonably to be attributed to the person making the instrument in respect of the words used: *Bennion*, para 3.17.

112. In his recent judgment in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department; R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343 Lord Hodge DPSC (with whom Lord Briggs, Lord Stephens and Lady Rose JJSC agreed) summarised the process of statutory interpretation (in relation to an Act of Parliament) at paras 29 – 31. Amongst other points, he addressed the importance of context, the use that may be made of external aids and the objective nature of the exercise:

> "29. …Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context' (*R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd* [2001] AC 349, 396.)

> Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words that Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained…
>
> 30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it address but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty and indeed may reveal ambiguity or uncertainty: …[*Bennion*], para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity…
>
> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered…"

113. Lord Hodge went on to emphasise, quoting the judgment of Lord Nicholls in *Spath Holme* [2001] 2 AC 359 at 396, that "the intention of Parliament" is not a subjective concept; the phrase is a shorthand reference to the intention which the court reasonably imputes to the language that is used. In *Prior & Ors v The Commissioner of Police of the Metropolis* [2021] EWHC 2672 (QB) ("*Prior*"), when considering the Determinations' Annex U provisions dealing with the away from home overnight allowance, Kerr J said at para 155:

> "It is, in the usual way, for the court to determine the correct interpretation of a normative document, including a statutory determination of the Secretary of State. It is not for the latter but for the court to rule on the construction of the words used, whether or not they lead to the conclusion subjectively intended by the Secretary of State…"

114. As regards the use that may be made of external materials, *Bennion* cites Lord Diplock's speech in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (at 281) and observes at para 24.9:

> "Where legislation is introduced to give effect to an official report containing proposals for reform, the report is likely to be a rich source of contextual information. Any doubts that the courts might once have expressed about looking at this kind of material has long since given way to general acceptance that it may be relied upon, at least for the purpose of determining the context or the mischief at which legislation is aimed."

115. Nonetheless, the authors also emphasise that: "A report should not, however, be relied on to alter the clear meaning of a provision. Resort to a report in those circumstances would undermine legal certainty".

116. In *Solar Century Holdings Limited v Secretary of State for Energy & Climate Change* [2014] EWHC 3677 (Admin) Green J (as he then was) observed that if there was an inconsistency between the statutory language and the pre-legislative admissible material, it could not be assumed without more than the statutory purpose must reflect the purpose set out in that pre-existing material: para 52(vi). However, where there was a collision between a literal interpretation of an enactment and the contextual material, with the consequence that the literal interpretation is "manifestly contrary to the intention which one may readily impute to Parliament when having regard to the historical context and mischief" then it should be construed in light of that: para 52(vii).

117. For present purposes and consistent with the principles I have referred to, the parties are agreed that I may have regard to Winsor 1, Winsor 2, PNB deliberations and PAT awards in resolving the issues of construction, at least in relation to ascertaining the context and the mischief which the provision in question is aimed at. In *Prior* it was agreed that the Court could look at Winsor 1 and Winsor 2 (para 100). In *Allard* at paras 37 – 42, Patten LJ considered the legislative history from the Police Regulations 1962 (SI 1962/823) onwards, including PNB Circulars, when deciding the issue I discuss at paras 171 -174 below.

118. When considering a question of construction under the Determinations in *Barwise* McCombe J referred to "the permissive construction which I recognise can be applied to documents, enacted under statutory authority, which are not themselves subordinate legislation" (para 29). However, it is important not to stretch this point too far. The general principles of statutory construction apply, as I have already explained. The authors of *Bennion* observe at para 3.17 that: "While it is no doubt helpful to bear in mind the context in which the delegated legislation is prepared, any suggestion that the quality of the drafting means that a different approach is generally needed when interpreting delegated legislation should be rejected".

119. When construing the Determinations it is important to bear in mind that PR 2003 and the Determinations are of general application to all officers of the relevant ranks and that no special provision is made for officers in specialist units with unusual working patterns: *Allard* per Patten LJ, para 20.

Issue 1: the four hour minimum

120. This issue concerns the overtime entitlement of full-time constables and sergeants, pursuant to Annex G para (1)(h)(iii) (set out at para 79 above). It also applies to the

equivalent provision for part-timers at Annex G para (3)(f) (para 82 above), which the parties also addressed in their submissions, although this provision is not explicitly listed in Issue 1 on the finalised list of issues (and it is not covered by Issue 36A, which concerns the effect of Annex G para (3)(m) when the thresholds in para (3)[x] are not met). I will therefore include consideration of para (3)(f) at this stage. As I indicated when setting out the legal framework, these Annex G four hour minimum provisions were repealed with effect from 1 April 2012. As the formulation of Issue 1 recognises, the equivalent question concerning the four hour minimum period also arises in relation to the Annex H entitlements for constables and sergeants who are required to do duty on rest days, public holidays and/or free days. The relevant provision here is para (3)(h) (para 93 above), which has not been repealed. I will focus firstly on Annex G para (1)(h)(iii).

Annex G para (1)(h)(iii)

121. The parties agree that the effect of this provision is that a single recall between rostered tours of duty lasting less than four hours is deemed to have lasted for four hours, irrespective of its actual length (subject to the impact of the reference to "each completed period of 15 minutes of overtime" in para (1)(d), which is the subject of Issue 1C). This effect was recognised by the Divisional Court in *R v South Yorkshire Police ex p. Middup* (25 April 1989, unrep.) ("*Middup*") in relation to the equivalent, but not identical, predecessor provision, reg.28(7)(c) Police Regulations 1987 (SI 1987/851) ("PR 1987"). Lord Justice Woolf (as he then was) said at pg. 3:

> "The language of paragraph 7(c) makes it clear that there are advantages of an officer bringing himself within that paragraph if he has in fact worked less than four hours of overtime, because if he has only in fact (to take an extreme example) worked for a period of half an hour which falls within the sub-paragraph, that half an hour is to be treated as four hours."

122. KSO and KWS submit that the effect of para (1)(h)(iii) is that the four hour period re-starts with each recall to duty, save that they accept there should be no double counting. The Commissioner no longer maintains the position that recalls between a tour of duty have to be added together before the four hour minimum period is applied, but he submits that once a recall has triggered the application of the four hour minimum period any further work undertaken within that period does not attract a further payment and it is only in respect of a recall after the four hour period that a further minimum period starts to run.

123. The difference between the parties' positions can be illustrated by the following example. An officer is recalled to duty for 20 minutes at 6pm. The four hour minimum applies and they are deemed to have worked until 10pm. If they are recalled again at 8pm for a further 20 minutes, on the claimants' case a new four hour period is triggered and they are deemed to have worked until midnight, but the avoidance of double recovery means that this would be treated as 6 hours of work as they would not be paid twice for the overlapping time between 8pm and 10pm. However, on the defendant's approach the entitlement would be to four hours overtime; as the second recall happened during the deemed four hour period triggered by the first recall. On his approach only a recall after 10pm would give rise to an additional entitlement.

124. For the reasons that I will explain I consider that the claimants' construction is correct.

125. A recall to duty within the meaning of reg.25(1)(b) and Annex G para (1)(a)(ii) (paras 61 and 75 above) contemplates a single event over a fixed period of time with a beginning and an end. When an officer is recalled they are on duty and at the end of the recall they go off duty. This is so whatever the length of the recall. (For the avoidance of doubt, my reasoning is based on the nature of a recall as it appears from these provisions; I did not derive direct assistance from Mr Westgate's reliance upon Woolf LJ's observation at p.5 in *Middup* that a recall to duty is an "island of duty between two rostered tours of duty", given that case was concerned with a different point, namely whether there was a recall when a change in rostering resulted in a tour of duty straddling two force days.)

126. Evidently, an officer may be recalled in this sense more than once within a four hour period. Paragraph (1)(h)(iii) does not say that a second recall in such circumstances does not trigger a four hour minimum period; to the contrary, the wording of the provision indicates that the deemed four hour minimum is to be applied to the period of the recall. The language used refers to "any period for which he is recalled" and to the four hour minimum applying to "such period". The crucial wording of the provision is:

> "where a member is recalled to duty between two rostered tours of duty…and is entitled to reckon less than 4 hours of overtime in respect of any period for which he is recalled…he shall be deemed to have worked for such period 4 hours of overtime…" (Emphasis added)

Equally this wording, which focuses upon an individual period of recall, cannot sensibly be read as referring to two or more aggregated recalls without distorting the language that is used.

127. In addition, the text indicates that the precondition for the application of the four hour minimum is a recall to duty between two rostered tours of duty. If there is more than one recall within the space of four hours, then that precondition is satisfied on each occasion, with the result that the deemed minimum applies.

128. In seeking to overcome these hurdles, Mr Beer placed particular emphasis on the phrase "entitled to reckon"; he submitted that as this means to establish by calculation it envisaged a process of addition or aggregation. However, I accept Mr Westgate's submission that "entitled to reckon" means no more than "entitled to count"; it does not of itself indicate that a process of aggregation is contemplated and, at best, it begs the question as to what is the unit of time that is to be employed. The reference to "reckon" is entirely consistent with the opening words of para (1)(h) (para 79 above); these are computation provisions. Further, as will be seen from the paragraphs that follow, the wording of the other provisions, both past and present, does not assist Mr Beer's argument in this regard.

Annex G para (3)(f) – part-time officers

129. Paragraph (3)(f), the provision concerning part-timer officers, uses slightly different wording (para 82 above). Arguably the effect is all the clearer here. The key wording is as follows:

> "For the purposes of sub-paragraph…[x] a period of duty:
>
> (i) which resulted from a member being recalled and returning to duty between two rostered shifts, and
>
> (ii) the length of which…was less than 4 hours;
>
> counts as a period of duty lasting for the aggregate of 4 hours…" (Emphasis added)

130. There is no reference to "entitled to reckon" here, suggesting that the phrase is not as significant as Mr Beer suggests in para (1)(h)(iii). Furthermore "a period of duty" is an unambiguous reference to a single recall, which counts "as a period of duty lasting for the aggregate of 4 hours". The Commissioner does not suggest that this provision should be interpreted differently to para (1)(h)(iii) and I accept that a common interpretation applies.

Legislative history – Annex G para (1)(h)(iii)

131. I have considered the legislative history as Mr Westgate and Mr Beer both submitted that it favoured their interpretation of the provisions. Before addressing these submissions, I emphasise that my conclusion is essentially based on the language used in the Determinations (as I have discussed), which I do not consider gives rise to ambiguity. However, if there were thought to be a degree of ambiguity, I consider that the legislative history affords some limited support for the claimants' interpretation and does not assist the defendant's preferred construction.

132. The predecessor to Annex G para (1)(h)(iii) first appeared by an amendment to the Police Regulations 1979 made by the Police (Amendment) (No.2) Regulations 1985 (SI 1985/885) ("P(A)R 1985"). This inserted a new reg.26, which dealt with remaining on duty and recalls. Regulation 26(7)(c) said:

> "where a member is recalled to duty between two rostered tours of duty and is entitled to reckon less than 4 hours of overtime, disregarding any overtime reckonable by virtue of Regulation 29 (travelling time treated as duty) he shall be deemed on that occasion to have worked for such period that he is entitled to reckon 4 hours of overtime in addition to any overtime reckonable by virtue of Regulation 29" (Emphasis added.)

133. The wording that appears in Annex G (1)(h)(iii) was introduced by the PR 1987 and then carried through to the PR 1995.

134. The language used in reg.26(7)(c) (as inserted by the P(A)R 1985) clearly had the effect that KSO and KWS contend for in respect of the Annex G provisions. This is apparent from the reference to the deemed four hours applying "on that occasion",

that is to say on the occasion of the particular recall. Mr Beer said he accepted that it was at least arguable that the wording used in this provision had the effect that the claimants rely upon. However, he derived significance from the fact that this wording was not employed in the subsequent versions of this provision from PR 1987 onwards. I will come to that point, but before leaving the P(A)R 1985 provision I note that the phrase "entitled to reckon" appeared here without it having the effect that Mr Beer contends for in relation to Annex G para (1)(h)(iii).

135. Mr Westgate argued that as the PR 1987 were consolidating regulations they are presumed not to have changed the earlier position. He also drew attention to the Explanatory Note which said that: "In addition to minor and drafting amendments the Regulations make the following changes of substance…" and the changes that were then listed made no reference to the altered wording of the four hour minimum provision. Mr Beer disputed that any such presumption applies in respect of delegated legislation, as opposed to Acts of Parliament; alternatively, he says that in the circumstances it is a very weak presumption.

136. I accept that there is force in Mr Beer's points that: (i) delegated legislation of this nature would not have been subject to procedures equivalent to those applied to consolidating Acts of Parliament pursuant to the Consolidation of Enactments (Procedure) Act 1949; and (ii) the only support identified by Mr Westgate for the proposition that the presumption against consolidating legislation changing the law applies to delegate legislation was a single sentence in *Bennion* at para 24.7 ("The approach described above also applies to delegated legislation".) The authority cited by *Bennion* in this regard is *Gluck v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 161 (Admin), para 77 ("*Gluck*").

137. I agree with Mr Beer that *Gluck* does not go so far as to support the existence of a presumption to this effect in relation to delegated legislation. The case was concerned with the correct interpretation of article 7, Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO 2015"). Having considered the meaning of the provisions in question, Holgate J turned to the legislative history from para 77 onwards. He indicated that the parties had undertaken research and prepared written submissions on the antecedents to article 7. He observed that the Explanatory Note to the GPDO 2015 said that the instrument consolidated previous legislation with some amendments and then said (at para 78) that the "general principles on the construction of consolidating legislation are summarised in *Bennion*, section 24.7". He characterised the correct approach as follows:

> "The starting point is to construe the consolidating legislation without reference back to earlier material. But where, for example, there is a genuine doubt as to the meaning of a provision in such legislation then it may be appropriate to consider antecedent material to see whether that does provide any real help in resolving the issue."

138. It is therefore apparent that Holgate J did not go so far as to say that there was a presumption that consolidating delegated legislation did not change the law (and nor did he apply such a presumption in his own reasoning at paras 79 - 83). Rather, he indicated that the legislative history may be of assistance in circumstances where there is genuine doubt as to the meaning of a provision. Having summarised the

legislative history he noted that it supported the analysis of GDPO 2015 which he had already set out (para 83).

139. Accordingly, I reject Mr Westgate's invitation to presume that the PR 1987 was not intended to change the law. At the highest some weak support for his position can be derived from the content of the Explanatory Note that I have already referred to.

140. Mr Westgate also relied on Home Office Circular 33/1987 dated 15 June 1987 which accompanied the PR 1987. The regulations were made on 7 May 1987 and came into force on 15 June 1987. The Circular listed "the following substantive changes from the existing Regulations" again without making any reference to the four hour minimum provision. Furthermore, Annex A to the Circular, listed each of the previous provisions and their new PR 1987 counterparts. The "Notes" column in respect of the new version of the four hour minimum provision indicated: "No change".

141. Mr Beer submitted that this cannot be relied upon as it is a post-enactment explanation. In this regard he sought to draw an analogy with Kerr J's approach at para 155 in *Prior* (para 113 above). However, in that case Kerr J rejected an invitation to construe the 2013 Determinations by reference to what the Home Office said they meant in a subsequent circular accompanying the 2015 Determinations. By contrast, HOC 33/1987 was sent to accompany the PR 1987 on the day they came into force. As Sales J (as he then was) observed in *London Borough of Harrow v Ayiku* [2012] EWHC 1200 (Admin) at para 29:

> "In cases of doubt or ambiguity, official statements in the period immediately following promulgation of legislation by the government department which is responsible for administering it may be treated as an aid to interpretation, as a form of *contemporanea expositio*…In my view, contemporaneous official statements by the relevant government departments will be still more significant as a guide to the proper interpretation of subordinate legislation, as in this case, since that is typically drafted in-house by the department itself rather than by Parliamentary Counsel and is promulgated primarily by the relevant Secretary of State rather than Parliament."

142. Accordingly, I agree that HO 33/1987 provides some further weak support for the constable claimants' position.

143. Mr Beer submitted that the change of wording in the four hour minimum provision from PR 1987 onwards must have been intended to carry with it a change of meaning as a legislator does not act in vain. However there is no firm presumption that applies in this regard: see the authorities discussed at *Bennion,* para 24.5. Moreover, the changes in wording that were made do not support the defendant's reasoning. If, as Mr Beer invited the Court to infer, the Secretary of State recognised that the earlier version of the four hour minimum provision could be read as applying to each of a number of recalls between two tours of duty and wished to change this to ensure that multiple recalls within a four hour period were aggregated, it would reasonably be expected that much clearer language would have been used in PR 1987, rather than language which in fact points to the claimants' interpretation. Further, in so far as it

may be necessary to identify a reason for the change, there is force in Mr Westgate's suggestion that the change in wording was because the earlier text did not expressly identify the "occasion" as being the occasion on which the officer was recalled. The 1987 wording (which has been retained thereafter) did so.

Annex H – para 3(h)

144. I agree that the four hour minimum in Annex H para (3)(h) operates in the same way as the Annex G provisions that I have just considered. Again it is not suggested that there is any logical reason for it to operate differently. Here the language is even clearer, stating in terms that the four hour deemed period applies to "each such period" of recall. The key wording is:

> "where a member is required to do duty, or is recalled to duty, for a period of less than 4 hours on a public holiday, or a rostered rest day or, for a part-time member, a free day, such period or each such period shall be treated as though it were a period of 4 completed hours…" (Emphasis added.)

145. The provision goes on to apply "the only exception to this" (which is not relevant here). There is no suggestion in the language used that a further exception applies where a second recall occurs within the four hour period triggered by the first recall; and the language of "each such period shall be treated…" is inconsistent with an intention that the recalls be combined for the purpose of applying the four hour minimum period.

146. The phrase "entitled to reckon" does not appear in the wording of this provision and thus the central point that Mr Beer relied upon in respect of Annex G (1)(h)(iii) can have no application. Instead Mr Beer submits that the reference to "such period or each such period" means that these periods should be aggregated together for the purposes of applying the four hour minimum provision. I do not agree. Whilst the wording certainly contemplates that there could be more than one recall between two tours of duty, para (3)(h) refers to these as individual recalls, with the four hour period to be applied to "each such period" of duty. Furthermore, if Mr Beer's interpretation of the language was correct, the aggregation would apply to all periods of recall between two tours of duty, regardless of whether they occurred within four hours of each other, which is not the construction that the defendant advances. Nor is it apparent, if Mr Beer is correct, why the need to aggregate would have been achieved by such different wording here from that used in Annex G para (1)(h)(iii).

147. Mr Beer also submitted that if the effect of this provision was that the four hour period applied to each recall it would have read as follows: "where a member is required to do duty or is recalled to duty for a period of less than 4 hours… [on a public holiday, rest day or free day] such period or each such period shall be treated as though it or each such period were a period of 4 completed hours". I have underlined the additional words that he said would be included if this was the intended meaning. However, the sheer fact that it is possible to think of a form of wording that would have made the position even clearer does not undermine the interpretation that I have accepted in circumstances where it is in any event apparent from the language used.

Legislative History – Annex 3(h)

148. As Mr Beer submitted that the legislative history supported his interpretation I will address this briefly. I do not consider that it has that effect.

149. The four hour minimum in relation to duty undertaken on rest days and public holidays was introduced by the Police (Amendment) Regulations 1973 (SI 1973/33) ("P(A)R 1973"). This was carried through to reg.29(7) PR 1987, which originally read:

> "29. …for the purposes of this regulation-
>
> (f) a period of less than 4 completed hours of duty on a day which is a public holiday or on a rostered rest day shall be treated as though it were a period of 4 completed hours of duty. "

150. The reference to "each such period" which appears in Annex H para (3)(f) was introduced by reg.2(b) Police (Amendment) Regulations 1988 (SI 1988/727) ("P(A)R 1988").

151. Mr Beer emphasised that the Explanatory Note said that the wording of reg.2(b) ensured that any period of duty, including a period for which a member was recalled to duty of less than four completed hours on a public holiday or rostered rest day, was to be treated as though it were a period of four completed hours. However, as Mr Westgate submitted, whilst the changed wording ensured that the four hour period applied to recalls (as well as to requirements to do duty), this did not confine the effect of the wording used. I consider the meaning to be clear as I have identified earlier.

Policy objections

152. The defendant also raises policy objections to the construction that is advanced by the claimants (that each recall triggers a further four hour period, subject to there being no double recovery). Mr Beer's central point was that the claimants' construction of the four hour minimum will lead to officers receiving significant over-compensation for periods that they have not in fact worked. (In closing he clarified that he did not put the point as high as saying that it would lead to absurdity.)

153. However this submission needs to be placed in the following context:

i) It is in any event inherent in the agreed operation of the four hour minimum period that where it applies an officer will receive an allowance for a period longer than he or she actually worked, in some instances substantially so. As I indicated in para 121 (and subject to Issue 1C) the parties accept that a single short recall triggers the four hour deemed period of work. They also agree that two recalls to duty between the same tours of duty that were more than four hours apart from each other; would both trigger a deemed four hour minimum period. The parties only disagree about the effect of multiple recalls that occur within four hours of each other;

ii) Although the four hour minimum period provisions in Annex G ceased to apply from 1 April 2012, the Secretary of State decided to retain para 3(h) in respect of Annex H despite it having the effect I have highlighted in sub-paragraph i);

iii) On the defendant's approach there would be an arbitrary distinction between a situation where the second recall commenced three hours and 59 minutes after the original recall and one where it commenced four hours and one minute after the first recall. If the Commissioner's interpretation is correct, the first situation would attract four hours of allowance, whereas the second situation would attract payment based on eight hours;

iv) The extent of over-compensation is reduced by the claimants' acceptance that the provisions do not contemplate double recovery for the same period of time; and

v) As I noted at para 119 above, these provisions in Annex G and Annex H apply to all police constables and sergeants. CHIS officers are more likely to have short periods of recall between tours of duty than many other officers given the nature of their work. If the language clearly indicates what the correct construction should be (as I have concluded), the meaning should not be distorted to accommodate a particular impact in relation to a particular cohort of officers.

154. Accordingly, policy considerations do not lead me to adopt a different interpretation of these provisions.

Conclusion

155. For the reasons that I have explained, I conclude that the four hour minimum provisions in Annex G paras (1)(h)(iii) and (3)(f) and Annex H para (3)(f) apply to each recall lasting less than four hours, including where the recalls occur within four hours of each other, but subject to there being no double recovery for the same period.

156. I will address Issue 1C next, given that it involves consideration of the same provisions. Issue 1A concerns evidential points relating to KSO's and KWS's overtime claims in respect of recalls. I have grouped my consideration of the evidential issues together later in this judgment.

Issue 1C: completed periods of 15 minutes

157. The question posed by Issue 1C concerns the inter-relationship between:

i) Annex G para (1)(d) and (1)(h)(iii) in relation to recalls to duty undertaken by full-time officers;

ii) Annex G paras (3)[x] and (3)(f) in relation to recalls undertaken by part-time officers;

iii) Annex H paras (1)(b) and (3)(h) in relation to requirements to do duty on rostered rest days for full-time officers; and paras (2)(a) and (3)(h) in relation to part-time officers;

iv) Annex H paras (1)(d), (3)(c) and (3)(h) in relation to requirements to do duty on a public holiday for full-time officers; and paras (1)(d), (3)(d) and 3(h) in relation to part-time officers; and

v) Annex H paras (2)(d), (2)(e) and (3)(h) in relation to requirements for part-time officers to do duty on a free day.

158. As I have indicated earlier, these provisions apply to constables and sergeants but not to inspectors. The Annex G four hour minimum provisions ceased to have effect from 1 April 2012.

159. The question raised by this issue is whether it is necessary for an officer to have completed a minimum of 15 minutes of duty for the entitlements to arise. The phraseology of issue 1C is not ideal as the issue is not so much whether para 1(d) applies at all, but how and when it is to be applied. Specifically, the dispute between the parties turns on whether the four hour minimum provisions are to be applied before those referring to a completed 15 minutes of duty or whether completing 15 minutes of duty is a condition precedent that must be satisfied in all cases before the application of the four hour minimum.

160. The resolution of this issue is potentially very significant for the quantification of KSO's and KWS's claims. I address the evidence relating to the lengths of their recalls to duty when I consider Issue 1A, but I note for present purposes (and by way of example) that on his schedule of loss KSO identifies an average time for shorter calls during his first role as up to 11 minutes (six minutes or less call time and five minutes processing time). Both officers rely on very short lengths of time for text messages and voicemails.

161. As I explained when I introduced the list of issues, Issue 1C is one of the issues that arose very late in the day. Until closing submissions it was not apparent that the Commissioner took the position that the application of the four hour minimum provisions was subject to a pre-condition that the duty must last for at least 15 minutes and the counter-schedules of loss had not been calculated on that basis.

162. Having considered the matter carefully I am satisfied that I am able to resolve it at this stage despite the relatively limited submissions that I heard from counsel because of the late introduction of this point. I will first consider the position in relation to Annex G paras (1)(d) and (1)(h)(iii).

Annex G paras (1)(d) and (1)(h)(iii)

163. I discussed the terms of para (1)(h)(iii) when I addressed Issue 1. I have set out para (1)(d) at para 77 above. For present purposes I am not concerned with the disregard in the last few lines of para (1)(d); as I will explain when I discuss the significance of *Allard* to this issue, that text is concerned with overtime at the end of a shift, not a recall to duty between shifts. The opening words of para (1)(d) are also not relevant to the present issue; *Allard* determined that para (1)(g) applies to overtime at the end of a shift; and para (1)(e) concerns circumstances where an officer chooses to receive time off in lieu of payment of the allowance. The material wording of para (1)(d) for present purposes is:

> "…a full-time member of a police force of the rank of constable or sergeant shall be granted an allowance in respect of each week at the rate of a twenty-fourth of a day's pay for each completed period of 15 minutes of overtime worked by him on any occasion during that week…" (Emphasis added.)

164. Para (1)(d) must be read in the context of para (1)(a) which provides (as material) that "a member of a police force of the rank of constable or sergeant shall be compensated in respect of time…" and then the three forms of overtime are described (para 75 above; emphasis added).

165. Accordingly, the structure is as follows. The entitlement to compensation is provided for by para (1)(a). Paragraph (1)(d) addresses the amount of compensation that will be paid in respect of full-time officers who have worked overtime, namely payment at 1/24th of a day's pay for each completed period of 15 minutes of overtime worked during the week in question. Paragraph (1)(h) addresses how the period of overtime is to be computed. Each of the sub-paragraphs in (1)(h), including (iii), concern the length of the period of overtime that is to be compensated.

166. In my judgment it therefore follows that payment of the allowance under para (1)(d) is to be applied to the period of overtime once the length of the overtime worked has been calculated pursuant to the provisions of para (1)(h).

167. Mr Beer submitted that the reference to "any period for which he is recalled" in para (1)(h)(iii) was a reference to the period referred to in para (1)(d) of 15 minutes of overtime worked (thereby indicating that it was subject to that requirement). I do not agree. The wording of para (1)(h)(iii) refers to the "period for which he is recalled", that is to say it refers to the length of the officer's recall, not to a criterion imposed by para (1)(d). Furthermore, and consistent with the structure that I have described, para (1)(d) is concerned with the computation of the allowance, not the computation of the length of the period worked. If the intention was to restrict the application of the four hour minimum period to circumstances where the officer had worked for at least 15 minutes, the logical place to say that would have been in para (1)(h)(iii).

168. Mr Beer also submitted that the claimants' construction ignored the 15 minute criterion. I do not consider that it does. The computation of the allowance pursuant to para (1)(d) involves payment being granted for each period of 15 minutes of overtime, so this provision is not ignored, but this calculation is applied once the period of overtime has been computed. In a similar vein he suggested that the claimants' approach failed to explain what happened after 1 April 2012 when para (1)(h)(iii) no longer applied. However, the position is then straightforward: the length of the period of overtime is computed without reference to what was para (1)(h)(iii); and then para (1)(d) governs the calculation of the allowance to be paid.

169. In so far as it is suggested that there is some inconsistency in applying a deemed four hour minimum in circumstances where the allowance is to be paid by reference to 15 minute increments, para (1)(d) applies to the calculation of the allowance for all instances of overtime claimed pursuant to Annex G, not just to recalls computed by reference to para (1)(h)(iii).

170. My conclusion is reached on a construction of the Annex G para (1) provisions. I emphasise that this is the basis of my conclusion because Mr Westgate submitted that the issue was already determined in the claimants' favour by *Allard* but for the reasons that I will go on to explain, I do not consider that the Court of Appeal's decision went that far.

The significance of *Allard*

171. In order to address the parties' rival contentions in relation to *Allard* it is necessary to explain the issue that was before the Court of Appeal, the submissions made and Patten LJ's reasoning. I earlier explained the court's conclusions in terms of what amounted to a recall (para 36 – 38 above). The claimants' position in that case was that in relation to each duty that amounted to a recall, the application of para (1)(h)(iii) meant: "for the time they were recalled to duty between each two rostered tours of duty they became entitled to be paid for a minimum of four hours' overtime. This would apply even if, for example, they received only one call on a particular evening and spent a total of no more than 10 to 15 minutes dealing with it" (Patten LJ, para 13). However, the Chief Constable submitted that even if the periods that were relied upon amounted to recalls, they were excluded from being treated as overtime by paras (1)(d), (1)(g) and (1)(h) of Annex G, which, it was said, excluded unplanned periods of overtime of less than 30 minutes (paras 25, 27 and 30-31). As Patten LJ identified at para 26 the issue turned on whether the disregard at the end of para (1)(d) applied to recalls ("except that on each of the first four occasions on which overtime in respect of which the member was not informed as mentioned in paragraph (g) is worked during a week 30 minutes of overtime is to be disregarded").

172. In the course of explaining this issue, Patten LJ referred to the conclusions of the judge below; that although he had considered that the governing provision for recalls to duty was paragraph 1(h) "so that even for a period of less than 15 minutes the minimum four hours of overtime becomes payable, he held the four hours attracted the disregard in the proviso to para (1)(d) thereby reducing the allowable overtime to 3.5 hours" (para 32). Lord Justice Patten then observed that neither party supported this part of the judge's reasoning (that the four hour minimum applied but with a 30 minute reduction); as the Chief Constable contended that the disregard precluded any claim of less than 30 minutes; and the claimants submitted that the proviso in para (1)(d) and para (1)(g) had no application to recalls. After reviewing the antecedent history of the provisions at paras 37 – 43, Patten LJ accepted the claimants' case that these provisions "were simply the latest version of a well-established scheme of overtime which distinguished between overtime at the end of a tour of duty (whether casual or planned) and overtime comprised in a recall to duty between tours" (paras 43 - 45). In the course of setting out his conclusion he observed that:

> "44. …It is highly relevant to the construction of paragraph 1(g) that it operates 'for the purposes of paragraphs (d) and (f)' and not for paragraph (h). This supports the view that paragraph 1(h) has an independent existence and field of operation which is general in its application in terms of computing qualifying overtime…"

173. As will be apparent from this summary, the Chief Constable's argument before the Court of Appeal rested on the proposition that the para (1)(d) 30 minute disregard

applied to recalls. Counsel did not contend in the alternative that the judge below had been wrong to find that para (1)(h)(iii) applied so that recalls of less than 15 minutes were deemed to involve working for four hours. Nor did the Court of Appeal express any disagreement with that proposition. This led Mr Westgate to submit that the Court of Appeal in *Allard* had, in effect, endorsed the inter-relationship between paras (1)(h)(iii) and (1)(d) that is relied upon by the constable claimants in these proceedings. In making this submission, he pointed out that Patten LJ's summary of his argument in para 13 showed that the Court was aware that claims were made for recalls shorter than 15 minutes and he did not demur at that prospect.

174. As I have already foreshadowed, I consider that this submission involves reading too much into *Allard*. The Court of Appeal did not hear any argument on the point that is raised by Issue 1C. The focus in that case was on the disregard part of para (1)(d) rather than the wording with which I am concerned. In the circumstances it is unsurprising that the Court did not express a view on the interrelationship between the main part of para (1)(d) and para (1)(h)(iii). At best Mr Westgate can derive some limited support from Patten LJ's observation in para 45, which I have already quoted, that para (1)(h) has an independent existence and field of operation which is general in its application in terms of computing qualifying overtime. I say limited support because, for the reasons that I have already explained, his reasoning was focused upon the effect of the disregard in para (1)(d) and para (1)(g).

Legislative history

175. As I have already explained I was not addressed on the antecedent provisions when submissions were made on Issue 1C. I have checked the position in terms of the regulations that were placed before me and I cannot see anything that points to a different outcome to the conclusion that I have expressed. I will summarise the position briefly.

176. Regulation 26 was inserted into the principal regulations by P(A)R 1985 (para 132 above). The structure of the provision was as follows. Regulation 26(1) provided that: "Subject to, and in accordance with, the provisions of this Regulation a member of a police force shall be compensated in respect of time for which he remains on duty after his tour of duty ends or is recalled between two tours of duty" and this was referred to as "overtime". The comparable provision to para (1)(d) of Annex G was as follows:

> "(3) A member of a police force to whom Regulation 25 applies shall…be granted an allowance in respect of each week at the rate of a twenty-fourth of a day's pay for each completed period of 15 minutes of overtime worked by him on any occasion during that week."

177. The computation provision was reg.26(7) which provided (as material):

> "(7) In computing any period of overtime for the purposes of this Regulation-
>
> …..

> (c) where a member is recalled to duty between two rostered tours of duty and is entitled to reckon less than 4 hours of overtime, disregarding any overtime reckonable by virtue of Regulation 29 (travelling time treated as duty), he shall be deemed on that occasion to have worked for such period that he is entitled to reckon 4 hours of overtime in addition to any overtime reckonable by virtue of Regulation 29."

178. Thereafter reg.28 PR 1987 followed a similar structure (albeit the specific text of the four hour minimum provision was altered to its current wording, see para 133 above); and reg.28 PR 1995 also followed a similar structure, save that the disregard provision was added to para (3).

Annex G – part time officers

179. I consider that the provisions for part-time officers in Annex G operate in a similar way to those relating to full-time officers. I can see no basis for differentiating between the two in this regard.

180. The entitlement to compensation is provided for by para (1)(a). Paragraph (3)[x] (para 82 above) addresses the amount of compensation that will be paid in respect of part-time officers who have worked overtime, where they have been on duty for more than 40 hours in the relevant week and on the day in question worked a duty of more than eight hours, namely an allowance at the rate of $1/12^{th}$ of an hour's pay for each completed period of 15 minutes of overtime. Paragraph (3)(f) (and some of the other provisions in para (3)) address how the period of overtime is to be computed.

181. It therefore follows that, structurally, the payment of the allowance under para (3)[x] is to be applied to the period of overtime after the length of the overtime worked has been computed pursuant to the provisions of para (3)(f).

The Annex H provisions

182. Counsel did not suggest that a different approach should apply under Annex H in relation to this issue. I consider that the Annex H provisions operate in the same way, essentially for the reasons that I have already discussed.

183. Thus, by way of example, the entitlement to be granted an allowance when the officer is required to do duty on a rest day is provided for by para (1)(a). The rate at which a full-time officer is to be paid is set out in para (1)(b), namely the fraction of a day's pay specified in para (1)(c) "for each completed 15 minutes of duty on a rostered rest day". However, the amount of duty that the officer undertook is to be computed by reference to the minimum four hour provision in para 3(h). Paragraph (1)(b) is not expressed as imposing a precondition that overrides the operation of para (3)(h) and there is nothing in the latter provision that suggests the period there referred to is a criterion expressed in para (1)(b), to the contrary, para (3)(h) applies where the officer "is recalled to duty, for a period of less than 4 hours on…" thus the period in question to which the four hour minimum is to be applied is the duration of the recall. A similar structure applies in relation to the provisions concerning requirements to work on a public holiday or (for part-time officers) on a free day. I have summarised those provisions at para 92, 93 and 96 above.

Conclusion

184. For the reasons I have identified I conclude in respect of Issue 1C that the four hour minimum provisions are applied as part of the process of calculating the length of overtime worked by the officer before the allowance payable is calculated by reference to the applicable rate which is applied to each completed 15 minutes of duty.

Issue 1B: recalls and requirements to do duty for inspectors

185. Issue 1B only concerns inspectors. It is not disputed that the periods of work that KSO and KWS rely upon between their tours of duty amounted to recalls. However, this is an area of dispute in relation to KBS. The defendant's position is that only urgent out of hours contact with or about a CHIS amounted to a recall or a requirement to do duty. KBS's position is that she was recalled to duty whenever she was contacted in relation to intelligence received by a handler out of hours which required a decision about dissemination or other consequential action and/or whenever she was contacted out of hours by handlers, operational teams of officers, or other agencies for input and/or action relating to a CHIS or a handler. I summarised the nature of the contacts that she would receive at para 53 above. As regards calls in respect of managerial issues or handler welfare, her position is that these were very negligible in amount, but in any event also constituted recalls to duty.

186. Taking what Mr Beer described as a pragmatic approach, the defendant's counter schedule has not in fact excluded any of the contacts upon which KBS's claim is made on this basis; I am asked to determine the point of general principle, rather than to make decisions in respect of individual calls with which she was involved.

187. Mr Cooper also pointed out that a substantial part of the claimant's contention in this respect was admitted in the defendant's pleadings. Subject to averments in respect of a rotating pattern of cover and an on call protocol, para 2 of the Defence admits para 11 of KBS's Particulars of Claim, which includes the following:

> "As a Controller the Claimant's core role was to manage the relationships between the Handlers in her unit and the CHISs, and the intelligence obtained from them. In order to perform those core functions, pursuant to her role definition, established practice and procedure, and the Defendant's expectations as to the performance of her role, she was expected and required (amongst other things) to:
>
> …..
>
> 11.2 manage and authorise all meetings and contacts with CHIS;
>
> 11.3 ensure that intelligence was appropriately graded and disseminated efficiently, [*Annex 30*] and any implications for the welfare of CHIS or Handlers;

> 11.4 determine, authorise and manage the appropriate and efficient onward dissemination of intelligence, and for that purpose make and maintain appropriate contact with the operational teams conducting investigations/operations to which the CHIS intelligence was relevant, and with senior managers;
>
> 11.5 [*Annex 31*];
>
> 11.6 for all of the above purposes, remain available to take calls on her work mobile telephone (or return any missed call within a short period) from Handlers, operational teams and/or senior manager at any time of the day or night, including during weekends, public holidays and when on leave (other than extended leave aboard)." (Emphasis added.)

188. Despite this partial admission, I will nonetheless determine the matter as one of principle (as Mr Cooper accepted I should), given the role that the trial of the lead claims is intended to have in resolving the POCL litigation.

189. Whether the work undertaken by KBS amounted to a recall to duty is relevant for the purposes of the annual leave provision in Annex U para (5) (para 105 above). It could also be relevant to the triggering of para (1)(g) of Annex H if Issue 7A were decided in KBS's favour.

The significance of *Allard*

190. Mr Cooper and Mr Beer both relied upon Patten LJ's reasoning in *Allard* as supporting their respective positions.

191. I have summarised the Court of Appeal's decision in *Allard* in respect of what amounted to a recall at paras 36 – 38 above. It is apparent from Patten LJ's reasoning in para 21 (quoted at para 37 above) that the question is whether "the officer was required to carry out the duty which he performed…if an occasion arises during what would otherwise be a rest or holiday period which, as a result of his current orders, requires the officer to carry out the particular task."

192. As expressed, it is clear that the principle is not confined to contact from CHIS or work in respect of CHIS; this was the focus of the decision because those were the scenarios before the Court of Appeal, but the principle is expressed more broadly. This is confirmed by the contents of para 22 where Patten LJ cited as "an example of" the principle he had just described in para 21, *Crosby v Sandford* (1979) 78 LGR 85 ("*Crosby*"), a case not relating to CHIS but a claim by a police dog handler for an overtime allowance in respect of time spent each day outside of rostered hours grooming and exercising the dog. The Court of Appeal found in the officer's favour, given the general instruction in respect of care of the dog that he had been provided with.

193. Furthermore, the *Allard* decision did not confine the circumstances in which a recall arose to urgent work. In para 23 of his judgment (cited at para 37 above) Patten LJ said that there was no reason to distinguish between a call involving the passing of

useful intelligence and a scenario where the reason for the call is a non-urgent welfare issue. The distinction between the eight scenarios that amounted to recalls and scenario V, which did not (para 38 above), was that in the latter situation, in light of the controller's decision, the handler was not to speak to the CHIS and thus was not required to undertake any duty.

194. Accordingly, I conclude that the defendant is incorrect in limiting the concept of a recall to circumstances where KBS had to deal with an urgent contact with or about a CHIS. Consistent with the decision in *Allard*, where the evidence establishes that the officer was required to carry out the duty they performed then it can amount to a recall.

195. Consistent with her role as I have described at paras 33 and 40 above, KBS was required to take the out of hours calls she received from handlers. In turn those calls would sometimes necessitate consequential actions in relation to intelligence that the CHIS had provided. The Commissioner has not disputed that implementing those consequential actions would amount to or be part of a recall to duty for the constable claimants; I can see no distinction of principle in respect of any consequential actions that KBS, as an inspector, had to take. Equally, the defendant accepts that KBS would have been contacted out of hours by other police operational teams and external agencies in respect of her CHIS controller responsibilities. Having heard her evidence, I am quite satisfied that the expectation was that KBS would answer those calls and take action as necessary. Of course, as a matter of practicality, KBS would not know if the matter was urgent or not until she had taken the call and thus was made aware of the reason for it. In any event, dealing with such calls fell squarely within her responsibilities as a CHIS controller and she was recalled to duty in the *Allard* sense, when she dealt with these matters.

196. During her cross-examination KBS said that a high percentage of the out of hours calls she received related to CHIS matters, rather than to her other managerial responsibilities. There was no evidence to contradict this and it accords with common sense, in that KBS is much more likely to have been contacted late in the evening or at weekends about intelligence just received from a CHIS than over a managerial issue. Nonetheless if a call relating to the latter was considered to be sufficiently pressing that it was necessary to contact her in her capacity as an inspector outside of her working hours, then it is reasonable to conclude that it was something that required her immediate attention and, as such, this would also fall within the concept of a requirement to do duty and a recall.

Conclusion

197. Accordingly, I accept that KBS was recalled to duty when she was contacted out of hours in relation to intelligence received by a handler which required a decision about dissemination or other consequential action and/or when she was contacted out of hours by handlers, operational teams of officers, or other agencies for input and/or action relating to a CHIS or a handler and/or when she was contacted out of hours in relation to her other managerial responsibilities.

198. It appears to me that it is logical to consider issue 7A next, given that it relates to the entitlement of inspectors, which I have just been considering and it involves Annex H

(which I have already addressed in relation to Issues 1 and 1C in respect of constables and sergeants).

Issue 7A: additional leave in lieu of duty on public holidays and rest days for inspectors

199. The question raised by Issue 7A is whether Annex H para (1)(g) has any application to the kind of out of hours work that KBS undertook as a CHIS controller. As I have already explained (para 100 above), the correct construction of this provision has a substantial impact on the quantum of KBS's claim. I have set out the Annex E para (4)(b) inspector's entitlement to rest days and leave on public holidays at para 72 above and Annex H para (1)(g) at para 100 above. However, given the centrality of para (1)(g) to this issue, I will also set it out again here:

> ""(g) Where the exigencies of duty have precluded:
>
> (1) the allowance of a day's leave on a public holiday, or
>
> (2) the grant in any week of two rest days,
>
> to a member of a police force of the rank of inspector or chief inspector, he shall, during the next following twelve months and so far as the exigencies of duty permit be allowed or (as the case may be) granted a day's leave in lieu of any such day not allowed or granted."

The provision applies to both inspectors and chief inspectors, but I will refer to inspectors in my discussion as a shorthand.

200. KBS submitted that the effect of this provision is that when she was required to undertake work on a rest day or a public holiday the exigencies of duty had "precluded" her from receiving her Annex E, para (4)(b) entitlement to a complete day's leave on a public holiday or to two complete rest days in each week, so that she was entitled to be allowed / granted a day's leave in lieu within the next 12 months. In turn, that the failure to grant her those days in lieu to which she was entitled gave rise to a right to compensation which can now be enforced by a claim for breach of statutory duty (Issue 8) or by the other means raised by Issues 9 – 10.

201. Even if KBS is correct in her construction of para (1)(g) she also has to translate that entitlement into a claim by succeeding on Issues 8, 9 and/or 10. Issues 8 – 10 will in any event fall to be considered in respect of the failure to grant additional leave accrued under Annex O. However, in relation to the Annex H claim, this antecedent issue arises as well, as the defendant disputes that she had any entitlement at all. His position is that para (1)(g) does not apply to circumstances where duty is performed by reason of a recall or a requirement which arises on the day itself, as opposed to where the grant of the rest day or allowance of the public holiday is cancelled in advance.

Construction of para (1)(g)

202. The wording of para (1)(g) is not as clear as it might be. The difficulty of arriving at the correct answer is compounded by the fact that both parties are able to point to

examples which they say illustrate the unfairness / absurdity of the other party's position. Specifically:

i) Mr Beer pointed out that if KBS's construction is correct then an inspector could spend as little as one minute dealing with a call / text message from a CHIS handler on one of their rest days or on a public holiday and thereby become entitled to a whole new day's leave in lieu; and

ii) Mr Cooper pointed out that if the Commissioner's construction is correct, then an inspector could work for a substantial number of hours on their rest day / a public holiday, having received no advance notice - for example if sensitive intelligence from a CHIS was received regarding an imminent threat to life - but they would receive no recompense for this as they would not get a replacement day off in lieu (and inspectors cannot claim overtime).

203. In construing this provision I must bear in mind (as I have noted in relation to earlier issues), that para (1)(g) applies to all officers of the relevant rank, some of whom may have very different working arrangements and duties to CHIS controllers.

204. Having reflected on all of the submissions made to me, I have concluded that the defendant's approach is correct for the reasons that I will identify.

205. Firstly, I have focused on the language used in the Determinations. I agree with Mr Beer's submission that it is not a natural use of language to say that a rest day has not been "granted" or a public holiday has not been "allowed" where the rest day or public holiday has been taken, but there has been some unplanned interruption, however short, during the course of it. Equally, it is not a natural use of language to say that the grant or allowance of the day has been "precluded" when the interruption occurs during, rather than before, the day itself. Nonetheless, I do not regard this as a particularly strong point in the Commissioner's favour given, as Mr Cooper points out, the Annex E, para (4)(b) entitlement is to a rest day or to a day's leave on a public holiday, not to an interrupted day and so on one view an officer who has only had an interrupted day of leave has been "precluded" from taking their entitlement.

206. However, a strong point in favour of the Commissioner's construction comes from the application of the (undisputed) principle that the provision must be construed in its context. As Mr Beer submitted, if the claimant's construction is correct, the contrast with the Annex H provisions relating to constables and sergeants is striking. As I have summarised at paras 89 – 99 above, there are detailed provisions that apply where constables and sergeants are required to work on their rest days or on public holidays or (for part-time officers) on their free days. These provisions contain a carefully calibrated scheme under which their level of entitlement depends upon the amount of notice they received of the requirement to work; the length of the duty they undertook is computed in accordance with specific provisions such as para (3) (h); and the rate of payment for the period worked is calculated by refence to specific formulae and measured in 15 minute parcels of duty undertaken. Yet, if KBS's construction is correct, there is no comparable calibration in relation to inspectors and any amount of duty undertaken on either a rest day or a public holiday, however small in amount and whatever the circumstances will lead to an entitlement of a whole day in lieu. Furthermore, there is no obvious explanation as to why the position for constables and

sergeants, on the one hand, and for inspectors, on the other, would be so different in this respect.

207. I also regard the difference in language as significant, in that the entitlements of the constables and sergeants are triggered when they are "required to do duty on a day which is" a rest day, public holiday or free day (paras (1)(a), (1)(d) and (2)(c) respectively). This phraseology plainly extends to a situation where an officer does some duty within what is otherwise a rest day, public holiday or free day (and is to be compensated as a result). By contrast, para (1)(g) uses very different language, referring as I have indicated to where "the exigencies of duty have precluded" the allowance of a day's leave on a public holiday or the grant of a rest day. There is no obvious reason why the Secretary of State could not have used the language of inspectors being "required to do duty on a day which is" a rest day or public holiday if that was intended to be the trigger for the grant of a day's leave in lieu. As Mr Beer submits, the language used in para (1)(g) is more consistent with circumstances where it becomes known in advance of the day in question that there is a need for the inspector to work on a day that was previously going to be their rest day / is a public holiday, so that the rest day is cancelled by the chief officer or they are not allowed to take the public holiday as leave.

208. Mr Cooper relied on the terms of the parent provision, reg.26(1) (para 62 above). He pointed out that like para (1)(g) itself, it is couched in mandatory terms ("shall") and refers to the officer being "granted leave or otherwise compensated" in respect of time spent on duty on public holidays or rest days. However, I do not consider that these points assist his argument; they simply beg the question of what that entitlement is. The regulation makes clear that it is for the Secretary of State to determine the circumstances in which an officer shall be granted leave or otherwise compensated. It is therefore for the Secretary of State to determine the preconditions for this entitlement, including, it follows, the circumstances in which leave will not be granted and compensation will not be payable.

209. Furthermore, the difference between constables and sergeants (on the one hand) and inspectors (on the other) if the defendant's construction is correct is readily explicable. Inspectors and the ranks above them are not entitled to claim overtime because they are salaried and their salary operates as an all-inclusive package; any out of hours work that they are required to do for which a constable or sergeant would be able to claim overtime (or seek leave in lieu) is already included in their pay package. The history is of assistance in illuminating this context.

Legislative history

210. Until 1994 all ranks up to but not including superintendents worked fixed hours on rostered tours of duty and were accordingly entitled to extra payments for overtime and for working on public holidays and rest days. Following the Sheehy Report in 1994, inspectors (and chief inspectors) changed from working fixed hours on a rostered tour with those entitlements to an all-inclusive salary that took into account overtime and interrupted rest days. The proposals put forward by the PNB are contained in PNB Circular 94/2 (Advisory). Paragraph 6.2.1 said:

> "Officers will be paid all-inclusive salaries which will cover all overtime, rest day and public holiday working by inspectors.

> The salaries set out at Annex A reflect this. As a consequence, all the current entitlements of inspectors to payment or time off in lieu will cease."

211. This proposal was carried into effect by regulations 3, 4, 5, 6(a) and 7 Police (Amendment) (No 2) Regulations 1994 (SI 1994 / 2195) ("P(A)R 1994"). The effect of these new provisions was summarised in the Explanatory Note as follows:

> "The effect of regulations 2 to 5, 6(a) and 7(a) is that inspectors and chief inspectors cease to work fixed hours in accordance with a duty roster, and accordingly cease to be entitled to extra payments for overtime, and for working on public holidays and rest days although they remain in principle free from duty on such days…"

212. Both parties place some reliance upon PNB Circular 94/17 (Advisory), dated 20 September 1994 as explaining the background behind the introduction of the provision that is now found in para (1)(g). The circular said:

> "The intention of the agreement is that the conditions for inspectors and chief inspectors should be based on the current working arrangements for superintendents, including the determination of their position on being required to work on a rest day or public holiday.
>
> Accordingly, inspectors and chief inspectors cease to be entitled to payment for overtime, and for working on public holidays and rest days, although they should, if the exigencies of duty permit, be free from duty on such days.
>
> …..
>
> It is an inevitable feature of police work that there will be occasions when, after a rest day has been arranged, an officer of the rank of inspector or chief inspector is nevertheless required to work on that day due to unforeseen circumstances.
>
> Where the exigencies of duty have led to an inspector or chief inspector working a day's duty on a day that would otherwise be a rest day then during the following 12 months he shall, subject to the exigencies of duty, be granted an additional rest day." (Emphasis added.)

213. This circular preceded reg.30(3) PR 1995 which introduced the equivalent provision to that which now appears in Annex H para (1)(g).

214. Whilst I do not treat the PNB's view as determinative (consistent with the principles I have already identified at paras 112 - 117 above), it is of some note that the explanation contained therein appears to accord with the interpretation that I have already arrived at from construing the provision in its context. In particular the circular indicates that where the exigencies of duty have led to an inspector "working

a day's duty" on a day that would otherwise have been a rest day, the entitlement to a day in lieu applies. I accept that this phraseology contemplates the inspector working a whole day's duty, as opposed to embracing situations where there is a requirement to do any work on a rest day. On the other hand, I do not consider that this text is consistent with Mr Cooper's submission that the wording of the circular indicates that reg.30 PR 1995 was intended to reinstate compensatory arrangements for inspectors who had to do work on a rest day.

215. In arriving at my conclusions, I bear in mind Mr Cooper's point that the intention behind provisions granting an entitlement to rest days and leave on public holidays (here Annex E para 4(b)) is to ensure that officers do not work unlimited hours and are afforded adequate rest. Nonetheless, the history I have just discussed supports the proposition that officers in the more senior ranks of inspectors and above are paid a compensation package that reflects the fact that their role means they will sometimes have to undertake out of hours duties.

Policy considerations and consequences

216. As I have summarised earlier (para 101 above), the equivalent provisions to para (1)(g) also apply in relation to officers of more senior rank. If KBS's construction is correct, then officers in those ranks would also become entitled to a day off in lieu on every occasion they were required to do any work on a rest day or public holiday, even if this involved a short response to a text message or a brief telephone call.

217. In this regard there is some force in the defendant's submission that the position would become unworkable if the claimant's construction is correct, thus indicating that this cannot have been the Secretary of State's intention. In a given year, inspectors are entitled to 104 rest days and seven public holidays. If KBS is correct, then if an inspector was required to deal with one communication on each of those days they would become entitled to an additional 111 days of leave in that year. A similar position would also apply to officers in the more senior ranks pursuant to the provisions in Annex H paras (1)(h) and (1)(i).

218. I accept that the dire scenario advanced by Mr Beer involved some overstatement. He suggested that KBS's construction would mean that throughout police forces, officers of the rank of inspector and above would be accruing and carrying over vast amounts of leave days, so that by the third year of such an arrangement they would be spending nearly all of their time on rest days, public holidays or days off in lieu of interrupted days. However, Mr Beer's scenario does not take account of the fact that para (1)(g) provides that the day in lieu is to be granted / allowed within the next 12 months and there is no carry over provision of the kind that applies to untaken annual leave (albeit KBS says that a monetary claim arises for days not given); nor of the fact that the grant of a day in lieu is expressly subject to "the exigencies of duty". In addition, Mr Cooper accepted that para (1)(g) could not apply where an officer elected to do some catch-up work on a rest day or public holiday, as opposed to where they are required to do duty or recalled to duty. However, even with these caveats, it remains the case that if KBS is correct, all officers from the rank of inspectors upwards could build up very large quantities of days in lieu in any given year to which they became entitled as a result of undertaking a brief amount of work on a rest day or public holiday and in circumstances where it must be in the nature of many

senior officers' roles that circumstances arise where there is a need to contact them out of hours.

219. There is also force in Mr Beer's point that if the claimant's construction is correct, it would effectively re-introduce the pre-Sheehy position for inspectors by the back door. I have already noted that both parties can point to injustice that could arise if the other party's construction is favoured. However, the consequences that Mr Cooper emphasises (of an officer working for a substantial period of hours on a rest day without receiving a day in lieu or compensation) are to be seen in the context of the inspector's salary package and the degree of flexibility afforded to an officer of the rank of inspector or above to manage their working hours.

220. I have already noted that officers of the rank of inspector and above do not have rostered tours of duty. KBS accepted when cross-examined that she was expected to manage her own time and that the times when she started and finished work were flexible and that, where her workload permitted it, she was able to adjust her working hours to take into account work she had undertaken out of hours. She also accepted that when she experienced a significant degree of disruption on a rest day / public holiday of around two or three hours or more she would ask the authorising officer for that day to be re-scheduled, which duly occurred. Mr Beer put to her that there was a "quid pro quo" or an informal form of "swings and roundabouts" in operation, which, broadly speaking, enabled her to take account of unanticipated interruptions in the way she organised her work. Although KBS did not fully accept this description (in particular emphasising that it was often too busy for her to come in late / leave early the next day), it appears to me to be a broadly fair one having listened to her evidence. Whilst KBS's own position cannot determine the construction of the Determinations, it illustrates that the unfairness is not as stark as Mr Cooper suggested.

221. Before leaving this issue I will mention briefly and for completeness two points raised by counsel that, in my judgment, do not assist me in the task of construing the Determinations. Firstly, I do not consider that the meaning of the provision can be influenced by the contents of the MPS's Users' Guide to Police Officers' Pay Expenses and Allowances. Other forces may or may not interpret the same provisions differently, but in any event what a particular police force makes of these provisions is not a permissible tool of construction. Secondly, Mr Cooper placed some reliance on the position under the Working Time Directive 2003/88/EC, which is given effect domestically by the Working Time Regulations 1998 ("WTR 1998"). However, the scheme and wording of those provisions is quite different, as is the context, including the overall package of benefits that inspectors are entitled to. My decision is very much based on the wording used in Annex H and on the particular context applying to police officers of the rank of inspector and above (as I have set out above).

Conclusion

222. Accordingly, I conclude that Annex H para (1)(g) does not permit an inspector to claim compensatory leave (or damages) for work performed on public holidays or rest days where the duty is performed by reason of a recall or a requirement to do duty which arises on the day itself. It follows that KBS's claim pursuant to para (1)(g) fails.

Issue 2: under-compensation through time off in lieu of an allowance

223. Having reflected upon the matter, I accept the defendant's submission that I should not deal with this issue as it does not arise in relation to KSO or KWS. In the circumstances, I will simply explain my reasons for taking that approach briefly.

224. The essential question raised by Issue 2 is that where an officer of the rank of constable or sergeant has elected time off in lieu of compensation pursuant to the relevant provisions in Annexes G and H and that time off in lieu is not then granted, can the officer still advance a monetary claim for the allowance. The claimants submit the question should be answered in the affirmative; the defendant says it should be answered in the negative.

225. In order to illustrate how the point arises, I have set out the Annex G paras (1)(e) and (1)(f) provisions – which apply to full-time officers - at para 82 above. I have identified more briefly the equivalent Annex G provisions that apply to part-time officers (para 85 above) and the provisions in Annex H that relate to an election to receive time off instead of an allowance where the officer is required to work on a rest day, public holiday or free day (paras 94 and 97 above).

226. Taking the Annex G provisions in relation to full-time officers as an example, the claimants' position is that if the time off is not granted in accordance with para (1)(f) then the extinguishing provision in para (1)(e) does not come into operation and the officer remains entitled to an allowance. By contrast, Mr Beer submitted: (i) that the chief officer is only required to grant the time off in lieu pursuant to para (1)(f) if the officer has made an election that accords with para (1)(e); and (ii) if some time off in lieu is granted pursuant to these provisions (for example one hour rather than four hours, because it was not appreciated that para (1)(h)(iii) applied) then an entitlement to the allowance is extinguished.

227. In the circumstances, questions arise as what amounts to an election for the purposes of para (1)(e) and, in particular, what amounts to a sufficient election to trigger the operation of these provisions where the officer in question did not appreciate that there was a four hour entitlement as a result of para (1)(h)(iii), rather than an entitlement based on the time actually worked. I heard some submissions from both Mr Westgate and Mr Beer as to what would amount to a sufficient election in the circumstances. In addition, I was addressed by Mr Beer on the importance of making a prompt election and the policy considerations that arose and Mr Westgate responded to these points.

228. Given that these matters are in play, I agree with Mr Beer's position (which was not strongly resisted by Mr Westgate) that it is desirable for Issue 2 to be determined in the context of a case (or cases) where a form of election / alleged election has been made by the officer in question so that these matters can be explored in the context of one or more concrete factual scenarios. Neither KSO nor KWS elected to receive time off in lieu of being paid the allowances at any stage.

Issue 8: failure to grant additional leave - damages claims for breach of statutory duty

229. As I have rejected KBS's construction of Annex H para (1)(g) when I addressed issue 7A, Issue 8 does not arise for determination in respect of her claim arising from work

undertaken on rest days and public holidays.

230. However, Issue 8 does arise in respect of the following. Firstly, the claims brought by KSO and KWS in relation to days when they were required to do work on a public holiday in circumstances that gave rise to an entitlement to be granted another day off in lieu (in addition to the allowance) pursuant to Annex H para (1)(d). (The issue could, in theory, also arise in circumstances where constables or sergeants were required to work on a rest day. However, as the entitlement to another rest day pursuant to para (1)(a)(ii) only applies where 15 days or more notice of the requirement to work has been given, it does not arise in the situations concerning CHIS handlers that I am asked to consider.)

231. Secondly, the issue arises for constables, sergeants and inspectors in relation to days when they were recalled to duty from a period of annual leave, insofar as the recall met the qualifying conditions in Annex O para (5), thereby triggering an entitlement to additional leave. As I have indicated earlier, Issues 10AA, 10A and 11 raise questions regarding those qualifying conditions; this issue proceeds on the basis that the officer in question has established that entitlement.

232. It is common ground that if the officer in question has made an effective election to receive payment rather than additional days in lieu (a matter which Issue 16 is concerned with), the sum in question may be recovered by way of a claim for statutory debt, so that a claim for breach of statutory duty (and the claims contemplated in Issues 9 and 10) are unnecessary. Issue 8 concerns the situation where the officer was due additional leave, pursuant to the provisions I have referred to in the two preceding paragraphs but did not receive it. The key question for present purposes is whether that can be pursued as a damages claim for breach of statutory duty.

233. The claimants' position is that if the additional leave is not granted within a reasonable time then the chief officer is in breach of the statutory duty to compensate the officer for the interruption of their annual leave or public holidays and that breach continues in relation to KSO (who remains a serving officer) and continued in the case of KWS and KBS until they left the service of the MPS. Further, that this breach of statutory duty gives rise to a claim in damages for the consequential loss sustained. By contrast, the defendant's position is that there is no cause of action entitling the payment of damages as an alternative to accrued but untaken days of additional leave. In the alternative, the defendant submits that any claim must be brought within a reasonable period of time.

The additional leave provisions

234. None of the provisions that confer the entitlement to additional days of leave spell out what is to happen if the additional leave to which the officer has become entitled is not granted.

235. I have earlier set out the material provisions as follows:

    i) Regulation 26(1) at para 62 above;

    ii) Annex H para (1)(d) at para 92 above;

iii) Annex O para (5) at para 105 above.

236. As I have indicated, the claimants submitted that the additional leave must be granted within a reasonable period (in the absence of any specific period being stated in the respective provisions). I agree. I accept that it cannot have been intended that the grant of the additional leave to which the officer becomes entitled can be postponed indefinitely. As Mr Westgate pointed out in relation to Annex H para (1)(d), the period is likely to be relatively short, given the four day notification window and the fact that intervals between public holidays are never more than about four months. At the outside, it is unlikely that a reasonable period in this context would be longer than the 12 month period specified in Annex H para (1)(g) (which, as I have decided under Issue 7A, only applies where inspectors' rest days or leave on public holidays are cancelled in advance). In any event the reasonable period has plainly expired in the claimants' cases and thus a breach of duty occurred at that point.

237. I also accept Mr Westgate's submission that whilst the officer remains in service, the chief officer can still grant the additional day in lieu after the expiry of the reasonable period, since this would be a class of act that is still valid if done late. In that regard he relies upon *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, where the Privy Council held that if the commissioner had failed to make a determination under s.64(2) of the Inland Revenue Ordinance of Hong Kong within a reasonable time (which was not the case on the Board's other findings), his jurisdiction to make a determination did not disappear thereafter (1296D-H). Whether that was the position depended upon the legislature's intention as ascertained in relation to the particular enactment (1296D-E).

238. In relation to the additional leave provision in Annex O para (5), the right to the additional leave arises as soon as the member has been recalled, but it is accepted that the chief officer must be granted a reasonable time to provide it. It follows that a breach of duty occurs after the lapse of that reasonable period. Again a reasonable period would be unlikely to be more than 12 months and has plainly expired in the claimants' cases.

239. The parties do not agree on the impact of Annex O para (3). As I summarised at para 104 above, this provision allows for a limited carrying over of untaken annual leave where the chief officer permits this. Failing that, the entitlement to annual leave pursuant to para (1) is to leave granted "in each leave year"; and thus the untaken leave lapses at the end of the leave year where the limited carry over in para (3) does not apply.

240. Mr Beer submitted that para (3) prevents the carrying forward of additional leave accrued under para (5). However, I agree with Mr Westgate's submission that para (3) does not catch additional leave that arises pursuant to para (5). Paragraph (3) is concerned with the officer's annual leave entitlement that is specified in Annex O para (1) (para 103 above). Paragraph (2) sets out how that leave accrues (monthly). Paragraph (3) says in terms that it applies "notwithstanding anything in paragraphs (1) and (2), where he [the chief officer] is satisfied that, in any leave year, the member has not taken the full period of annual leave specified in those paragraphs" (emphasis added). In other words para (3) applies to the primary annual leave entitlement, not to any additional days arising by operation of para (5). There is nothing in para (5) that indicates such days are to be taken by a particular time or lost or that the provision is

subject to para (3). Furthermore, the method of calculation in para (5) can lead to an officer acquiring more than the total period of leave specified in para (1).

241. I turn to consider whether a failure to grant the additional leave within a reasonable period gives rise to an action in damages for breach of statutory duty.

Action for breach of statutory duty: the legal principles

242. The classic exposition of when a breach of statutory duty will give rise to an actionable claim in tort for breach of statutory duty is that given by Lord Browne Wilkinson in *X v Bedfordshire County Council* [1995] 2 AC 633 at 730. He said:

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, as a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of statutory duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action…"

243. Having pointed out that many statutes protect a limited class of people but give rise to no private law cause of action, Lord Browne Wilkinson said (at 732):

> "The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions."

244. In *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 ("*Pickering*") Lord Bridge (who gave the leading speech) observed that he knew of no authority where a statute had been held to give a cause of action for breach of statutory duty where the nature of the statutory obligation "was not such that a breach of it would be likely to cause a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss" (420C).

245. Accordingly, to establish that the breach of the duty in question gives rise to an actionable claim in tort for damages it is necessary to show as a matter of construction of the instrument that:

i) The duty is imposed for the protection of a limited class of the public;

ii) Parliament intended to confer a private law right of action on members of this class; and

iii) Breach of the duty would be likely to cause loss or damage to members of the class.

246. Mr Beer emphasised the centrality of the second of these points, noting that in *R v Deputy Governor of Parkhurst Prison ex p. Hague* [1992] 1 AC 58 ("*Hague*") Lord Jauncey observed that showing that the statute protected a limited class of persons was insufficient and that the primary question was always whether the legislature intended that private law rights of action should be conferred upon those within the class for breaches of the relevant provision (170H-171A).

247. Lord Browne Wilkinson's analysis also indicates that if the instrument provides no other remedy for breach of the duty this *may* be an indicator in favour of the existence of a right of action.

248. Mr Beer placed particular reliance on *The Claimants in the Royal Mail Group Litigation v Royal Mail Group Limited* [2021] EWCA Civ 1173 ("*Royal Mail*") where the Court of Appeal upheld the decision that the claimant organisations (referred to collectively as "the traders") did not have a private law cause of action derived from provisions requiring a supplier to provide a VAT invoice. The judgment of the Court (Lewison LJ, Asplin LJ and Sir Timothy Lloyd) identified seven reasons for this conclusion. Mr Beer drew attention to two of these reasons as being of particular relevance to the instant case.

249. Firstly he emphasised the Court's fourth reason, namely that it was difficult to locate the source of a private law cause of action created by Parliament. The instrument relied upon was reg.13 VAT Regulations 1995. Having referred to the enabling provisions in the Value Added Tax Act 1994 (s.24(6) and Sch. 11), the Court continued (at para 109):

> "These, as we understand it, are the enabling powers with gave HMRC the right to make regulations requiring the production of a VAT invoice. We do not consider that it can be suggested that section 24 itself creates a private law cause of action in one taxable person to require another taxable person to supply him with a VAT invoice, since no such invoice is mentioned in section 24. Nor does Schedule 11 on its face lay down any particular duty. It seems highly unlikely that Parliament intended to give HMRC the power to create a private law cause of action when none existed before, particularly where the only possible kind of loss that might be suffered is economic loss as opposed, for example, to personal injury."

250. By way of reinforcing this point, Mr Beer highlighted that at paras 110 – 111 the Court cited from p.171D-E of Lord Jauncey's speech in *Hague* where he observed that to give the Secretary of State power in s.47 Prison Act 1952 to confer private law rights on prisoners by the Prison Rules would "therefore" be to allow him to extend the general scope of the Act by rules. However, as Mr Westgate pointed out, this observation was made after his Lordship had determined that he could find nothing in the Act to suggest that Parliament had intended to confer on prisoners a right of action for breach of statutory duty. The point being made was that if the necessary intention could not be ascertained, then any delegated legislation purporting to confer such rights would be ultra vires. The question remains whether Parliament intended to create a private law right.

251. It is apparent from a consideration of the Court's reasoning in *Royal Mail* that it was the combined effect of the seven reasons that it identified, which led to the conclusion that there was no such intention in that case (para 124).

252. Mr Beer also relied upon the seventh difficulty that the Court of Appeal identified with the claimants' argument, namely, that the loss covered by the alleged private law cause of action was purely economic (para 122). The Court noted that this was not a bar to a private law cause of action arising but cited Stuart-Smith LJ's judgment in *Richardson v Pitt-Stanley* [1995] QB 123 at 132, to the effect that a court would more readily construe a civil cause of action as arising where the provision related to the safety and health of a class of persons, as opposed to where they would have merely suffered economic loss.

253. Accordingly, this is a relevant factor to be taken into account, but the fact that the loss in question may be purely economic is not determinative of the question. In this regard see also the citation from Lord Bridge's speech in *Pickering* at para 244 above.

Application of the legal principles

254. I therefore turn to apply these principles to the question before me.

255. Firstly, in respect of the provisions in question, the duty to provide additional leave is plainly imposed for the benefit of a limited class of persons, namely police officers of the ranks to whom the provisions apply and who met the qualifying criteria.

256. Secondly, failure to confer the benefit (the additional leave days) is likely to cause loss that can be compensated in monetary terms, as is illustrated by the fact that the officer can choose to convert one of the two days of additional leave arising under Annex O para (5)(a)(i) to a day's pay at double time (and to convert subsequent days of additional leave to ½ day's pay at double time, pursuant to para (5)(a)(ii)).

257. Thirdly, there is no other means provided for enforcing the entitlement if the additional leave days are not granted.

258. These matters all point in favour of the claimants' construction. The economic loss point has some traction in the other direction, as I have discussed. The crucial question is whether there was an intention to create an enforceable right of action for the members of the class.

259. Mr Beer submitted that given the general terms of s.50 PA 1996 (para 55 above), it could not be said that Parliament intended to create such a right of action. However, as Mr Westgate submitted, the answer does not depend so much upon the degree of specificity in the enabling power, but rather upon the nature and extent of the power thereby conferred on the Secretary of State. Section 50 empowers the Secretary of State to make regulations as to police "conditions of service" and as to (amongst other things) "leave, pay and allowances of members of police forces". Entitlements of this nature are of a kind that usually give rise to individual rights enforceable by those upon whom they are conferred. In my judgment this is a strong indicator that by conferring powers of this nature on the Secretary of State, it was intended to confer private rights of action on the relevant members of police forces to enforce the entitlements that were thereby created.

260. It is common ground that if an allowance provided for by the PR 2003 and the Determinations is unpaid, this gives rise to a liability enforceable as a statutory debt. However, if the defendant is correct, officers have no means of enforcing their rights to additional leave if it is not granted. This would give rise to a striking contrast, for example in relation to Annex O para 5: Officer A who chose to receive payment at double time in lieu of the second day's leave could enforce a failure to pay as a statutory debt, but Officer B who wished to receive the additional day's leave has no means of enforcement if that leave is not then granted.

261. For these reasons, I accept that it must have been intended that a failure to grant the additional leave would be enforceable by way of an action for damages for breach of statutory duty.

262. For completeness, I indicate that in relation to this issue (as with Issue 7A) I do not consider that I am assisted by the claimants' attempt to draw an analogy with the position under the WTR 1998, where the framework and wording of the provisions is entirely different and in a number of respects the position under the Determination is more generous than those in the WTR 1998.

263. As regards the defendant's alternative contention that proceedings must be brought within a reasonable time, a six year limitation period applies pursuant to s.2 Limitation Act 1980 for a breach of statutory duty claim (as opposed to an equitable claim). It is accepted that the claims before me were brought within this period.

Conclusion

264. For the reasons that I have indicated, I conclude that a failure by the chief officer to grant additional leave that arises under the provisions I have identified at paras 230 - 231 above within a reasonable period of time does give rise to an actionable claim for damages for breach of statutory duty.

265. In the circumstances it is unnecessary for me to address Issues 9, 10, 12 and 14, which would arise for consideration if I have found that these provisions did not confer an actionable claim for breach of statutory duty if additional leave was not granted. I will next consider the other issues that relate to the annual leave entitlements in Annex O.

Issues 10AA and 10A: interpretation of Annex O para (5)

266. I have set out Annex O para (5) at para 105 above. It applies to constables, sergeants and inspectors. Issue 10AA concerns the defendant's contention that an officer can only qualify for the additional leave entitlement if they have been recalled to duty for a complete day's duty on the one, two or three or more days that are referred to in para (5)(a) as triggering the entitlement. The claimants' position, on the other hand, is that the entitlement to additional leave arises in respect of any length of recall provided the recalls fall on days that meet the requirements of para (5)(b).

267. This is one of the issues that only emerged during the course of closing submissions. The first formulation of Issue 10AA that I saw was in the updated list of issues provided at the conclusion of those submissions. Having reflected on the text it does not appear to me that Issue 10A raises any free-standing point that is distinct from Issue 10AA. (In an earlier iteration of the list of issues, issue 10A was expressed to be agreed and I believe this issue was retained as well in its revised formulation simply to underscore the disagreement now raised specifically in Issue 10AA.)

268. Because the defendant's contention was raised at such a late stage, I did not have the benefit of submissions from the parties on the legislative history. However, I have concluded that I am in a position to decide the issue as a matter of construction, given that the answer appears to me to be relatively clear.

Interpretation of para (5)

269. For the reasons that I will indicate I conclude that the claimants are correct in their interpretation of para (5).

270. To recap, para (5)(b) states that the provision applies to a period of absence from duty of three or more days, where at least one of those days is a day of annual leave and the other days (if not days of annual leave) are rostered rest days, days taken off in lieu of overtime, public holidays, free days and/or monthly leave days. The parties agree that only recalls falling within a qualifying period of absence of three or more days can give rise to an entitlement under this paragraph. Furthermore, in accordance with para (5)(a) the recall must be on a day during that period which is a day of annual leave or a day taken off in lieu of overtime. All this is not controversial.

271. The entitlement provided for by para (5)(a)(i) arises where the officer is "recalled to duty for 1 or 2 days (whether or not in the latter case those days formed a single period)". The entitlement in para (5)(a)(ii) arises where the officer is "recalled to duty for 3 or more days (whether or not forming a single period)".

272. The opening words of para (5)(a) indicate that the provision applies: "Where a member of a police force has been recalled to duty from a period of absence from duty to which this paragraph applies". The compensatory entitlement is expressed to be "for being recalled to duty on any day during that period" which is a day of annual leave or a day taken off in lieu of overtime.

273. As the provision applies where the officer is "recalled to duty" it appears to embrace the situation where the annual leave day / time off in lieu of overtime day has already begun (and indeed could be well underway) before the period of duty commences. In

other words it will include a day where the officer has already had some part of their anticipated time off before being subject to a recall to duty. On the face of it, this is inconsistent with the Commissioner's position whereby the entitlement can only arise where an officer works a full eight hours of duty. Alternatively, if the defendant's construction applies so as to exclude recalls that have lasted for less than eight hours of duty, then a recall would rarely meet the para (5) criteria.

274. I note that the entitlement arises where the officer is recalled "on any day" of annual leave / time off in lieu of overtime. This reinforces my understanding that a recall for the purposes of this provision can be one where the leave has commenced.

275. Furthermore, as I have discussed when considering the overtime provisions in Annex G, a recall to duty occurs for a period of time between two tours of duty and it has a beginning and an end, but use of the word "recall" does not connote any particular length of duty in itself.

276. Pursuant to para (5)(c), the entitlement to additional leave can also arise in circumstances where an officer is required to work on a day scheduled to fall within a relevant period of absence (as well as to a recall situation). Thus, circumstances where a leave day is cancelled in advance, so that the officer works the day in question, is an additional situation that comes within para (5), as opposed to the sole situation.

277. Mr Beer emphasised the phrases "for 1 or 2 days" and "for 3 or more days" in paras (5)(a)(i) and (ii). However, these words should be understood in light of the immediately preceding phrase, "so recalled to duty". Accordingly it is the recall to duty on those days that is the trigger for the entitlement, not the officer working for the entire (eight hours) day. The same observation applies to the phrase that appears at the end of para (5)(a)(i) and (ii) "in lieu of each such day for which he was so recalled". The day being referred to here is the day on which the recall occurred.

278. I have focused on the language used (in its context) rather than upon the consequences of one or other of the parties' preferred interpretations, since this is another situation where both claimants and defendant can point to surprising situations that would result from their opponent's construction. By way of example, Mr Beer emphasised that on the claimants' construction the two days' additional leave provided for by para (5)(a)(i) could arise from a very short recall on one day of annual leave. On the other hand, on the defendant's interpretation, an officer (including constables and sergeants), could be recalled to work for 7 hours 59 minutes on a day of annual leave and receive nothing by way of compensation for doing so.

Conclusion

279. For the reasons I have identified, I conclude that the entitlements provided for in Annex O para (5) arise where an officer is recalled to do some duty on a qualifying day/s of annual leave and that is not necessary for the officer to have worked for a full working day/s.

Issue 11: effect of recalls to duty outside of Annex O para (5)

280. Issue 11 addresses what, if any, entitlement arises where an officer is recalled to duty or required to do duty on a day of annual leave that does not fall within Annex O, para

(5), for example because the circumstances do not satisfy para (5)(b) (para 270 above). The defendant's position is that there is no entitlement to compensation in these circumstances. The claimants' position is that if the leave day is interrupted then it is cancelled as a leave day and the officer is entitled to have that leave day restored to them (and to claim damages for breach of statutory duty if that leave day is not restored to them).

281. This is a further dispute that only emerged during closing submissions. Prior to that the defendant had not indicated, or at least, not clearly indicated that it disputed that an entitlement arose outside of para (5) in relation to a recall to duty on a day of annual leave.

282. As with Issue 10AA, because the defendant's contention emerged at such a late stage, I did not have the benefit of submissions from the parties on the legislative history. However, I consider that I am in a position to decide the issue at this stage as a matter of construction given that the answer appears to me to be relatively clear.

283. Mr Beer's central submission was that as Annex O makes no express provision for additional leave or other compensatory entitlement where an officer is recalled to duty on annual leave days that do not fall within para (5), it follows that no entitlement arises.

284. However, I do not consider that it was necessary for Annex O to make such express provision. The rationale underpinning para (5) and hence the need for that particular provision, is to afford an enhanced form of compensation when an officer is recalled to duty in circumstances falling within its terms. Outside of a situation where that enhanced entitlement applies there is no need for an express provision.

285. As the claimants submit, the starting point is the primary annual leave entitlement conferred by Annex O para (1)(b). As I have set out at para 103 above, every member of a police force below the rank of superintendent "shall be granted annual leave entitlement (expressed in 8 hour days) in each leave year" as set out in the accompanying table. Accordingly, the officers to whom this applies have a mandatory entitlement to receive the specified number of leave days.

286. In turn, there is nothing in Annex O that extinguishes the officer's right to have this specified number of leave days. It follows that if they are recalled to duty on one of their annual leave days, they have not received that and they remain entitled to do so.

287. However, unlike additional days arising under para (5) (discussed at para 240 above), as this entitlement arises as part of the primary annual leave entitlement conferred by para (1), it is subject to the limits on carrying forward untaken leave.

Conclusion

288. For the reasons I have indicated, I conclude that if an officer's leave day is interrupted by a recall to work in circumstances that do not come within Annex O para (5), then the officer is entitled to have that leave day restored to them as part of their primary annual leave entitlement conferred by para (1). However, in these circumstances the restrictions on carrying forward untaken leave will apply.

Issue 16: timing of election for payment in lieu of additional leave days

289. Issue 16 concerns the time at which an election has to be made by the officer to take payment in lieu of additional leave pursuant to the Annex O para (5) entitlement (a provision which I have discussed in detail in respect of issues 10AA – 11 above).

290. Paragraph (5)(a)(i) permits an officer who was recalled to duty for 1 or 2 days in a qualifying period of absence to have an additional two days' annual leave or "if the member so choose, 1 day's annual leave and 1 day's pay at double time". Paragraph 5(a)(ii) permits an officer who was recalled to duty in such circumstances for 3 or more days to 2 days' annual leave or "if the member so choose, 1 day's annual leave and 1 day's pay at double time" in lieu of the first two such days and 1½ days' annual leave "or if the member so choose, 1 day's annual leave and ½ day's pay at double time" in lieu of each subsequent day.

291. This issue arises in respect of KSO and KWS. KSO indicated that he made this election in his Particulars of Claim and KWS did so in her preliminary schedule of loss. They were both MPS officers at the time. The claimants say that the election may be made at any time whilst the chief officer is able to grant the additional leave, in other words whilst the officer remains in the force. The Commissioner's position is that the election must be made within a reasonable period of the officer incurring the right to make the election (i.e. when they undertook the work) and that in any event it must be within the leave year in question.

292. The issue does not arise in KBS's case because her service had ceased at the time when her claim was issued and it is accepted that she did not make a specific election for payment prior to this time.

293. Mr Westgate makes the point that, strictly speaking, this is not a true election as it does not involve the officer making an irrevocable decision between two inconsistent alternatives; the default entitlement to two days' leave (in para (5)(a)(i)) can be changed to double pay for the second day if the officer so chooses. Nonetheless, I will refer to it as an election for the purposes of this discussion simply as a shorthand and because that is the terminology used on the list of issues.

294. The formulation of Issue 16 on the list of issues also refers to the time off in lieu of payment provision in Annex H para (2)(h), which applies to recalls to duty on part-time officer's free days. However, para (2)(h) provides a period, saying in terms that the election is to be made within 28 days; and in their submissions to me counsel only suggested that the matter required resolution in respect of Annex O para (5). Accordingly, I will treat Issue 16 as focused upon this provision.

295. Nothing in Annex O para (5) stipulates a particular period within which the officer must make the election. This is in contrast to a number of similar (albeit not identical) provisions within the Determinations which do have a time limit. I have already referred to Annex H para (2)(h). The election referred to in Annex G para (1)(e) in relation to time off in lieu of an allowance for overtime worked is to be made "before the expiry of any pay period". The same period applies to the equivalent election by part-time officers in Annex G para (3)(h).

296. There is force in the claimants' submission that provided the chief officer is still in a position to grant the additional days, there is no reason to limit the right to choose payment in lieu to some earlier date based on a reasonable period. I have accepted when considering Issue 8 that the chief officer remains under a duty to grant the additional leave arising under para (5) after a reasonable period has elapsed (paras 236 above). If the duty to grant the leave remains, then it is difficult to see why the right to convert this to a payment should not also continue to apply or by what mechanism it would be extinguished.

297. When considering Issue 8 I also concluded that the Annex O limitation on carrying forward annual leave days does not apply to additional leave arising under para (5) and thus the restrictions on carrying forward do not provide a reason for limiting the timing of the election to the leave year itself.

298. Mr Beer suggested that the inclusion of specific periods in the Annex G and Annex H provisions that I have just referred to supported the need to imply a period of time within which the election could be made in Annex O para (5). However, there is a material distinction between the respective provisions. In the Annex G and Annex H provisions the primary entitlement is to payment of an allowance and the election, if made, is for the chief officer to grant the member time off in lieu instead. In these circumstances it is not difficult to see why on grounds of practicality a limited period is imposed within which the officer can choose the time off in lieu option. By contrast, in para (5) the primary entitlement is to the additional days in lieu but the officer may choose to convert a portion of this additional leave into a payment instead. Whilst the leave entitlement remains outstanding it is difficult to see how the chief officer is prejudiced by an election for payment; the payment can simply be made at that stage.

299. In closing submissions Mr Beer did not appear to maintain the Commissioner's earlier position that as a matter of law an election could not be made after the issue of proceedings as there needed to be a completed cause of action before the claim was commenced. In any event, if this does remain in dispute, I do not accept that submission. Firstly, the entitlement to the additional leave had already arisen pursuant to Annex O para (5) prior to the issue of proceedings, the election made relates to the form of compensation rather than to the existence of the right which has not been granted. Secondly, an election between two courses of action can be made by or after the issue of proceedings, rather than beforehand. Mr Westgate gave the example of *Canas Property Co Ltd v K.L. Television Services Ltd* [1970] 2 QB 433 in relation to an election to forfeit a lease.

Conclusion

300. For the reasons I have discussed I conclude that the officer's choice to receive payment rather than additional leave pursuant to Annex O para (5)(a)(i) and (ii) may be made at any time when the chief officer is able to grant the additional leave; and that the election can be made in the pleadings if the officer remains a member of the relevant police force at the time.

301. I will next consider the specific Annexes G and H issues that relate to part-time officers that are posed by Issues 36, 36A, 37 and 37A.

Issue 36: part-time officers and completed periods of 15 minutes

302. This issue relates to the operation of the reference in Annex G para (3)[x] to payment in respect of "each completed 15 minutes" and the effect (in respect of pre 1 April 2012 recalls) of para (3)(f). As such, it replicates the question raised by Issue 1C and I have already considered the effect of these provisions at that stage (paras 179 – 181 above). Counsel did not suggest that the part-timers provisions raised any materially different considerations.

Issue 36A: the four hour minimum and Annex G para (3)(m)

303. This issue only arises in relation to part-time officers. It relates to the effect of Annex G para (3)(m) in respect of pre 1 April 2012 recalls. I set out para (3)(f) at para 82 above and para (3)(m) at para 84 above.

304. The issue concerns recalls where the threshold hours criterion in para (3)[x] is not met. In those circumstances the parties are agreed that the officer is only entitled to compensation at plain time, but the question is whether para (3)(m) has the effect of applying a four hour minimum period to the length of the recall for the purposes of this calculation. As this concerns part-time officers and overtime, it only impacts upon KWS's claim. She submits that para (3)(m) does have this effect; the Commissioner contends that it does not.

305. Given its centrality to the issue at hand, I will repeat the wording of para (3)(m):

> "For the purposes of Regulation 24(1) (pay) any extra period of duty in respect of which time off is granted under sub-paragraph (d) or (i) counts as one and one third times the number of completed quarters of an hour comprised in the extra period of duty and a period falling within sub-paragraph (f)(i) and (ii) counts as one of 4 hours."

306. Sub-paragraph (d) (in fact sub-paragraph (c) given the textual error I referred to earlier) concerns the situation where the officer choses to receive time off in lieu of an allowance for overtime; and sub-paragraph (i) concerns where the officer chooses to receive time off in lieu of the allowance provided for in sub-paragraph (h) (where the commencement time for a rostered shift is brought forward). Sub-paragraph (f)(i) and (ii) refer to an officer being recalled to duty between two rostered shifts for less than four hours.

Interpretation of para (3)(m)

307. I do not accept the claimant's interpretation of this provision. It is necessary to set out Mr Westgate's submission as to the effect of para (3)(m) in order to explain why this is the case.

308. His starting point was to refer to the part-time officer's entitlement to plain time pay arising under reg.24 PR 2003 and Annex F para (11)(1) (para 74 above). In addition to the plain time entitlement, for pre 1 April 2012 overtime, where the officer worked for more than 40 hours in a week they were also entitled to the overtime allowance calculated at $1/12^{th}$ hours pay for each 15 minutes (a $1/3^{rd}$ time), as provided for in

Annex G para (3)[x]. Accordingly, they were entitled to receive payment at 1 1/3rd time for the overtime period (the plain time hourly rate plus the overtime allowance). Mr Westgate emphasised the existence of these two elements because he said it was key to understanding how the four hour minimum provisions worked for part-time officers. Annex G para (3)(f) applied the four hour deeming provision to the overtime allowance element and para (3)(m) applied it to the plain time element. Paragraph (3)(f) was expressed as applying for the purposes of para (3)[x] because it was only concerned with circumstances where payment of the overtime allowance arose. By contrast, para (3)(m) was concerned with plain time pay and contained no such limitation.

309. Mr Beer rejected that construction. He submitted that the reference to the four hour minimum provision in para (3)(f) applying "for the purposes" of para (3)[x] clearly indicated that it was only where an officer has worked for more than 40 hours in a week that they were entitled to benefit from the four hour minimum period rule. He submitted that para (3)(m) is about the calculation of time off in lieu and essentially it says that for the purposes of time off in lieu in sub-paragraphs (d) and (i), the period of duty shall count as 1 1/3rd time and for any period that is within para (3)(f) the four hour minimum will apply to it. However, the conditions of para (3)(f) remain operative so that the four hour minimum only applies to a period satisfying para (3)[x], including the requirement that 40 hours have been worked in the week in question.

310. I agree with Mr Beer's submission that para (3)(m) is concerned with the computation of "any extra period of duty in respect of which time off is granted under sub-paragraphs (d) or (i)". It is reasonably clear that this wording is intended to govern all of the text that follows, which is thus entirely concerned with the computation of the period of time off in lieu. I do not consider that the concluding words of the provision from "and a period falling within…" onwards introduce a different and unrelated rule in the same sub-paragraph concerning the computation of plain time pay.

311. Mr Westgate suggested that para (3)(m) does not have the meaning Mr Beer proposed because the computation of the relevant period of time off in lieu is already addressed in sub-paragraphs (d) and (i). By way of example, the former refers to a duty on the chief officer to grant time off equal to the total of "the time in excess of 8 hours spent on duty on the day/s" in question and "15 minutes in respect of each completed 45 minutes of that time". However, I see no reason why the computation rules in para (3)(m) cannot apply as well to such time off in lieu.

312. Furthermore, I cannot detect anything in the wording of para (3)(m) that indicates that the four hour minimum rule is to apply outside of the para (3)(f) situation. Indeed it says the opposite. Express reference is made therein to "a period falling within sub-paragraph (f)(i) and (ii)". As I have already noted, the application of para (3)(f) is in terms "for the purposes" of para (3)[x], that is to say where the 40 hours rule is met.

313. Mr Westgate observed that the level of disruption will likely be the same for an officer who is recalled to duty between rostered tours, whether they have or have not worked more than 40 hours in the relevant week. However, it is clear that the scheme of Annex G para (3) does draw a distinction between those two situations.

Conclusion

314. For the reasons I have indicated, I conclude that in respect of a part-time officer's recall to duty prior to 1 April 2012 that does not meet the prescribed conditions in Annex G para (3)[x], para (3)(m) does not have the effect of applying a deemed four hour minimum period to the length of that recall for the purposes of the officer's entitlement to payment at plain time.

Issue 37: KWS's payment for duty on her free days

315. I summarised a part-time officer's entitlement to payment when they are required to do duty on a free day at para 96 above. This issue concerns whether KWS is entitled to claim at the higher "Type A" rate or the lower "Type B" rate.

316. As I explained in para 96 above, the lower rate applies where the duty is "of such a nature that it would not in the circumstances have been reasonably practicable for it be done by any other member": Annex H para (2)(d)(iii). The higher rate applies where this is not the position.

317. KWS contends that it was always reasonably practicable for the duty that she performed on her free days to have been performed by her co-handler or by a full-time handler within her unit. She emphasises that the practicality of others undertaking this duty is to be assessed by reference to the "nature" of the duty, as opposed to, for example, the particular working arrangements that the force has chosen to employ.

318. The Commissioner does not dispute that the nature of the duty was such that it was reasonably practicable for the officers mentioned by KWS to undertake it, but he advances a different interpretation of the material provision, namely that the lower rate entitlement applies save where it was not reasonably practicable for the duty to have been done by every other member of the relevant force. Mr Beer contended that this was the meaning of "done by any other member". He said that as KWS's specialist role could not have been carried out by every other member of the MPS, the duty she undertook on her free days is to be remunerated at the lower Type B rate.

319. Accordingly, resolution of this issue, although expressed as relating to KWS, in fact entails a wider question of construction.

320. The parties agree that the burden lies on the chief officer to show that it would not have been reasonably practicable for the duty to have been done by any other officer.

321. Although the rationale for this provision is not set out in the Determinations, I agree with Mr Beer's observation that the basis appears to be to incentivise (or conversely, penalise) chief officers who call upon part-time constables and sergeants to perform duties on their free days when those duties could have been performed by other police officers who were on duty.

322. I do not accept the Commissioner's construction. It would not reflect this rationale (which Mr Beer identified); that where another officer can do the duty, the force should be disincentivised from requiring the part-time officer who is on their free day to undertake it. Provided it is reasonably practicable for another officer to carry out

the duty, I can see no reason at all why the provision would require that every single officer in the force should be able to do the duty. Furthermore, given the many specialised roles within policing, the higher Type A rate would hardly ever be payable if the defendant's construction is correct.

323. Importantly, the language used is more consistent with the claimant's position too. The question is whether it would not have been reasonably practicable for "any other member" of the force to do the duty, rather than it not being reasonably practicable for "every other member" or "all members" of the force to undertake it.

Conclusion

324. For the reasons I have indicated, I conclude that where a part-time officer is required to do duty on a free day, for the chief officer to avoid the allowance being payable at the higher rate, pursuant to Annex H para (2)(d) and (e), it is necessary for them to show that the duty was of such a nature that it was not in the circumstances reasonably practicable for another officer in the force to have done that duty.

325. In light of this interpretation of para (2)(d)(iii) there are no further factual issues that I need to resolve in respect of Issue 37. Duty that KWS was required to undertake on her free days is payable at the higher Type A rate.

Issue 37A: KWS's entitlements if the "Type B" rate applies

326. In light of my conclusion under Issue 37 this issue does not arise in relation to KWS's claim; the duty she was required to undertake on her free days attracts an allowance at the Type A, rather than the Type B rate.

327. One of the points raised in the parties' formulation of their respective positions in the list of issues concerns whether KWS's entitlement to payment at plain time for the period she worked is subject to the four hour minimum period. I have considered the equivalent matter in relation to the Annex G overtime entitlements under issue 36A. Neither party suggested that a different position applied in relation to Annex H.

328. Having addressed the legal issues arising in respect of Annexes G, H and O, I will next turn to the on call allowance.

Issues 4 and 5: on call allowance

329. Issues 4 and 5 concern the circumstances in which CHIS handlers and controllers were "on call" for the purposes of the on call allowance and thus entitled to receive this payment. I have referred to PR 2003 reg 34 at para 65 above and to the introduction of the allowance and the material provision in Annex U para (13) at para 108 above. The allowance applies to constables, sergeants, inspectors and chief inspectors.

330. The claimants contend that they were "on call" when they were required to be available to perform their duties as CHIS handlers or controllers outside of their working hours. They submit that in accordance with this interpretation of "on call", following the introduction of the allowance (from 1 April 2013), they were on call for the vast majority of the days within the time span of their claims. KSO claims the allowance for each day of the year save for when he was on annual leave and abroad.

KWS claims the allowance for each day of the year save for when she was on periods of extended leave or during her long-term sick leave. KBS claims the allowance for each day when she was shown on the defendant's system as the designated controller (which was at all times other than when she was on extended leave: para 52 above).

331. The defendant's position is that an officer was only "on call" when they were required to be on call and were ready for duty, in that they were fit and able to return to duty (including not having drunk alcohol) and they were available to return to police duty within a reasonable period of time; and that this is a predetermined requirement, signified by a rota or the equivalent. Accordingly, the defendant does not accept that the claimants were "on call" save where they were rostered as such, following the introduction of on call rotas.

332. The issues raised involve both a question of construction as to the meaning of "on call" in Annex U para (13) and an evidential question in terms of the application of that meaning of "on call" to the claimants' circumstances. In so far as Issue 5 refers to the statutory debt owed to each of the claimants in respect of this allowance, I am not asked to determine the quantum of the individual claims at this juncture.

333. Annex U para (13) does not define the concept of being on call. It provides that the allowance is payable to the officer "in respect of each day on which he spends any time on-call".

The meaning of on call

334. I will refer to the legislative history. The defendant places particular significance upon the understanding of when an officer was on call expressed in Sir Tom Winsor's reports.

335. A recommendation was made for the introduction of an on call allowance in Winsor 1, paras 5.1.66 – 5.1.87. Sir Tom Winsor noted that an officer who was in readiness for duty (as opposed to recalled to duty) did not qualify for overtime and that some forces had decided to stretch the existing pay mechanisms to provide an allowance recognising the disruption of being on call (para 5.1.66). He referred to a survey conducted by the Office of Manpower Economics for the PNB Joint Secretaries in 2008 ("the Survey") which had found that where forces had introduced such arrangements, four main restrictions were placed on officers who were on call, namely: an obligation to be contactable by phone or pager; availability to return to duty within a reasonable time; to be fit for duty, including not having consumed alcohol; and to have access to transport (para 5.1.67).

336. Sir Tom Winsor concluded that "police officers, like police staff, should receive a payment for being on-call. When an officer is on-call, the disruption to his domestic circumstances can be substantial, and when an officer is on-call it affects his family too" (para 5.1.79). He observed that since being on call was analogous to working overtime, "the rate and terms of on-call should be established nationally" (para 5.1.81). He considered that as some amount of on call was to be expected in certain jobs, particularly in specialist roles, officers should become eligible for the allowance after they had undertaken 12 sessions of on call in an annual period (para 5.1.86). Sir Tom Winsor's Recommendation 44 was as follows:

> "A national on-call allowance for the Federated ranks should be introduced from September 2011. The amount of the allowance should be £15 for each occasions of on-call after the officer in question has undertaken 12 on-call sessions in the year beginning on 1 September. An on-call occasion should be defined as the requirement to be on-call within any 24-hour period related to the start-of-the-police-day."

337. The PAT did not accept Recommendation 44. At page 42 of its decision in relation to Winsor 1 it observed that the proposed level of recompense was rather low given the high level of skills generally possessed by officers who were on call and given the 12 on call sessions qualifying requirement. The PAT made no award, indicating that this was a matter requiring further consideration in Winsor 2.

338. Recommendation 112 in Winsor 2 repeated the previous Recommendation 44. In the text of his report Sir Tom Winsor indicated that his view had not altered (paras 9.4.23 and 9.4.25). As regards when an officer is on call he said (at para 9.4.3):

> "An officer who is on-call is essentially off duty and free to undertake the majority of his personal pursuits. For this reason, on-call duty does not qualify for overtime, for which the officer becomes eligible once the recall to duty has taken place. I reiterate, however, that in readiness for duty, it is necessary that the officer is:
>
> - contactable by telephone or pager;
> - available to return to duty within a reasonable period of time;
> - able to obtain access to appropriate transport; and
> - fit for duty."

339. A footnote in the report after this text said that this included not having consumed alcohol; and the Survey (para 335 above) was quoted as the source.

340. In para 9.4.20 Sir Tom Winsor noted that it was part of a police officer's job to be required to undertake on call duties and they were remunerated for this in their basic pay. However, he continued in para 9.4.22:

> "What should separate on-call duty from the universal requirement to return to duty when ordered to do so, is the fact that some roles carry a higher likelihood and incidence of on-call than others. For example, roles that require expert knowledge such as in firearms tactics or specialist crimes, may be required to be placed on-call many more times than an officer in a response team because the skills of the latter are less specialised or in demand. Therefore, a higher frequency of on-call duty should be rewarded separately from the general

> requirement to be called to duty that applies to all police officers…"

341. In their December 2012 decision, the PAT accepted Recommendation 112 on the basis that the £15 daily allowance would be payable without a requirement to have undertaken 12 unpaid qualifying sessions first (para 55).

342. In addition to Winsor 1 and 2, Mr Beer placed reliance on the Police Officers 'On-Call' within the Metropolitan Police Service – Joint Agreement with the Federated Ranks dated 26 March 2013 ("the Joint Agreement"). The document records that it was "intended to provide a properly regulated and recorded system of on-call in the MPS, which satisfies the legal requirements; and the needs of MPS Managers to meet their business demands, whilst protecting officer's interests…" (para 9.1). The following text in section 2 appears under the heading "Definition for 'On-Call'":

> "2.1 Unlike a 'recall to duty', which is defined below, 'on-call' is a predetermined requirement for an officer to be available, outside of their normal working hours, to attend or undertake duty.
>
> 2.2 An officer who is on-call is essentially off duty and free to undertake the majority of his personal pursuits.
>
> 2.3 For this reason, on-call does not qualify for overtime, for which the officer becomes eligible once the recall to duty has taken place.
>
> 2.4 In readiness for duty, it is necessary that the officer on call is:
>
> - Contactable by telephone or pager;
> - Available to return to duty within a reasonable period of time;
> - Able to obtain access to appropriate transport; and
> - Fit for duty (this includes not having consumed alcohol)."

343. Mr Beer also emphasised para 5 of the Joint Agreement, which says that no officer should be permanently required to be on call and that there should be "predetermined periods…when officers who agree to be on-call will be notified of a requirement and time span not normally exceeding 7 days in a 28-day period." Paragraph 6 states that the requirement to be on call within an OCU must be assessed by the OCU Commander and agreed by the relevant Assistant Commissioner; and that the system must include "clear written arrangements for" the hours and days in the stipulated period (a maximum of seven days) when an officer was on call and "the restrictions, if any, to be imposed on an officer who is 'on-call'". The restrictions then referred to include the requirement to respond to a telephone call, to attend the normal or a temporary place of duty, and to be within a specified geographical area.

344. I do not agree that the concept of "on call" in Annex U, para (13) is to be understood as aligned with the bullet point criteria contained in para 9.4.3 of Winsor 2 or in section 2 of the Joint Agreement. The Secretary of State could have defined "on call" in this way in para (13) if that was the intention but did not do so. Furthermore, Sir Tom Winsor's description of when an officer was on call, whilst part of the text of his report, was not included within his Recommendation 112. As I have indicated when summarising Winsor 1, the genesis of the bullet points was the Survey of how forces were operating their ad hoc on call arrangements (para 335 above), rather than an attempt to capture the essence of being on call in a definitional sense. Furthermore, the PAT's decision in respect of Recommendation 112 contained no discussion of para 9.4.3 of Winsor 2, nor any indication that this description of on call was agreed. Paragraph 55 noted that "there did not appear to be a great consistency in the manner in which forces in England and Wales operated on-call".

345. In these circumstances and mindful of the principles I summarised at para 112 – 116 above, I do not consider that it would be a legitimate use of the *travaux preparatoires* to read into the words used in Annex U para (13) of the Determinations ("on call") additional wording which limits their meaning and which is derived from the report of an advisory body (Winsor 2), where that wording did not form part of the report's recommendation nor part of the decision of the statutory body (PAT) whose decision the Secretary of State was required to take into account. Indeed, in so far as it is of significance, the drafting history tends to point in the opposite direction, given that the Secretary of State choose not to adopt Sir Tom Winsor's description of on call in or in relation to para (13).

346. Furthermore, I do not consider that the approach to "on call" adopted at a particular time by a particular police force can impact upon the meaning of the phrase used in the Determinations. As noted in Winsor 1 (para 336 above), the terms of on-call are to be established nationally. The understanding of when an officer is or is not on call within the meaning of para (13) must be a uniform one that applies to all police forces.

347. I accept Mr Westgate's submission that, rather than altering the meaning of being "on call", the requirements of an officer being on-call that are contained in the Joint Agreement are conditions imposed by the chief officer as the "employer", in the interests of the effective operation of his force (pursuant to his general power of direction and control in s.4 Police Reform and Social Responsibility Act 2011). (This is also consistent with Sir Tom Winsor's description of on-call as derived from conditions which chief officers of various forces had imposed in practice.)

348. Additionally, the words used in the Joint Agreement are not apt to give rise to the definitional limits Mr Beer advanced. Paragraph 2.4 contains operational requirements that may be imposed on officers in order to make on call effective; but the wording used in that paragraph does not purport to define when the officer is on call. This is reinforced by the terms of para 6.2 which in terms contemplates that some of the restrictions referred to in para 2.4 have not been imposed ("if any"). Where those operational requirements are imposed, failure to comply would be a management and/or disciplinary matter.

349. The meaning of "predetermined" in para 2.1 ("a predetermined requirement for an officer to be available") is not entirely clear, but I accept that as being on call is an

objective status, it cannot be the case that the chief officer can alter the meaning of what amounts to being on call, simply by pre-designating an officer as on call or not on call via a rota or similar means. I also note that the concept of predetermination is not to be found in the Winsor reports or in the PAT decision.

350. For the avoidance of doubt, I am not assisted in the task of construing Annex U para (13) by the subjective understanding that particular officers held as to the meaning of "on call", whether expressed in contemporaneous documents or when giving evidence in these proceedings.

351. Having explained why I reject the Commissioner's invitation to read words of limitation into the concept of being "on call", I return to what this phrase was intended to mean. Given there is no clear indicator to suggest otherwise, I consider that the words should be given their non-technical ordinary meaning. I thus derive assistance from the Oxford English Dictionary definition of "on call", which is:

> "On call, adv. and adj.
>
> adv.
>
> Available; on standby; awaiting orders; ready to answer a call or summons immediately; spec. available to provide a professional service if and when required, esp. outside normal working hours
>
> adj.
>
> Usually hyphenated. Immediately available; on duty; spec. of, relating to, or participating in a professional service whereby a designated person or team is available to provide a service if and when required, esp. outside normal working hours."

352. I therefore accept the claimants' submission that an officer is on call for the purposes of para (13) when they are required to be available to perform their duties outside of their rostered tours of duty and that, in turn, whether they are required to do so is to be assessed by reference to the substance of their duties, rather than simply by whether they had been designated on a rota as "on call" for the period in question.

Application of the meaning of on call to the claimants

353. I will begin by briefly recapping some of my earlier findings and some of the defendant's admissions in respect of the claimants' roles and duties (although, of course, I have considered them in their entirety).

354. I described the respective roles of handlers and controllers at paras 29 – 33 above. The defendant admits that CHIS had to be able to make contact with a CHIS handler at any time of the day or night throughout the year (para 31 above). I accepted that contact outside of rostered tours of duty between a CHIS and their handler was commonplace and unavoidable and fell to be dealt with by their assigned handler unless alternative effective provision was made (para 35 above). Additionally, I accepted that KSO and KWS regarded themselves as under a duty to take a call from a CHIS whenever they received it (para 39 above). I noted that the Commissioner: (i)

admits that, save when he was on annual leave, KSO had to answer or return telephone calls and text messages from CHIS when he was not rostered for duty (para 32 above); (ii) makes a similar admission in respect of KWS, save where there was a rotating pattern of cover (para 32 above); and (iii) admits that KBS was required to be available to make and receive telephone calls and perform consequential duties at any time of the day or night, save that this was subject to a rotating pattern of cover (para 33 above). I described the parameters that KBS set for her handlers (para 51 above); and I addressed the circumstances in which she was required to do duty or recalled to duty out of hours under Issue 1B (para 197 above), finding that (amongst other situations) this occurred when she received intelligence from a handler which required her decision about dissemination or other consequential action and when she was contacted by operational teams or other agencies for her input in relation to a CHIS.

KSO and KWS

355. Accordingly, it was inherent in the handler role that calls from CHIS would be received and were required to be addressed between rostered tours of duty. The defendant supplied KSO and KWS with the equipment that enabled them to receive the out of hours calls, texts and emails from CHIS (paras 44, 46 and 47 above) and did so knowing that CHIS would make use of this facility. The handlers met the requirement on the defendant to provide a 24 hour facility for CHIS to be able to maintain contact. The handlers could not assert effective control over when they were contacted by CHIS and were aware that it could be at any time of the day or night and aware of their duty to respond if contact was made; it was not open to them to ignore the contact. As Mr Westgate put it in his closing submissions: "Everyone understood that functionally handlers had to be there to pick up the phone when CHIS called." Neither KSO nor KWS were ever stood down from this obligation by their controllers.

356. I have already indicated that an officer is on call when they are required to be available to perform their duties outside of their rostered tours of duty and that, whether they are so required is to be assessed by reference to the substance of their duties, rather than simply by whether or not they had been designated on a rota as "on call" for that period.

357. In any event, KSO was not subject to any formal rota during any period covered by his claim.

358. In KWS's unit a rota was introduced after the allowance came into force. She was on the rota for some weeks thereafter and, as I understand it, she accepts that she received payments for the weeks when she was shown as "on call" on the rota (but not for her free days). However, her evidence was that the rota was simply a means of sharing out receipt of the on call allowance and that its introduction did not affect the ways in which calls from CHIS were dealt with in practice, so that the arrangements which I described earlier (para 47 above) continued and KWS remained responsible for handling contacts that were made by her CHIS. I accept her evidence in this regard. It is also supported by the available records concerning the weeks where the rotas have been disclosed; the level of contacts continued during the weeks when she was not on the rota and are not markedly greater in the weeks when she was on the rota. Furthermore, the defendant did not call any evidence that directly contradicted KWS' evidence in this respect. It was only after [*Annex 32*] that a formalised rota

system was introduced, which only applied to KWS for a couple of months before her retirement.

359. In the circumstances, I am satisfied that KSO and KWS were required to be available to perform their duties as handlers between their rostered tours of duty and, as such, were "on call" within the meaning of para (13) throughout the period for which they have claimed the allowance, save in relation to days falling within the exceptions that they have respectively acknowledged and, in KWS's case, save in relation to the period after the introduction of the new system shortly before her retirement (para 49 above).

KBS

360. As regards KBS, I accept her evidence that she would keep her phone switched on and make arrangements to ensure that she was sufficiently contactable out of hours and able to respond promptly to CHIS-related communications. The defendant did not contradict or challenge this evidence. It was inherent in her role as a controller and from the parameters which she had the authority to set and did set her handlers, that she would (and did) receive regular out of hours contacts in relation to CHIS. She was unable to control the timing of these communications and was aware that they could occur at any time of the day or night and that she was expected to respond to such contacts. The defendant supplied her with the equipment that enabled her to receive the out of hours contacts, knowing that such communications would be made. In the circumstances, I accept that KBS was required to hold herself in a state of readiness such that she was able to respond promptly to these out of hours communications.

361. The defendant relies upon a rota system introduced in [*Annex 33*] and the fact that KBS was paid the on call allowance in relation to the weeks when she was shown as "on call" in these documents. For the reasons that I will go on to indicate, I accept KBS's evidence that the introduction of this rota made no practical difference to the position that I have described.

362. Firstly I accept that KBS held the detailed knowledge in relation to both her CHIS and the relevant operations and thus, to the knowledge of those she worked with, she was best placed to assess relevance and risk. The rota included controllers from other DSUs who would not have had the necessary knowledge. Secondly, I accept that it was only practicable for her to transfer her responsibilities to another controller when she would be away for extended periods of annual leave, given that a detailed handover was required, which took around two hours.

363. Thirdly, the records indicate that KBS continued to receive contacts on the weeks when she was not designated as "on call" after the rota system was introduced.

364. I bear in mind that to some extent KHP took issue with KBS's evidence regarding the rota, in so far as he suggested during his cross-examination that she should have adhered to it rather than retaining responsibility for out of hours decisions. However, his evidence in this respect was undermined by the fact that he took no steps to enforce this during his time as manager of the unit, so that he had (at least tacitly) approved the continuation of the previous practice operated by KBS and her fellow controller. Additionally, I did not find KHP to be a satisfactory witness; he was prone

to making sweeping statements and inclined not to make realistic concessions (in contrast to the other witnesses called by the defendant).

365. Fourthly, there are contemporaneous documents that support the proposition that in practice the rota did not impact upon the way that controllers continued to receive out of hours contacts. By way of example: (i) in an email sent to himself during the period I am concerned with, KBS's fellow controller recorded that the new on call system was "simply to satisfy ACPO requirements and we are to continue as normal"; and (ii) a document drafted by KMT referred to the fact that notwithstanding the rota, "each controller remains effectively on call to their unit(s)".

366. Fifthly, the new system that was subsequently introduced several years later, underscores the difference. At that stage the role of deputy controller was introduced, a role that was fulfilled by experienced sergeants within the same unit, meaning that they had the pre-existing knowledge of the relevant CHIS and thus were able to deputise effectively for the controllers.

367. Accordingly, I am satisfied that KBS was required to be available to perform her duties as a controller outside of her working hours and that, as such, she was "on call" within the meaning of para (13) throughout the period for which she has claimed the allowance, save in relation to the exception she has acknowledged, namely days falling within the periods of extended leave when she arranged for the system to no longer show her as the designated controller.

368. I indicate for completeness that whilst the claimants submitted that I should draw particular adverse inferences from the defendant's failure to call certain witnesses and disclose certain policy documents, I have not found it necessary to do so in order to resolve these issues.

369. I also indicate that if I were found to be wrong in my construction of the meaning of "on call" in Annex U para (13), so that the features contained in the bullet points in para 9.4.3 of Winsor 2 and/or para 2 of the Joint Agreement were definitional requirements of an officer being "on call", then I accept that they were in any event satisfied in relation to the claimants. Plainly they were contactable by telephone; since they could undertake the recalled duty from their current location (or a suitably quiet place close by) they were able to return to duty within a reasonable period of time; no transport was required and therefore "appropriate" transport in the circumstances was no transport; and it has not been suggested that any of the claimants were unfit to undertake their duty at any time, they each gave evidence indicating that they arranged their life in a way that enabled them to return to duty as and when necessary.

Conclusion

370. I therefore conclude that an officer is on call for the purposes of Annex U para (13) when they are required to be available to perform their duties outside of their rostered tours of duty and that, in turn, whether they are required to do so is to be assessed by reference to the substance of their duties, rather than simply by whether they had been designated on a rota as "on call" for the period in question.

371. In the circumstances, I am satisfied that KSO and KWS were required to be available to perform their duties as handlers between their rostered tours of duty and, as such,

were "on call", within the meaning of Annex para (13), throughout the period for which they have claimed the allowance, save in relation to the times that I have referred to at para 359 above. I also arrive at a similar conclusion in relation to KBS, namely that she was required to be available to perform her duty as controller outside of her working hours, so that she was "on call" throughout the period for which she has claimed the allowance, save in relation to the days that fall within the exception that she has recognised.

372. I turn next to the issues that I have grouped together because they concern the evidencing of an officer's entitlements, as opposed to questions of construction.

The evidential issues: introduction

373. The evidential issues largely concern how the officers are to prove the numbers of recalls to duty that they undertook and the length of the same.

374. It is common ground between the parties that the available data does not clearly or comprehensively document all of the out of hours of duties performed by the claimants. There are a number of reasons for this. They include: the passage of time; the limitations of the defendant's internal systems used at the time, which were not designed for retrospective searching for the kind of information sought in this litigation; that prior to *Allard* there was a lack of appreciation that taking a call from a CHIS between rostered duties amounted to a recall and a requirement to do duty for the purposes of the Determinations; the sensitivity of much of the material involved, so that access to it is restricted; and [*Annex 34*]. More controversial reasons have also been raised: both the claimants and the defendant say that the other should have kept better contemporaneous records; and the claimants indicate that at the time they were discouraged by superior officers from claiming overtime save when they undertook substantial periods of out of hours work.

375. The data which the Commissioner has provided in relation to KSO and KWS was primarily drawn from: payslips and HR records; [*Annex 35*] (records which a handler is required to make) and which were [*Annex 36*]; and an internal electronic system holding rosters known as [*Annex 37*]. In relation to KBS, the principal source of data obtained by the Commissioner was from the usage of her MPS issued mobile phone. In each instance, a number of sample periods were used and the extracted data has been provided to the claimants on a series of spreadsheets.

376. The claimants have also produced diary entries.

377. The claimants have emphasised the incomplete nature of some of the data provided by the defendant. I refer to the position concerning KBS' telephone records under Issue 23 below. In the case of KWS, her [*Annex 38*] were destroyed after she left the force. Further, as a retired officer she has not been permitted to access data held on certain systems. In relation to KSO the [*Annex 39*] are incomplete and material was not searched for after a somewhat arbitrary cut-off date of February 2016.

Issue 1A: length of recall

378. Issue 1A raises three issues concerning the length of KSO's and KWS's recalls to duty. This is primarily relevant to the computation of their Annex G overtime claims.

The [*Annex 40*] that the officers completed generally indicate the length of their communication with the CHIS but not the time that was taken up with processing the communication or other consequential steps. This gives rise to sub-issues a. and c. which concern the length of their recalls and the use that can be made of the estimates provided by the constable claimants. I am not asked to determine the length of particular recalls. I will consider these two matters and then the broader subject of clustering.

Use of KSO's and KWS's estimates

379. The constable claimants' argue that their estimates should be accepted, as reflecting the necessary time spent on note-taking and other follow-up activity (which I will refer to compendiously as processing time). These estimates are set out in their respective schedules of loss and first witness statements. The defendant submits that the claims should be confined to the documented length of the calls.

380. KSO says that for a call lasting for six minutes or less, an average of five minutes of processing time would be involved; and that for a longer call, on average there would be ten minutes of processing time. In the event of a CHIS welfare call, the average processing time would be one minute. When he held the posting at [*Annex 41*]: the average processing time for a call lasting seven minutes or less was 15 minutes; the average processing for a longer call of 8 minutes or more was 20 minutes. Throughout the period of his claim, he relies upon an average processing time of three minutes in relation to a text message and one minute in respect of a missed call. As regards emails, he applies an assumed reading time of ten minutes and a processing time of ten minutes. He allows five minutes in respect of each email that he sent.

381. KWS allows for a seven minute average processing time in relation to "regular calls". However, she estimates that 30 – 40% of her calls would generate follow-up work that lasted for one – two hours on average. The uplift that she claims in respect of these "long calls" is the subject of the sub-paragraph c. issue. KWS estimates that text messages, missed calls and voicemails each involved one minute of her time.

382. Leaving aside the question of KWS's uplift for long calls, I am satisfied that the officers' estimates are realistic and reasonable and I accept that they should form the basis of their claims.

383. I accept that it is likely that a call from a CHIS generated a need for the officer to make notes and that it is unlikely that they were able to make a sufficiently full note during the call itself. (I have explained earlier that formal records of the call could only be made once the officer was back in the office.) I also accept that a call from a CHIS may well have generated thinking time regarding consequential actions and it may have resulted in the officer making contact with their controller (albeit I note that both KSO and KWS described a less frequent level of out of hours contact with their controllers than KBS described having with her handlers). When he was cross examined by Mr Westgate, KTP accepted that a contact from a CHIS would generate note taking, thinking time and potentially contact with the controller. However, the defendant's approach makes no allowance at all for these additional periods of time.

384. Mr Beer made a number of points about the tasks that the officers would not undertake at this stage given the (accepted) fact that they did not have remote access

to MPS databases or management systems. However, the claimants' estimates did not include time for undertaking such tasks. Further, as I understand it, their estimates allowed for the fact that they would usually make some notes during the call itself and that they did not contact the controller after the call as a matter of routine.

385. In cross examination, Mr Beer asked KSO why the records he made (intermittently) in his own diaries only recorded the length of the call rather than any processing time. It is fair to say that KSO did not provide a clear explanation for this. I have borne this point in mind but set against the other evidence I have referred to, including his own credible descriptions of the work involved, I do not consider that this lack of record-keeping in his diary undermines the proposition that the calls generally involved additional processing work.

386. As regards the emails that KSO dealt with, I accept the account set out in his witness statement (which was not significantly challenged in cross examination), that these tended to be very lengthy emails and they required the reading and processing time that he has indicated.

387. The claimants' estimates are averages and thus, by their nature, there will have been occasions when the processing time involved was significantly shorter. However, I accept that there will also have been times when it was significantly longer. The periods that the claimant constables have claimed are relatively modest. The assessment I have to make is on the balance of probabilities (rather than being certain).

388. My decision in this respect does not set a precedent for officers' estimates to be accepted in all other POCL cases. It will be open to the chief officer to challenge the reasonableness or accuracy of the same. This is illustrated by my decision in relation to KWS's claimed uplift, which I address below.

389. I mention for completeness that Mr Beer spent some time in cross examination, particularly with KWS, seeking to show that a 'swings and roundabouts' approach applied, so that on some occasions when KWS had received calls from CHIS between tours of duty she would be permitted to leave early the next time she was in the office if her workload allowed for this. Whilst KWS did not agree that this occurred to the extent that was being put to her, she accepted that it did happen on occasions. In any event, I do not see how the existence of an informal swings and roundabouts approach of this nature assists the Commissioner in relation to the calculation of lengths of recalls for the purposes of Annex G overtime (and I understand it primarily to have been raised by way of defence to equitable claims).

KWS's uplift

390. I have explained the basis upon which KWS claims an uplifted figure for "long calls" in her schedule of loss (para 381 above). For calculation purposes she takes the figure of 1.5 hours for 35% of the out of hours calls she received (77 out of 220 calls). The defendant disputes this in its entirety.

391. I am not satisfied that there is sufficient evidence to support the claimed uplift. Accordingly, it follows that the amounts allowed for these calls on KWS's schedule of loss should be amended to claim at the "regular call" rate.

392. The reasons for my conclusion are as follows:

i) When cross examined, KWS accepted that her estimate was based on the amount of work generated by a portion of the calls that she had received generally, irrespective of whether this was in the office or out of hours. She then conceded that calls she received during the day time when she was in the office tended to generate a greater amount of processing work in their aftermath. Accordingly, the failure to distinguish between these two different scenarios when preparing her estimates, undermines KWS's figures;

ii) KWS's evidence did not adequately explain the significant divergence between the average processing time she applies to regular calls (seven minutes) and the much longer processing period that she applies to 30 – 40% of her calls. At para 104 of KWS1 she gives an example of a situation that did generate a substantial amount of out of hours work, but this appears to be an example that lies at one end of the spectrum rather than something that occurred in relation to 35% of her out of hours contacts;

iii) KWS accepted in cross examination that where an out of hours call generated one or two hours of consequential work, this was the sort of situation she had described in KWS1 where she said that infrequently she did put in a contemporaneous claim for overtime if she had worked a "meaningful hour" between tours of duty (which was then paid); and

iv) KSO does not make a similar claim, although the officers worked in the same unit for part of the period of their claims.

Clustering

393. As I have explained when addressing Issues 1 and 1C, it is necessary to identify the beginning and end of a recall for the purposes of applying the four hour minimum period (pre 1 April 2012) and for calculating the allowance due under Annex G. A potential difficulty arises where there are a series of short phone calls or other contacts close together in time: are these to be treated as individual recalls or a single period of duty and thus a single recall? The constable claimants have put forward a way of addressing this in their respective schedules of loss. They refer to a continuous period of duty covering two or more occasions of CHIS contact by the shorthand term of a "cluster". Where a cluster occurs this has been treated as a single recall. Outside of a cluster situation, a fresh recall to duty is claimed in relation to a subsequent contact occurring between the same periods of rostered duties. The schedules of loss indicate that contacts are treated as a cluster where:

i) There is a further contact or other recorded activity within the assumed processing time for the first contact;

ii) The contact appears to be part of a chain of activity (for example a text message followed by a call from the same CHIS after a gap); or

iii) The claimant recalls the events and has provided specific evidence in their witness statement justifying their treatment as a cluster.

Contacts with separate CHIS are generally treated as separate recalls unless the pattern of contact or other available information suggests that they should be clustered.

394. The defendant does not accept this approach, contending that it involves reading words into the Determinations which are not there and that it is a device used to bloat the claims.

395. I accept that the constable claimants' position is a reasonable, proportionate and appropriate one in the circumstances. Both parties need to know the length of a recall in order to calculate the allowance that is due. The claimants do not suggest that clustering arises as a matter of construction from the wording of the Determinations or that words need to be read into the provisions to reflect this. Where they identify a cluster, that is, in the language of the Determinations, a period of recall for which the officer has been recalled. They say, and I accept, that clustering is simply an evidential tool for ordering the facts and quantifying the claim. I also accept that clustering has a relatively neutral effect on the overall scale of the claims (in some instances it assists the claimants and in others, the defendant), so that it is not fair to say that it is being employed to inflate or bloat the claims.

396. Mr Beer also submitted that the adoption of clustering would give rise to uncertainty and unpredictability in the quantification of claims as it would depend upon the subjective interpretation of the person making the claim. However, as in the present cases, the majority of clusters are likely to arise from the application of the criterion I have indicated at para 393 (i) above, namely that the second contact occurs within the assumed processing time for the first contact. This is something that is readily identifiable once the average processing time for the particular officer is provided. Furthermore, in so far as Mr Beer suggested that such subjective interpretations may not always be reliable, there is nothing to prevent them from being challenged in a particular case. The defendant has not suggested an alternative (other than the position taken in relation to Issue 1, which I have rejected.)

Conclusion

397. Accordingly, for the reasons I have identified, I accept the estimates provided by KSO and KWS as to their average processing times in relation to contacts with CHIS between rostered tours of duty, save that I do not consider that a sufficient evidential basis has been shown to justify accepting KWS's uplift.

398. I accept that in determining whether several duty activities constitute a single recall or more than one recall, the constable claimants' approach to clustering is appropriate.

Issue 38: when KSO was recalled to duty

399. Unlike Issue 1A which concerned the duration of recalls to duty, this issue relates to the number of recalls that KSO undertook. KSO relies upon his diary entries as evidencing recalls that do not appear on the defendant's spreadsheets. He contends that his diary entries accurately reflect occasions where there was out of hours contact. The defendant's position is that his diaries cannot safely be relied upon as evidencing out of hours contacts. Although the wording of Issue 38 (in referring to his diary "in particular") suggests that the question was posed on a wider footing, the

submissions made to me only related to the diaries and I will confine my consideration accordingly.

400. In KSO1, the officer explains that on each occasion he made the diary entries shortly after the contacts that they refer to. He says that he is confident of their accuracy. He accepts that the diary entries are not comprehensive and that this is something he did intermittently. There are 57 instances where KSO has recorded a contact in his diary that does not appear on the defendant's spreadsheets. He indicates that a significant number of these concern the same CHIS.

401. I accept that KSO has shown on a balance of probabilities that he was recalled to duty on the additional occasions recorded in his diary. I do so for the following reasons:

i) KSO was generally measured and credible in the evidence that he gave;

ii) His diary entries of CHIS contacts do coincide with the defendants' records on a significant number of occasions, both as to date and as to the length of the call. This gives me some further confidence as to their reliability;

iii) As I have already noted when introducing the evidential issues, the defendant's records are not comprehensive;

iv) KMT accepted when he was cross examined, that an entry of a contact in KSO's diary that was not on the defendant's spreadsheet likely meant that there was a missing record, rather than the contact did not occur;

v) The defendant's records indicate at least two instances where KSO received a payment consistent with the overtime allowance (time and a third) which coincide with a contact entry in KSO's diaries, but where there is no record on the [*Annex 42*] of a contact. This supports the proposition that there are contact instances recorded in KSO's diaries even though they are not on the defendant's system or have not come to light from searches of those system; and

vi) No sufficient reason for questioning the reliability of the diary entries has been identified.

Conclusion

402. I accept that KSO has shown that he was required to do duty or recalled to duty on the occasions recorded in his diary entries that do not appear on the defendant's counter schedule of loss.

Issue 23: quantification of the claims generally

403. As expressed in the updated list, Issue 23 raises a general question as to the approach to be taken to quantifying the number of times that officers were recalled to duty and/or required to work out of hours and the duration of those duties. The parties are agreed that it would be disproportionately expensive, impractical and time consuming for officers to be required to prove each and every occasion by witness evidence or documentary evidence. They both agree that claims may be quantified by demonstrating a representative number of occasions on which a duty was worked, for

example by dip sampling particular periods. However, the defendant does not agree with the claimants' proposition that these matters can be quantified by demonstrating general or average frequencies and/or durations of out of hours duty.

404. After I have dealt with this general issue, I will turn to the disputes that arose in relation to KBS's claim, as they have not been formulated into a specific issue on the updated list of issues, but it was plainly intended that I would address them (and I heard a substantial amount of submissions and evidence in relation to those matters).

405. As I have already observed, the Commissioner accepts that the available records are less than comprehensive in the present cases. The position is unlikely to be significantly different in respect of other MPS claims. In any event, the defendant's records do not show the officer's processing time where contacts are documented. In all the circumstances, I do not accept that there can be a valid in principle objection to claimants using estimated averages to quantify the number of contacts and/or the length of the duty. I have accepted this approach in respect of KSO and KWS under Issue 1A (save for KWS's uplifts). It is a sensible and proportionate course.

406. I do not know the position in relation to record keeping as regards the other police forces who are facing claims. In any event (as I noted when addressing Issue 1A) it will always be open to the Commissioner or other chief officer to dispute or test the estimates provided in a particular case as insufficiently explained, unreliable and/or excessive. The defendant uses the word "guesses" in setting out the Commissioner's position in the list of issues. If an estimate was provided without a credible basis underpinning it, so that it could properly be described as no more than a guess, then the chief officer would likely have good grounds to dispute it. However, for the reasons I identified when I addressed Issue 1A, I do not consider that the estimates which I have accepted from KSO and KWS could fairly be described as guesses.

407. The claimants addressed me on a number of cases where adverse inferences were drawn as to facts in issue as a result of the defendant's failure to make proper disclosure of the relevant material and/ or to keep the records they were required to keep by law. These authorities included *Browning v Messrs Brachers* [2005] EWCA Civ 753 at paras 204 – 210; and *Antuzis v DJ Houghton Catching Services Ltd* [2011] EWHC 971 (QB) ("*Antuzis*") at para 110. The decisions were specific to the particular factual circumstances before the court. As Dingemans LJ emphasised in *Mackenzie v Alcoa Manufacturing (GB) Ltd* [2019] EWCA Civ 2110 ("*Alcoa Manufacturing*") at para 50 "whether it is necessary to draw an inference, and if it is appropriate to draw an inference the nature and extent of the inference, will depend on the facts of the particular case". I do not consider that a direct analogy can be drawn with the circumstances before me. For the avoidance of doubt, I have reached the conclusion I have expressed in respect of this issue without applying an evidential presumption of the kind discussed in these cases.

Conclusion

408. I accept that individual claims can be quantified by demonstrating general and/or average frequencies or durations of out of hours duty. However, this conclusion is not intended to preclude defendants from being able to test and dispute the cogency of particular estimates.

Issue 23: quantification of KBS's claim

409. Nearly £72,000 of KBS's claim relates to additional duty performed on rest days and public holidays. However, a further £81,342.52 concerns additional duty performed during annual leave. As a result of my conclusion in respect of Issue 7A, she can only pursue a claim for the latter. However, I will approach the issue that I now turn to on a general basis, rather than confining my consideration to the latter.

410. I am not asked to make findings about individual instances, but I am asked to resolve the appropriate method of quantifying the number of occasions when KBS was recalled to duty or required to do duty out of hours, as the parties have adopted significantly different approaches.

411. The defendant's figures are based on the following:

    i) Telephone data relating to KBS's MPS issued mobile phone; and

    ii) Notes and times entered on [*Annex 43*] by KBS.

412. KBS submits that the above are far from comprehensive. In addition to these materials she places reliance upon:

    i) Her diary entries for part of the period;

    ii) A review of selected [*Annex 44*] conducted by KKPA; and

    iii) Her own estimates as set out from para 132 in her witness statement.

413. In terms of her estimates, KBS puts forward the following:

    i) She received at least one call on three out of the four weekend days in any given fortnight. The number of calls on those days ranged between one and five;

    ii) She received calls on approximately half of the bank holidays;

    iii) She was contacted on 95% of odd days off that she had during the week and received between two – eight calls on those days;

    iv) During a period of extended leave she would receive one or two calls on 85% of the days.

414. The defendant does not accept these additional sources and contends that KBS's claim should be limited to the documented contacts reflected in his counter schedule of loss. By the time of closing submissions KBS advanced a secondary fallback position, namely that if her estimates were not accepted by the court, it was nevertheless appropriate to rely on her diaries and the review conducted by KKPA in addition to the instances appearing in the defendant's documents.

415. Before returning to KBS's estimates I will address each of the other sources that are relied upon.

The telephone records

416. Telephone data was obtained in respect of KBS as she stated that she always used her work mobile for these purposes during the period of her claim.

417. In July 2019 KTJ (who was the point of contact for the disclosure process in respect of KBS's claim) completed a MPS template form requesting incoming and outgoing call data and billing data for the period [*Annex 45*] for the mobile phone in question. He submitted this to the Directorate of Professional Standards ("DPS") The application indicated that this was a work phone provided by the MPS. However, it appears that when the request was conveyed to BTS Holdings, the DPS did not indicate that the subject of the request was a MPS phone. Their request was initially made in a call and then followed up in an email sent on 12 July 2019 which simply asked for data for the phone number that was provided. On 22 July 2019 KTJ received two Microsoft Excel documents from the DPS. One covered the previous Unix system and the other the current Commsware system. KTJ noticed that the data appeared to be lacking in calls from the mobile in question and sent an email the same day to DPS querying whether the complete data set had been provided. He was advised on 24 July 2019 that all the data that could be obtained had been provided for the requested period.

418. As I have described in para 22 above, it was only after the trial had commenced that it was realised that some of the available data had been overlooked. In his second statement (provided pursuant to my order) Mr O'Sullivan, who was not involved in obtaining the original data, explained that he realised the problem during the course of preparing to give his evidence. The second statement made by KTJ (also provided pursuant to my order) explained that the data that was previously disclosed only covered calls and texts to KBS' phone and not outgoing calls or texts from the mobile because the request to BTS Holdings had not identified that the number in question was a MPS phone for which such data would be available. Whilst I accept this account of how some of the relevant data was previously overlooked and that it arose through inadvertence rather than a lack of good faith, it is also right to record that KBS and her legal team had highlighted the apparent discrepancy at an earlier stage and had been (wrongly, as it turned out) reassured that the available data had been provided. For example, the response dated 31 July 2020 to the questions raised in the letter of 9 December 2019 incorrectly stated that the data captured all of the phone interactions, without, it appears, any further checks having been made with BTS Holdings before that letter was written.

419. The failure to appreciate this error at an earlier stage has a particular consequence because data is only held for seven years, thus restricting the period for which the data relating to outgoing calls and texts is now available. In relation to any earlier period data for outgoing calls and texts from KBS's mobile is unavailable, save where the call was made to a MPS landline.

420. Additionally, there are other respects in which it is agreed that the telephone data is incomplete:

    i) The data that was recently provided does not include records for the month of [*Annex 46*]. The reason for this is unclear. The data for the month that follows is duplicated and the reason for this is also unknown;

ii) It does not capture calls or text messages to KBS's mobile that were made from non-MPS devices. KBS emphasises that she received contacts from external organisations on a regular basis (para 53 above). In her statement she estimates this as accounting for 40% of her calls on weekdays (as outside of her own DSU it would not be known when she was off duty) and 5% of her calls at weekends. She also says that sometimes handlers would call her from non-MPS phones;

iii) There are some earlier gaps in the data provided, specifically [*Annex 47*]; and

iv) The earlier Unix data does not contain details of text messages sent by any device. This affects the period [*Annex 48*].

421. For these reasons I accept that the telephone data does not provide a complete picture of the out of hours calls and texts made and received by KBS. Where this data shows that a call or text occurred then it is reasonable to accept that as reliable. However, I conclude that there are likely to be a significant degree of additional calls and texts not captured by this data.

422. Nonetheless, the year for which the greatest amount of data is available is of evidential value as KBS accepted when cross examined that the pattern of out of hours contacts in that year were not atypical (and this is also consistent with the approach she took to the estimates given in her statement, which did not differentiate between the various years).

423. I note for completeness that in her statement KBS queried the fact that there were calls with very short duration times, sometimes as little as three seconds, shown in the data. She suggested that this was indicative of the unreliability of the data as she would never have had such brief calls. However, I consider that this concern was satisfactorily explained by Mr O'Sullivan in his first witness statement. Due to the configuration of the MPS network it is possible for the same call to generate more than one call record because it is routed through more than one site within the MPS network and each stage of this process produces a separate call record. Thus, the duration shown for a call record relating to, for example, the passage of the call from the originating site to the trunk line would be very brief; and a separate and longer call record would then reflect the call once on the trunk line to the external number.

The defendant's records

424. The [*Annex 49*] records indicate some of the occasions when KBS worked out of hours, as there were times when KBS made a note of this on this system (and she sometimes received a payment in respect of this). KBS says that there were many other occasions when she received calls out of hours but did not make a note of this kind. She described her reasons for not doing so as a combination of pressure of work, not being in the office at the time (the system could not be accessed externally) and not anticipating at that stage that a claim would be made years later. She also said that she was not aware of the note facility on the system for the early period of her claim. Mr Beer probed this point in his cross examination of KBS, asking her why (once she had discovered the note facility) she did not use it to record a greater instance of her out of hours working if this was occurring as frequently as she alleged. She accepted Mr Beer's description of her entries as being made "really infrequently".

425. It is clear that when KBS did make a note of this kind on the system it is good evidence of the out of hours work that is there referred to. I also accept that there were a significant number of occasions when she was recalled to duty that she did not record on this system and that these notes are not comprehensive (as the telephone data also shows). Nonetheless, I consider that there is some force in Mr Beer's point, after making due allowance for the explanations that KBS gave. I return to this point when I address KBS's estimates.

KBS's diary entries

426. The diaries are of limited value for present purposes. Firstly, they only cover the period [*Annex 50*]. Secondly, KBS did not use them to specifically record when she received an out of hours contact. She primarily recorded matters such as deadlines for CHIS authorities and reviews, meetings with CHIS and with operational teams, court hearings, briefings and days when she was on annual leave.

KKPA's review

427. I have already referred to the fact that KBS was not able to access sensitive records herself as she is no longer a serving officer. KKPA was permitted to examine [*Annex 51*] where KBS had a footprint in respect of the CHIS, for the sample months of February and May in the years [*Annex 52*]. These documents do not generally indicate in terms the time when a controller was contacted or, in the majority of occasions, if a controller was contacted in the immediate aftermath of the call between handler and CHIS, as opposed to them later signing off the document when they were in the office. In his statement, KKPA explained that he used his own professional experience to assess when he would have expected a controller to have been contacted promptly, in particular whether high level or urgent intelligence had been received requiring immediate dissemination or whether the subject of the contact was lower level intelligence that would not have required immediate dissemination or contact with the controller. KKPA said that he categorised some instances as "potentially relevant" where the situation was such that it did involve or was likely to have involved contact with the controller. He classed some of the other instances as "possibly relevant", where the nature of the intelligence was not such that it would clearly have required the controller to be contacted immediately, but where he personally considered it appropriate for the handler to have done so.

428. I agree with Mr Beer's submission that this material does not assist KBS in advancing her claims as it has not produced clear evidence capable of satisfying me on the balance of probabilities that she undertook out of hours work on specific occasions that KKPA refers to. I arrive at this conclusion for the following reasons:

    i) KKPA only found one instance where it was expressly stated that KBS had been contacted and had given an authority at a specific time;

    ii) In other instances where reference was made to the controller having been informed, no time was given and therefore it is not possible to know whether this had occurred whilst KBS was off duty or when she was next in the office. Of course this ambiguity also applies to instances where KKPA has inferred that the controller would have been contacted (as opposed to this being stated); and

iii) Whilst I bear in mind that he confirmed he had read KBS's witness statement describing her method of working with the handlers, my impression from KKPA's evidence is that he applied his own subjective judgment as to the likelihood of the handler making prompt contact with the controller. He also accepted that in every instance there were a number of variables in terms of whether and when contact occurred.

KBS's estimates

429. For the reasons that I will identify, I do not consider that KBS's estimates provide a reliable foundation upon which to quantify her claim.

430. KBS accepted in cross examination that her estimates as to the frequency of her out of hours contacts were drawn from her memory. A contact between a CHIS and a handler does not necessarily generate a need for a controller to be contacted immediately, albeit the practice that KBS operated required the majority of her handlers to contact her if there was a consequential need to disseminate information (para 51 above). In her witness statement – which was also where she had set out the estimates that she relied upon – KBS had said that a handler was required to contact a controller after initial contact with a CHIS for direction, authorisation for further contact with the CHIS and dissemination of intelligence. She accepted in cross examination that this overstated the position.

431. Most notably, for the period of almost a year where the fuller telephone data is available, it does not accord with KBS's estimates by a considerable margin, even allowing for the other limitations on the data that I identified earlier and the possibility of a degree of human error in relation to the inputting of particular instances. I have already noted that KBS does not suggest that this was an atypical year (para 422 above). In particular:

i) Although KBS estimated that she received at least one call on 85% of her extended annual leave days, Mr Beer took her to particular examples in cross examination which did not bear this out. They included the following: the data showed calls made on only two days during the period [*Annex 53*]; and during her annual leave from [*Annex 54*] the data indicated only one call lasting 43 seconds;

ii) The data for the period [*Annex 55*] shows contact to or from her phone on six of the 16 days marked as annual leave on the defendant's system, amounting to 37.5% of her annual leave days;

iii) The data for the same period indicates contact to or from KBS's phone on 25 of the 95 weekend days during the same period. This amounts to 26% of her weekend days, rather than the estimate of 75% which she provided; and

iv) For the same period, the data shows contacts on two out of five public holidays; that is say on 40% of those days, rather than her estimate of 50%.

432. KBS was not able to convincingly explain these discrepancies. For the avoidance of doubt, I do not believe that KBS has been other than honest in the estimates she provided; as Mr Beer suggested it appears to have been a case of cognitive bias, in the

sense that the occasions when her holidays and weekends were interrupted by calls loom larger in her memory than the days when this did not happen.

433. Although I regard it as considerably less significant than the matters I have just identified, I also bear in mind the limited entries that KBS made on [*Annex 56*] even after she was aware of the note facility (para 425 above).

Conclusions

434. For the reasons I have identified, I do not consider that KBS's diaries, KKPA's review or KBS's estimates provide a sufficiently reliable foundation upon which to base the quantification of recalls to duty for the purposes of her claim.

435. However, for reasons that I have also identified, I accept that the telephone data is incomplete and that there are likely to be a significant number of additional calls and texts not captured by this data. Although Mr Cooper addressed me on the evidential presumption discussed in the *Alcoa Manufacturing* line of authorities and on the application of *Antuzis* in particular (para 407 above), I do not consider that this is of direct assistance in this instance. It is in any event apparent from the agreed gaps and limitations in the telephone data and the concessions that Mr O'Sullivan made when cross examined by Mr Cooper, that there will have been additional contacts that are not captured by this data and that appropriate allowance should therefore be made for this. It is also evident that some of these gaps would have been avoided if the correct searching parameters had been employed from the outset or the omission I have explained were appreciated earlier. Nonetheless, it is also clear from the evidence that I have summarised that even taking a generous approach to KBS's evidence her estimates are considerably wide of the mark.

436. It is also apparent that the [*Annex* 57] data only records a limited number of instances of the out of hours working.

437. In the event that I found I was not able to rely upon KBS's estimates, Mr Cooper proposed a number of options which were, in summary, that: (i) her claim be quantified by reference to the four sources of data that I have identified and discussed; (ii) I made my own estimates on a global percentage basis; or (iii) I gave a general indication as to the documentary sources I considered reliable and unreliable with a view to the parties reformulating their schedules on this basis.

438. It follows from the conclusions that I have already set out that I reject option (i). I have considered adopting option (ii), but ultimately I have concluded that it runs the risk of causing unfairness to one or other party, given I have not heard detailed evidence about particular instances, as opposed to evidence that illuminates the reliability or otherwise of the data sources currently relied upon. I therefore conclude that the just and appropriate solution is for the parties to reformulate, and hopefully agree figures for the number of relevant contacts, based on the guidance I have provided in this judgment. I have already indicated my conclusions as to the reliability of each of the sources. I consider that the correct approach is to take the telephone data supplemented by the [*Annex 58*] data as the starting point and for a modest percentage uplift to be applied in relation to each year to reflect the gaps in and the limitations of this data.

Summary of conclusions reached on the issues

439. In the interests of clarity, I will summarise the conclusions that I have reached on each of the issues that are before me at this stage. I will do so in the order in which I have considered them. For the reasons I indicated at paras 223 – 228 I decided that it was not appropriate for me to resolve Issue 2 at this stage. In light of the conclusion I reached on Issue 8, it was unnecessary for me to decide Issues 9, 10, 12 or 14; and in light of the conclusion I reached in respect of Issue 37, Issue 37A did not arise. Hopefully, these conclusions will enable the parties to agree the quantification of the respective claims.

Issue 1

440. The four hour minimum provisions in Annex G paras (1)(h)(iii) and (3)(f) and Annex H para (3)(f) apply to each recall lasting less than four hours, including where the recalls occur within four hours of each other, but subject to there being no double recovery for the same period.

Issue 1C

441. The four hour minimum provisions are applied as part of the process of calculating the length of overtime worked by the officer before the allowance that is payable is calculated by reference to the applicable rate applied to each completed 15 minutes of duty.

Issue 1B

442. KBS was recalled to duty when she was contacted out of hours in relation to intelligence received by a handler which required a decision about dissemination or other consequential action and/or when she was contacted out of hours by handlers, operational teams of officers or other agencies for input and/or action relating to a CHIS or a handler and/or when she was contacted out of hours in relation to her other managerial responsibilities.

Issue 7A

443. Annex H para (1)(g) does not permit an inspector to claim compensatory leave (or damages) for work performed on public holidays or rest days where the duty is performed by reason of a recall or a requirement which arises on the day itself. It follows that KBS's claim pursuant to para (1)(g) fails.

Issue 8

444. A failure by the chief officer to grant additional leave that arises under the provisions identified at paras 230 - 231 above within a reasonable period of time gives rise to an actionable claim for damages for breach of statutory duty.

Issue 10AA and 10A

445. The entitlements provided for in Annex O para (5) arise where an officer is recalled to do some duty on a qualifying day of annual leave and it is not necessary for the officer to have worked for a full day.

Issue 11

446. If an officer's leave day is interrupted by a recall to work in circumstances that do not come within Annex O para (5), the officer is entitled to have that leave day restored to them as part of their primary annual leave entitlement conferred by para (1). However, in these circumstances the restrictions on carrying forward untaken leave will apply.

Issue 16

447. The officer's choice to receive payment rather than additional leave referred to in Annex O para (5)(a)(i) and (ii) may be made at any time when the chief officer is able to grant the additional leave. The election can be made in the pleadings if the officer remains a member of the relevant police force at the time.

Issue 36

448. This replicates the question raised by Issue 1C and the answer is as given in respect of that issue.

Issue 36A

449. In respect of a part-time officer's recall to duty prior to 1 April 2012 that does not meet the prescribed conditions in Annex G para (3)[x], para (3)(m) does not have the effect of applying a deemed four hour minimum period to the length of that recall for the purposes of the officer's entitlement to payment at plain time.

Issue 37

450. Where a part-time officer is required to do duty on a free day, for the chief officer to avoid the allowance being payable at the higher rate pursuant to Annex H para (2)(d) and (e), it is necessary for them to show that the duty was of such a nature that it was not in the circumstances reasonably practicable for another officer in the force to have done that duty.

Issues 4 and 5

451. An officer is on call for the purposes of Annex U para (13) when they are required to be available to perform their duties outside of their rostered tours of duty and that, in turn, whether they are required to do so is to be assessed by reference to the substance of their duties, rather than simply by whether they had been designated on a rota as "on call" for the period in question.

452. In the circumstances, I am satisfied that KSO and KWS were required to be available to perform their duties as handlers between their rostered tours of duty and, as such, were "on call", within the meaning of Annex para (13), throughout the period for which they have claimed the allowance, save in relation to the times that I have referred to at para 359 above. I arrive at a similar conclusion in relation to KBS, namely that she was required to be available to perform her duty as controller outside of her working hours, so that she was "on call" throughout the period for which she has claimed the allowance, save in relation to the days that fall within the exception that she has recognised.

Issue 1A

453. I accept the estimates provided by KSO and KWS as to their average processing times in relation to contacts with CHIS between rostered tours of duty, save that I do not consider that a sufficient evidential basis has been shown to justify accepting KWS's uplift.

454. I accept that in determining whether several duty activities constitute a single recall or more than one recall, the constable claimants' approach to clustering is appropriate and should be adopted.

Issue 38

455. I accept that KSO has shown that he was required to do duty or recalled to duty on the occasions recorded in his diary entries that do not appear on the defendant's counter schedule of loss.

Issue 23: general

456. I accept that individual claims can be quantified by demonstrating general and/or average frequencies or durations of out of hours duty. However, this conclusion is not intended to preclude defendants from being able to test and dispute the cogency of the same.

Issue 23: KBS

457. I do not consider that KBS's diaries, KKPA's review or KBS's estimates provide a sufficiently reliable foundation upon which to base the quantification of recalls to duty for the purposes of her claim. I accept that the telephone data and the [*Annex 58*] data is incomplete and that there are likely to have been significant additional calls and texts that are not reflected in this data. Appropriate allowance should be made for this.

458. The just and appropriate solution at this stage is for the parties to reformulate, and hopefully agree figures for the number of relevant contacts, based on the guidance I have provided. I consider that the correct approach is to take the telephone data supplemented by the [*Annex 59*] data as the starting point and for a modest percentage uplift to be applied in relation to each year to reflect the gaps in and the limitations of this data.