EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/114070/07

Held in Glasgow on 25, 30, 31 August and 1 and 4 September 2017

Employment Judge: **Lucy Wiseman**
Members: **Peter Denheen**
Vernon Alexander

Ms Fiona McBride — **Claimant**
Represented by:
Mr C MacNeill - Queens Counsel

Scottish Police Authority — **Respondent**
Represented by:
Mr B Napier - Queens Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:-

(a) The respondent has not shown it was not practicable, in terms of Section 117(4)(a) of Employment Rights Act, to reinstate the claimant on 27 February 2017.

(b) The respondent shall pay to the claimant compensation in the sum of £415,227 (Four Hundred and Fifteen Pounds, Two Hundred and Twenty Seven Pounds).

REASONS

E.T. Z4 (WR)

1. The claimant brought a claim of unfair dismissal in July 2007. The case was heard in September and October 2008, and the tribunal decided the claimant had been unfairly dismissed and ordered reinstatement.

2. The respondent successfully appealed the tribunal's decision to order reinstatement to the EAT. The claimant thereafter appealed to the Inner House of the Court of Session and the Supreme Court. The Supreme Court upheld the claimant's appeal and remitted the case to the original Employment Tribunal (or to a Tribunal that included any members of the original Tribunal who are still in office) to consider variation of its order in relation to the matters specified under Section 114(2) of the Employment Rights Act 1996, in view of the time that had passed since that order was made.

3. An Employment Tribunal decided (Judgment dated 24 January 2017) to vary the date of the order for reinstatement from the 27 February 2009 to 27 February 2017. The Tribunal allowed a period of 28 days for parties to agree the amount to be specified in terms of Section 114(2)(a) Employment Rights Act. (This sum was not agreed and is dealt with below).

4. The respondent did not reinstate the claimant and this Hearing was arranged to determine (i) whether it was practicable for the respondent to comply with the order to reinstate the claimant and (ii) compensation.

5. We heard evidence from Ms Joanne Tierney, Fingerprint Operations Manager; Mr Tom Nelson, Director of Forensic Services and the claimant. We were referred to a jointly produced bundle of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

6. The claimant commenced employment with the respondent (known at the time of her dismissal as the Scottish Police Services Authority) on 29 October 1984. She was employed as a Fingerprint Officer until she was dismissed on 1 May 2007. The claimant earned a salary of £31,950.

7. The respondent organisation has undergone significant change in the period since May 2007. The delivery of forensic services in Scotland has been modernised and a national service created. The process of modernisation started in 2010/11 and one of the key changes was to bring together a range of related disciplines (Chemistry, Drugs and Toxicology and Fingerprints) under the umbrella of Physical Sciences.

8. The respondent introduced a new structure and job roles within Fingerprints (document entitled Scottish Police Services Authority Forensic Services (April 2011) at page 93). The respondent had previously trained all fingerprint examiners to expert level. A decision was taken to split court work and investigation and the new structure comprised the roles of Reporting Fingerprint Examiner and Fingerprint Examiner. The Reporting Fingerprint Examiners are required to carry out evidential work, produce statements and attend Court; the Fingerprint Examiners carry out intelligence work and produce reports.

9. Employees completed a Staff Preference Form and were thereafter allocated a post in the new structure following a selection process. Employees were transferred into a new post effective from 12 December 2011 (page 130).

10. The claimant, had she been in post in 2011, or if she had been reinstated, would have transferred/returned to the post of Reporting Fingerprint Examiner.

11. There are currently 24 Reporting Fingerprint Examiners and 17 Fingerprint Examiners. Ms Tierney is employed in the role of Fingerprint Operations Manager. She reports to Mr Gary Holcroft, Head of Physical Sciences, who

in turn reports to Mr Tom Nelson, Director of Forensic Sciences who reports to the Chief Executive.

12. The respondent has also, over the last 10 years, significantly changed the way in which it works in respect of fingerprints and this was due in part to obtaining ISO accreditation and also the outcome of the Fingerprint Inquiry which reported in 2012.

13. The key change is that fingerprint comparison was previously regarded as a statement of fact, whereas now it is regarded as a statement of opinion. There has, since 2006, been a move to non-numeric comparison whereby all points of similarity and unique features on the ridges and pores can be referred to. The Inquiry led the respondent to accept that people looking at the same print could vary in their opinion. The respondent now has a structured and more rigorous process in place to check identifications, with examiners each checking a mark independently and then coming together to discuss it. The respondent will not put the identification of a fingerprint forward unless the examination of the fingerprint is unanimous.

14. The respondent was the first fingerprint service to achieve ISO accreditation, and it took eight years to achieve this standard. The accreditation standard means every single activity done on a case has to be documented, dated and initialled. The respondent must show that everything it does is fit for purpose, and competence is closely monitored, and regularly audited internally and externally. The major change for the fingerprint service was the move from a management control which focused on documents, to a laboratory system where everything has to be tested and validated.

15. The respondent has in place a Management of Variance in Examiner Opinion procedure (page 246) which provides a structure for the management of those occasions on which there is a variance in examiner opinion with regard to the end result for a particular mark. The procedure confirmed that:-

"*positive identifications will only be reported in circumstances when agreement on the reporting outcome has been reached amongst all examiners who have examined the relevant mark/s and reference print/s either in the course of normal case work and/or as an outcome of a formal discussion process*."

16. The respondent carried out significant training for staff (in respect of the above points) and there is ongoing monthly sampling of work and presentation of evidence to demonstrate competence in respect of activities undertaken. An employee who has not undertaken certain activities for a prescribed period of time (for example, due to ill health) will be deemed to have lost competence and will require a programme of re-training. The Standard Operating Procedure (SOP) entitled Fingerprint Technical Training and Competence (page 262) included, at page 281 the procedure in place to deal with a "*Lapse/Withdrawal of Technical Competence*". A new SOP has been drafted (page 287) and is due to come into force soon. The material point in both SOPs is that an Action Plan, tailored to the needs of the individual, should be put in place to address training needs following the lapse of competence.

17. The fingerprint learning programme takes 36 months and during this time an employee would work on live cases, but their work would be subject to a second check which involves a competent examiner doing the work again and signing it off.

18. The claimant has not worked in fingerprinting for a number of years, and her competence would be regarded as having lapsed. The claimant would require an Action Plan to be put in place to address her training needs. Ms Tierney and Mr Nelson considered the claimant would need the maximum amount of training given her time away from the job, but they had not spoken to the claimant to ascertain her training needs.

19. The respondent has formalised its Defence Access Policy which gives open and transparent access to a case file. This means that a defence agent may review the case file and, now every activity done on a case is documented, dated and initialled, it is clear who has worked, at any stage, on a case file. The Reporting Fingerprint Examiner will prepare the statement for Court and attend to give evidence if required, but the defence could call as a witness any other person who had worked on the case file.

20. The Fingerprint Inquiry was a significant inquiry conducted by Sir Anthony Campbell. The key Findings and Recommendations of the Inquiry were set out on pages 42A – 42N. The key Findings included:-

- *2. The mark Y7 … was misidentified as the fingerprint of Ms McKie;*

- *6. There was no impropriety on the part of any of the SCRO fingerprint examiners who misidentified the mark Y7 as having been made by Ms McKie … These were opinions genuinely held by them;*

- *7. The marks Y7 …. were both misidentified by the SCRO fingerprint examiners due to human error and there is nothing sinister about the fact that these two errors occurred in the same case.*

- *8. The misidentifications of [the marks] expose weaknesses in the methodology of fingerprint comparison and in particular where it involves complex marks.*

- *9. Fingerprint examiners are presently ill-equipped to reason their conclusions as they are accustomed to regarding their conclusions as a matter of certainty and seldom challenged.*

21. The key Recommendations included:-

1. *Fingerprint evidence should be recognised as opinion evidence, not fact, and those involved in the criminal justice system need to assess it as such on its merits.*

2. *Examiners should discontinue reporting conclusions on identification or exclusion with a claim to 100% certainty or on any other basis suggesting that fingerprint evidence is infallible.*

3. *Examiners should receive training which emphasises that their findings are based on personal opinion; and that this opinion is influenced by the quality of the materials that are examined, their ability to observe detail in mark and print reliably, the subjective interpretation of observed characteristics, the cogency of explanations for any differences and the subjective view of sufficiency.*

22. Mr Nelson and Mr Holcroft held a number of meetings with staff following upon the Inquiry Report being issued on 14 December 2011. The staff briefing (page 79) from Mr Nelson included the following paragraph: "*This will be the definitive piece of work on these much-debated and long-standing issues. As an organisation it is our intention to accept its findings in totality, and I expect all of our staff to respect the findings of the Inquiry*."

23. Mr Nelson considered that respecting the findings of the Inquiry would present the claimant with some difficulty. His view was based on his reading of a Sunday Mail article (page 44) where it was stated: "*McBride – who maintains there was no mistake in her identification*". Mr Nelson did not know if this was a quote from the claimant. He has never spoken to the claimant to ascertain her views regarding respecting the findings of the Inquiry.

24. The claimant's personal opinion is that there was no misidentification of the mark Y7.

25. The claimant, had she been reinstated, would have respected the findings of the Inquiry. The claimant would have abided by the Code of Conduct regarding standards of behaviour of employees and what was expected of her.

26. There are employees, who continue to be employed in the respondent's organisation, who hold the same personal opinion as the claimant, but adhere to the respondent's expectation that staff respect the findings of the Inquiry.

27. There has been Press interest in the employment dispute between the claimant and the respondent. A number of articles have appeared in the press, and particular interest was generated by the decision of the Supreme Court. The following articles were produced at the Hearing:-

- page 43 was an article from the Sunday Mail, dated 5 March 2017 regarding the claimant not being permitted to return to work on the 27 February 2017;

- page 44 was an article from the Sunday Mail, dated 29 January 2017 regarding the decision of the tribunal to vary the date of reinstatement;

- page 48 was an article from the Sunday Mail, dated 19 June 2016, regarding the decision of the Supreme Court;

- page 49 was an article from the Daily Record, dated 16 June 2016, regarding the decision of the Supreme Court;

- page 50 was an article from the Sunday Mail, dated 12 June 2016, regarding the decision of the Supreme Court;

- page 51 was an article from the Sunday Mail, dated 28 February 2016, regarding the appeal to the Supreme Court;

- page 54 was an article in The Herald, dated 15 December 2011, regarding Mr Nelson's apology to Ms McKie;

- page 57 was an article from The Herald, dated 30 October 2012, regarding an appeal by the claimant;

- page 58 was an article from The Herald, dated 26 January 2013, regarding the appeal to the Inner House;

- page 61 was an article from The Herald, dated 13 January 2016, regarding the appeal to the Supreme Court;

- page 62 was an article from The Herald, dated 16 June 2016, regarding the decision of the Supreme Court and

- page 65 was an article from The Herald, dated 30 January 2017, regarding the decision of the tribunal to vary the date of reinstatement.

28. A number of the articles (five), reported the claimant as maintaining there was no mistake regarding the identification of the mark Y7.

29. The claimant acknowledged she had spoken to some reporters, particularly following their contact with her after the decision of the Supreme Court. The claimant does not court media attention and is always very careful and guarded about what she says and the language used. The claimant has no control regarding what is subsequently written and has noted that quotes attributed to her are almost always not direct quotes.

30. Mr Nelson took the decision that it would not be practicable to reinstate the claimant. He considered the position of the Lord Advocate to be "*critical*" to the decision-making process. Mr Nelson based his decision on the position of Lord Boyd, the Lord Advocate in 2006, when he confirmed the Crown did

not intend to call the fingerprint officers (including the claimant) as expert witnesses in future.

31. Mr Nelson, acting on legal advice, had a letter sent to Mr Stephen McGowan, Procurator Fiscal, on the 7 February 2017 (page 75) noting the Tribunal had recently decided to vary the date of the claimant's reinstatement from 27 February 2009 to the 27 February 2017. Mr Nelson noted that a key factor in the practicability of the claimant's reinstatement, was the comments made by the former Lord Advocate, Lord Boyd of Duncansby QC, in September 2006, when he confirmed to the Justice 1 committee that the Crown did not intend to call the fingerprint officers (including the claimant) as expert witnesses in future. The letter set out the relevant exchanges at the Justice 1 committee. Mr Nelson`s purpose in writing was to establish whether the present Lord Advocate's position on the issue of Ms McBride being called as an expert witness in criminal proceedings was materially different from that expressed by Lord Boyd. The letter asked for an urgent reply, and noted a link to the archive of the Justice 1 committee.

32. The letter sent on 7 February 2017 made no reference to any of the material factors which had occurred in the period since 2006 when Lord Boyd (the then Lord Advocate) adopted his position. There was no reference, for example, to the fingerprint Inquiry finding that there was no impropriety on the part of the fingerprint examiners; and no reference to the fact a subsequent Lord Advocate had put two of the claimant`s colleagues on the Crown list of witnesses to appear in a high profile double jeopardy case.

33. Mr McGowan responded by letter of 17 March 2017 (page 77) and in that letter he stated that the decision as to whether to call an expert as a witness in a criminal trial rests with the Lord Advocate and the Procurator Fiscal. The Lord Advocate's view was that any trial in which Ms McBride gave evidence might become a trial of Ms McBride rather than of the accused. That was a situation he would wish to avoid and therefore were the situation to arise, the

Lord Advocate's view was that he would not intend to call Ms McBride as a witness.

34. Mr Nelson considered that if the claimant was not to be called as an expert witness by the Crown, then she could not undertake the principal duties of the Reporting Fingerprint Examiner post. In addition to this Mr Nelson was concerned the Defence Access Policy would mean the claimant had to be removed from the scientific chain of evidence because if a defence agent saw the claimant had been involved on a case, she could be called as a witness.

35. Mr Nelson's remit is subject to budgetary constraints and pressures, and any recruitment/vacancy is scrutinised to ensure it is best placed. The respondent has not recruited any new fingerprint examiner/officers, but they have advertised for temporary positions to be covered.

36. Mr Nelson made Mr Foley, Chief Executive, and the senior management team, aware of the decision not to reinstate the claimant. Mr Nelson considered there were five reasons why reinstatement was not practicable:-

(i) a period of 10 years had elapsed since the claimant last worked for the respondent, and in that time, significant organisational and cultural changes had taken place, as well as a number of redundancies. There had also been the Fingerprint Inquiry and introduction of the Defence Access Policy.

(ii) The position of the Lord Advocate meant the claimant could not carry out the principal duties of a Reporting Fingerprint Examiner and the Defence Access Policy meant defence agents could identify the claimant if she worked on the chain of evidence at any stage, and could make an issue of it.

(iii) The financial consequences of having the claimant return to a Reporting Fingerprint Examiner role, but not the core function of going

to court would be organisationally difficult and would be questioned by other staff. This was particularly so given the financial pressures on the organisation.

(iv) There would be significant costs in training the claimant for a job she ultimately could not perform. This was compounded by the fact there are financial pressures on the organisation and every post within forensic services which becomes available must be assessed regarding where it is most needed, and that currently is within biology and not fingerprinting.

(v) The staff would not welcome the return of the claimant because they would be fearful of a return to the past.

37. Mr Nelson had not, when concluding staff would not welcome the return of the claimant, canvassed the views of staff.

38. The claimant has, since the time of her dismissal, received supportive communications from a number of colleagues, particularly following the decision of the Supreme Court. The claimant's sister-in-law is currently employed as a Reporting Fingerprint Examiner and the claimant believes there is a great deal of support for her return to work.

39. There was no record of Mr Nelson's decision-making regarding practicability or his discussions with Mr Foley, Chief Executive. Mr Nelson could not say when he made his decision regarding reinstatement, although it had been prior to 27 February 2017. Mr Nelson acknowledged he had not written to the claimant to explain she would not be reinstated, or to set out the reasons why: in fact he has had no contact with her in the 10 years since her dismissal.

40. The claimant attended at the respondent's offices at Pacific Quay on 27 February 2017, in compliance with the order for reinstatement. The claimant waited in the foyer until Ms McIntyre, HR, came down to tell her that she had

been told to tell the claimant she should telephone her lawyer. The claimant thanked her and left.

41. Mr Charles Stewart and Mr Hugh MacPherson, former colleagues of the claimant who also identified the print Y7 as being that of Ms McKie (and Mr MacPherson signed the report) were involved in a high profile double jeopardy case. They had both left the employment of the respondent by the time of the second trial in 2015, but were both named on the Crown list of witnesses (to be called to give evidence regarding the identification of the fingerprint/s). The defendant in that case was represented by Donald Findlay QC, who had represented Ms McKie in the perjury trial.

42. The evidence of Mr Stewart and Mr MacPherson was agreed by Donald Findlay QC and no issue was made of the fact they had previously identified Y7 as being that of Ms McKie, or that the findings of the Fingerprint Inquiry (that there had been a misidentification in respect of Y7) in some way cast doubt on their identification of the print/s in the case going to trial.

43. The representatives agreed the claimant's earnings in the period since dismissal to the date.

Credibility and notes on the evidence

44. We found Ms Tierney to be a credible witness and she gave her evidence regarding the training process, accreditation and the Defence Access Policy in a straightforward manner. Ms Tierney's evidence was, however, undermined on occasion when she made assertions which, when tested, could not be supported. For example, Ms Tierney was asked about her concerns regarding the claimant returning to work and replied that it was not about the claimant coming back to the office, but it was about the claimant not accepting the findings of the Inquiry. Ms Tierney expanded by stating there was no desire to revisit the past, but that was dependent upon the

claimant's position regarding the Inquiry. Ms Tierney was directed to the key findings and recommendations of the Inquiry and asked to identify the recommendations the claimant would not accept. Her response was that she did not know. Mr MacNeill suggested the claimant may accept all of the recommendations, and Ms Tierney could not disagree with this.

45. Ms Tierney adopted the mantra of the claimant's position being at odds with that of the respondent notwithstanding the fact (i) she did not know what the claimant's position was regarding the findings and recommendations of the Inquiry and (ii) others in the respondent's organisation have the same (personal) opinion as the claimant regarding the Y7 mark. Ms Tierney accepted they were entitled to hold that personal opinion but they had complied with the respondent`s instruction to respect the outcome of the Inquiry.

46. Mr Napier, in his submission, invited the Tribunal to find Mr Nelson a credible and reliable witness and he reminded the tribunal that it had made such a finding in 2009 and there was no basis upon which to depart from that view. We reminded ourselves that in fact the Tribunal's Judgment dated 26 January 2009 found the respondent's witnesses to be credible and reliable, but went on to state that we found Mr Nelson had been wholly controlled by Mr Mulhern in terms of the matters to be discussed, the information to be provided and, effectively, the decisions to be made.

47. We found Mr Nelson to be a not entirely credible or reliable witness for a number of reasons. Firstly, he promoted a view of the claimant for which there was no basis. This was exemplified on a number of occasions: (i) he stated the claimant would not accept the findings of the Inquiry, but when he was asked to tell the tribunal which findings/recommendations she would not accept, he did not know; (ii) he stated staff would not welcome the return of the claimant, but had no basis for making this statement in circumstances where he had not spoken to staff and where the reference to hearing someone was "*nervous*" occurred after the date for reinstatement. Further

Mr Nelson had to acknowledge that when the claimant had been employed, she had been a popular and respected member of staff; (iii) he referred to "*revisiting the past*"; *"rehashing the McKie saga*"; "*taking us back to the bad old days"* in circumstances where that relates to the McKie case. It is the McKie case which is notorious, and not to the claimant. The claimant was not responsible for the McKie saga: she was asked to identify a mark and she did so: there was no impropriety on her part, and it was an opinion genuinely held by her (and others). Mr Nelson's evidence gave the impression that it is he rather than the claimant who cannot move on from the past.

48. Second, Mr Nelson could not tell the Tribunal when his decision regarding practicability had been made, although it had been made prior to 27 February 2017. In fact, Mr Nelson told us he had made his decision prior to the letter being sent to the Lord Advocate on 7 February 2017. There were no notes and no documentary evidence to support/evidence the decision-making process. We were left with the distinct impression from Mr Nelson's evidence that the decision not to reinstate the claimant was made in 2009 and simply perpetuated by the respondent. We formed that impression having had regard to the fact Mr Nelson told the Tribunal that the reasons for not reinstating had not changed since 2009; he agreed with the suggestion made to him by Mr MacNeill that the respondent had decided, at any cost, that the claimant was not returning to work. He also agreed that even before the tribunal had varied the date of reinstatement, the respondent wanted a hearing to determine practicability to be arranged, because whatever the date of reinstatement, it was never going to be practicable. Furthermore, Mr Nelson's decision regarding practicability was rooted in the decision of the Lord Advocate in 2006, rather than on any current position of the current Lord Advocate.

49. Mr Nelson's decision was based on the decision of the Lord Advocate in 2006. Mr Nelson did not take the decision to write to the current Lord Advocate in February 2017 to ascertain his views. That letter was only sent following legal advice. We do not know who drafted the letter. The difficulty

this presented for Mr Nelson was that he could not explain why a full account of all the material factors which have occurred since 2006, including the changes made to the respondent's way of working, were not included to give a fair opportunity for reflection. Mr Nelson had to accept that if all of the information had been provided, he did not know what response might have been given by the current Lord Advocate.

50. Mr Nelson repeatedly stated the view of the Lord Advocate was critical, and by this he meant the view of the Lord Advocate in 2006. Mr Nelson's evidence on this point was undermined when he went on to suggest the context and circumstances in which the Lord Advocate's position had been adopted in 2006 were "*not important*".

51. Third, Mr Nelson told the Tribunal that he had kept the decision regarding reinstatement under review. We could not accept this as a reliable statement because (i) the respondent was successful in their appeal to the EAT regarding reinstatement, and in defending the claimant's appeal to the Inner House, and therefore we had to question what would bring about review of reinstatement in those circumstances; and (ii) what was there to review if no enquiries were made regarding any change to the circumstances. The suggestion by Mr Nelson of reviewing in the abstract was not credible and did not sit comfortably with the respondent's position that the claimant was not, at any cost, returning to work.

52. Fourth, Mr Nelson (and Ms Tierney) struggled to explain to the tribunal his concern about the claimant being called as an expert witness in Court. Mr Nelson used emotive expressions, such as the McKie saga being "*rehashed"* without being able to illuminate the perceived difficulty. It was only in the cross examination of the claimant that Mr Napier articulated a perceived difficulty (see below).

53. Fifth, Mr Nelson suggested he did not know the personal opinion of Mr Geddes and Mr Foley (current employees) regarding the mark Y7, because

he had not asked them. We did not find this aspect of Mr Nelson`s evidence to be credible in circumstances where he has been involved in the history of the McKie case.

54. Sixth, we did not find Mr Nelson`s evidence that he was not aware of the Mackay report (which was leaked in 2006 prior to Lord Boyd adopting his position regarding the fingerprint officers) to be credible. Mr Nelson has been involved in the circumstances of the fingerprint officers from the beginning. Furthermore, the Inquiry report detailed the treatment of the fingerprint officers and the events leading up to the decision of the Lord Advocate in 2006.

55. We found the claimant to be a credible and reliable witness. We could not accept Mr Napier's submission that the claimant had been less than candid in some of her answers. For example, the claimant was asked to accept that the Lord Advocate's veto on her acting as an expert witness for the Crown would be fatal to a return to full duties, and she responded that she was not sure. We could not accept this was disingenuous in circumstances where (i) the claimant, prior to dismissal, had been working for a number of years in a role where she was fully occupied in all fingerprint duties with the exception of appearing in court and (ii) the claimant considered there was still scope to have joint discussions with the Lord Advocate regarding a return to full duties.

Respondent's submissions

56. Mr Napier summarised the three issues before the Tribunal were:- (a) has the respondent shown it was not practicable, in terms of Section 117(4)(a) Employment Rights Act, to reinstate the claimant on 27 February 2017 in accordance with the revised order of the tribunal; (b) if so, what remedy should be given to the claimant in respect of her unfair dismissal on 1 May 2007 and (c) if it is not shown by the respondent that it was not practicable to reinstate the claimant, then what award should be made by the tribunal under

reference to Section 117(3)(b) (an additional award) and Section 123 and 124 (compensatory award).

57. Mr Napier submitted the evidence of Ms Tierney and Mr Nelson should be accepted as both credible and reliable. Mr Napier reminded the Tribunal that in the original judgment of 29 January 2009 it had found Mr Nelson to be a credible witness, and he submitted there was no basis for the present Tribunal to depart from that assessment. There was, in particular, no basis for attacking Mr Nelson's credibility regarding the sending of the letter to the Lord Advocate, or for suggesting that a costly litigation was being carried on by the organisation (and by implication Mr Nelson) for improper reasons. Mr Napier invited the Tribunal to find Mr Nelson honest and reliable in the accounts he gave of events and in his assessment of the various problems he saw for the respondent in the event of the claimant being reinstated.

58. Mr Napier submitted that Mr Nelson endorsed the position of the respondent as set out in the Further Particulars giving details of the respondent's case (pages A159 – 163), but it was not his evidence that these reasons were in his mind when he took the decision not to reinstate. It was submitted the list of reasons is a statement of the respondent's position as to why the statutory test of practicability was met as at 27 February 2017. It was not a list of considerations that were present in the mind of Mr Nelson at that date or any other date/s.

59. Mr Napier invited the Tribunal to also accept the evidence of Ms Tierney as credible and reliable. She was a key participant in the Fingerprint Inquiry and relied upon by the Inquiry as an authoritative source of information about the practice of the respondent. She was, it was submitted, scrupulous when giving her evidence, to distinguish between the claimant's personal and professional qualities. She emphasised that there was nothing that related to the claimant as a person that she objected to, although she did see her reinstatement in the role of a Reporting Fingerprint Examiner as problematic in a number of ways, and likely to be harmful to the organisation.

60. It was submitted that neither Mr Nelson nor Ms Tierney were motivated by personal animosity towards the claimant. Mr Nelson said in evidence that he "*did not have an issue with [Ms McBride] personally, this is just about reinstatement*". Mr Nelson also stated he had been prepared to consider redeployment in 2007 and would have been prepared to reconsider the claimant's situation in 2017 had he known the opinion of the Lord Advocate had changed.

61. The respondent accepted the claimant was, and remains at all times, motivated to return to the job of Reporting Fingerprint Officer with full court reporting duties. The respondent takes no issue with either her commitment to work, nor her technical skills in her job (subject to a need for retraining). It was submitted however that she had been less than candid in her answers to certain key questions put to her in cross examination. She had been asked whether she would accept the Lord Advocate's veto on her acting as an expert witness for the Crown would be fatal to her returning to full duties, and her answer that she was not sure and would have to discuss it with her employer was, at best, disingenuous. She would not even accept it was an important consideration. It was submitted these answers were not credible given the lengthy background to this case and the fact the claimant knew, in 2007, that the Lord Advocate's views on her being used by the Crown as an expert witness were crucial in whether she could work as a Fingerprint Officer with reporting duties and she had no reason to think that had changed in 2017.

62. Mr Napier submitted the claimant's purported uncertainty about the significance of the Lord Advocate's views was inconsistent with the points made by her Counsel to the effect that she should have been involved in making submissions to him before he reached his revised position. If the matter was not important, it was difficult to see why it was necessary to pursue this point in cross examination of Mr Nelson.

63. Mr Napier invited the Tribunal to keep the claimant's lack of candour in mind when evaluating whether it accepts her assertion that, had she returned to work, she would have followed the instruction to staff given by Mr Nelson to respect the finding of the Fingerprint Inquiry that there had been a misidentification.

64. Mr Napier suggested that the claimant's wholly unrealistic view of her chances of persuading the Lord Advocate (or any future Lord Advocate) to permit her to return as an expert witness for the Crown, gave substance to Mr Nelson's evidence that he did not have confidence that she would be able to reintegrate into the organisation if she came back.

65. Mr Napier invited the Tribunal to accept Ms Tierney's evidence regarding the modernisation of the fingerprint service, the cultural changes, the disclosure requirements and the Defence Access Policy, the move to ISO accreditation in 2015 and the extensive training required by the claimant before she could successfully re-enter the organisation as an expert.

66. Mr Napier also invited the Tribunal to note the respondent's concern that reinstatement of the claimant would bring to staff a return to the stress and pressures that had previously existed when there was an unprecedented level of public and media scrutiny during the pre-Fingerprint Inquiry years. It was submitted the correct test to apply here, by analogy, was not whether this would be the case, but whether the employer genuinely believed the claimant's reinstatement would have this effect, and whether there was a rational basis for that belief (***United Lincolnshire Hospitals NHS Foundation Trust v Farren 2017 ICR 513*** at paragraph 40).

67. Mr Napier submitted the assertion in the further particulars that reinstatement of the claimant would be likely to lead to media attention and a return to past difficulties was amply borne out by the press reports. The claimant, in the eyes of the media, is still linked to the McKie affair, and, it was submitted, always would be. Mr Napier submitted the same characterisation would be

likely to arise were the claimant ever to give fingerprint evidence in a criminal trial, and the result would be a risk – entirely unnecessarily – that the attention of the jury would be diverted from the task of deciding the guilt or innocence of the accused. Some jurors read the sensational press and may be influenced by what they read there.

68. The claimant has, in co-operating with the press as her appeals progressed, and after the decision of the Supreme Court, contributed to her public profile as a fingerprint expert who does not accept the finding that Y7 was misidentified. She has repeated her belief in evidence to this tribunal. In doing so, and in accepting she has an ongoing relationship with a journalist and with whom she is willing to engage, places her in public conflict with the official view of the organisation to which she seeks to return. This, it was submitted, was an important consideration when deciding whether the respondent would have had trust and confidence in the relationship with the claimant as at 27 February 2017, and supports the respondent's concern that reinstatement would have caused potential stress to existing employees.

69. Mr Napier invited the Tribunal to accept the evidence of Ms Tierney and Mr Nelson that the rules and practice on disclosure have changed significantly since the claimant was employed, with the result that defence agents can discover the identity of experts who have worked on fingerprint material. This increases the risk that a criminal trial in which the claimant had been involved in the chain of evidence would be diverted from its proper course. It was submitted the fact there may be experts still in the employment of the respondent who hold the same views as the claimant is of little significance because they are not in the same category as the claimant and not only do they lack her notoriety, they were also recognised as deserving of different treatment by the Fingerprint Inquiry (chapter 17.79).

70. It was submitted that the risk identified at paragraph 17.78 is still there in relation to the claimant were she to be called as an expert witness. The two members of staff said to hold the same views as the claimant have chosen to keep their opinions to themselves, and it was very unlikely they would be

known to defence solicitors/counsel at all, let alone in the context of the misidentification of Y7.

71. The claimant sought to play down the risk her involvement in the criminal process would constitute by referring to the experience of Mr Stewart and Mr MacPherson. Mr Napier submitted the Tribunal heard no evidence regarding the reason/s for the evidence being agreed. In any event, he submitted, it took the claimant no-where because the risk identified by the Lord Advocate in 2006 and in 2017 was that the involvement of the claimant may turn the trial into a trial about her rather than the accused.

72. Mr Napier invited the Tribunal to accept Ms Tierney's evidence that it would take approximately 36 months of training before the claimant was again qualified as an expert. The respondent was not willing to invest time and resources in this training when there was no reasonable prospect of the claimant ever returning to full court going duties.

73. Mr Napier referred to the evidence of Mr Nelson, where he had stated that it was the Lord Advocate's view (that he would not wish to call the claimant as an expert in a criminal trial) above all, which persuaded him that reinstatement was not an option. He took the view that the Crown's view had not changed from that expressed in 2006, and the letter dated 17 March 2017 confirmed he was right.

74. The suggestion that the letter seeking the Lord Advocate's views was written dishonestly or was an artificial exercise, intended by its contents to elicit a particular response, does not, it was submitted, stand up to scrutiny. This would be totally out of character for Mr Nelson and the letter itself contained a link to the complete proceedings of the Justice 1 committee in 2006. Mr Napier submitted that far from seeking to present a partial picture the letter shows that whoever wrote it was anxious to give the full context of the earlier remarks.

75. Mr Napier noted Mr MacNeill made continual reference to the omission from the letter of the Mackay report and the fact it had been discredited, and submitted the importance he attached to this had been misplaced. It was not accepted the Mackay report was likely to be as influential in the Lord Advocate's thinking as he suggested. There were numerous references in the transcript of the Justice 1 session to the Mackay report, and the fact the Justice Minister said there was no suggestion of malice on the part of the fingerprint officers, and so even by 2006 there was no question of criminal proceedings against the officers concerned. In any event the Lord Advocate had been a core participant in the Fingerprint Inquiry and Mr McGowan was the main link with Forensic Services. To suggest the Lord Advocate would confirm in writing a view of such significance, without due regard to relevant factors, was unsustainable.

76. The claimant was asked in cross examination about a hypothetical situation in which she may, in a trial, be questioned about her beliefs as to the misidentification of Y7. The claimant had said she would expect to be given training to deal with any such line of cross examination. It was submitted however that a refusal to accept there had been a misidentification would open the way to arguments that she was unwilling to accept that she could make mistakes in her work.

77. Mr Napier accepted the burden of proof rested with the respondent to show (on the balance of probabilities) that reinstatement was not practicable (in terms of Section 117(4)(a) Employment Rights Act). Mr Napier stressed the issue is whether as a matter of fact it was practicable as at 27 February 2017 for the respondent to comply with the order to reinstate. Mr Napier referred to the case of ***Port of London Authority v Payne [1993] ICR 555*** where it was stated that "*it is a matter of what is practicable in the circumstances of the employer's business at the relevant time*". The relevant time is when the order for reinstatement takes effect (***Great Ormond Street Hospital for Children NHS Trust v Patel [2007] UKEAT/0085/07***).

78. The issue of what was in the mind of the decision maker (Mr Nelson) at that date, or prior to it, is certainly part of the circumstances to be taken into account when the tribunal has to decide what has been proved, but it is in no sense determinative of the outcome to the question whether it was practicable for the respondent to comply with the order to reinstate. The tribunal must, it was submitted, decide what was "*practicable"* in the light of all the evidence that has emerged during the hearing, whether or not that has been accurately or sufficiently described in the further particulars provided by the respondent in advance of the hearing.

79. Mr Napier submitted that whether or not the decision to reinstate made by Mr Nelson was made properly, in the sense of being based on a sufficiency of evidence and communicated at an appropriate time to the claimant, is a quite different matter. Mr Nelson accepted, in cross examination, that the respondent could have handled communications with the claimant differently, particularly about important decisions, such as his decision, reached prior to 27 February 2017, that she would not be reinstated. If that is seen as blameworthy or inappropriate conduct by the Tribunal, then there is scope for that being reflected in any additional award. This is currently a sum between 26 and 52 weeks' pay, and it has been judicially recognised that in assessing how the tribunal's discretion is to be exercised, a range of factors will be relevant which may include the view that the Tribunal takes of the conduct of the employer in refusing to comply with the order they have made (***Morganite Electrical Carbon Ltd v Donne [1987] IRLR 373***).

80. Any fault of the employer in its dealings with the claimant prior to the date of reinstatement is thus a matter that may be taken into account in the setting of the level of an additional award, should this become payable. It is not to be taken into account in deciding the separate question of practicability, except where an employer has deliberately created a situation in the workplace in order to be able to claim reinstatement is not practicable (***Cruickshank v London Borough of Richmond EAT 483/97***). Mr Napier submitted there was no basis for thinking that any of the changes made within the

organisation were made for any improper reasons. Mr Nelson was specifically asked if all his decisions (including his support for the funding of litigation) were made for proper reasons, and his affirmative reply should be accepted by the Tribunal.

81. Mr Napier reminded the Tribunal that the test was not whether the respondent had acted reasonably in not complying with the order for reinstatement. Equally, the issue was not whether the respondent has used its resources wisely in conducting litigation; or whether the outcome was just or fair in some general or overarching sense.

82. The Tribunal must, as described in the case of ***Central & North West London NHS Foundation Trust v Abimbola [2009] UKEAT 0542/08*** carry out a balancing exercise between the interests of the respondent on the one hand and the claimant on the other. It was submitted that in carrying out that exercise, it was crucial to keep in mind what was said by Neill LJ in ***Port of London Authority v Payne*** (above) at paragraph 57:-

> "*On the one hand it is necessary to bear in mind that the issue of practicability was a question of fact for the Industrial Tribunal to decide. An appellate court must therefore be very careful before it interferes with such a finding. But the test is practicability not possibility. The Industrial Tribunal, though it should carefully scrutinise the reasons advanced by an employer, should give due weight to the commercial judgment of the management unless of course the witnesses are disbelieved. The standard must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer does not have to show that reinstatement or re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time*."

83. Mr Napier submitted Neill LJ had effectively endorsed what had been said in the EAT, which was that:-

> "*an employer, in making his explanation as to why there are no vacancies and thus re-engagement was not practicable, is entitled to say what in his commercial judgment is the best interests of his business when viewed against its existence, survival and success in a competitive commercial market. That success is to be seen not only against the interests of its owners … but against the interests of the maintenance of employment and the wellbeing and contentment of the workforce*."

84. It was submitted that in this case, the commercial judgment of the employer was that not only were there no vacancies that could be filled by the reinstatement of the claimant, but also that there would be no point in allocating the substantial resources and personnel required for the task of training the claimant to operate the new practices and procedures within the organisation and the new professional standards required as a result of accreditation. There was a double unattractiveness attaching to such a prospect: the actual cost of training, and its duration. Furthermore, the present trend was away from fingerprint evidence to other forensic activities. Mr Napier submitted that for all of these reasons it would not be a good use of resources to retrain the claimant to be a court –reporting expert when it was highly unlikely (because of the Crown's policy decision) that she would ever be able to use the professional qualifications she would have acquired.

85. The likely outcome would be that if reinstated she would be employed and paid at the rate appropriate for a Reporting Fingerprint Examiner, but she could not be used on court-going duties. Indeed, she could not be used on any part of the "*chain of evidence*" because of the disclosure requirements. That did not make commercial sense, and thus the refusal to reinstate on that basis alone, was a decision which the respondent, as a reasonable employer was entitled to make. It was submitted that an order for reinstatement should

not be made if that would require an employer to alter a legitimate policy decision ***(London Borough of Redbridge v Fishman [1978] IRLR 69***).

86. Mr Napier referred to the case of ***Great Ormond Street Hospital for Children NHS Trust v Patel UKEAT/0085/07*** where it was held that an order for reinstatement should not be made where it would have the effect of requiring the employer to create an anomalous job on a permanent basis for which it had no need. He submitted that compliance with the Tribunal's order would have meant the respondent was obliged to create a position of non-court going Reporting Fingerprint Expert where it had no need for such a position and where the claimant would never be able to do the job she wanted to do (unless and until a lengthy process of training had been carried out and the Lord Advocate changed his views and accepted the claimant as a potential expert witness). Furthermore, any new roles in Forensic Services would be directed away from fingerprinting to the other disciplines.

87. In ***Tayside Regional Council v McIntosh [1982] IRLR 272*** it was commented that the Industrial Tribunal had been wrong to say that in relation to an order for reinstatement it was not relevant to consider whether, if reinstated, the dismissed employee would be sufficiently employed. Mr Napier referred to Ms Tierney's evidence that she would not have a job for the claimant to do were she reinstated.

88. Mr Napier submitted that "*practicable*" means more than merely possible: it means *"capable of being carried into effect with success*" (***Coleman v Magnet Joinery Ltd [1975] ICR 46***). Further, the remedy of reinstatement will only be practical in the rarest of cases where there is a breakdown in confidence as between the employer and employee: ***Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680***. It was submitted the respondent did not have confidence in the ability of the claimant to do the job given the stance taken by the Lord Advocate in his letter of 17 March 2017. It was further submitted there can be doubt that the view expressed by the Lord Advocate in that letter, existed on 27 February 2017 even though at the

time, the respondent was unaware of it. Mr Nelson certainly believed that to be the case, relying on what Lord Boyd had said in 2006.

89. It was submitted that where an employer has lost faith in the employee's ability to do the job, that will make reinstatement not practicable. This was the view of Mr Nelson and Ms Tierney, and it was a view supported by reasonable grounds (namely the position taken by the Lord Advocate).

90. Mr Napier submitted that it was a requirement of practicability that a reinstatement order must restore contractual rights. It is not possible to restore to the claimant the contractual rights she enjoyed when dismissed in 2007 because the contractual rights attach to a job that no longer exists. The contractual terms of employees transferred to a Reporting Fingerprint Examiner post were amended. Accordingly it could not be practicable to be restored to contractual terms that are different to those in force when the dismissal took place.

91. Mr Napier referred to the case of ***Rao v Civil Aviation Authority [1992] IRLR 203*** for a useful summary of the relevant considerations. It was submitted that what was clear from this summary was that in deciding whether the test of practicability is met, it is appropriate for the Tribunal to consider not just the situation at the time of a return to work, but what would the likely consequences be over time of the employee returned to the job from which she had been dismissed.

92. Mr Napier referred to the Tribunal's original Judgment where the issue of practicability had first been considered, and accepted that decision had to be taken into account in the present context. However, it was submitted that decision could have very little influence on the one that has to be made now, given the different nature of the test to be applied, and the intervening events.

93. A useful summary of the differences in the two stage approach to practicability was set out in ***Central & North West London NHS Foundation Trust v Abimbola*** (above) at paragraph 17.

94. It was submitted that in the passage of time circumstances had changed radically for the claimant and the respondent. The claimant had lost her skills and qualifications through not being employed, and her notoriety had increased by reason of her contacts with the press. The respondent had undergone a raft of changes to culture and operational structure. Ms Tierney had voiced concern about how someone who had not been part of that ongoing process could fit in without having a negative impact on the changes.

95. In conclusion, it was submitted that the idea it might be seen as practicable for an employer to comply with an order for reinstatement some ten years after the event, would, in any ordinary unfair dismissal case, be seen as wholly surprising and unprecedented. Mr Napier accepted however that this was no ordinary case, and the question deserved to be answered with reference to the facts as they had emerged. He acknowledged the position had been complicated by the very lengthy appeal process, but submitted the respondent was not to be blamed for pursuing a process that led to such a lengthy delay. Having won at the EAT and Inner House, the respondent cannot be said to have acted irresponsibility in seeking to defend its position at the Supreme Court. The outcome of the passage of time, however, is that the prospects of reinstatement working have diminished. There was, however, no basis for maintaining that such a result was deliberately brought about by the respondent's manipulation of events.

96. As at 27 February 2017 there were a multitude of factors against compliance being practicable. The main point however was the unreality of reinstating someone to a job where they are unable to carry out the principal duties, and that position was unlikely to change in the future. Mr Napier accordingly invited the Tribunal to find the respondent had satisfied the test set out in

Section 117(4)(b) and shown that it was not practicable to comply with the order for reinstatement.

97. If the Tribunal accepts the respondent has shown that it was not practicable to comply with the order for reinstatement, then remedy will be an award of compensation for unfair dismissal that was held to have taken place by the original tribunal. The basic and compensatory award figures were agreed between the parties.

98. If the Tribunal did not accept the respondent had proved its case, then the Tribunal must make an award of compensation and may make an additional award under Section 117(3)(b).

Claimant's submissions

99. Mr MacNeill noted the first issue for determination by the Tribunal was whether the respondent had satisfied the Tribunal that it was not practicable to comply with the order for reinstatement. He submitted that on the evidence, the Tribunal could not be so satisfied. "*Practicable"*, according to the Oxford English Dictionary, means "*able to be done or put into practice successfully*". He submitted that in order to make reinstatement happen and to succeed, the respondent would have had to expend resources on ascertaining and meeting the claimant's training needs, speaking to other staff to ascertain if they had any concerns about the claimant returning to work and, if they did, alleviating them and perhaps issuing a press release stressing the claimant had been authoritatively declared to be an expert who had conducted herself with integrity throughout the McKie case and without any impropriety and that they wished to use her considerable experience, ability and enthusiasm for the detection of crime and for the benefit of the criminal justice system.

100. The respondents have, it was submitted, failed to establish that they could not have done any of that. Further, the explanation for why they have not done it, is because they have adopted an entrenched, prejudiced, suspicious

and irrational approach to the claimant since before the original reinstatement order was made.

101. Mr MacNeill submitted the credibility of the reasons provided for not reinstating the claimant would have been greater if they had been communicated or even recorded internally before the respondents were put into a position, on 28 June 2017 in which they had to provide reasons. There was no answer to the claimant's request to the Tribunal that reasons should be provided in advance of the Hearing and, even when the reasons were provided on 19 July 2017 (page A152), they were so bland and inspecific as to be meaningless.

102. In addition to the purported reasons for impracticability, there was an assertion relevant to compensation that had the claimant not been dismissed when she was, the claimant would have been dismissed in early 2012. This was the first time that assertion had been made. Indeed, on the 22 September 2016, during submissions by senior counsel in support of the respondent's position that the date for reinstatement should not be varied, that had the claimant not been dismissed when she was, she would have been dismissed on 1 November 2007. Mr Nelson was in attendance that day to give evidence to that effect.

103. In the event, he did not give evidence that day. However, when he did give evidence to the Tribunal, no evidence was led in support regarding these positions. Mr MacNeill questioned how it came about that these two inconsistent representations were made to the claimant and to the Tribunal and yet, when the time came to support them, they were not supported. It was submitted that it demonstrated that at least part of the document at page A152, which asserted a hypothetical date of dismissal, was unsupportable.

104. It was submitted that this sequence of events cast doubt on the integrity of the process that led to the paper produced at page A152 as accurately reporting the genuine and contemporaneous position of the respondent. If

these were genuine, contemporaneous reasons (which they were presented by the respondents as being) there was no reason why they could not have been set out clearly in writing at the time the decision was made. It would have been, at the very least, a basic courtesy to the claimant to have done so. The fact that they were not, casts doubt on their integrity.

105. Mr MacNeill noted that when asked for more detailed reasons, the respondents maintained that the bland reasons were sufficient. Nevertheless, in an apparent recognition that the original reasons were deficient, the respondent, on 8 August 2017, provided over four pages of detail. The fact these further details were provided so long after the reinstatement date and so shortly before the Hearing, could, it was submitted, lead to the inference that these reasons were being fleshed out for the purposes of the Hearing rather than being a reflection of the contemporaneous thinking of the respondent.

106. Mr MacNeill accepted that the issue of practicability was not one of examining the decision-making process for flaws. It was a question of whether reinstatement was, as a matter of fact, practicable. However, it was submitted that when the respondents offer to discharge the onus on them by proving that they made a decision that reinstatement was not practicable on particular grounds, the only way to test that position was by examining with critical scrutiny the grounds that they say led to their decision.

107. Mr MacNeill grouped the passage of time, changes in procedure, cultural changes, the need for training and resourcing issues together because they were similar in character and, he submitted, ultimately came to nothing. The claimant, it was submitted, was no stranger to change in the organisation: between 1984 and 2007 the fingerprint service had undergone a series of innovations in technologies and techniques which included the introduction of the computerised National Criminal History System in 1989, the first ever Automated Fingerprint System in 1991, the 24-hour Livescan System in 1998 and intensive palm print comparison courses in 1998. The claimant had

enjoyed and embraced all of these innovations, undertook the necessary training and passed all assessments of competency that were required. Even after she was dismissed, she spent two years as editor of "*Fingerprint Whorld*", the international magazine for those with an interest in fingerprints and attended conferences and corresponded with enthusiasts around the world until she ran out of funds to be able to support her interest.

108. Mr MacNeill accepted the claimant would undoubtedly have required training to become an effective and up-to-date fingerprint examiner, but no assessment of exactly what those training needs were was ever carried out. The respondent has in place procedures for Fingerprint Technical Training and Competence (pages 262 and 288); procedures in place for staff whose competence has lapsed (page 281) and, in the pending version, who have been on long term absence (page 301). These procedures envisage an individually designed training package to suit the needs of the individual.

109. It was submitted there was no reason to suspect the claimant would not have enthusiastically undertaken the training required of her. Ms Tierney had accepted in cross examination, that "*if the Lord Advocate's position had been different, the necessary training would have been done*."

110. Mr MacNeill acknowledged training would have used resources, but submitted no costings had been put forward, nor any justification in terms of the overall budget for the bare assertion that it would cost a lot, let alone too much. Other than bare assertions about demand for fingerprint examinations decreasing and resources being diverted to other fields within Physical Sciences, no material as to budgets or personnel numbers or anything else on which the tribunal could properly take a view on resource issues was put before it. On the contrary side, the claimant's experience, enthusiasm and ability would have been a valuable contribution to the resources of the service.

111. The next issue was staff morale. Mr MacNeill submitted that on a rational basis, it made sense that fingerprint examiners who are paid to provide their opinion would have higher morale if they knew that when they expressed their opinion honestly and without any impropriety on their part, they would be supported and not subjected to being unfairly dismissed and then kept out of their jobs. The word used by the claimant was that they would feel "*safer*". The claimant said it would have been a boost to staff morale if she had been allowed to return to work.

112. The claimant evidently got on with the colleagues she had worked with over many years and still kept in touch with them. When she was at work, Mr MacKenzie, Mr Dunbar, Mr Innes, Mr Robertson and Mr Geddes all thought the claimant was fulfilling a worthwhile role. She had 22 years unblemished service.

113. The contrary position put forward by Mr Nelson and Ms Tierney was without foundation and was advanced on the basis of second or third hand accounts. Mr Nelson used the word "*nervous*" but this, it was submitted, was an unambiguous term and Mr Nelson accepted he heard of this only after 27 February 2017.

114. Mr MacNeill submitted there was no reliable evidence base for the respondent's position on staff morale: it was nothing more than just another assertion. Mr Terry Foley and Mr Alistair Geddes, who both agreed with the claimant's and others' identification of Y7, are still employed, apparently with no corrosive effect on morale.

115. The third issue related to failure to accept the findings and recommendations of the Fingerprint Inquiry, which played an important part in the thinking put forward by the respondent. The key findings of the Inquiry are found at page 42A, and included:-

"*6. There was no impropriety on the part of any of the fingerprint examiners.*

8. The misidentifications expose weaknesses in the methodology of fingerprint comparison.

9. Examiners are presently ill-equipped to reason their conclusions".

116. The Key Recommendations start with the statement that fingerprint evidence should be recognised as opinion evidence, not fact.

117. Mr MacNeill submitted that of all the Findings and 86 Recommendations, the claimant not only accepts, but agrees with and welcomes them all. There was one qualification to that, which, despite everything that has been made of it, is in fact a minor one. The Report concludes that Y7 is not the fingerprint of Ms McKie. But the Report says fingerprint evidence is opinion evidence and the claimant holds the opinion that Y7 is that of Ms McKie. So do others in the respondent's organisation such as Terence Foley and Alistair Geddes. So do others outside the organisation. There is a difference of professional, expert opinion.

118. It was submitted that if the respondents' fear is that the claimant wished publicly to exploit that difference of opinion to embarrass the organisation or draw attention to herself, such a fear is groundless, as set out in the section on media profile.

119. The fourth issue was the Lord Advocate's position. The position of the Lord Advocate was heavily relied on by both of the respondent's witnesses as being an insuperable obstacle to the claimant returning to work. The witnesses spoke of the claimant being unable to carry out any of the duties of the post of Reporting Fingerprint Examiner, or being involved in the chain of evidence, and therefore, it was said, it was a waste of money training her.

120. Mr MacNeill noted the position which had been relied on for many years was the statement of Lord Boyd to the Justice 1 committee on 12 September 2006. The circumstances in which he said what he said are worthy of note and were set out in the Fingerprint Inquiry Report (pages 12 and 13).

> "*17.60 … By then (27 March 2006) there had been a leak of part of the Mackay report disclosing that Mr Mackay had considered that there was criminal conduct .. Mr Brisbane's view was that it was hard to envisage any circumstances in which the officers would not face challenge on the basis of Mr Mackay's allegations of criminality and the characterisation of the officers' conduct in the McKie case as `an honest mistake` could prove problematic ..*
>
> *17.61 On 28 March 2006 the Lord Advocate appended a manuscript note to Ms Brisbane's minute: `I consider that it would not be appropriate to have the SCRO personnel involved in the McKie case as witnesses in criminal trials in the future. For the reasons discussed today …` Whatever view was taken of the Mackay report, it had been leaked and recommended criminal proceedings … They would have been subject to cross-examination on the contents of Mr Mackay's report and it would have been difficult for the Crown to suggest that they be accepted as credible and reliable witnesses at that point.*
>
> *17.62 … {O}n 12 September 2006 Lord Boyd made a public statement when he gave evidence to the Justice 1 committee's Inquiry and said this in relation to the Crown' intention to call the officers as witnesses:*
>
> > *The matter is under discussion, but it is fair to say that there are considerable difficulties in that respect. Frankly, the situation has not been helped by the unauthorised disclosure of Mr Mackay's report. I have enormous sympathy with the SCRO officers, some of whom are very experienced and have given*

> *very good service. However, my job is to ensure that criminal trials are properly conducted and the people have confidence in the criminal justice system. I have a concern that must be addressed. The position of some officers is now so notorious – I do not mean that in a pejorative sense, but the views that have been taken on them are well known – that if any of them were called as a witness, the trial concerned might well become a trial of the officer, rather than of the accused. I want to avoid that*."

121. Mr MacNeill submitted that an important element in the Lord Advocate's reasoning was that there was, in the public domain, a report that alleged not just incompetence or impropriety on the part of the officers concerned, but criminal conduct, and in those circumstances it was understandable why the Lord Advocate of the day would be against leading them as witnesses for the Crown and why, albeit reluctantly and subject to ongoing "*discussion*" he said what he said.

122. Mr Nelson said this was a definitive statement of the Lord Advocate's position. He said he did not take into account the context in which it had been made and he did not think that was relevant: he did not know what the Mackay report was. Mr MacNeill submitted that such a position was untenable. Context was always important: the statement was made over 10 years ago and even in its own terms, it is not "*definitive*" because the matter was described as "*under discussion*".

123. Between 12 September 2006 and the Supreme Court decision in 2016, material changes to the considerations of Lord Boyd had taken place:

- The Fingerprint Inquiry Report in December 2011 found the officers had acted with no impropriety, let alone criminality;

- The many changes in the operating procedures, culture and accreditation of which the respondent have made so much when

arguing Ms McBride could not return to work, were ignored by them in this context. There have been huge improvements in the integrity and robustness of the system that would support the claimant if giving evidence in the present day.

124. Mr MacNeill submitted that Mr Nelson writing to the Lord Advocate on 7 February 2017 in the terms that he did, was a disgraceful and disingenuous exercise. Further, Mr Nelson's defence of the letter was woeful. Mr Nelson thought the Lord Advocate would "*do the groundwork*" himself. He thought that if the Lord Advocate's position on the claimant giving evidence had changed at any point since 2006 he or she would have let him know. Having had overnight to think about it, the best he could come up with was that the Lord Advocate had a team of advisers and that he had a table at the Fingerprint Inquiry. When asked, however, he could not say who the Lord Advocate was at the time of the Inquiry (it was Elish Angiolini QC).

125. Mr Nelson was asked why he wrote the letter at all, and said he felt he should write as there had been a change of Lord Advocate, and he felt he should ascertain the view of the new post-holder. However he had not written to the two previous post holders, and nor had he written to the current Lord Advocate when he took up post. It was submitted that clearly this was not the reason for writing the letter.

126. Mr Nelson disclosed in re-examination that he had not been the author of the letter. He did not disclose who the author had been, but stated in chief that he had written the letter "*on legal advice*".

127. It was submitted that it was obvious from the timing of the letter and its contents that it was sent in order to elicit from the Lord Advocate one response and one response only in time for the reinstatement date.

128. Mr MacNeill submitted that in order to get a fair response, at least three crucial things ought to have been specifically drawn to the Lord Advocate's attention

for his consideration: (i) what the conclusions of the Mackay report were; (ii) that the Inquiry report in December 2011 had concluded there was no impropriety on the part of any of the officers and (iii) a description of how the procedures, techniques, recording of conclusions and culture of the organisation had changed since 2008.

129. Mr Nelson ultimately accepted that if such material had been put to the Lord Advocate, he did not know what the answer would have been.

130. Mr MacNeill submitted the respondent had failed to establish in evidence that the Lord Advocate's position was an insuperable obstacle to the claimant's reinstatement or even that reinstatement was not practicable.

131. It was submitted that what emerged from the evidence was that in truth the respondent and its predecessors have never revisited in any meaningful, reflective or thoughtful way the decision that was taken by Mr Mulhearn that the claimant should not be employed by them.

132. The respondent adopted a static, rigid position which has been impervious to the passage of time and changing circumstances. This was evidenced by their behaviour since the first reinstatement order dated 26 January 2009:-

- they immediately appealed against the reinstatement order
- they persuaded the EAT to adopt a view which even they, by the end of the process in the Supreme Court, did not support (that is, perversity of the decision on practicability and contributory conduct);
- they resisted the claimant's appeal to the Inner House, persuading the Inner House to adopt a different view from the EAT (competency of the order as being in reality an order for re-engagement);

- when the claimant applied for legal aid to appeal to the Supreme Court, they opposed her application on the grounds the claimant had no reasonable prospects of success;

- when the claimant eventually managed to obtain legal aid, the respondent claimed the appeal was out of time and should be struck out on that basis;

- when the reinstatement order was restored by the Supreme Court, they issued a press release referring to the case as a "*long running legacy employment issue*" rather than a case involving an individual with whom they themselves had been litigating as the result of their own decisions;

- when the case was remitted to the Tribunal, despite the agreement of the parties before the Supreme Court that the order required to be varied and that the views of the Supreme Court as to the need for variation was "*clearly stated*", they argued that the date for reinstatement should not, after all be varied from 27 February 2009. Had that position been correct, the appeal process to the Supreme Court would have been meaningless;

- had their position at the Preliminary Hearing been accepted, it would mean that they had decided not to comply with the order some nine years previously;

- at that hearing they made it "*abundantly clear*" they would not be reinstating the claimant (paragraph 65 page A144) and asked for a hearing on practicability to be set down, even before they knew whether the date was going to be varied or not;

- at that hearing they maintained that in any event, the claimant would have been dismissed on 1 November 2007 and offered to lead evidence from Mr Nelson to prove it;

- by this stage no reasons why reinstatement would not have been practicable had been provided nor potentially fair grounds upon which the claimant would have been dismissed;

- in all this time they initiated no contact with the claimant which might have led to a conversation as to the practicability of her returning to work and

- at no time did the respondent ever communicate in straightforward language that they were not going to reinstate the claimant. That position was apparently an underlying assumption in the communications between the lawyers. Quite apart from the consideration of courtesy to the claimant, it can be taken from this that nobody from the respondent at any particular time felt – and it certainly never crossed Mr Nelson's mind – that now was the time to take a fresh, rational view of matters in light of all relevant up-to-date factors and to inform the claimant of the outcome of that exercise.

133. Mr MacNeill noted that in pursuing this course of conduct, the respondent had spent unknown sums on the appeal to the EAT and the appeal to the Court of Session. Their external spending on the Supreme Court appeal, the award of expenses against them in the Inner House and the tribunal proceedings since the remit from the Supreme Court has been some £257,120. They have assumed the risk of an additional six figure sum being payable if they do not succeed in establishing impracticability. Mr Nelson could only agree at the end of cross examination that it could be seen that the position of the respondents (and their predecessors) had been that the reinstatement order was not going to be complied with "*at any cost*", and this position was pursued from the beginning.

134. Mr MacNeill pointed to Mr Nelson's evidence that his belief as at 30 August 2017, and notwithstanding the judgment of the Tribunal in 2009, was that he still "*agreed*" with the decision to dismiss the claimant when she was dismissed. Mr MacNeill described this evidence as revealing, and submitted that far from the organisation having moved on and "*drawn a line in the sand*" after the Fingerprint Inquiry Report, senior management had still evidently not moved on from the mind-set that resulted in the original unfair dismissal in 2007.

135. Mr Nelson agreed in evidence that bearing in mind the singularly unfortunate background, he would want to make a scrupulously researched and fair decision. It was submitted that had an actual decision been taken, relevant factors would have included the following:-

- the claimant had been an employee of the respondent for 22 years;
- she had an unblemished record (a fact of which Mr Nelson was ignorant);
- her ability to do the job at the time of her dismissal was not hindered by any personal quality relating to skill, aptitude or health;
- when she was employed, her colleagues believed she had been fulfilling a worthwhile role and making a valuable contribution to the work of the department;
- she was unfairly dismissed;
- the dismissal had taken place after a "*sham*" consultation process;
- a sham process should be avoided in the decision whether to reinstate;

- the claimant won an order that she be reinstated with effect from 27 February 2009;

- the lengthy legal battle the claimant has had to pursue to have the reinstatement order restored;

- in all of this time the claimant has never given any indication other than that she wanted her job back and

- the Fingerprint Inquiry cleared her of any impropriety.

136. Nevertheless, in all the time since 2007:

- there was no consultation with the claimant to assess her training needs, her view of the Fingerprint Inquiry Report or indeed anything else;

- there was no discussion with staff about their attitude to her return to work, whether they had any anxieties about that and if so, how those might be allayed;

- there was the woefully inadequate letter to the Lord Advocate which unambiguously gave the false impression that circumstances in February 2017 were indistinguishable from those in 2006;

- hundreds of thousands of pounds of taxpayers' money were diverted from front line services in order not to comply with the original reinstatement order;

- the respondent had disengaged with the claimant to such an extent it did not even cross their mind to write to her to inform her that a decision had been made that she was not going to be reinstated;

- they did not even appreciate from her perspective that she felt she should turn up for work on 27 February 2017 because that is what the order of this tribunal said and

- the claimant was generally treated by the respondent (and the SPSA) with a shameful lack of consideration and respect.

137. The final issue to consider was the media profile, Mr MacNeill submitted that it was clear from the evidence of Mr Nelson and Ms Tierney that they felt the notoriety attached to the claimant, and in using this term, it was submitted that it was clear the respondents' witnesses were not using it as a compliment. Mr Napier had used the term "*high media profile*". The claimant does not accept she has a "*high media profile*". The "*notoriety*" referred to appeared to have come from the fact that over the years there has been some newspaper coverage of the claimant's efforts to be reinstated.

138. The respondent produced 15 items to support their position. Mr MacNeill noted two articles were about the Fingerprint Inquiry and of the remaining 13, three were about the appeal to the Supreme Court; seven were about the Supreme Court decision, two were about reinstatement and one was about being turned away from work on 27 February 2017. Mr MacNeill invited the tribunal to note that none of the articles had been front page news.

139. Mr Nelson relied on only two of the articles to support his view of the claimant's notoriety (Sunday Mail 28 February 2016 and Sunday Mail 29 January 2017).

140. Mr MacNeill submitted the articles had been generated by the respondent's decision to appeal the order for reinstatement and subsequently to oppose the appeals to the Inner House and the Supreme Court. But for the respondent's decision, none of the articles would have been generated. Furthermore, the claimant was never quoted in any of the articles as saying

she adhered to the identification of Y7: that was how she was described by the newspaper.

141. It was submitted that it became obvious in cross examination that the respondent had, over the years, formed a deep suspicion of the claimant's dealings with the press. These suspicions, once they had been articulated, could be easily and quickly dispelled. If the respondent had consulted with the claimant earlier, they would have learned that she does not enjoy dealing with the press; it was journalists who contacted her; she regards the press as unreliable reporters of fact and quotations; she does not enjoy reading about herself in the paper and does not necessarily read what has been written about her.

142. Mr MacNeill submitted the respondent's misguided thinking on the subject was apparent when their suspicions were put in cross examination to the claimant when it was suggested her return to work on 27 February 2017 had been nothing more than a publicity stunt. This demonstrated the respondent could not appreciate that turning up for work on the new reinstatement date, which had never been countermanded, was the most natural thing in the world for a person to do who wants their old job back.

143. Mr MacNeill noted the respondent's fears that the claimant would court publicity and stir up controversy regarding Y7 were answered when, in cross examination she was asked, for the very first time, how she would respond to questions from the press regarding Y7. The claimant said she would abide by the code of conduct for the organisation: she said that she would say "*You'll have to contact the organisation and not me*."

144. It was submitted that if the claimant's evidence was accepted, the respondent had been labouring under a misapprehension as to the claimant's approach to the press for years. All they had to do was ask.

145. Mr MacNeill submitted the respondent's entrenched position has not proceeded on a rational assessment of the risk of reinstating the claimant; and it had certainly not proceeded on an informed assessment. Neither Mr Nelson nor Ms Tierney could describe the process by which the claimant giving evidence would "*take the organisation back to the dark days of the Fingerprint Inquiry*". They could not explain how it could "*discredit*" fingerprint evidence. They did not appear to have any confidence in their current procedures which help officers explain their findings and other safeguards of the integrity of the identification process such as the standard operating procedure "*Management of Variance in Examiner Opinion*", nor in the role of the trial judge in excluding collateral or irrelevant evidence and directing the jury to base their verdict on evidence alone.

146. The extent of the respondent's irrational fear of the claimant was demonstrated when Mr Nelson went so far as to say the claimant could not form any part of the chain of evidence. He could not explain how that would be harmful when the claimant had always been a trustworthy and conscientious employee.

147. It was submitted that the idea that an expert's opinion should be disregarded because of an opinion expressed 20 years ago was disagreed with judicially, was outlandish.

148. Mr MacNeill reminded the Tribunal of the evidence it had heard regarding the high profile double jeopardy case where Charles Stewart and Hugh MacPherson, who had been co-signatories along with the claimant on the Y7 report, were cited to give expert evidence. It was submitted that if the respondent's theories regarding the difficulties of the claimant giving evidence held any water, the defence would have made the trial in that case, a trial about the experts. In the event the defence agreed the fingerprint evidence.

149. Mr MacNeill submitted there were no proper grounds on which the Tribunal could conclude that reinstating the claimant with effect from 27 February 2017 would not have been practicable.

150. Mr MacNeill noted the Employment Judge had invited the representatives to agree the figure noted in terms of Section 114(2)(a) Employment Rights Act. The representatives had broadly agreed the figures subject to three areas of dispute. Mr MacNeill referred to the terms of Section 114(2)(a), and noted the relevant period was 1 May 2007 to 27 February 2017.

151. The arrears of pay were £358,215 gross (£247,617 net). The first dispute between the parties related to whether the figure should be gross or net of tax.

152. The employer's pension contributions were £65,974 and this figure had been agreed.

153. Section 114(2)(a) provides that in calculating the figure, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the claimant in respect of the same period, by way of (a) wages in lieu of notice or ex gratia payments paid by the employer, or (b) remuneration paid in respect of employment with another employer and such other benefits as the Tribunal thinks appropriate in the circumstances.

154. The representatives had agreed the remuneration paid in respect of employment with another employer; however there was a dispute regarding whether those "*sums received*" should be reflected gross or net of tax. The gross figure for remuneration from other employment is £15,444.90, and the net figure is £14,749.30.

155. The claimant received Jobseekers Allowance during the period 6 February to 5 April 2013 amounting to £568. The respondent believed this sum should be deducted when calculating the Section 114(2)(a) amount. The claimant

disputed this and argued it would not be appropriate to do so because it was not akin to the sums referred to in Section 114.

156. Mr MacNeill calculated the figure to be used for Section 114(2)(a) as £358,215 (back pay) + £65,974 (agreed pension contributions) - £14,749 (net earnings) = £409,440.

157. Mr MacNeill submitted the Tribunal would next be required to calculate the award of compensation. The representatives agreed, if impracticability was established by the respondent, that the basic award was £6,355. Further, the representatives agreed that the cap imposed by Section 124(1ZA) meant the compensatory award would be £37,776 (being 52 weeks' pay). The total compensation to be awarded should impracticability be established is £44,131.

158. Mr MacNeill submitted that if the respondent was not successful in arguing that it was not practicable to comply with the order for reinstatement, then the basic award (agreed) would be £6,355.

159. The claimant had lost wages in the period to the date of the Hearing of £229,098 (an agreed figure). The claimant had an ongoing future loss which Mr MacNeill based on two years' loss, giving a figure of £70,000. The claimant had also suffered loss of pension rights of £299,800 (an agreed figure), and loss of statutory employment rights of £400.

160. The Tribunal would also have to make an additional award and it was submitted 52 weeks pay would be the appropriate award in the circumstances of this case. This was a figure of £24,908. Mr MacNeill referred the Tribunal to the case ***of Morganite Electrical Carbon Ltd v Donne [1987] IRLR 363*** for guidance regarding the additional award.

161. The total compensatory and additional awards, before the application of any cap, was £624,206.

162. Mr MacNeill referred to Section 124(4) Employment Rights Act, and submitted the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under Section 114(2)(a). The effect of this is that the compensatory and additional awards together are capped at the Section 114(2)(a) figure, so the end result is a basic award of £6355 plus a compensatory and additional award limited to £409,440, to produce a total compensation of £415,795.

Discussion and Decision

163. We firstly had regard to the statutory provisions in Section 117 Employment Rights Act 1996 which provide that if an order under Section 113 is made (for reinstatement or re-engagement), but the claimant is not reinstated or re-engaged in accordance with the order, the Tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with Sections 118 to 126), and an additional award of compensation of an amount not less than twenty six weeks nor more than fifty two weeks' pay to be paid by the employer to the employee. The additional award of compensation does not apply where the employer satisfies the tribunal that it was not practicable to comply with the order.

164. We next noted the onus is on the employer to show, on the balance of probabilities, that it was not practicable for it to comply with the order. The issue of practicability is a question of fact for the Employment Tribunal and it is not simply a question of whether the employers objections were such as a reasonable employer might hold (***Port of London Authority v Payne [1994] IRLR 9***).

165. We had regard to the case of ***Central & Northwest London NHS Foundation Trust v Abimbola*** (supra) where the EAT referred to a Tribunal considering the test for what is practicable, carrying out a balancing exercise. This was described as: "*The balancing exercise to be carried out by the*

Employment Tribunal between the interests of the respondent on the one hand and the claimant on the other." In striking the balance, the words of Neill LJ in the Court of Appeal case of ***Port of London Authority v Payne*** (supra) should be borne in mind. He stated: "*On the one hand it is necessary to bear in mind that the issue of practicability was a question of fact for the Industrial Tribunal to decide. An appellate court must therefore be very careful before it interferes with such a finding. The Industrial Tribunal, though it should scrutinise the reasons advanced by the employer, should give due weight to the commercial judgment of the management unless the witnesses are to be disbelieved. The standard of proof must not be set too high. It is a matter of what is practicable in the circumstances of the employer`s business at the relevant time*".

166. We were also referred to the case of ***Great Ormond Street Hospital for Children NHS Trust v Patel*** where the EAT held that the date at which the practicability of an order for re-engagement is to be considered is when such re-engagement would take effect. Mr Napier, in his submission stressed, and we accepted, that the issue for determination is whether as a matter of fact, it was practicable as at 27 February 2017, for the respondent to comply with the order to reinstate the claimant.

167. We also had regard to the following authorities to which we were referred: ***London Borough of Redbridge v Fishman***, where it was held that an order should not be made if it would require the respondent to alter a legitimate policy; ***Great Ormond Street Hospital for Children NHS Trust v Patel*** where it was held that there was no requirement on a respondent to create an anomalous job and ***Coleman v Magnet Joinery Ltd*** where it was held that practicability means capable of being carried into effect with success.

168. We decided it would be appropriate to consider each of the points referred to by (Ms Tierney and) Mr Nelson in evidence, regarding the practicability of reinstating the claimant. There were five broad headings, the first of which

included the passage of time, the changes to the organisation, the new roles, training and technical competence and accreditation.

169. There has been a significant passage of time since the claimant was dismissed and we acknowledged that to be considering the practicability of reinstatement some 10 years after dismissal was unusual. However, this is an unusual case, and the passage of time was but another unusual factor in an unusual case. There was no suggestion that passage of time, on its own, rendered reinstatement not practicable.

170. The evidence of Ms Tierney and Mr Nelson regarding the changes to the organisation in the intervening period, including the introduction of the new roles, training and accreditation was uncontroversial. The fingerprint service now forms part of Physical Sciences. The respondent introduced the roles of Reporting Fingerprint Examiner and Fingerprint Examiner.

171. The respondent's accreditation means each activity done on a case has to be documented, dated and signed. There is a strict scientific and quality assurance standard in place.

172. The key change to the way in which the respondent works came out of the Inquiry. One of the key findings of the Inquiry was that "*fingerprint examiners are presently ill equipped to reason their conclusions as they are accustomed to regarding their conclusions as a matter of certainty and seldom challenged*." The key recommendations included:-

- *1. Fingerprint evidence should be recognised as opinion evidence, not fact, and those involved in the criminal justice system need to assess it as such on its merits.*

- *2. Examiners should receive training which emphasises that their findings are based on their personal opinion; and that this opinion is influenced by the quality of the materials that are examined, their ability to observe detail in mark and print reliably, the subjective interpretation*

of observed characteristics, the cogency of explanations for any differences and the subjective view of "sufficiency".

- *3. Examiners should discontinue reporting conclusions on identification or exclusion with a claim to 100% certainty or on any other basis suggesting that fingerprinting evidence is infallible.*

- *4. Differences of opinion between examiners should not be referred to as disputes.*

173. We accepted the respondent undertook a training exercise for employees regarding the move to opinion based work. They also introduced standard operating procedures to set out the training and competences required to be demonstrated and maintained (The Fingerprint Training and Competence Framework) and a procedure to deal with cases where there was not agreement regarding the mark (Management of Variance in Examiner Opinion).

174. We considered there were a number of key points to note from Ms Tierney's evidence, and they were firstly, there was no suggestion of any employee "*failing*" the training and accordingly there was nothing to suggest the claimant would be unable to undertake it. Secondly, the move to non numeric comparison was something which started when the claimant was still employed, and accordingly is not an unfamiliar concept to her. Thirdly, all employees were offered the opportunity to complete a Preference Form for the new roles, and all employees were transferred into a new role. There was nothing to suggest that if the claimant had been employed at the time she would not also have transferred to a new role (Reporting Fingerprint Examiner). Fourthly, Ms Tierney had no concerns regarding the competence of the claimant, subject to completion of the training.

175. The concerns of the respondent related to training the claimant for a job she could not perform because of the view of the Lord Advocate. We deal with this below.

176. We concluded (putting to one side the above point), with regard to the changes to the organisation, the way of working, training and competence that the respondent has not shown it was not practicable to reinstate for these reasons. The claimant is a qualified fingerprint examiner with 22 years' experience. She would require training to update her skills, but there were no issues regarding her competence, or enthusiasm, to undertake such training. The claimant loves the subject and science of fingerprinting and has a deeply held abiding interest in it. She would relish the opportunity for training and updating her skills.

177. The second broad heading to be considered is the Inquiry. Mr Nelson described this as a critical part of his decision-making. The respondent's concern focused on the fact the second key finding of the Inquiry was that "*The mark Y7 on the door frame of the bathroom in Miss Ross's house was misidentified as the fingerprint of Ms McKie*." The key findings went on to say that there was "*no impropriety on the part of any of the fingerprint examiners who misidentified the mark Y7 as having been made by Ms McKie .. these were opinions genuinely held by them. The marks were misidentified due to human error*."

178. Mr Nelson told the Tribunal that the respondent recognised the Inquiry was "*monumental*", and it allowed a line to be drawn under the McKie saga, and for the respondent to move forward. The respondent accepted the Findings and Recommendations of the Inquiry, and staff were instructed accordingly. The Staff Briefing (page 79) described the Inquiry as the definitive piece of work on these much-debated and long-standing issues. It went on to state that *"[A]s an organisation it is our intention to accept its findings in totality, and I expect all of our staff to respect the findings of the Inquiry*."

179. Mr Nelson considered it would not be practicable to reinstate the claimant if she did not accept the findings of the Inquiry. He believed the claimant would not accept them because he had read an article in the Sunday Mail, which noted the claimant was of the belief there had not been a misidentification of the mark. Mr Nelson acknowledged he did not know if the paper had quoted the claimant, or merely reported on the matter.

180. Mr Nelson accepted he had not spoken to the claimant regarding this matter and had not canvassed her views regarding the Inquiry. He accepted he did not know which, if any, of the Findings and Recommendations the claimant did not accept, and acknowledged that she may, in fact, accept them all.

181. We considered there was no basis for Mr Nelson reaching the conclusion the claimant would not respect the outcome of the Inquiry: a view formulated by reading an article in the Sunday Mail cannot be said to be reasonable, particularly given the importance of this matter. In addition to this there were two important factors within the knowledge of Mr Nelson, and to which he ought to have had regard. Firstly, it was within his knowledge that the respondent employs people who hold the same personal opinion as the claimant regarding the identification of Y7. Mr Geddes and Mr Foley respect the findings of the Inquiry and there has been no issue with their continued employment. Mr Nelson suggested he did not know the personal opinion of Mr Geddes and Mr Foley regarding the identification of mark Y7 because he had never asked them. We considered this response to be deliberately evasive and a clear attempt to avoid acknowledging they also believe the mark Y7 was made by Ms McKie.

182. Secondly, there is a Code of Conduct in place by which employees must abide. Mr Nelson had no basis for thinking the claimant would disobey an instruction from the respondent regarding respecting the outcome of the Inquiry.

183. We considered it is not uncommon for employees to hold personal opinions which differ from those of their employer. There will be no difficulty in the employment relationship as long as employees, when asked, confirm the view of their employer. Messrs Geddes and Foley are prime examples of this. Indeed, Mr Nelson gave a very good example of holding one view but accepting another when he was asked about the finding of the Employment Tribunal regarding his having been controlled by Mr Mulhern. Mr Nelson clearly did not think this finding was correct, but he accepted it was a decision the Tribunal had reached.

184. The claimant is of the opinion there was no misidentification of the mark Y7. That is her personal opinion. We accepted her evidence that she would have been willing, if she returned to the employment of the respondent, to accept the respondent's position and respect the findings of the Inquiry. The claimant confirmed that if, as an employee, she had been asked about the matter of the identification of Y7, she would have referred the person to the respondent. The claimant is aware of the Code of Conduct.

185. There appeared to be some concern on the part of Mr Nelson that the claimant would wish to vindicate her position as being correct. We considered there was no reasonable basis for this concern. The claimant's driving force is to return to work: it is not to have her opinion vindicated. The respondent accepts the identification of fingerprints is opinion and not fact. They also accept that people looking at a print (or mark) may hold different opinions regarding the identification of the print (or mark). We considered that against that background, Mr Nelson`s suggestion regarding vindication of an opinion, had no reasonable or realistic basis.

186. We concluded the respondent has not shown it was not practicable to reinstate the claimant for this reason. Mr Nelson's position that he thought, based on an article in the Sunday Mail, that the claimant would not accept the Inquiry was not credible, particularly when he knew there were other

employees in the organisation who held the same personal opinion as the claimant, but who had respected the respondent's position.

187. The third category related to the position of the Lord Advocate. Mr Nelson's evidence was very clear: he made his decision based on the position of the Lord Advocate, Lord Boyd, in 2006. Mr Nelson did not consider the context and/or circumstances in which Lord Boyd adopted his position to be relevant; nor did he consider or attach any weight to anything which had happened in the 10 years since Lord Boyd adopted his position.

188. We firstly considered what had been said by Lord Boyd to the Justice 1 committee in September 2006. We noted the Fingerprint Inquiry dealt at some length with the position of the Lord Advocate. We considered the circumstances in which Lord Boyd said what he said are important (for reasons set out below). We quote from the Inquiry at paragraph 17.60:-

> "*By then (27 March 2006) there had been a leak of part of the Mackay report disclosing that Mr Mackay had considered that there was criminal conduct .. Mr Brisbane's view was that it was hard to envisage any circumstances in which the officers would not face challenge on the basis of Mr Mackay's allegations of criminality and the characterisation of the officers' conduct in the McKie case as `an honest mistake` could prove problematic.*
>
> *On 28 March 2006 the Lord Advocate appended a manuscript to Mr Brisbane's minute: `I consider that it would not be appropriate to have the SCRO personnel involved in the McKie case as witnesses in criminal trials in the future. For the reasons discussed today … whatever view was taken of the Mackay report, it had been leaked and recommended criminal proceedings. They would have been subject to cross examination on the contents of Mr Mackay's report and it would have been difficult for the Crown to suggest that they be accepted as credible and reliable witnesses at that point`.*

On 12 September 2006 Lord Boyd made a public statement when he gave evidence to the Justice 1 committee's Inquiry and said, in relation to the Crown's intention to call the officers as witnesses: The matter is under discussion, but it is fair to say that there are considerable difficulties in that respect. Frankly, the situation has not been helped by the unauthorised disclosure of Mr Mackay's report. I have enormous sympathy with the SCRO officers, some of whom are very experienced and have given very good service. However, my job is to ensure that criminal trials are properly conducted and that people have confidence in the criminal justice system. I have a concern that must be addressed. The position of some officers is now so notorious – I do not mean that in a pejorative sense, but the views that have been taken on them are well known – that if any of them were called as a witness, the trial concerned might well become a trial of the officer, rather than of the accused. I want to avoid that."

189. We stated above that the circumstances in which Lord Boyd said what he did were important because, as the above passages demonstrate, there was, at that time, a report by Mr Mackay, a retired police officer, which alleged not just incompetence or impropriety on the part of the fingerprint officers involved, but criminal conduct. We accepted Mr MacNeill's submission that in those circumstances it was understandable why Lord Boyd would be against leading those officers as witnesses for the Crown.

190. Mr Nelson suggested he was not aware of Mr Mackay or his report, but given the fact Mr Nelson has been involved in the McKie saga throughout, and has doubtless read the Inquiry report in detail, his position was not credible.

191. We noted, in addition to the above, that there was, at the time, consideration of whether the fingerprint officers had colluded to produce an identification and whether they had been negligent in the performance of their duties. This period of time may well be described as being "*in the thick*" of the McKie saga.

192. Mr Nelson's position was that he relied on the 2006 position of the then Lord Advocate because "*nothing had changed*". The statement by Mr Nelson that "*nothing had changed*" in ten years was simply wrong. Mr Nelson undermined his position when he (i) accepted Lord Boyd's position was not a definitive one because he made reference to the matter being "*under discussion*"; (ii) agreed that Lord Boyd's concern at the time had been with the Mackay report and allegations of criminal conduct and (iii) agreed that in 2017 things had moved on and were completely different. The Inquiry had, for example, completely exonerated the fingerprint officers.

193. We considered that even if all other things remained equal, the fact was the Fingerprint Inquiry and its findings and recommendations, which the respondent accepted, brought about a sea-change in the McKie landscape. We say that because the Inquiry drew a line under that saga and allowed people to move on. There was a dispute regarding the identity of the mark Y7: there were, and are, people who believe the mark is that of Ms McKie. There are others who believe it is not that of Ms McKie. A determination required to be made regarding the dispute. The Inquiry heard a great deal of evidence and concluded the mark Y7 was not that of Ms McKie. There will undoubtedly be people who accept that conclusion and others who do not: be that as it may, the fact remains that there has been a determination and that determination is the final say on the matter.

194. The Inquiry also made clear the changes required to be made to fingerprint identification: it caused a re-assessment of what fingerprint evidence could say, and the key point was that such evidence is not a statement of fact, it is a statement of opinion. Fingerprint evidence is not infallible, and there may be differences of opinion. Indeed, the respondent's have a procedure for Management of Variance in Examiner Opinion.

195. A further significant factor was the fact a subsequent Lord Advocate departed from Lord Boyd`s position in 2015, when a decision was made to put Mr

Stewart and Mr MacPherson on the Crown list of witnesses in a high profile double jeopardy case. Mr Stewart and Mr MacPherson both identified the mark Y7 as being that of Ms McKie and Mr Stewart signed the joint report in respect of that identification. Mr Stewart and Mr MacPherson were part of the group of fingerprint officers affected by Lord Boyd`s decision in 2006.

196. Mr Napier submitted these facts took the claimant no further in her case. However, we could not accept that submission. We acknowledge we do not know why the evidence was agreed, but we considered the material fact to be that the Lord Advocate in 2015 took the decision to put fingerprint officers on the Crown list of witnesses, in circumstances where these fingerprint officers had not been utilised because of Lord Boyd`s position.

197. We acknowledged the respondent properly had to consider the position of the Lord Advocate when considering the practicability of reinstating the claimant in February 2017. However, we considered the position of Lord Boyd in 2006 was the starting point, rather than the end point of any considerations. Mr Nelson's blinkered approach denied the existence of many fundamentally important factors which may have had a bearing on the position of the Lord Advocate.

198. Mr Nelson told the Tribunal he would have been advised if the position of the Lord Advocate had changed in the period since 2006, but when questioned about this, he could not explain how this may have come about without an enquiry from him regarding the matter. There has been no enquiry in the intervening 10 years and therefore no need for the Lord Advocate to consider the position.

199. We considered it clear from Mr Nelson's evidence that he was content to make a decision regarding reinstatement based on the Lord Advocate's position in 2006. The letter to the current Lord Advocate was sent only on the basis of legal advice: Mr Nelson did not even draft the letter (although he approved it and it was sent in his name). Furthermore, it could not, and did

not, form any part of Mr Nelson's decision because he did not receive the response (page 77) until 17 March 2017, which post-dated the date of reinstatement.

200. Mr Nelson was, during cross examination, under some difficulty with regard to this letter because his decision was based on what the Lord Advocate said in 2006, and he told us his decision regarding practicability had been made prior to sending the letter to the current Lord Advocate. In those circumstances, he struggled to explain why a letter had been sent to the current Lord Advocate. He suggested that he thought it was appropriate to write to get a final definitive position; but if that was correct, why had he not done so prior to making his decision.

201. Mr Nelson agreed that by 2017 things had moved on and the landscape was completely different: for example, in 2006 there was talk of criminal misconduct and/or negligence regarding the fingerprint officers, but by 2017 the Inquiry had completely exonerated the fingerprint officers of any impropriety (including criminal conduct). Mr Nelson could not explain why it had not been thought appropriate to include these crucial facts in the letter of 7 February 2017. In fact, he could not explain why a single fact occurring in the ten year period since Lord Boyd adopted his position, had not been included in the letter.

202. Mr Nelson was asked whether he expected the Lord Advocate to make his own investigations of what had happened in the ten year period, or to proceed on the basis of the information with which he had been provided. Mr Nelson responded that he "*hoped*" the former. He was next asked whether he agreed that in order to produce an informed opinion, he expected the Lord Advocate to do the ground work to find information, and he responded "*I was leaving him to think about what information he needed*".

203. Mr Napier submitted it was unsustainable to suggest the Lord Advocate would take such a significant decision without informing himself of the relevant facts,

this was particularly so when the Lord Advocate had been a participant at the Inquiry. We considered the difficulty with that submission was that there was no evidence to support it: neither the witnesses, parties nor representatives knew what the Lord Advocate did, or did not, consider when making his decision. The evidence before this Tribunal was that the letter sent to the Lord Advocate in February 2017 made no mention of any of the significant facts which had occurred in the intervening 10 year period. Furthermore, Mr Nelson accepted that if all of the relevant information had been presented to the Lord Advocate for consideration, he did not know what decision might have been reached.

204. Mr Nelson rejected the suggestion, in cross examination, that the letter to the Lord Advocate had been a wholly inadequate and dishonest exercise, which sought to illicit the response given. We concluded, having had regard to the evidence, that the letter was wholly inadequate and was sent with the purpose of obtaining the response the respondent wanted. We reached that conclusion because the letter omitted reference to significant facts post-dating Lord Boyd's position and because it was sent to illicit a response to bolster a decision which had already been made. The reality of the matter, as Mr Nelson accepted, was that if the letter to the Lord Advocate had been a joint approach, with all the details provided, he (Mr Nelson) did not know what the response of the Lord Advocate would have been.

205. We acknowledged the position of the Lord Advocate was a critical consideration for Mr Nelson. We reminded ourselves that the issue being considered is whether it was, as a matter of fact, practicable as at 27 February 2017, for the respondent to comply with the order to reinstate the claimant. We asked ourselves: what was the position of the Lord Advocate as at 27 February 2017. Mr Nelson knew the position adopted by Lord Boyd in 2006, but he did not know the view of the current Lord Advocate.

206. We concluded Mr Nelson's decision to base his decision regarding practicability of reinstatement solely on the position of the Lord Advocate in

2006 was not credible because (i) it was not a definitive position and the language used confirmed this: for example, Lord Boyd stated *"[A]t the moment, I cannot say that it would be appropriate for the officers to be called*" and (ii) there had been a number of significant and material facts occurring in the ten year intervening period. The position of the Lord Advocate in 2006 may have been the starting point of any consideration, but it could not be the finishing point given what has happened in the intervening period.

207. The letter sent to the current Lord Advocate to seek his position, was inadequate and sought to illicit a response to bolster the respondent's position, rather than allow proper and due consideration to be given to the issue. Mr Nelson's admission that he did not know what response the Lord Advocate would have given if he had been presented with all of the material facts was of the greatest significance.

208. We wish to make it very clear that these conclusions do not seek, in any way, to comment upon the position of the Lord Advocate. The criticism is of the respondent: they relied very heavily on the position of the Lord Advocate in reaching the decision that reinstatement was not practicable. The testing of that position has demonstrated its flaws.

209. We acknowledged that Mr Napier's position was that notwithstanding Mr Nelson did not have the response from the Lord Advocate prior to making his decision regarding practicability of reinstatement, this Tribunal ought to consider it because it is within our knowledge. We have set out above our conclusion that the letter sent to Mr Stephen McGowan, Procurator Fiscal (page 75) was inadequate and drafted so as to illicit the response the respondent wanted. In those circumstances, and given Mr Nelson's admission that if the Lord Advocate had been provided with all material details, he did not know what the response would have been, led us to conclude the response from the current Lord Advocate did not assist the respondent.

210. The fourth category regarding practicability related to the Defence Access Policy. This policy has formalised and expanded the previous position regarding the ability of a defence agent to access the full range of documents. The respondent's accreditation process means all work carried out on a case is documented, initialled and dated. It was the respondent's position that if the claimant carried out work on a case, the defence agent would be able to identify this from the file. This could lead to a position whereby the claimant would not be called as a witness for the Crown, but could be called by the defence. The respondent argued that, accordingly, the claimant would have to be removed from the scientific chain of evidence and therefore could not perform any part of the role of Reporting Fingerprint Examiner.

211. This category is inextricably linked to the position of the Lord Advocate, and accordingly subject to the conclusions set out above.

212. The fifth category regarding practicability related to staff concerns regarding the claimant's return; the McKie saga being re-hashed; a return to the "*bad old days*"; the reliability and credibility of fingerprinting coming under attack; media scrutiny and a desire not to revisit all of the old tensions and divisions.

213. Ms Tierney and Mr Nelson both spoke of staff concerns regarding the return of the claimant, but both accepted they had not spoken directly to staff about this and had not canvassed staff views. Mr Nelson's reference to a comment from someone who used the word "*nervous*" was, he conceded, after the decision regarding practicability had been made. The respondent's evidence for their position was, at best, weak and wholly undermined by the fact the claimant has friends and relatives who work for the respondent and who have been supportive throughout. The claimant received a message of support from someone within the respondent's organisation following upon the decision of the Supreme Court. Mr Nelson's position was also undermined by the fact he accepted that when the claimant was at work she had got on well with people.

214. Ms Tierney and Mr Nelson used emotive language (back to the bad old days; ghosts of the past etc) to express the view that they feared the claimant's return to work would herald a return to the old divisions and tensions. The Inquiry had drawn a line under it all and allowed everyone to move on: the respondent's position was that the claimant's return would cloud this. We acknowledged the desire of the respondent to draw a line and move on, and we also acknowledged the considerable work which has gone in to rebuilding the credibility of fingerprinting and the way in which fingerprinting is presented and accepted.

215. The first point we considered in relation to these matters, related to why Mr Nelson was of the opinion the claimant's return to work would lead to everything being re-hashed, and how realistic/rational was this concern. We acknowledged the reinstatement of the claimant would no doubt cause some Press interest. The ongoing dispute between the claimant and the respondent regarding reinstatement has been the basis of most of the articles produced at this Hearing. We also acknowledged that it would be more likely than not, that articles would comment on, or refer to, the claimant as having identified Y7 as the mark of Ms McKie. The articles may also refer to the fact the claimant remains of that opinion. However, beyond this, we questioned realistically how much appetite there would be for a re-hashing of the saga?

216. It appeared to this Tribunal that the Inquiry and the changes introduced by the respondent provide a complete answer to any re-hashing. The respondent's own procedures not only recognise there may be a difference of opinion between experts, but the procedure sets out how this is to be dealt with. The claimant has an opinion regarding the mark Y7: others may have a different opinion. The rights and wrongs of these opinions and the opinions of various national and international experts have been considered, and a determination has been made.

217. There was no evidence to suggest the claimant wished to return to work in order to discuss the rights or wrongs of the identification of mark Y7, or to stir

up old tensions and divisions. Mr Nelson gave no insight to how, or why, he thought this might happen. In fact, the evidence suggested the respondent is not the only one who wishes to move on and draw a line under it all.

218. We did note that Mr Nelson, at no time during his evidence, referred to a lack of trust and confidence in the claimant. We further noted this did not form part of the further particulars advanced by the respondent.

219. The second point we considered was the respondent's concern that if the claimant was called as a witness, the credibility and reliability of fingerprinting would be moved back to centre stage, and that she would become the focus of the trial rather than the guilt or innocence of the accused. Both Ms Tierney and Mr Nelson struggled to explain how this might happen. Ms Tierney told the Tribunal her concern was that the issue of whether the claimant was right regarding mark Y7 would become the focus of the trial. We, in considering Ms Tierney's evidence, had regard to the fact that if the claimant returned to work, she would receive the appropriate training and would comply with the respondent's standard operating procedures and policies. Furthermore, if the claimant was called by the Crown to give evidence, it would only be in circumstances where other examiners have unanimously agreed the identification. The respondent does not put forward an identification in cases unless there is unanimous agreement. Ms Tierney refused to voice an opinion regarding the realistic risk of the claimant being asked, in these circumstances, of the rights and wrongs of Y7.

220. Mr Nelson told the Tribunal that his concern was that the claimant could be asked if she had made a mistake regarding Y7 and whether she accepted the Inquiry report. Mr Nelson agreed that if the claimant was asked about Y7, she could state she had given her opinion, but insisted that she could be challenged about making a mistake. Mr Nelson rejected the suggestion that it was irrational to suggest that the defence would challenge the claimant's credibility using the Inquiry report which exonerated her of any impropriety.

221. The claimant accepted in cross examination that if she gave evidence she may be asked about a mistake in the identification, and if she denied any mistake, she could be asked about Y7. The claimant in response to this stated she would refer to the competency tests. She also accepted that if she was asked if she had made a mistake regarding Y7, she would deny it. The claimant refused to accept that she may be vulnerable to attack on the basis she would not accept mistakes.

222. We acknowledged that if the claimant was called to give evidence, she could – if the trial judge considered it relevant – be asked about the identification of Y7. However, we, for several reasons, questioned the reality of this diverting the attention of the Court and jury. The first reason related to the fact the claimant would be able to refer to the identification of Y7 being her opinion; the fact others may have a different opinion; the fact the Inquiry report determined Y7 was not the mark of Ms McKie, but was satisfied there was no impropriety on the part of the fingerprint officers who misidentified the mark, and that their opinions were genuinely held. The claimant would also be able to provide details of the respondent's policies and procedures and confirm the identification in the current case was based on the unanimous view of the experts involved.

223. The second reason related to the fact that Mr Geddes and Mr Foley held the same view as the claimant regarding the identification of mark Y7. They continue to work for the respondent as Reporting Fingerprint Examiners and can be called as a witness. They have not been subject to the type of cross examination suggested above. The respondent suggested they had not had the same media attention as the claimant. We acknowledged they may not have been subject to the same media attention, but that does not alter the fact that if (and we stress if) there is a vulnerability in the claimant being called as a witness because she identified Y7 as that of Ms McKie, and the Inquiry determined that was a misidentification, then the same vulnerability must attach to others who made/agreed with that identification, and that has not proven to be the case.

224. The third reason related to the fact a defence agent had an opportunity to re-open all of the old wounds and attack the credibility of fingerprinting, but did not do so. There was no dispute regarding the fact that in a high profile double jeopardy case, the Crown called Mr Charles Stewart and Mr Hugh MacPherson who had prepared the initial report for the case back in 1998. Mr Stewart and Mr MacPherson had been signatories to the joint reports regarding identification of the mark Y7 as being that of Ms McKie.

225. The defence agent in the double jeopardy trial was Donald Findlay QC, who had represented Ms McKie in the perjury trial.

226. Mr Stewart and Mr MacPherson were not in fact called as witnesses because the evidence was agreed. However, we took from this case the fact that it was more likely than not Donald Findlay knew who Mr Stewart and Mr MacPherson were (in relation to the mark Y7) and that if there had been a desire to challenge evidence based on a mistake/misidentification of Y7, or the credibility of fingerprints, then this was a golden opportunity to do so; but it did not happen.

227. We, having had regard to all of the above points, concluded the respondent exaggerated these matters with evidence of what might be, and emotive language, and their position was undermined by the fact of what has actually happened. We acknowledge the claimant could, in the same way as any witness, be challenged about historical matters, but we were not persuaded by the respondent`s evidence that the risk was as they stated.

228. The sixth category considered in relation to practicability related to the issue of resources. The respondent's position was that they could not employ the claimant if she was unable to perform any of the duties of the role because of the position of the Lord Advocate (this is dealt with above and not repeated), and the respondent was under financial pressures. We accepted there will be financial pressures on the respondent organisation and that when a post

becomes vacant there will need to be a management case for refilling it. We also acknowledged the different specialisms making up Forensic Services will have to compete for resources and that there is currently a greater demand for work involving DNA than there is for fingerprinting.

229. We accepted the respondent has not recruited any new employees to train up as fingerprint experts, but they have advertised to recruit for temporary roles, where candidates must already be qualified. We understood the respondent was not seeking to argue that it had permanently filled the claimant's post, but rather that it did not have any vacancies for the claimant.

230. Mr Nelson, in his evidence, referred to Best Value and he also confirmed there is a no compulsory redundancy policy in place.

231. Mr MacNeill challenged Mr Nelson's position by pointing to the very substantial sums of money spent by the respondent in fighting reinstatement. The respondent spent £257,120 defending their position at the Supreme Court, and to this must be added the costs (solicitor's costs and counsel's fees) of taking an appeal to the EAT and at the Inner House. Mr Nelson accepted the proposition put to him that notwithstanding Best Value, the respondent had decided, at any cost, that the claimant was not going to return.

232. We wish to make clear that we make no comment on the respondent's decision to fight this case: it is for them to make decisions based on the advice they receive. However, the very significant sums of money spent on the one hand, do not sit comfortably with, on the other hand, the respondent's position that they are under financial pressure. We were accordingly not at all convinced that the financial pressures on budgeting and staffing were such as to make reinstatement not practicable.

233. We, having had regard to all of the points raised by the respondent, next stepped back and had regard to the totality of the evidence, and we asked

ourselves whether it was, as a matter of fact, practicable as at 27 February 2017, for the respondent to comply with the order for reinstatement.

234. We (for all of the reasons set out above) found the respondent`s explanation it was not practicable to reinstate the claimant either lacked credibility or was not reliable because it was exaggerated or undermined. The respondent adopted a static, rigid position in respect of reinstatement which was impervious to the passage of time and the changing circumstances.

235. We acknowledged the position of the Lord Advocate was an important factor in the practicability of reinstatement but we concluded the respondent`s evidence and position regarding this matter lacked credibility. It was not credible for Mr Nelson to rely upon a decision which was over 10 years old and fail to have regard to the very significant factors and changes which had occurred in the intervening period. Mr Nelson did not know the position of the current Lord Advocate as at 27 February 2017 and, significantly, he accepted that if the Lord Advocate had been provided with all the relevant information, he did not know what his response might have been.

236. We decided the respondent has not shown, on the balance of probabilities, that it was not practicable to reinstate the claimant. We have set out our reasons, above, why we reached that conclusion in respect of the issues put forward by the respondent. In addition to this we noted the respondent raised no issues regarding trust and confidence.

237. Mr Napier did, in his submissions, introduce an argument that reinstatement must restore contractual rights and that was not possible in this case. He referred to the contractual terms of employees transferred to a Reporting Fingerprint Examiner role being amended. The only evidence before this Tribunal regarding this matter was Ms Tierney`s evidence when she told the Tribunal that employees transferred to a new post received a letter (p130). The letter amended the employee`s contract of employment to the extent of

confirming the title of the role. The letter confirmed "*All other terms and conditions of employment will remain unchanged.*" We could not accept Mr Napier`s submission for two reasons: firstly, there was no suggestion, either in evidence or the further particulars that this had been a consideration in the mind of the employer when deciding upon reinstatement. Secondly, these proceedings have taken place on the basis the claimant would, had she been employed or reinstated, have transferred to the role of Reporting Fingerprint Examiner. There is a material finding of fact to this effect.

238. We decided the respondent has not shown, on the balance of probabilities, that it was not practicable to reinstate the claimant. We must now determine the compensation to be paid to the claimant including the amount of an additional award.

The Section 114(2)(a) figure

239. Section 114(2) provides that on making an order for reinstatement the tribunal shall specify:-

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement.

240. The period between the date of dismissal and the date of reinstatement is 1 May 2007 to 27 February 2017.

241. The representatives agreed the figures for the arrears of pay as £358,215 (gross) and £247,617 (net)

242. The representatives agreed the figures for lost pension contributions of £65,974.

243. They agreed a deduction requires to be made in respect of remuneration received from another employer of £15,444.90 (gross) and £14,749.30 (net).

244. The dispute between the parties related to (i) whether the loss of earnings should be a gross or net figure; (ii) whether the earnings from another employer should be deducted gross or net and (iii) whether a sum of £568 Jobseekers allowance should be deducted.

245. We had regard firstly to the terms of Section 114(2)(a) and acknowledged that a reference to arrears of pay, would on the face of it be a reference to net pay. However, there is no longer an employment relationship between the claimant and the respondent, and there has not been one for 10 years. Mr Napier could not provide any clarity on the question of whether the respondent would be liable to account for the tax to be paid to the Revenue if the sum ordered to be paid to the claimant was net. We accordingly decided the arrears of pay to be paid to the claimant should be a gross sum because she will be liable to account to the Revenue for the tax to be paid.

246. We decided that the sums received by the claimant from earnings from other employers should be a net sum to reflect what the claimant actually received.

247. We further decided the sum of £568 Jobseekers` Allowance should be taken into account so the claimant does not receive payment twice.

248. We decided the figure to be used in terms of Section 114(2)(a) Employment Rights Act is £358,215 (gross back pay for the period 1 May 2007 to 27 February 2017) + £65,974 (lost pension contributions for the period 1 May 2007 to 27 February 2017) = £424,189.

249. We next deducted the sum of £15,317 (being £14,749 + £568) from £424,189 to produce a final figure of £408,872.

Additional Award

250. We had regard to the terms of Section 117 Employment Rights Act which provides that if an order for reinstatement is made but the employee is not reinstated in accordance with the order, the Tribunal shall make an award of compensation and an additional award of compensation (unless the employer satisfied the Tribunal that it was not practicable to comply with the order). The additional award is of a sum of not less than 26 weeks' pay and not more than 52 weeks' pay.

251. We were referred to the case of ***Morganite Electrical Carbon Ltd v Donne [1987] IRLR 363*** regarding the correct approach to the additional award. The EAT in that case held that the Tribunal had erred in awarding the maximum additional award of 26 weeks' pay in the event of the employer's failure to comply with the re-engagement order without addressing their minds to the fact that where in the range of 13 to 26 weeks the additional compensation award should fall is a discretionary power, and in not considering what factors ought properly to affect the exercise of that discretion. It was stated that:-

> "*While there is a wide discretion as to the matters which can properly be taken into account by an Industrial Tribunal in deciding where in the range of 13 to 26 weeks the additional award should fall, some sort of proper assessment and balancing must take place. Plainly one factor would ordinarily be the view that the Tribunal takes of the conduct of the employer in refusing to comply with the order that they have made. It would also be material for the tribunal to take into account the extent to which the compensatory award has met the actual loss suffered by the claimant* .."

252. We, in considering the amount of the additional award had regard firstly to the conduct of the employer in refusing to comply with the order. We noted that in the intervening ten year period the respondent has not engaged in any dialogue with the claimant. For example, the respondent took no steps to

discuss with the claimant what her training needs may be if she returned to work, notwithstanding there is a policy for lapse of competence and the requirement to identify skills gaps and formulate an action plan. A further example was that the respondent made no enquiries of the claimant regarding the Inquiry findings and recommendations and whether she would respect the Inquiry outcome if she returned to work. The respondent, having adopted the position that the claimant would not accept the Inquiry, had to admit they'd never asked her.

253. The respondent had no dialogue with the claimant regarding the date of reinstatement. The claimant, considering she may be in contempt of court if she did not attend for work on 27 February 2017, attended at the respondent's offices. Mr Nelson described himself as being "*shocked*" at this, but given the Tribunal had ordered reinstatement to take effect that day, this was somewhat surprising. Mr Nelson accepted the respondent could have handled things differently with the claimant and could, for example and as a matter of courtesy, written to her to explain they were not going to comply with the order for reinstatement and explain why.

254. We next had regard to the fact that notwithstanding the evidence of Mr Nelson regarding practicability, this decision had in reality been taken in 2009. Mr Nelson told us that the reasons for the organisation not reinstating have not changed since 2009; and, that the respondent had decided at any cost that the claimant is not returning to work. We had to question why, if the reasons for not reinstating had not changed since 2009, we heard evidence about all of the changes made by the respondent and the findings and recommendations of the Inquiry?

255. We also had regard to the losses sustained by the claimant. Mr Napier invited us to have regard to the significant award due to be made to the claimant to compensate for her losses. We acknowledged the loss of earnings and future loss of earnings is significant, but noted it does not fully compensate the

claimant for the loss of her career. The respondent is the only employer of fingerprint experts in Scotland: the claimant cannot pursue her career elsewhere and has no funds to establish herself as an independent expert. The claimant had 22 years' service with the respondent and an unblemished career until McKie. The claimant was not responsible for what happened, and is not to blame for it: she acted with impropriety.

256. We decided, having taken the above points into account, to make an additional award of 52 weeks' pay, being £24,980.

Compensation

257. The claimant is entitled to a basic award, which representatives agreed was £6,355.

258. The representatives also agreed the wage loss net of tax and other earnings was £229,098; and the pension loss (per the agreed report produced) was £299,800.

259. The claimant is entitled to an award for future loss and we decided it would be appropriate to make an award of two years' pay in circumstances where the claimant will not be able to pursue her career as a fingerprint expert. We calculate this sum to be £63,900.

260. We also award the sum of £400 in respect of loss of statutory employment rights.

261. The total compensatory and additional award, is £599,553.

262. We next had regard to the terms of Section 124(4) Employment Rights Act provides that the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the

compensatory and additional awards fully to reflect the amount specified as payable under Section 114(2)(a).

263. We were also referred to the case of ***Selfridges Ltd v Malik [1997] IRLR 577*** where the EAT provided guidance regarding the approach to be adopted. We acknowledged the basic award is unaffected by the cap, but the compensatory and additional awards together are capped at the Section 114(2)(a) figure.

264. We concluded, therefore, that the total compensation payable to the claimant is a basic award of £6355 plus a compensatory and additional award limited to £408,872 = £415,227.

Employment Judge: Lucy Wiseman
Date of Judgment: 22 December 2017
Entered in register: 22 December 2017
and copied to parties