**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4102336/2017**

**Held in Dundee on 7, 8, 9, 10 and 30 January 2019, with written submissions on 13 February 2019**

**Employment Judge: G Woolfson**

| | |
|---|---|
| **Mrs C Daly** | **Claimant**<br>**Represented by:**<br>**Mrs A Fox**<br>**Solicitor** |
| **HMRC** | **Respondent**<br>**Represented by:**<br>**Dr A Gibson**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. The claimant was unfairly dismissed and the respondent is ordered to pay the claimant **£6933.80 (SIX THOUSAND NINE HUNDRED AND THIRTY THREE POUNDS AND EIGHTY PENCE)**.

2. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to the award, as the claimant received jobseeker's allowance. The prescribed element is £1367.03 (one thousand three hundred and sixty seven pounds and three pence) and

relates to the period from 12 May 2017 to 30 January 2019. The monetary award exceeds the prescribed element by £5566.77 (five thousand five hundred and sixty six pounds and seventy seven pence).

## REASONS

### Introduction

1. The claimant has brought a claim for unfair dismissal. The hearing took place over five days in Dundee. I heard evidence from four witnesses for the respondent (James Bird, Damian Smith, Grant McNaughton and Paul Kennard) and from the claimant herself. I was referred to a joint bundle of documents.

2. By the end of the fifth day of evidence, there was insufficient time for oral submissions. I was asked by Mrs Fox for the claimant and Dr Gibson for the respondent if written submissions could be provided. I gave them the option of having a separate hearing for oral submissions, however they were content to proceed with written submissions. I therefore agreed to having written submissions. It was also agreed they would have two days in which to respond to each other's written submissions, if they wished. In the event, they did not do so.

### The issues to be determined

3. Did the respondent have a potentially fair reason for dismissal?

4. If the respondent did have a potentially fair reason for dismissal, and if that reason was the conduct of the claimant:

4.1. did the respondent have a genuine belief in the alleged conduct of the claimant?

4.2. if so, were there reasonable grounds for that belief?

4.3. if so, did those grounds follow a reasonable investigation?

5. Was the decision to dismiss within the range of reasonable responses?

6. If the claimant was unfairly dismissed:

6.1. should the Tribunal make an order for reinstatement or re-engagement?

6.2. how much compensation should be awarded?

6.3. should any compensation be reduced to take account of any failure on the part of the claimant to mitigate her loss, the application of **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 or contributory conduct?

## Findings in fact

7. The claimant commenced employment with the respondent on 14 March 2005 as a Contact Centre Advisor. For the first two years of her employment she provided advice to individuals and employers in relation to tax credits. She then moved into other areas of the business, and latterly was a Hidden Economy VAT Officer. The claimant worked in Dundee.

8. Within the respondent's organisation there is a department known as Internal Governance (IG). Within IG there are two separate teams. One is a civil investigation team (IG civil) and the other is a criminal investigation team (IG criminal).

9. IG civil investigates potential cases of gross misconduct in respect of the respondent's employees.

10. IG criminal investigates potential criminal activity by employees of the respondent, or involving employees of the respondent, where that relates to a function of the respondent. IG criminal has statutory powers to apply for production orders, apply for search warrants and take statements from witnesses. The statutory powers are derived from the Criminal Law (Consolidation) (Scotland) Act 1995 and the Criminal Procedure (Scotland) Act 1995. IG criminal also has powers under the Regulation of Investigatory Powers Act 2000 which enables it to obtain, amongst other things, information in relation to telephone data. Relevant officers of the respondent are provided with specialist training before they are authorised to use the criminal investigation powers. When IG criminal has concluded its investigation, the matter is referred to the Procurator Fiscal for a decision on whether a criminal charge is to be brought.

11. Occasionally, an investigation in relation to suspected gross misconduct runs in parallel with an investigation in relation to suspected criminal conduct. This involves IG civil and IG criminal carrying out separate investigations in relation to essentially the same matter. Guidance provided by the government, on the GOV.UK website, explains that there is a complete separation of civil and criminal investigations, and that: *"No one in HMRC dealing with civil enquiries such as tax returns, and claims for tax credits can use criminal powers to further these enquiries"*. Therefore, only IG criminal can use criminal investigation powers. However, IG criminal can and will share information with IG civil, and in 2016 it was a matter of judgment which information was shared in any particular case (unless there was a statutory prohibition on particular types of information being shared). There was no written policy or guidance regarding this at that time. There is now a memorandum of understanding.

12. James Bird is employed by the respondent as an Investigation Officer. He works for the fraud investigation service within IG criminal. In April 2016, a referral was made to Mr Bird from the respondent's tax credit office. At this time, Mr Bird was still in his training and assessment period. Concerns had been raised regarding the claimant and claims she had made for tax credits, and specifically the fact that she had been claiming tax credits as a single person and not as a couple jointly with her husband, Paul Daly. Mr Bird commenced an investigation in relation to this matter, in conjunction with an intel team. On 2 June 2016 the claimant received a request to attend an interview under caution.

13. On 6 June 2016, Mr Bird sent an email to a senior officer within IG civil, in which he explained that he was conducting an investigation and required a link officer for the civil side of the case. By this, he meant that an investigator was needed in order to carry out a parallel investigation for IG civil. Mr Bird also explained in his email that he was planning to interview the claimant for suspected tax credit fraud. At this time, the claimant was absent from work on sick leave, and Mr Bird asked for confirmation that it would be appropriate to suspend the claimant the following week, when she was due to return to work.

14. Damian Smith is employed by the respondent as an Investigation Officer. He works within IG civil. On 6 June 2016, Mr Bird was informed that Mr Smith would be the civil link in relation to the case. Mr Smith, therefore, was appointed as the IG civil investigator. Mr Smith's role was to gather the facts for the purposes of the civil side of the case. He was free to conduct his own investigation and meet with witnesses.

15. The claimant was interviewed by IG criminal. On the advice of her solicitor, she made no comment. She had been advised that no inference could be taken from her exercising her right to silence.

16. By letter dated 14 June 2016 from Mr David Boothroyd, Senior Investigation Officer, the claimant was informed of her suspension from duty. This letter, however, was not sent until 17 August 2016, which is when the claimant returned to work following her sickness absence. The letter began by stating that Mr Boothroyd had been informed that the claimant had been interviewed by IG criminal in relation to tax credit fraud. The letter stated that the claimant's actions represented a potential serious breach of the respondent's guidance in respect of expected standards of conduct and that an investigation would be carried out.

17. By letter dated 2 August 2016 from Mr Boothroyd, which was also sent on 17 August 2016, the claimant was informed that Mr Smith of IG civil had been appointed to investigate whether the claimant's actions had breached the respondent's policies and procedures. The letter confirmed the claimant's suspension from duty and that the alleged misconduct appeared to fall within the Cabinet Office definition of internal fraud.

18. On 31 August 2016, Mr Bird sent an email to Mr Smith. The email attached a number of documents which Mr Bird (and therefore IG criminal) held in relation to the criminal investigation and which Mr Bird stated would be of use to Mr Smith. Mr Bird expressed his view that the claim for tax credits should have been a joint claim for a number of reasons, and he concluded with the following:

*"When we interviewed Catriona Daly she answered 'no comment' to all questions as is her right to silence in Scotland. Although no adverse inference can be gained from this you would expect someone who is totally innocent [to] come and give an account of their innocence."*

19. By email dated 27 September 2016, Mr Smith asked Mr Bird if copies of certain documents could be provided. Mr Bird responded on 12 October 2016 stating that he had provided as much as possible, which he said should have been enough for the IG civil case.

20. The documentation provided to Mr Smith by Mr Bird was the following:

20.1. A statement from Mr Bird. His statement said that the claimant had claimed tax credits jointly with her husband, Mr Daly, between 2 December 2003 and 9 June 2012, but had then claimed tax credits as a single person from 10 June 2012 onwards. He explained that it was suspected she should have claimed jointly with her husband from 10 June 2012, rather than as a single person. He explained that the effect of claiming as a single person was that the claimant had received tax credits at an inflated rate, because only her income had been taken into account. He explained that: (a) the claimant and her husband jointly purchased and owned a property at Balunie Avenue in Dundee, (b) they were married on 31 March 2007 and he had not seen any evidence to show that they had since divorced or started legal proceedings, and (c) on 22 December 2013 the claimant had a further child, with Mr Daly being registered as the father.

20.2. The Land Register entry for the property at Balunie Avenue, showing the claimant and Mr Daly as joint proprietors from 1 September 2006 and that they had, prior to that, lived at a property in Seagate in Dundee. Mr Bird said in his statement that Dundee City Council had confirmed that the Council tax for Balunie Avenue did not receive a single person discount, and that the claimant had made arrangements to pay arrears of Council tax between May 2014 and July 2016. Mr Bird stated that the claimant had serious debt problems and could ill afford to pay the full Council tax if she was entitled to a single person discount.

20.3. The Land Register entry for the same property in Seagate, showing the claimant's mother and father as joint proprietors from 28 August 2006.

20.4. A certified copy of the Register of Marriages for the claimant and Mr Daly, showing a married date of 31 March 2007.

20.5. A certified copy of the birth certificate for the child HD, showing the claimant as the mother and Mr Daly as the father, with the date of birth being 22 December 2013.

20.6. A letter to Mr Daly from his employer, dated 21 March 2013, in which Mr Daly appears to confirm, by signing and dating the document on 22 March 2013, that his address was the property at Balunie Avenue. Mr Bird had obtained this through a production order, as Mr Daly's employer did not provide this voluntarily.

20.7. An email dated 4 June 2016 from the employer of Mr Daly explaining that Mr Daly's address had changed to a property at Seagate in Dundee. Mr Bird had also obtained this through a production order.

20.8. An extract from a bank statement for an account in the name of the claimant and Mr Daly, identifying card transactions on 25 and 27 December 2015 at The Applecross Hotel. Mr Bird stated it was known from other evidence that the claimant's sister lived in the Applecross area, which is four or five hours from Dundee. He stated that the card in question was issued in the name of Mr Daly which showed he spent the Christmas period in Applecross. Mr Bird also stated that the extract bank statement showed that the wages of Mr Daly had been paid into a joint account. The bank statement was obtained through a production order.

20.9. Contact details for ED, being one of the children of the claimant and Mr Daly, held by ED's school and dated 14 September 2015, showing the address for the claimant and Mr Daly as Balunie Avenue.

20.10. Contact details for MD, being one of the children of the claimant and Mr Daly, held by MD's school and dated 14 September 2015, showing the address for the claimant and Mr Daly as Balunie Avenue.

20.11. Contact details for RD, being one of the children of the claimant and Mr Daly, held by RD's school and dated 1 September 2015, showing the address for the claimant and Mr Daly as Balunie Avenue, but with the address for Mr Daly having been scored out and the address in Seagate being handwritten instead. In his statement, Mr Bird stated that whilst Mr Daly claimed to be living at the address in Seagate, the property was owned by the claimant's mother and father, and that he was unable to identify any payments of rent.

20.12. Facebook entries posted by Mr Daly as follows: (a) from 16 and 17 November 2013 which referred to a stay which Mr Daly and the claimant had at The Witchery in Edinburgh, and which included photographs and a comment from another Facebook user stating he had seen a post from the claimant; (b) a photograph of the claimant, Mr Daly and their children, uploaded on 16 May 2014; and (c) a photograph of the claimant, Mr Daly and their children, uploaded on 19 September 2015. Mr Bird stated: *"It has been identified from these that the couple have been on multiple holidays together during the single claim and have attended social events together."*

20.13. A copy of the claimant's tax credit annual review, setting out her tax credits award for the period 10 June 2012 to 5 April 2013.

20.14. A statement from Alison Jones, an Officer of the Tax Credit Office in Preston. Ms Jones explained in her statement that she dealt with fraudulent claims for tax credits where an HMRC staff member is

suspected of being involved in the fraud, and that her role was to correct the information, provide technical expertise and calculate the cost to the public purse. Ms Jones' statement included the following:

(a) The following passage:

*"Claimants are required to decide whether they should claim as a single person or jointly as part of a couple; broadly speaking, a 'couple' for tax credits purposes would usually, but not always:*

- *Live in the same household most of the time; one or both partners may also spend some time in another household or work away;*
- *Have a stable, established relationship; they are still classed as a couple even if they have frequent breakdowns in the relationship, have a 'trial separation' or are likely to get back together;*
- *Financially support each other; they share money or are each responsible for paying particular household bills, for example food or motor costs;*
- *Share responsibility for looking after any dependent children;*
- *Act as a couple; they socialise as a couple or family, and other people treat them and perceive them to be a couple.*

*If the claimant is married, they should always claim jointly as a couple unless they are separated under a Court Order or in circumstances which are likely to be permanent; they will be*

*treated as a couple for tax credit purposes unless they can provide evidence which can demonstrate their permanent separation."*

(b) An explanation that the claimant and Mr Daly would always be treated as a married couple for tax credit purposes unless they could provide evidence to the contrary. She stated that, further to the Tax Credit Act 2002, they would need to be either separated under a Court Order or in circumstances in which the separation is likely to be permanent. Ms Jones stated that in order to be considered as permanent, the claimant and Mr Daly would need to have taken certain steps, such as: (i) getting a divorce or a legal separation under a Court Order, (ii) dissolving joint financial ties, for example closing joint bank accounts or removing one party's name from the mortgage, (iii) maintaining separate households, usually in different permanent residences, (iv) no longer acting as a couple, for example going on separate holidays, (v) no longer supporting each other financially, or (vi) changing of the surname back to the maiden name.

(c) Her opinion that from the evidence available to her, she believed that the claimant and Mr Daly had not yet taken such steps to permanently separate. Amongst other things, Ms Jones referred to the following: (i) the claimant and Mr Daly still being married and not legally separated or divorced, (ii) the claimant and Mr Daly having a joint mortgage on their jointly owned property at Balunie Avenue, (iii) the claimant and Mr Daly having a joint bank account with Mr Daly's wages having been paid into that account since March 2015, (iv) despite conflicting evidence as to whether the claimant and Mr Daly lived in the same household and at the same address, the only alternative accommodation for Mr Daly was provided

free of charge by the claimant's mother, (v) the energy bills for the jointly owned property were in Mr Daly's name, (vi) the emergency contact details held by the school for two of their children listed Mr Daly as living at the joint home, (vii) the claimant and Mr Daly had been on holidays together, as a family with their children and alone as a couple, with evidence of them having been to Florida twice in the previous three years and also to Norway, (viii) the claimant and Mr Daly being romantically involved, having had a fourth child together in December 2013, (ix) the claimant and Mr Daly acting as a married couple, such as attending a wedding together as a family and socialising together.

(d) The following conclusion: *"It is therefore inherently probable that they do not meet either criteria to entitle them to claim as single people, and they should have, and should continue to claim as, a married couple jointly"*.

21. Mr Smith prepared a report on behalf of IG civil based entirely on the documentation provided to him by Mr Bird of IG criminal. Mr Smith did not undertake or instruct any separate investigation of his own and did not meet with the claimant or any other witnesses.

22. In his report, Mr Smith referred to and provided copies of various policy documents regarding the expected conduct and professionalism of employees, including the policy which states it is important to ensure any benefit claims are a true reflection of an employee's own personal circumstances and that they are receiving the actual amount to which they are entitled. The report explained that obtaining or attempting to obtain tax credits, benefits or payments administered by the respondent to which entitlement does not exist is an example of gross misconduct. Mr Smith referred to IG criminal having conducted an investigation to establish whether or not the claimant was cohabiting with her husband whilst claiming

tax credits as a single person. Copies of all of the documents provided by Mr Bird were included as appendices.

23. Mr Smith concluded his report by explaining that it was being alleged the claimant had done the following:

*"Claimed as a single person whilst in a relationship with Mr Daly.*

*Failed to notify TCO [tax credit office] of a change of circumstances with regard to her status as a single person.*

*Received an estimated £32,924.71 Tax Credits to which she had no entitlement."*

24. Mr Smith's report included recommendations. This section was completed by Mr Smith's manager, Janet Cameron, and included the following:

*"In this case there are several signposts which indicate, on the balance of probability, that Mr and Mrs Daly were still a couple and/or they reconciled after TCO were informed by Mrs Daly in June 2012 that they had separated. Mrs Daly should have cancelled the single claim and submitted a joint claim, if they had separated, when her husband returned to the family home."*

25. Ms Cameron then referred to some of the information provided by Mr Bird, and concluded as follows:

*"I have carefully considered all of the available evidence and conclude that:*

> *'You have breached the Civil Service Code and the HMRC Conduct Guidance HR22007 Conduct Honesty and impartiality; HR22009 Conduct: Private Conduct and HMRC Conduct Update 2 (personal Responsibility) in that you have knowingly obtained or attempted to obtain Tax Credits to which entitlement did not exist.*

*You failed to inform Tax Credits Office that you were in a relationship with Mr Daly and continued to claim as a single person when you should have submitted a joint claim.*

*Your actions reflect poorly on you as an Officer of HMRC bringing the Department into serious disrepute.'*

*This is my recommendation which is not binding on the Decision Manager."*

26. Ms Cameron's recommendation is dated 7 November 2016.

27. During his investigation, Mr Bird of IG criminal also obtained the following information, which will be referred to as the "Undisclosed Information":

27.1. A handwritten statement from the nursery manager, taken in July 2016, in which the nursery manager stated that her understanding from the claimant and Mr Daly was that they were separated but that they had a very amicable relationship.

27.2. A handwritten statement from the deputy headteacher of the school of two of the claimant's children, taken in July 2016, in which the deputy headteacher stated she had heard from the children's grandmother (who worked at the school) that the claimant and Mr Daly were separated and that Mr Daly lived in a flat which the grandmother owned.

27.3. A statement from the claimant's manager, Angela Barclay, taken in June 2016, in which Ms Barclay explained that the claimant had spoken on occasion about her ex-partner and that this was in the context of childcare arrangements.

27.4. Details of a statement having been taken from the General Manager of The Witchery Hotel, who spoke to a one night champagne bed and breakfast stay for two adults in November 2013 in the name of Mr Daly with an address at Balunie Avenue.

27.5. Details of a statement having been taken from a Liaison Visiting Officer for Dundee City Council who spoke to visiting the property at Seagate on 27 April 2016 and Mr Daly informing him that he had only lived there since 14 March 2016.

27.6. Details of a statement having been taken from a Government Administrator at Sky who spoke to a subscription for the flat in Seagate in the name of Mr Daly being activated in June 2015.

27.7. A document from the nursery of HD, being one of the children of the claimant and Mr Daly, dated 30 October 2014 and signed by the claimant, showing Mr Daly's address as the address in Seagate.

27.8. Details of a statement having been taken from an executive of British Airways who spoke to booking information for the claimant and Mr Daly regarding a trip to Florida in October 2015.

27.9. A screen capture of the timeline from the Facebook profile for the claimant, taken on 20 July 2016, in which the relationship status had been set to *"separated"*.

27.10. Screen captures of the timeline from the Facebook profile for Mr Daly, which included the following:

(a) 24 December 2012: a comment from another Facebook user which stated, in response to a photograph being posted by Mr Daly: *"this single life style is killing your diet dude".*

(b) 21 August 2013: a post from Mr Daly which referred to him and the claimant having been to Perth for lunch.

(c) 5 October 2013: posts referring to Mr Daly being on holiday in Florida for two weeks.

(d) 27 November 2013: a post from Mr Daly which referred to him and the claimant having been at The Witchery.

(e) 23 and 29 December 2013: posts from Mr Daly in relation to the birth of his and the claimant's fourth child.

(f) 21 January 2014: a post from Mr Daly which referred to a stay at the Crieff Hydro for a week.

(g) 12 October 2015: posts from Mr Daly which referred to Mr Daly attending a restaurant in Florida with the claimant and other family members and which uploaded photographs of the claimant and other family members.

(h) 13 December 2015: a post from Mr Daly which referred to *"Santa time at camperdown"* and mentions the claimant.

28. Mr Bird used his judgment, in conjunction with senior investigation officers, not to share with Mr Smith the Undisclosed Information, or any of the details within the Undisclosed Information, including witness details. Therefore, nothing from within the Undisclosed Information formed part of the IG civil report.

29. Grant McNaughton is a Business Unit Head for the respondent, based in Edinburgh. He was appointed as the Decision Manager. By letter dated 1 December 2016 he wrote to the claimant to require her to attend a disciplinary meeting to *"consider the allegation that you failed to notify Tax Credit Office of a change of circumstances regarding your status as a single*

*person and claimed Tax Credit as a single person whilst in a relationship".* He enclosed the report of Mr Smith. He set down the disciplinary meeting for 15 December 2016.

30. Mr McNaughton was not provided with any of the Undisclosed Information.

31. The disciplinary meeting took place on 15 December 2016. Notes were typed in the course of the meeting by a notetaker. The claimant attended, and was unaccompanied. The claimant stated the following:

31.1. She understood that additional evidence was in the possession of the respondent, such as interviews and observations.

31.2. She could not explain why Mr Daly informed his employer that his home address was Balunie Avenue, when he was in temporary accommodation at the time.

31.3. She and Mr Daly had separated in around June/July 2012, but Mr Daly could not leave the home until September 2012, and he was then in temporary accommodation until June 2013, at which point he moved into the property at Seagate which was owned by the claimant's parents.

31.4. She started paying off Council tax arrears in 2014, and did not apply for a single person discount as she wished to repay her arrears first, but that she now received the single person discount for Council tax. Mr Daly had not registered for Council tax where he had been living.

31.5. Although the utility bills were in Mr Daly's name, these were run by a meter and the name on the account was irrelevant as the utilities are prepaid.

31.6. The mortgage for Balunie Avenue remained in joint names, and this was due to the cost of the mortgage and because Mr Daly was not seeking to purchase another property.

31.7. She and Mr Daly had not started divorce proceedings, and she had been advised to wait a year after separating before proceeding with divorce. She fell pregnant with her fourth child following one night with Mr Daly in the year following their separation. She had been under the influence of alcohol and Mr Daly had been looking after one of their children who was unwell. Mr Daly then wanted to consider reconciliation. They had a couple of lunches, and a night away at The Witchery in Edinburgh in November 2013. However, they did not reconcile.

31.8. She had previously planned to move to Aberdeen, which is one of the reasons divorce proceedings had not been started, and they would have divorced in 2016 had it not been for the disciplinary investigation. She was also concerned about the cost of legal separation or divorce.

31.9. The separation was amicable and her parents were happy to provide the property at Seagate for Mr Daly to live in.

31.10. She could not explain why correspondence from the school referred to Balunie Avenue for both her and Mr Daly, though letters from the school were provided to her mother who works at the school and the claimant did not see the correspondence. It was clear the information was out of date.

31.11. Although she and Mr Daly had a joint bank account, she never used it, other than perhaps on one occasion, and the account was kept open as Mr Daly had said he was using it to receive wages.

31.12. Mr Daly was at The Applecross Hotel during Christmas 2015 as he wished to spend time with his children when they were visiting the claimant's sister.

31.13. She attended two family weddings with Mr Daly and their children, as they maintained good relationships with each other's families and they were opportunities for Mr Daly to spend time with the children and for the children to spend time with Mr Daly's family.

31.14. There had been a compliance check into her tax credit claim in 2013. She had provided documentation at the time, and this resulted in her tax claim being unchanged in 2014.

31.15. She had an ongoing appeal with the First-tier Tax Tribunal in relation to her tax credit claim being stopped.

31.16. She could provide statements from neighbours, nursery and colleagues to the effect that she and Mr Daly were not together.

31.17. A holiday to Florida had already been arranged prior to their separation and booked shortly after they separated, and as it was successful they agreed to visit Florida again, with both holidays being booked and paid for by the claimant's sister. Another holiday to Florida was planned for 2017. Mr Daly joined them on a holiday to Norway to visit the claimant's brother, with whom Mr Daly was close friends. All holidays were for extended family and not just the marital family unit.

31.18. The separation was amicable for the sake of their children and Mr Daly needed to maintain his relationship with his children.

31.19. She had kept the name Daly as her children are called Daly and keeping the name was convenient. She would consider changing to her maiden name.

31.20. Mr Daly would still be shown on the electoral role for Balunie Avenue, though the claimant had taken him off the role earlier that year.

32. The claimant provided Mr McNaughton with the following documents: (a) a copy of a tenancy agreement between Mr Daly and her parents, (b) a document from Aberdeenshire Council regarding the claimant being on their housing list, (c) a copy of Mr Daly's driver's licence with the Seagate address, (d) Virgin Media bills in her name from 2013 and 2016, (e) a letter from a utility company in her name from November 2016, (f) Council tax bills, (g) a statement regarding nursery payments in her name from 2015, and (h) home and car insurance documents in her name.

33. The claimant also explained that her housing application to Aberdeenshire Council had closed and she would be required to go through data protection to obtain a copy, but that she may be able to obtain her Dundee City Council application and had copies of emails to Aberdeenshire Council. Mr McNaughton asked if her Council housing requests would add weight to her case, to which the claimant replied that they would as they covered the period in question and supported her intention to join the Councils' housing register as a single person. Towards the end of the disciplinary meeting, the claimant was asked if there was anything else she wished Mr McNaughton to consider. The claimant asked if Mr McNaughton would like her to obtain the housing application information and other information to support her intent to move. Mr McNaughton stated that he did not require the claimant to provide that information at that time and that he would advise if it was required. Mr McNaughton did not ask for this information to be provided.

34. By email dated 16 December 2016 (the day after the meeting), Mr McNaughton sent the draft minutes of the disciplinary meeting to Mr Smith, and confirmed that he would arrange for copies of the additional documents provided by the claimant to be forwarded to Mr Smith. He asked Mr Smith to let him know when further guidance had been sought. On the

same day, Mr Smith forwarded the draft minutes to Mr Bird. Mr Bird replied to Mr Smith on 19 December 2016 with a number of comments on the minutes. These comments were forwarded to Mr McNaughton by Mr Smith in an email on 20 December 2016. However, Mr McNaughton did not take into account Mr Bird's comments on the minutes, as he did not consider it appropriate to take into account information provided from IG criminal.

35. By letter dated 13 January 2017 Mr McNaughton wrote to the claimant and enclosed a copy of the Land Register document for the property at Balunie Avenue (which had been included in the IG civil report). He also enclosed notes of information provided to the respondent following the compliance enquiry into the claimant's single tax credit claim for the year 2012/13. The notes in relation to the compliance enquiry indicated that further information should have been obtained in 2013 as part of the compliance enquiry as it appeared that Mr Daly had been living at Balunie Avenue since December 2006.

36. When reaching his decision, Mr McNaughton placed weight on the following matters:

36.1. the claimant still using her married name;

36.2. the claimant and Mr Daly not having started divorce or separation proceedings;

36.3. the document from Mr Daly's employer from March 2013 showing his address as Balunie Avenue;

36.4. the joint mortgage for the property at Balunie Avenue remaining in place and the claimant not having applied for a single person discount in respect of Council tax;

36.5. Mr Daly not having registered for Council tax at the Seagate property, being the property which the claimant had said Mr Daly was renting from her parents;

36.6. the emergency contact details provided by the school for two of the children, dated September 2015, being Balunie Avenue;

36.7. the handwritten amendment to the contact details for the child RD (with the address for Mr Daly having been scored out and the address in Seagate being handwritten instead) not having been signed and dated;

36.8. the claimant and Mr Daly still having a joint bank account, with Mr Daly's wages having been paid into the account;

36.9. the claimant becoming pregnant in 2013, with Mr Daly being the father;

36.10. the claimant and Mr Daly having an overnight stay at The Witchery in November 2013, five weeks before the claimant giving birth;

36.11. the claimant and Mr Daly being together with the children and the claimant's sister in Applecross over Christmas in 2015;

36.12. the holidays to Florida and Norway;

36.13. Facebook photographs of the claimant with Mr Daly and their children together at two family weddings;

36.14. the notes of the information provided to the respondent following the compliance enquiry into the claimant's single tax credit claim for the year 2012/13; and

36.15. the claimant's experience in dealing with tax claims, given the nature of her employment with the respondent.

37. By letter dated 5 May 2017, Mr McNaughton invited the claimant to attend a further meeting on 12 May 2017 in order to inform the claimant of his decision. The policy of the respondent is that the decision meeting should take place within five working days of the disciplinary meeting. The delay of around five months between the disciplinary meeting and the decision meeting set down for 12 May 2017 was due in part to Mr McNaughton's role changing and his business area being restructured.

38. At the meeting on 12 May 2017, the claimant was provided with the following documents: (a) the minutes of the disciplinary meeting from 15 December 2016, (b) Mr McNaughton's deliberations dated 4 May 2017, and (c) a letter dated 11 May 2017 stating that McNaughton found the allegation against the claimant to be proven and that her employment was to be terminated with immediate effect, without notice or payment in lieu of notice.

39. The letter of 11 May 2017 also informed the claimant that details of her dismissal would be sent to the Cabinet Office for inclusion on their database of civil servants dismissed for internal fraud. The claimant was informed that these details would be kept on the Internal Fraud Hub for five years, and that this meant she would be banned from employment in the Civil Service during that five year period, unless she could show truly exceptional circumstances.

40. The document setting out Mr McNaughton's deliberations included the following passages:

*"No sustainable evidence was presented to support a separation. No sustainable evidence was presented to reflect distance between Catriona Daly and Mr Paul Daly. No tangible explanation was offered as to why Mr Paul Daly confirmed his home address as the same address Catriona Daly advised of residing at. Whilst an explanation was received regarding vacations with Mr Paul Daly and social media comments and photographs*

*with Catriona Daly and Mr Daly, I base my decision on the balance of probabilities.*

*…..*

*The production of documentation presented, during the meeting on 15 December 2016, did not verify the situation regarding the relationship between Catriona Daly and her husband. She failed to present any substantial evidence to verify a full separation or that she and her husband had taken steps to separate.*

*…..*

*It is my opinion that Catriona Daly had substantial departmental experience, and in particular a working knowledge of Tax Credits, to be aware of her personal responsibilities and the expectations from her employer. Again, with the balance of probability, there are several indications that Catriona Daly's relationship with Mr Paul Daly was not that of a separated / divorced couple under a Court Order or that she was able to provide evidence to demonstrate her permanent separation."*

41. The claimant's employment terminated on 12 May 2017.

42. Paul Kennard is the Regional Assistant Director for Scotland, Northern Ireland and North East England for Complex Civil Investigation Work in Individuals and Small Businesses. Mr Kennard was appointed to be the appeal officer.

43. By letter dated 23 May 2017, the claimant appealed to Mr Kennard against the decision to terminate her employment. Her grounds of appeal were the following:

*"No consideration has been given to the fact that the appeal against the termination of my single Tax credit award was successful at tribunal and is now back in payment.*

*There is no evidence in the summing up of the case that consideration has been given to all the documentary evidence provided. For example, there is no mention that the lease document had been provided showing details of when Paul took over the tenancy to the Seagate.*

*The notes to the meeting were not provided to me until the decision meeting more than five months after the meeting took place. Upon checking these on the 12th of May I have noticed mistakes and missing answers and do not agree this is a fully accurate representation of the meeting that took place."*

44. Mr Kennard was provided with the IG civil report, the notes of the disciplinary meeting and the documents which Mr McNaughton provided to the claimant at the meeting on 12 May 2017. By letter dated 13 June 2017, Mr Kennard asked the claimant to provide evidence in relation to her successful appeal against the termination of her single tax credit award, and to provide comments on the notes of the disciplinary meeting in order to identify any mistakes.

45. The claimant replied by letter dated 22 June 2017. She enclosed a copy of her provisional tax credit award which she confirmed was a single award for her and her children. The document provided from the First-tier Tribunal, Social Entitlement Chamber, dated 17 February 2017, stated the following:

*"I accept on the balance of probabilities since 24/08/2016 the appellant and Mr Paul Daly are separated in circumstances where the separation is likely to be permanent."*

46. In her letter the claimant also referred to the notes of the disciplinary meeting, and made the following points:

46.1. With regard to the contact address for her child, RD, the evidence provided by the respondent was that RD's school did not hold Mr Daly's address as Balunie Avenue.

46.2. She would have made clear during the disciplinary meeting that the nursery held Mr Daly's correct address information. However, this was missing from the notes, together with her offer to provide this information from the nursery.

46.3. The notes suggest she started working for the respondent in 2007, when in fact it was 2005 and she stopped working within the area of tax credits in 2007.

46.4. The notes were hard to follow, and the answers did not always seem to apply to the questions, and as it had been so long between having the meeting and seeing the notes the claimant felt she could not agree that they were a totally accurate representation of the meeting.

47. By letter dated 29 June 2017, Mr Kennard invited the claimant to attend an appeal meeting on 25 July 2017. The appeal meeting took place on that day, and the claimant attended by herself. Key points from the meeting are the following:

47.1. The claimant stated that the notes of the disciplinary meeting did not include her first question to Mr McNaughton when she asked if he had been provided with all of the evidence which was available, or only that which was contained within the IG civil pack.

47.2. The claimant stated that she found it hard to believe that notes of interviews and observations were not included within the IG civil pack, and felt that all information should have been made available to Mr McNaughton.

47.3. The claimant provided a written note to Mr Kennard which confirmed her view that all information should have been made available to Mr

McNaughton and that if witnesses had not been interviewed, including people at the nursery, then they should be interviewed or an explanation should be provided as to why they were not being interviewed.

47.4. Mr Kennard stated that he would seek HR advice on the issue raised by the claimant in her note.

47.5. The claimant raised a concern regarding the length of time which it had taken for the notes of the disciplinary meeting to be provided and therefore for her to be able to address errors in the notes.

47.6. The claimant was concerned that Mr McNaughton had not fully explained his decision and why he disagreed with what the claimant had said during the disciplinary meeting, including in relation to address details on the school documentation.

47.7. The claimant stated that she felt the tenancy agreement between Mr Daly and her parents had not been taken into account, and that the decision had been weighted on how Mr Daly completed a work form, but that she did not have control over what he did and he did not have a permanent address at the time.

47.8. The claimant explained that the same information had been presented to both the respondent and the First-tier Tribunal, and that the First-tier Tribunal was aware of the respondent's investigation.

48. By letter dated 1 August 2017, Mr Kennard informed the claimant that her appeal had been unsuccessful. He enclosed with the letter a note of his deliberations, the key points of those being the following:

48.1. He did not consider that the accuracy of the notes of the disciplinary meeting made a material difference to the decision of Mr McNaughton.

48.2. There was no indication that any observations were undertaken or third parties interviewed as part of the IG investigation, or that any evidence had been withheld by IG, and the claimant had not submitted any such documents in support of her case.

48.3. Notwithstanding the tenancy agreement between Mr Daly and the claimant's parents, rental payments were claimed to be made in cash but there was no evidence available; Mr Daly had not registered for Council tax at the Seagate address; Mr Daly remained on the electoral register at the Balunie Avenue address; Mr Daly confirmed the Balunie Avenue address to his employer as his home address; and the mortgage on the Balunie Avenue property remained in joint names.

48.4. The decision of the First-tier Tribunal related to the period from 24 August 2016, and evidence provided to that Tribunal was different to that considered by the respondent's decision maker as information provided by the claimant to the First-tier Tribunal contained updated and different information.

49. At the time of her dismissal the claimant earned £457.96 per week before tax, which was £350.52 per week after tax.

50. Following the termination of her employment, the claimant looked into the possibility of setting up her own business selling children's toys. This did not lead to anything. She then decided to take on the role of full time carer for one of her daughters. The claimant received job seeker's allowance, and then carer's allowance. More recently, towards the end of 2018, the claimant

has made some enquiries regarding the possibility of employment, and has contacted local businesses.

51. The investigation carried out by IG criminal led to the Procurator Fiscal deciding to prosecute the claimant for alleged fraudulent activity with regard to tax credits. The claimant entered a not guilty plea in April 2017. The trial took place in March 2018, and the claimant was found to be not guilty.

**Relevant law**

52. In terms of section 94 of the Employment Rights Act 1996 (the "1996 Act") an employee has the right not to be unfairly dismissed.

53. In terms of section 98 of the 1996 Act, it is for the employer to show the reason for dismissal, and that it is either a reason falling within section 98(2) or some other substantial reason which justifies dismissal. One of the reasons which fall within section 98(2) is a reason which relates to the conduct of the employee.

54. In terms of section 98(4) of the 1996 Act, whether a dismissal is fair or unfair *"depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [the reason] as a sufficient reason for dismissing the employee"*. This is to be determined in accordance with equity and the substantial merits of the case.

55. The correct approach is summarised in **Sharkey v Lloyds Bank PLC** UKEATS/0005/15, at paragraph 9:

**The focus is thus on the employer's reason for dismissal and whether the employer's actions, focusing upon those actions, were reasonable or unreasonable. The conventional approach, derived from British Home Stores Ltd v Burchell [1978] IRLR 379, is that it is for the employer to show the reason (here, the reason was conduct; that is**

**not controversial). Then there is a four-stage test in order to determine the question arising under section 98(4): does the employer have a genuine belief in the misconduct, are there reasonable grounds for that belief, do they follow a reasonable investigation, and is the decision to dismiss one that is within the band of reasonable responses?**

56. The band (or range) of reasonable responses also applies to the procedure by which the decision is reached, as was explained by the Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt** [2003] I.C.R 111, paragraph 30:

**The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.**

57. This means that it is not for the Tribunal to decide what it would have done, had it been the employer. Instead, the Tribunal is to consider the actions of the employer by reference to the objective standards of the reasonable employer.

**Submissions: Dr Gibson for the respondent**

58. The dismissal of the claimant was for the potentially fair reason of conduct. The two decision makers held a genuine belief that the claimant was guilty of the allegations which led to her dismissal.

59. The Tribunal would have to substitute its own view for that of the decision makers if it was to find that the decision makers did not have reasonable grounds given all the evidence. The decision makers were entitled to treat

with scepticism and doubt the accounts of the claimant and her explanations. The claimant had also lied to Mr McNaughton.

60. The Tribunal should be cautious not to take into account evidence which the claimant gave in her oral evidence to the Tribunal which was not before the decision makers. The claimant expanded and embellished on her evidence.

61. The Tribunal should be very cautious of placing any weight on the fact that the claimant was not convicted.

62. The band of reasonable responses approach also applies to the conduct of investigations. In the circumstances, the investigation undertaken was reasonable and appropriate. Any suggestion that in a situation where serious misconduct is alleged a dismissal is rendered unfair by reason of a failure on the part of the employer to carry out more investigations than it had in fact done is classic substitution territory.

63. It is clearly not reasonable to say that the respondent's criminal investigation officers, with powers and responsibilities accorded to them under criminal legislation (commensurate with the powers and responsibilities accorded to police officers), acted in any way unreasonably in not disclosing witness statements and documents to IG civil.

64. It will be within judicial knowledge that if an employer asked Police Scotland to provide them with witness statements and documents gathered by police officers, and not yet disclosed to the accused, so that an employer could use these statements in a gross misconduct hearing, that under no circumstances would Police Scotland release such information.

65. Simply because the IG criminal investigation officers are part of the respondent's organisation does not make any difference. There are important firewalls between departments within the respondent for very important reasons. IG criminal and IG civil carry out very different functions. Their respective investigation officers have very different powers to allow

them to carry out these functions. IG criminal has reporting obligations to the Procurator Fiscal. It is the Procurator Fiscal who ultimately decides when disclosure takes place and what is actually disclosed.

66. If the Tribunal was to find that the non-disclosure of witness statements and documents to IG civil prior to their disclosure to the Procurator Fiscal means that the respondent failed to carry out a reasonable investigation then the Tribunal would be acting perversely. It is outwith the powers accorded to the Tribunal to effectively say that the way in which the respondent conducts criminal investigations is unreasonable. The claimant is inviting the Tribunal to find that the respondent should have prejudiced the integrity of a criminal investigation so that an internal disciplinary hearing could have sight of statements and documents not gathered for that purpose. That would simply be perverse.

67. If the claimant's position is accepted and disclosure should have taken place, then that would have to be disclosure of everything. Everything includes the vast amount of incriminating evidence not presented to IG civil. There was enough evidence presented to the Procurator Fiscal to convince them that it was in the public interest to prosecute because they thought the evidence was sufficient to satisfy the court beyond reasonable doubt. This is why the claimant's accusations of "cherry picking" are simply ludicrous.

68. The Procurator Fiscal‘s duty to disclose information is further to section 121 of the Criminal Justice and Licensing (Scotland) Act 2010. The Procurator Fiscal would take a very dim view indeed if IG criminal disclosed to a potential accused any of the information set out at section 121(3) prior to a not guilty plea being tendered, as the integrity of the criminal case would be adversely impacted upon. There is absolutely no basis for the claimant saying that the respondent has acted improperly in not disclosing information to her which it was not within their gift to disclose. That power, decision and responsibility rested with the Procurator Fiscal, not the respondent.

69. With reference to the Court of Appeal decision in **Stuart v London City Airport Ltd** [2013] EWCA Civ 973, it is debatable whether disclosure of the IG criminal statements and documents was required. The decision makers knew everything there was to know about what the claimant was saying about her relationship status. The fact that the claimant had mentioned an ex-partner to her line manager, and the nursery manager had formed a view that the claimant and her husband were separated, and the Head Teacher said the claimant's mother had said they were separated - at some unknown times - was not crucial to the claimant's defence. All this showed was what the claimant and her mother had said to third parties.

70. The Tribunal should look at what was in the IG civil report and ask itself whether that was sufficient to establish a reasonable investigation. In other words, forget about what was not disclosed and look at what was. Nothing more was required by way of investigation when there was sufficient evidence to prove on the balance of probabilities that the claimant acted in the way alleged.

71. The claimant seeks to criticise the respondent for alluding to her no comment interview in an e-mail where Mr Bird states that he would expect someone who is innocent to give an account of their innocence. Mr Bird is entirely within his rights to say this. He is not the prosecutor. The respondent is entirely within its rights to question why someone who claims to be innocent would not tell them why she was innocent.

72. A fair procedure was followed and one which was compliant with both the respondent’s Conduct Code and the ACAS Code of Practice.

73. With regard to reinstatement and re-engagement, the respondent has lost all trust and confidence in the integrity of the claimant. The claimant is currently unable to re-apply for any civil service position, by virtue of an order of the Cabinet Office, for five years from the date of her dismissal. It is not within the Tribunal's jurisdiction to overturn that order. This reflects the

wishes of the respondent and goes to practicability. If the Tribunal orders re-instatement or re-engagement then the respondent will have to obtain permission of the Cabinet Office to rescind the Internal Fraud Hub order. The respondent has no desire to do that and can give no guarantee the Cabinet Office would agree. Further, the fact that a prosecution took place supports the view that the respondent has lost trust and confidence in the claimant. In addition, the claimant's job in Dundee is simply not there anymore. The operations are being run down and eventually will all be based in Edinburgh.

74. The Claimant has contributed to her dismissal by her conduct.

75. It would not be just and equitable to award the Claimant any loss of earnings beyond six months from the date of her dismissal. The Claimant spoke of setting up in business as soon as she was dismissed. She decided not to pursue this. She has since not applied for work because she is now a carer for her child and she receives carer's allowance. Whilst that is no doubt a difficult situation, the restriction on her ability to find new employment is due to a matter in her private life and is not something which can be laid at the door of the respondent.

76. With regard to **Polkey**, if all the information which IG criminal had held was made available to the decision makers, both incriminating and exculpatory, then the claimant would have been dismissed anyway, and it is in fact more likely she would have been dismissed. This is because if IG civil should have received the IG criminal documents, then that has to mean IG civil should have received everything which was the basis for a criminal prosecution. Any compensation should be reduced to nil.

**Submissions: Mrs Fox for the claimant**

77. The respondent's investigation did not meet the standards of the **Burchell** test. From the very outset of the investigation, there was a bias on the part

of the respondent to simply prove the claimant's guilt and not to impartially investigate.

78. When Mr Bird began the investigation, he was still in his training and assessment period. Mr Bird had formed an opinion of the claimant's guilt and provided evidence to IG civil and the decision maker which would only show this outcome.

79. If it had been a reasonable investigation, IG criminal would have disclosed potentially exculpatory evidence to IG civil and Mr McNaughton. As well as failing to disclose exculpatory documents, Mr Bird failed to disclose exculpatory statements from witnesses who expressed a knowledge of the claimant and her husband being separated. Mr Bird sought to claim that he was protecting witnesses' identities from the claimant. However, these witnesses were providing evidence of an exculpatory nature. Mr Bird said he was concerned the claimant could have influenced witnesses, which begs the question of how much weight the respondent would have placed on any statements provided by the claimant, which the respondent's witnesses said she should have done.

80. The IG civil investigation consisted solely of receiving information from IG criminal. How can it be argued by the respondent that they are unable to pass all information gathered during an IG criminal investigation to IG civil, but then also state that all information they rely upon comes from IG criminal and that IG civil do no further investigation?

81. Mr Bird conceded that there was no policy within the respondent to say that witness names or statements cannot be passed to IG civil. He stated that while this case was ongoing there were no guidelines at all.

82. It was repeated by each of the respondent's witnesses that the claimant should have provided more evidence. She did so, but little regard was given

to these documents. The claimant also offered to provide further information, but none of this was looked into.

83. Mr Smith did not interview anyone at all, not even the claimant. It is ridiculous to suggest a fair and through investigation has been carried out into misconduct without interviewing the alleged culprit or her direct manager. What is perhaps worse is that the respondent had interviewed the claimant's direct manager who provided what would have been a favourable statement for the claimant, but this was never given to the decision maker.

84. There is nothing binding on the respondent in legislation, their guidance or policies which tells them to withhold or not disclose potentially exculpatory evidence to other departments.

85. The claimant was acquitted at the end of the criminal trial. The Tribunal cannot discount the fact that if all of the evidence had been passed on from IG criminal to IG civil it could have made a significant difference to the findings of Mr McNaughton.

86. Mr McNaughton appeared reasonable and made concessions. However, when asked how much weight he put on the fact that the claimant had fallen pregnant in 2013, he stated he put great weight on this and it was incredible for someone who advised they were separated and no longer a family unit to subsequently fall pregnant on a one night stand. He further described it as unfortunate and convenient. To suggest that it was incredible for a separated couple to have a one night stand and another baby as a result, is itself an incredible statement. Such a point of view can only harm the credibility and therefore reliability of Mr McNaughton as a witness.

87. The claimant waited five months for the notes from the disciplinary meeting. After she received them, she stated that they were inaccurate. This was not addressed properly.

88. Mr Kennard refused to accept that exculpatory evidence could have made any difference to his decision. This is incredible and goes directly to affect his credibility and reliability. This attitude is simply indicative of the unreasonable standpoint of the respondent in this entire investigation.

89. The claimant mentioned housing applications to Mr McNaughton. During his evidence, Mr McNaughton confirmed that he had not been given the evidence of the housing applications to consider. He therefore was not in receipt of all relevant information, as he reasonably should have been.

90. No deduction should be made in relation to contributory conduct. Throughout the investigation and disciplinary the claimant provided evidence to support her innocence, yet no weight was given to this and there are comments from the investigators questioning the validity of the evidence. At the disciplinary meeting, the claimant offered to provide more information and was told by Mr McNaughton that it was not required.

91. **Polkey** should not be applied. Mr McNaughton suggested that if the potentially exculpatory evidence had been submitted to him, he would have taken this into consideration. Furthermore, the Tribunal cannot find that if further investigation had been carried out by IG civil that the outcome would have been the same. It is clear from the evidence left out by IG criminal, and especially the statement from the claimant's line manager, that there were people within the respondent's business who were able to give evidence which would have been in favour of the claimant. It cannot be suggested that the failings in this investigation and procedure made no material difference to the decision.

92. The Tribunal should order that the claimant be reinstated or re-engaged by the respondent. The respondent did not provide any credible evidence to suggest that the claimant could not be reinstated or re-engaged. The claimant stated that she felt she could go back to work for the respondent and that she had no hard feelings especially towards the people she worked

with. The respondent is one of the largest employers in the UK and therefore even if the claimant was unable to go back to her original position the respondent could offer her a fair and reasonable alternative. The respondent failed to call a witness who would be in a position to comment on its ability to reinstate or re-engage the claimant.

93. The Claimant should receive a compensatory award for up to 52 weeks as she has been out of work for this period of time.

**Observations on the evidence**

*Mr Bird*

94. Mr Bird carried out the IG criminal investigation and provided Mr Smith with the entirety of the information which formed the basis of the IG civil report. Mr Bird, however, only shared some of the information which he held. He did not share the Undisclosed Information.

95. It is apparent the IG criminal investigation involved documents and information beyond those referred to above as the Undisclosed Information. However, the Undisclosed Information referred to above represents the documents and information, not shared with IG civil, which were referred to during the Tribunal hearing in the context of information which the decision makers had not seen and therefore had not been able to take into account when reaching their decision.

96. Mr Bird was referred to the guidance provided on the GOV.UK website which states that no one dealing with civil enquiries can use criminal powers to further these enquiries. He explained that this means anything which IG criminal has obtained using criminal powers should not be used in civil investigations. However, Mr Bird also stated in evidence that he had applied for a production order (i.e. he used a criminal power) to obtain information from Mr Daly's employer. This was information shared with IG civil, and it is

clear from the statement Mr Bird provided for the IG civil report that he had used a production order to obtain a bank statement, which was also shared with IG civil. This evidence is therefore contrary to what Mr Bird said is meant by the above statement in the GOV.UK website. In this regard, the statement is that no one dealing with civil enquiries can use criminal powers to further these enquiries. This is different from any question around whether IG criminal can share information which it has obtained through its use of criminal powers, which is what Mr Bird did. Further, Mr Bird explained that whilst IG criminal and IG civil run separate, albeit parallel, investigations, *"the only thing which crosses over is information sharing".*

97. Dr Gibson refers to the Criminal Justice and Licensing (Scotland) Act 2010, and says that the Procurator Fiscal would take a dim view if IG criminal disclosed information prior to a plea being tendered. This does not suggest IG criminal is prohibited from doing so. Mr Bird was not referred to this legislation, and said he is not aware when the Procurator Fiscal has a duty to disclose. During cross-examination, however, he was asked about his training and whether it was a judgment call regarding disclosure of information by IG criminal, to which he replied:

*"The main disclosure training is with regard to criminal, and it's a judgment call what we pass to civil. There's no guidance or law on what criminal can pass to civil. There is now a memorandum of understanding in place."*

98. With regard to witness statements, during examination-in-chief Mr Bird said that IG criminal would not reveal statements to IG civil, on the basis that statements are given for a criminal case and IG civil can themselves speak with witnesses. During cross-examination, he was asked whether it was a judgment call not to reveal witness statements, to which he said: *"yes, but a discussion with my case manager and senior officer".* Mr Bird also explained that at the time there was no policy or guidance on the sharing of witness statements. He explained that whereas now there is a memorandum of understanding which says that IG criminal should not share statements, this

was not in place at the time (and he mentioned that, even now, there is still no guidance). He said again that non-disclosure of statements was an informed judgment by his manager and senior officer. He also confirmed that the issue around disclosing witness statements is one of safeguarding and not wanting to reveal a criminal witness. He referred to the potential for witnesses being harmed, intimidated or persuaded to withdraw their statements.

99. When it was put to Mr Bird that three potentially exculpatory witness statements had not been disclosed, he said that they did not disclose statements and denied it was a judgment call. He said he was led by more experienced officers and that there is now a memorandum of understanding in place.

100. Mr Bird's evidence on this issue was therefore not entirely consistent. Nevertheless, I conclude that at the time there was no policy or guidance on the disclosure of witness statements. There was a concern, however, around safeguarding and the potential for witnesses being harmed, intimidated or persuaded to change their statements. Mr Bird would liaise with his manager and senior officer as appropriate in any particular case, and they would use their judgment to decide whether or not statements would be disclosed.

101. With regard to disclosing the identity of witnesses (as opposed to the statements themselves), Mr Bird said that IG criminal wouldn't disclose a full witness list and that it *"depends on the situation and things like that"*. Mr Bird also confirmed it is a matter for his own judgment to suggest to IG civil who they may wish to speak with. The concern, however, is the same, i.e. safeguarding.

102. Mr Bird confirmed that anyone, and any investigator, can access anything public on Facebook. When asked what the problem was with sharing Facebook entries, he replied: *"I've conceded that one."* He also confirmed that other information is publicly available.

103. Mr Bird also explained that he was not allowed to share information from Virgin Media, as that had been obtained under RIPA. It is notable that he specifically said he wasn't allowed to share that information, as opposed to it being a matter of judgment.

104. I draw the following conclusions from the evidence of Mr Bird:

104.1. IG criminal can share information with IG civil, even if the information has been obtained through the use of criminal powers, unless there is a statutory prohibition (for example, information obtained under RIPA). At the relevant time, there was no policy or guidance on the sharing of information. It was a matter of judgment.

104.2. At the relevant time, there was no policy or guidance on the sharing of witness statements or revealing the identity of witnesses. It was a matter of judgment, the main concern being the potential for witnesses being harmed, intimidated or persuaded to withdraw their statements.

104.3. There was no difficulty with sharing information which was publicly available or otherwise a matter of public record, such as Facebook entries.

*Mr Smith*

105. Mr Smith was the IG civil investigator. He gathered together the information which Mr Bird provided to him. Mr Smith did not make the recommendation in the IG civil report. That was done by his manager. Then, when Mr McNaughton provided Mr Smith with the draft minutes of the disciplinary meeting, Mr Smith passed them to Mr Bird for comment.

106. Therefore, Mr Smith essentially collated information which was provided to him by Mr Bird of IG criminal. When it was put to him that IG civil did no investigating, he said: *"In this case, no".* He confirmed that his role was to gather the facts. When he was asked what facts he gathered, he replied: *"What James [i.e. Mr Bird] provided"*. Mr Smith explained that he did not know why Mr Bird provided him with some information, but not other information.

*Mr McNaughton*

107. During cross-examination Mr McNaughton was asked about criminal investigations being entirely different, to which he said: *"To my knowledge it's an entirely different investigation, though as I understand it a lot of the evidence will be shared with the civil side as it's appropriate to the civil investigation".* He said that in this case he would have expected evidence to be shared.

108. However, he also said the following with regard to Mr Bird having provided comments on the minutes of the disciplinary meeting: *"I never sought comment or direction from anyone on the criminal side. In fact, I was angry that something came from the criminal side. My point of contact was with Damian Smith. To receive this back, I was disappointed".* He then stated he was surprised that all of the evidence came from IG criminal.

109. It is not clear, therefore, why Mr McNaughton would be angry or disappointed about information being provided from IG criminal, and surprised that the evidence came from IG criminal, if at the same time his expectation was that evidence would be shared.

110. With reference to the birth of the claimant's fourth child, Mr McNaughton first stated: *"It was certainly a consideration, worthy of debating I suppose*". This tends to suggest it was not a particularly significant concern. However, he went on to say that he found it *"incredible"* and *"exceptionally strange yet also convenient"*, and during cross-examination he stated that he added

quite a bit of weight to this. With regard to the holidays, during examination-in-chief Mr McNaughton confirmed that he *"gave that great weight"*, whereas during cross-examination he said: *"I explained previously I would put light weight on that"*.

111. Mr McNaughton was asked how much weight he placed on information around the claimant's mother having informed Dundee City Council that Mr Daly resided at Seagate, but that she did so very soon after the claimant was made aware of the IG criminal investigation. Mr McNaughton replied that this could perhaps have been an indication of addressing outstanding matters (which was the claimant's explanation in evidence) or an indication of trying to cover one's back. It is not clear which of those is his view. In any event, Mr McNaughton was asked about this in the context of his decision making process, yet it is not clear how or when he was made aware of this. Although the claimant's mother contacting Dundee City Council is mentioned in Mr Bird's email of 31 August 2016 to Mr Smith, Mr McNaughton was not copied in to that email and he was not referred to that email in evidence. There is also no reference to this in the IG civil report or the minutes of the disciplinary meeting. Therefore, I conclude this was not a matter on which Mr McNaughton attached weight when reaching his decision.

112. I have concluded the claimant said at the start of the disciplinary meeting that she understood additional evidence was in the possession of the respondent, such as interviews and observations. Although the minutes of the disciplinary meeting do not reflect this statement of the claimant, and although Mr McNaughton said in evidence that, had the claimant said this, it would have been in the minutes, I am satisfied the claimant did say this. I take into account the fact that the claimant raised at the earliest opportunity her concerns regarding the accuracy of the minutes, and raised this omission in particular at the appeal meeting. I also accept the claimant's evidence on this, and have regard to my comments above in relation to Mr McNaughton's evidence, which impacts on reliability.

113. I am nevertheless satisfied that Mr McNaughton gave genuine consideration to what he called the *"basket of indicators"* when reaching his decision after the disciplinary meeting.

*Mr Kennard*

114. Mr Kennard explained in examination-in-chief that the claimant provided a written note at the appeal meeting which confirmed her view that all information should have been made available to Mr McNaughton. He said:

*"I think [the note] went on to say if we hadn't interviewed people at nursery and other witnesses then that's what we should go and do, or explain why we weren't doing it."*

115. In the course of cross-examination, Mr Kennard's position on this changed. He stated that in her note the claimant was asking him only to confirm why witnesses were not spoken to (if that was the case), but was not asking him to speak with them himself.

116. The note was not produced in evidence. I consider that Mr Kennard's initial evidence is more likely to be correct, and that the claimant said in her note that if witnesses had not been interviewed then they should be interviewed, or an explanation should be given as to why they were not being interviewed.

*The claimant*

117. I consider the claimant to have given an honest account of events. When faced with challenges to her credibility, she provided answers in a balanced, consistent and credible manner. For example, it was put to the claimant that what she had said during evidence-in-chief regarding her child being ill on the night Mr Daly looked after the children was not in the minutes of the disciplinary meeting, and it was suggested that she was only saying this now to *"beef up"* her story. The claimant replied that she probably explained it at

the time but that it's not in the minutes. In fact, her comment regarding her child being ill that night is in the minutes (though she was not directed to that part of the minutes) and therefore she was not only raising this now to enhance her story.

118. It was put to the claimant that she had been untruthful to Mr McNaughton, and reference was made to two comments in the minutes of the disciplinary meeting. However, having considered the minutes as a whole, the fact that I have found they are not accurate in at least one other (material) respect, and taking into account the claimant's evidence as a whole, I consider it to be more likely that the minutes are not accurate. In this regard, the claimant was not provided with the minutes until almost five months after the disciplinary meeting. The claimant raised her concern at the appeal meeting regarding the length of time which it had taken for the minutes to be provided and for her to be able to address errors in the minutes. Her main concern, however, at that point was the omission from the minutes of the key issue she raised at the start of the disciplinary meeting (as noted above).

119. Mr McNaughton explained in evidence that the delay in providing the minutes was regrettable. He said that he was following the respondent's procedure which states that minutes are to be issued at the same time as the outcome, but that this should happen within five working days (not five months). Whilst the delay of five months does not impact on the fairness of the dismissal, I do not consider the delay to have been acceptable. The minutes were available in draft form the day after the disciplinary meeting. When it became clear the decision meeting would not be taking place within five working days, or anywhere close to that time frame, it seems to me that the claimant could (and should) have been provided with the minutes at a much earlier point.

**Decision**

120. The reason for dismissal was the alleged conduct of the claimant. Conduct is a potentially fair reason for dismissal further to section 98(2) of the Employment Rights Act 1996.

121. I will therefore now follow the four-stage test set out by the Employment Appeal Tribunal in **Sharkey v Lloyds Bank PLC**.

*Did the respondent have a genuine belief in the alleged conduct of the claimant?*

122. The alleged conduct, as set out by Mr McNaughton in his letter of 1 December 2016, was that the claimant *"failed to notify Tax Credit Office of a change of circumstances regarding your status as a single person and claimed Tax Credit as a single person whilst in a relationship"*.

123. Following his review of the information provided to him, and after meeting with the claimant, it is clear that Mr McNaughton genuinely believed this conduct had occurred. It was never suggested the dismissal was for any reason other than the alleged conduct.

*Were there reasonable grounds for that belief?*

124. Alison Jones, in her statement which formed part of the IG civil report, referred to separation in circumstances which are likely to be permanent. Therefore, Mr McNaughton considered whether, on the balance of probabilities, he was satisfied the claimant and Mr Daly were separated in circumstances which were likely to be permanent or whether they were still in a relationship.

125. It is not for me to determine what I would have decided, had I been the decision maker. The question is whether, applying the objective standards of the reasonable employer, Mr McNaughton had reasonable grounds to

reach the conclusion that the claimant and Mr Daly were still in a relationship.

126. With this in mind, it was open to Mr McNaughton to have regard to, amongst other things, no steps having been taken to divorce or legally separate, a joint mortgage and bank account remaining in place, the birth of a fourth child, being away at The Witchery, spending Christmas together and going on holiday together on more than one occasion. It was open to Mr McNaughton not to accept certain explanations provided by the claimant. For example, Mr McNaughton found it unusual and surprising for it to be said that the claimant and Mr Daly had what was described as a one night stand in circumstances in which they were married with three children and were also said to have permanently separated, and it was open to him not to accept the explanation of the claimant when that was taken together with the other factors upon which he placed weight. In addition, the fact that the claimant had provided household bills and other documents in her name did not, in Mr McNaughton's view, support a finding that there had been a single occupancy household.

127. Therefore, given the information which Mr McNaughton had been presented in the IG civil report, and bearing in mind it was Mr McNaughton who chaired the disciplinary meeting and I must not substitute for his view what my view might have been, I conclude there were reasonable grounds for Mr McNaughton to believe that the alleged conduct had taken place.

*Did those grounds follow a reasonable investigation?*

128. From the claimant's perspective, the following information from the Undisclosed Information should have been shared with IG civil: (a) a document from the nursery of one of the claimant's children showing Mr Daly's address as Seagate, as at October 2014; (b) information from Facebook to the effect that the claimant had changed her relationship status to *"separated"* and that Mr Daly, as at December 2012, was referred to as

living a *"single life style"*; and (c) statements from the nursery manager, the deputy head teacher of one of the schools and the claimant's line manager, which indicated their understanding that the claimant was separated.

129. As outlined above, there was no policy or guidance in place with regard to the sharing of information, including witness statements and the identity of witnesses. It was a matter of judgment. Therefore, it was open to Mr Bird, in conjunction with his case manager and senior officer, to decide whether to share with Mr Smith the above information from the Undisclosed Information. I will therefore consider each item in turn, and the reasons given for non-disclosure.

130. **The nursery document**: Mr Bird explained that he did not share the nursery document because it would have revealed the witness (the nursery manager). However, there are a number of issues arising from this.

131. Firstly, it is unclear why Mr Bird considered that disclosing the nursery document would have revealed the identity of the nursery manager as a witness for IG criminal, and he did not expand on this. The document is a form with contact details and permissions, which was completed and signed by the claimant in October 2014. The nursery manager is not mentioned in the document. The document is entirely separate from the witness statement, and there is nothing in the document to suggest the nursery manager had given a statement to IG criminal (almost two years later).

132. Mr Bird's position on this is inconsistent with him stating that contact detail forms for one of the schools, which he did share with IG civil, did not reveal the witness from that school (the deputy headteacher). There is no explanation for Mr Bird's position that the school documents did not reveal the identity of a witness, but that the nursery document would have done so.

133. In the bundle of documents for the Tribunal, there are two pages after the nursery document in relation to child protection and absence, signed by the claimant and the nursery lead practitioner (who later became the nursery

manager). However, these pages are separate from the contact details and permissions form (which refers to Mr Daly's address as Seagate) and, in any event, there is nothing in those pages, signed in 2014, to suggest that the person who later became the nursery manager provided a statement to IG criminal in 2016.

134. The specific concern expressed by Mr Bird around revealing the identity of the nursey manager was that the claimant might have persuaded the nursery manager to withdraw her statement. However, the information from the nursery manager in her statement was evidence upon which the claimant would have relied. When Mr Bird was asked if the statement was potentially exculpatory, he confirmed that it was. Therefore, it would have made no sense for the claimant to have tried to persuade the nursery manager to withdraw her statement.

135. Mr McNaughton confirmed that he would have given the nursey document consideration.

136. Taking all of this into account, I conclude that it was unreasonable for the nursery document not to have been shared with IG civil.

137. **The Facebook entries**: Mr Bird said he did not disclose the entry regarding Mr Daly because he decided not to, though offered no explanation as to why he made that decision. He said that when deciding which Facebook entries to share with IG civil, he had a discussion with his manager, though offered no insight as to what was discussed and why only certain Facebook entries were shared with IG civil. When asked what the problem was with sharing Facebook entries, he replied: *"I've conceded that one."*

138. Mr McNaughton confirmed that he would have given the Facebook entries consideration.

139. I therefore conclude that it was unreasonable for the Facebook entries not to have been shared with IG civil.

140. **The three witness statements**: The deputy headteacher confirmed in her statement that she had heard from the claimant's mother, who worked in the school, that the claimant and Mr Daly were separated and that Mr Daly lived in a flat owned by the claimant's mother. The nursery manager said in her statement that her understanding from the claimant and Mr Daly was that they were separated but had a very amicable relationship. The claimant's line manager said in her statement that the claimant had spoken to her on occasion about her ex-partner and that the conversations were usually in the context of childcare arrangements.

141. When referred to the three statements during his evidence, Mr McNaughton confirmed that he would have taken them into consideration, had they been shared with IG civil. When asked whether he would have been duty bound to investigate, he confirmed that he would have been. In addition, one of the factors referred to by Alison Jones, in the IG civil report, is the perception of others.

142. Therefore, Mr Bird had obtained evidence from three witnesses, which was relevant to the issue being investigated and potentially helpful to the claimant, and which would have been considered by the decision maker.

143. There are two particular reasons from Mr Bird's evidence as to why neither the witness statements nor the names of the witnesses were shared.

144. Firstly, Mr Bird explained that his concern around sharing the statement (or the identity) of the nursery manager was the possibility of the claimant persuading the nursery manager to withdraw her statement. However, as explained above, it would have made no sense for the claimant to have tried to do this. The same applies to the other two witnesses, as the claimant would also have relied on their evidence in support of her position. Mr Bird acknowledged that their statements were potentially exculpatory (though he did not raise a specific concern that the claimant may have tried to persuade those witnesses to withdraw their statements).

145. Secondly, Mr Bird said that it was a matter for Mr Smith to decide who to speak with and what to investigate. With regard to the line manager's statement, he said: *"Civil can take their own statements. They would have known that [she] was her manager"*. However, whilst it is correct that it was open to Mr Smith to speak with witnesses (and it is clear Mr Bird would have had no difficulty with Mr Smith speaking with the same witnesses), the reality is that Mr Smith relied entirely on Mr Bird for the provision of information. Mr Bird provided Mr Smith with all of the information which formed the basis for the IG civil report. Furthermore, Mr Smith had no particular reason to know that the witnesses in question might have had relevant information.

146. Beyond the above two reasons, there were Mr Bird's more general statements to the effect that witness statements would not be shared. However, I have already concluded, from his other evidence, that there was no policy or guidance on this and that it was a matter of judgment. In this regard, Mr Bird is an investigator and it was his role to provide another investigator with information. However, no information regarding witnesses was shared and I do not consider that a reasonable explanation has been provided for this. Had Mr Bird shared either the statements themselves or only the names of the witnesses, this would have enabled Mr Smith to carry out his own investigation.

147. It is also necessary to consider the roles played by Mr McNaughton and Mr Kennard.

148. Mr McNaughton said the following in evidence:

*"Whilst it's convenient to say to me I should have done more, I'm not the investigator. That said, if more information is provided, I can make a decision to investigate further."*

149. However, even though the claimant stated at the start of the disciplinary meeting that she understood additional evidence was in the possession of

the respondent, such as interviews and observations, Mr McNaughton took no steps to investigate.

150. During the disciplinary meeting, the claimant offered to obtain housing application information in relation to Aberdeenshire Council and Dundee City Council. Mr McNaughton stated that he did not require the claimant to obtain that information. He stated in evidence that he placed no weight on what the claimant had said about the possibility of moving, as he was not provided with evidence that this was a single venture, as opposed to a joint venture. However, this is notwithstanding the claimant having explained at the disciplinary meeting that the housing information supported her intention to join the Councils' housing registers as a single person (as reflected in the minutes). Therefore, Mr McNaughton concluded there was a lack of evidence regarding the nature of the housing applications, but without taking the opportunity to be provided with more information from the claimant in relation to those applications. He did the opposite, and told the claimant that the information was not required. I do not accept the suggestion made by Mr McNaughton that the claimant chose not to provide this information. She asked him if he wanted the information, and he said no.

151. During the appeal meeting, the claimant explained to Mr Kennard that she understood other evidence was available. She provided a written note which confirmed her view that all information should have been made available to Mr McNaughton and that if witnesses had not been interviewed then they should be interviewed, or an explanation should be given as to why they were not being interviewed. Mr Kennard stated at the appeal meeting that he would seek HR advice on this issue. However, the following exchange took place in evidence, when Mr Kennard was asked about the note which he explained the claimant had provided:

*"Q Did she give you names?*

*A No.*

*Q What could you do with that?*

*A Nothing."*

152. Therefore, on the one hand Mr Kennard told the claimant he would take advice from HR around her concern about information not being provided to Mr McNaughton and the interviewing of witnesses, and yet he took no further steps because the claimant had not given him specific names. It seems that Mr Kennard was expecting the claimant to know who the respondent had spoken with as part of its investigation and provide him with that information, and because she did not do so, and notwithstanding the note she provided, he took no further steps despite saying he would do so.

153. In addition, Mr Kennard stated in his deliberations after the appeal meeting that there was no indication any third parties had been interviewed by Internal Governance or that evidence had been withheld. However, Mr Kennard's own evidence was that the claimant had provided a written note regarding information which she had said should have been made available to Mr McNaughton, including in relation to witnesses. His deliberations, therefore, did not reflect what was discussed at the appeal meeting.

154. Mr Kennard said the following in evidence:

*"The civil procedure gives an opportunity to introduce witnesses, and it is a matter for the employee to put forward witnesses she wants us to interview. There's nothing in the procedure to say we've to seek out witnesses."*

155. No evidence regarding any such procedure was provided or referred to, and the claimant explained in evidence that at no point had she been told that she could have brought her own witnesses. The claimant, however, did say to Mr McNaughton during the disciplinary meeting that she could provide supporting statements from neighbours, nursery and colleagues, and I agree that if the claimant believed such statements might have been helpful then she could have taken steps to obtain statements in addition to the other information she had provided.

156. However, the issue here is not about the claimant not providing her own witness statements or whether the respondent should have taken steps to *"seek out"* witnesses (as it was put by Mr Kennard). The issue is that the claimant had raised her concerns, at both the disciplinary and appeal meetings, around statements which she believed (correctly) the respondent already held. This was an important issue for the claimant. It was about the steps which she believed the respondent had already taken. Mr McNaughton did nothing in relation to this. Mr Kennard said he would seek advice, and he failed to do so. His deliberations then overlooked this issue and stated a contrary position. Had Mr McNaughton and Mr Kennard been acting reasonably, they would have followed up this issue and made enquiries regarding information withheld from IG civil.

*Conclusion*

157. Dr Gibson refers to **Stuart v London City Airport Ltd**. That was a case involving alleged theft of goods from a duty-free department. The essence of the complaint was that the employer had carried out an inadequate investigation, as it had not approached relevant witnesses or obtained CCTV footage.

158. The Court of Appeal explained that it was important to consider the question of what investigation the employer should have carried out in the context of the defence which the employee was advancing. The employee's defence was that he genuinely believed he had not left the duty-free department. The employer had conscientiously investigated that defence, and because it concluded the employee had not been truthful in relation to that issue (i.e. the defence he was advancing), it was entitled to prefer the account of witnesses on other matters without recourse to further investigation. In addition, during the disciplinary proceedings the employee did not at any point suggest that the employer should have carried out the investigation which the employee was subsequently saying at the Employment Tribunal should have been carried out.

159. Following this guidance, it is necessary to consider the context of the defence which the claimant was advancing. The context of the claimant's defence during the disciplinary proceedings was her relationship status. It is clear that the information which the claimant says should have been shared with IG civil would have been directly relevant to that defence (as opposed to a separate matter, as was the case in **Stuart v London City Airport Ltd**). During the disciplinary proceedings she asked for the issue of information withheld from IG civil to be looked into. This is not something the claimant is only raising now. In these circumstances, I do not consider that **Stuart v London City Airport Ltd** assists the respondent.

160. The Court of Appeal also stated, at paragraph 15:

**Although the question of what reasonableness, or fairness, requires must be answered objectively, the answer in any particular case is inevitably a matter of judgment and evaluation, on which views may reasonably differ.**

161. I need to apply the standard of the range of reasonable responses. I therefore need to consider the actions of the respondent with reference to the objective standards of the reasonable employer. I am also mindful of the nature of the allegation and the fact that, as a result of her dismissal, the claimant has been banned from employment in the Civil Service for five years. The respondent should therefore have taken particular care in its investigation, again judged against the standard of what was reasonable.

162. IG criminal was wholly responsible for the information which formed the basis of the IG civil report. Mr Bird chose to share some information with IG civil, but not other information. He withheld information relevant to the issue being investigated, which would have been potentially helpful to the claimant. He has not provided a reasonable explanation for this. When the claimant raised this very issue in the course of the disciplinary and appeal meetings, nothing was done and this is even though Mr Kennard said he

would seek advice from HR. Mr McNaughton also informed the claimant that he did not require to see housing application information, even though the claimant offered to provide the information which she explained would have supported her position. I do not consider any of this to have been an approach which an employer acting reasonably would have adopted.

163. Therefore, the grounds for the belief which the respondent held, albeit reasonable based on the information which was shared with IG civil, did not follow a reasonable investigation. The third limb of the **Burchell** test has not been met. The investigation was outwith the range of reasonable responses. In all the circumstances, and taking into account equity and the substantial merits of the case, it was not reasonable for the respondent to treat the conduct of the claimant as a sufficient reason for her dismissal. The dismissal of the claimant is therefore unfair.

**Reinstatement and re-engagement**

164. The claimant has said that she wishes to be reinstated. However, Mr McNaughton explained that the team within which the claimant worked in Dundee is being wound down and that the role carried out by the claimant is no longer there. I therefore conclude it would not be practicable for the respondent to comply with any Order for reinstatement.

165. With regard to possible re-engagement, the claimant explained that even if Dundee was not an option, a move was not out of the question and she would consider a position elsewhere.

166. On the issue of practicability, Dr Gibson states that both Mr McNaughton and Mr Kennard have lost trust and confidence in the claimant and that the respondent does not wish her back under any circumstances. The evidence of Mr McNaughton was a little different to that, as he said:

*"I would reluctantly have to say I wouldn't welcome her back, due to honesty and integrity. I say it with a heavy heart. I can't speak for another business area."*

167. Nevertheless, there is the difficulty, outlined by Dr Gibson, that the claimant is currently unable to re-apply for any Civil Service position, by virtue of an order of the Cabinet Office, for five years from the date of her dismissal. Dr Gibson stated that if the Tribunal was to Order re-engagement then the respondent would need to obtain permission from the Cabinet Office, but can give no guarantee the Cabinet Office would agree. There was no evidence on this particular issue. With reference to **Lincolnshire County Council v Lupton** UKEAT/0328/15 (paragraph 18), "practicable" means *"capable of being carried into effect with success"*. In the absence of any clarity around the issue of permission which would be required from the Cabinet Office, I am not satisfied that re-engagement would be practicable.

168. In any event, there was no evidence regarding any particular roles, or types of role, within the respondent's organisation to which the claimant could potentially be re-engaged. There was no evidence around the *"nature of the employment"* (section 115(2)(a) of the 1996 Act). In this regard, **Lincolnshire County Council v Lupton** (paragraph 22) confirms that any order for re-engagement must include terms which are *"specified with a degree of detail and precision"*. I have no information which could form the basis of any such terms. The most I have is evidence from Mr McNaughton who said that, potentially, there are vacancies within the regional centre in Edinburgh. However, I do not consider that to be sufficient for an Order for re-engagement.

169. For these reasons I am not making an Order for reinstatement or re-engagement.

**Basic award**

170. The claimant completed 12 years of service. She was 36 years of age. Her gross weekly wage was £457.96. The basic award is therefore £5495.52. I will address the question of contributory conduct below.

**Compensatory award**

171. Further to section 123(1) of the 1996 Act, the amount of compensation is that which the Tribunal considers to be just and equitable in all the circumstances *"having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

172. The claimant is seeking 52 weeks' loss, and Dr Gibson in his submissions suggested 26 weeks (subject to deductions). Mrs Fox made no response to this.

173. The claimant initially looked into setting up her own business, and then decided to become a full-time carer for one of her children. She has only in the last few months or so made some enquiries with regard to other work. In those circumstances, I do not consider that the full amount of the loss sustained by the claimant is attributable to action taken by the respondent.

174. The point at which the claimant decided to become a full-time carer was not confirmed in evidence. However, given the submissions on this issue, I am prepared to accept that 26 weeks' loss is just and equitable. The claimant's take home pay was £350.52 per week. Therefore, this part of the compensatory award is £9113.52.

175. The claimant is also seeking compensation for loss of statutory rights in the sum of £475. No objection to this has been raised by Dr Gibson, and I am prepared to make this award.

176. Therefore, the total compensatory award is £9588.52.

**Polkey reduction**

177. I refer to the following passage from **Software 2000 Ltd v Andrews** UKEAT0533/06 (paragraph 53):

> **The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a Tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the Tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.**

178. The Employment Appeal Tribunal also explains the following (paragraph 54):

> **[The Tribunal] must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.**

179. I also have regard to the decision in **Contract Bottling Ltd v Cave & McNaughton** UKEAT/0100/14, in which the Employment Appeal Tribunal explains the following (paragraphs 19 and 20):

> **19. […] As the words "just and equitable" in section 123 of the Employment Rights Act suggest, the award may necessarily have an element of broad-brush about it. O'Donoghue v Redcar and Cleveland BC [2001] EWCA Civ 701 demonstrates that a period of time may be as appropriate in some cases as it is to express a result in terms of a percentage deduction from what would otherwise be the full period of loss assessed by the Tribunal. A percentage does, however, have the advantage of transparency in identifying a particular factor in respect of which arguments may then be addressed. In assessing this percentage, it must be remembered that a Tribunal is not looking to decide the probability of a past event having happened. It is seeking to determine the likelihood in percentage terms of a future event occurring.**
>
> **20. Whether the word "chance" is used or "risk" is used is, in my view, largely immaterial. They express the same concept, though from different perspectives. The aim of the assessment is to produce a figure that as accurately as possible represents the point of balance between the chance of employment continuing and the risks it will not, expressed in terms of weeks, months or years or as an overall percentage.**

180. I take the following principles from the above cases:

180.1. I must consider whether I have sufficient information for conclusions to be drawn as to how the picture would have developed.

180.2. In carrying out this assessment, I must have regard to any material and reliable evidence, whilst recognising that a degree of

uncertainty is inevitable and that an element of speculation is likely to be involved.

180.3. The purpose of the assessment is to determine the likelihood of a future event occurring, i.e. the chance that the employment would have continued, which can (as one possibility) be expressed in percentage terms.

181. In order to carry out this assessment, I will consider the information not shared with IG civil: the witness statements, the housing information, the Facebook entries and the nursery document.

182. I agree with Dr Gibson that if I find (as I have) that information should have been shared with IG civil, then it must follow that this includes not only the particular information which the claimant considers would have been helpful to her defence, but also other information which Mr Bird had obtained. In this regard, the following is of relevance from the Undisclosed Information, being information referred to during the Tribunal hearing in the context of the decision makers not having been made aware of this information: (a) details of a statement having been taken from a Liaison Visiting Officer for Dundee City Council who spoke to visiting the property at Seagate and Mr Daly informing him that he had only lived there since March 2016; (b) details of a statement having been taken from the General Manager of The Witchery regarding a one night stay for two adults in the name of Mr Daly with an address at Balunie Avenue; (c) details of a statement having been taken from a Government Administrator at Sky regarding a subscription for the flat in Seagate in the name of Mr Daly being activated in June 2015, and (d) Facebook entries which referred to the claimant and Mr Daly having had lunch together in Perth in August 2013 and Mr Daly having spent a week at the Crieff Hydro in January 2014, and an entry from Mr Daly from December 2015 which referred to *"Santa time at camperdown"* and which mentioned the claimant.

183. I will therefore also take into account the above evidence for the purposes of considering whether to make a **Polkey** reduction.

184. The Undisclosed Information included other Facebook entries in relation to the holidays to Florida, the claimant giving birth and The Witchery, and information from a British Airways executive regarding the holiday to Florida in 2015. However, Mr McNaughton already had information on these matters and had formed a view, and I do not consider this additional information would have changed his view. Therefore, I will focus on the other information referred to above from the Undisclosed Information for the purposes of the **Polkey** assessment.

*The three witnesses*

185. Mr McNaughton explained in evidence that his main concern was the three witness statements did not cover the period of the single claim (from June 2012 onwards), and in his view they were only relevant as at the date on which they were taken. He further stated, in what he said was his gut reaction, that he would put little weight on the statement from the claimant's line manager, on the basis that the manager worked for the same organisation, i.e. the respondent, which administered the tax credits, and that the claimant, in Mr McNaughton's view, would therefore have tried to cover from colleagues the fact that she was married (though by this I think he meant in a relationship).

186. However, Mr McNaughton also explained that he would have had questions on the statements and that he would have been duty bound to investigate. I believe Mr McNaughton was therefore acknowledging at least the possibility that further investigation in relation to the witness statements might have allayed the concerns which he had expressed in his evidence. There was no evidence, however, on what would have been said, had there been such further investigation (or indeed any investigation, if at the time only the

names of witnesses, and not the statements themselves, had been provided).

*Housing information*

187. During the Tribunal hearing Mr McNaughton was shown emails between the claimant and Aberdeenshire Council from February 2013 in relation to the claimant's housing application. These referred to the claimant having made a housing application in December 2012 and included a statement from the claimant to the effect that she was separating. Mr McNaughton explained he had not seen these before and that he would have had to consider this information, which he said may or may not have added weight. The housing applications themselves, which the claimant said at the disciplinary meeting showed that she applied as a single person, were not referred to in evidence.

*Facebook entries*

188. With regard to the Facebook entry showing the claimant's status as *"separated"*, Mr McNaughton said that he would certainly have given it consideration, but that it was not clear when the status had changed. The claimant was unsure in her evidence about when exactly she changed her Facebook status, and thought it was probably 2012. Mr McNaughton was also asked to comment on the Facebook entry in which Mr Daly was referred to as living a *"single life style"*. Mr McNaughton said that he questioned the validity of Facebook comments and that he wasn't necessarily sure it would have changed his decision.

189. Mr McNaughton was not asked to comment on the Facebook entry about the Crieff Hydro. During her cross-examination, the claimant explained that she had given birth on 22 December 2013, four weeks early, and that the baby had been in special care. She explained that the time in the Crieff Hydro, in January 2014, was a break so that she and Mr Daly could get over the birth of their child and the problems which resulted, and give the other

children their Christmas presents. She said that their daughter needed her dad. The claimant also explained that she and Mr Daly had separate rooms.

190. If this had been raised with the claimant at the disciplinary meeting, I consider it likely that she would have given the same explanation. I also believe I can speculate as to the view which Mr McNaughton would likely have taken, had this been explained to him at the disciplinary meeting. I say this with reference to his other evidence in relation to the photographs of the claimant, Mr Daly and their children at two weddings. Mr McNaughton said that whilst he appreciated these were family gatherings for the sake of the children, they nevertheless gave the impression of a family unit. Therefore, with regard to the Crieff Hydro, I consider it likely he would have had a similar view, and that he would have understood the explanation of the claimant, but nevertheless have placed weight on the fact that the claimant and Mr Daly were spending time together with their children in what Mr McNaughton would have been likely to have viewed as a family unit.

191. With regard to the Facebook entries showing that the claimant and Mr Daly had lunch together in August 2013 and Mr Daly referring to Santa time in December 2015, there was no evidence on these matters from either the claimant or Mr McNaughton, other than the claimant stating that she could not remember why she and Mr Daly had lunch in August 2013. I nevertheless consider it likely that Mr McNaughton would have placed weight on the August 2013 entry as evidence of an ongoing relationship, bearing in mind his views on the claimant and Mr Daly having been in Florida in October 2013 and at The Witchery in November 2013.

192. I cannot, however, conclude that Mr McNaughton would have placed weight on the Santa time entry, as there is no evidence this represented the claimant and Mr Daly having spent time together – the evidence is only that Mr Daly mentioned the claimant in a Facebook post.

*Mr Daly's address*

193. Mr McNaughton was not asked to comment on the evidence of the statement from the General Manager of The Witchery regarding the booking in Mr Daly's name with an address at Balunie Avenue, or the statement from the Liaison Visiting Officer for Dundee City Council to the effect that Mr Daly said he had moved into the flat in Seagate in March 2016. Nevertheless, given the other matters on which Mr McNaughton placed weight, I consider it is likely he would have placed weight on these pieces of evidence.

194. Having said that, the evidence in relation to the Liaison Visiting Officer does not appear to correspond with the evidence of the statement from the Government Administrator at Sky, which suggests Mr Daly lived in Seagate in June 2015. Mr McNaughton would have had to consider this and also the nursery document, which refers to Mr Daly's address in October 2014 as having been Seagate. Mr McNaughton was not asked to comment on either of these matters (beyond confirming that he would have considered the nursery document).

*Conclusion*

195. On the one hand, I consider there is sufficient in what I have outlined above to lead me to conclude that investigation in relation to the witnesses, together with the housing emails, the Facebook entries about the claimant's Facebook status and Mr Daly, and the evidence regarding Mr Daly's address, could potentially have led Mr McNaughton to accept what the claimant was saying about her relationship status. I therefore do not conclude there would have been no prospect of the claimant's employment continuing, had there been a reasonable investigation.

196. On the other hand, it is clear that Mr McNaughton would have had concerns about the witness statements had he seen them at the time. Given these concerns, and as there is no evidence on what would have resulted from any investigation in relation to the witnesses, I cannot conclude it is likely

that any such investigation would have resulted in Mr McNaughton treating such evidence as supportive of the claimant's position. There are also Facebook entries which I consider it is likely Mr McNaughton would have viewed as evidence of an ongoing relationship and evidence of the claimant, Mr Daly and their children having been a family unit.

197. It is also important to take into account the IG civil report, which Mr McNaughton would have considered. It is clear he would have placed weight on a number of matters from within that report, all as outlined earlier in this judgment. When the IG civil report is factored in to the assessment of what Mr McNaughton would have considered, this leads me to conclude it would have been very unlikely that Mr McNaughton's decision would have been different, had there been a reasonable investigation.

198. Therefore, whilst the possibility would have been there for the outcome to have been different, I consider it to be very unlikely the claimant's employment would have continued, had a reasonable investigation been conducted. My assessment is there would have been a 15% chance the claimant's employment would have continued. In other words, I am of the view there would have been an 85% risk that dismissal would have been the outcome. I therefore consider it appropriate to reduce the compensatory award by 85%. This means the compensatory award is £1438.28.

**Contributory conduct**

199. Although the respondent seeks a reduction for contributory conduct, no submission was made regarding the basis for this. There is a statement in the ET3 to the effect that the claimant had not made her relationship status clear, though this was not expanded upon or referred to in submissions. Nevertheless, contributory conduct is an issue which I need to consider.

200. When considering a possible reduction for contributory conduct, the following passage from the Employment Appeal Tribunal in **Steen v ASP**

**Packaging Ltd** UKEAT/0023/13 explains how a Tribunal should approach the matter (paragraphs 8 to 14):

**8. In a case in which contributory fault is asserted the tribunal's award is subject to sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2), dealing with the basic award, provides:**

**"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."**

**9. Section 123(6) provides:**

**"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

**10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.**

**11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.**

**12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.**

**13. (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).**

**14. This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.**

*Question 1: what is the conduct which gives rise to potential contributory fault?*

201. I consider that the conduct which gives rise to potential contributory fault is the following conduct of the claimant, taken into account by Mr McNaughton and which led him to conclude that the claimant and Mr Daly were in a relationship: (a) the claimant not changing her name and not having started divorce or separation proceedings; (b) the joint mortgage for the property at Balunie Avenue remaining in place and the claimant not having applied for a single person discount in respect of Council tax; (c) the claimant still having a joint bank account with Mr Daly; (d) the claimant becoming pregnant in 2013, with Mr Daly being the father; (e) the claimant and Mr Daly having an overnight stay at The Witchery in November 2013; (f) the claimant and Mr Daly being together with the children and the claimant's sister in Applecross over Christmas in 2015; (g) the claimant going on holidays to Florida and Norway, with Mr Daly also attending; and (h) the claimant being with Mr Daly and their children at two family weddings.

*Question 2: was the conduct blameworthy?*

202. Further to the above passage from **Steen v ASP Packaging Ltd**, this involves the Tribunal establishing for itself what the claimant did or did not do.

203. The Court of Appeal, in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220, at paragraph 46, recommends that a Tribunal makes *"separate and sequential findings of fact on discrete issues"*, such as contributory conduct, even if this involves a degree of overlap with earlier findings.

204. I therefore make the following findings of fact which I consider to be relevant specifically for the purpose of addressing the question of whether the claimant's conduct was blameworthy.

*Findings of fact*

205. The claimant and Mr Daly started living together in 2003. They lived at a flat in Seagate in Dundee. They moved to a house in Balunie Avenue in Dundee from September 2006 and were joint owners of that property. The claimant's parents bought the flat in Seagate when the claimant and Mr Daly moved to Balunie Avenue.

206. The claimant and Mr Daly were married in 2007. They had three daughters together. Their relationship broke down in June 2012. The claimant decided that she and Mr Daly should separate. At first, Mr Daly remained in the house and slept on the sofa. In around September 2012, he moved out of the house and moved in with the claimant's younger brother, with whom Mr Daly was friends. This was at the flat in Seagate (owned by the claimant's parents). In around December 2012, Mr Daly moved to stay with a different friend at Lochee in Dundee. He moved back to the flat in Seagate in around July 2013. The claimant's brother still lived there, though a few months later he moved to Norway. Mr Daly remained in the flat.

207. From December 2012 the claimant travelled between Aberdeen and Dundee for work. She considered moving to Aberdeen with her three daughters. She was on a list for a Council house in Aberdeen and had also applied to Dundee City Council for housing. The claimant ended up staying at Balunie Avenue as she was later based only in Dundee for work. She did not wish to sell the house or change the mortgage into her own name, as the mortgage payments were low at around £250 per month and she was concerned that if she changed the mortgage then the cost would increase.

208. The claimant and Mr Daly had a joint bank account. The account was only used by Mr Daly and it was kept open after the claimant and Mr Daly separated to enable Mr Daly to continue to use it.

209. In the spring of 2013, the claimant and Mr Daly spent one night together. The claimant was going on a night out, and Mr Daly was to spend the night

with their three daughters at his friend's flat in Lochee. However, one of their daughters was unwell. Mr Daly therefore stayed with the children at the house in Balunie Avenue. The claimant had planned to go to a friend's house. However, she had been drinking alcohol that night and went back to her own house. Prior to this, the claimant and Mr Daly had not been speaking very much. When they learnt that the claimant was pregnant, Mr Daly took steps to try to rekindle the relationship. This included booking a night away at The Witchery in Edinburgh in November 2013 as a birthday gift for the claimant. However, this did not result in their reconciliation as a couple.

210. The claimant had fallen into arrears with her Council tax for Balunie Avenue. When she was contacted about this, she agreed to make good the arrears. She paid off the arrears between May 2014 and July 2016. Although she would have been entitled to apply for a single person discount, her focus was on repaying the arrears and she wanted that to be resolved. The claimant subsequently claimed the Council tax discount.

211. Before the claimant and Mr Daly separated, there had been discussions with the claimant's sister about a holiday to Florida. Following their separation, the claimant was unsure what to do. She eventually decided it would be good for the children if Mr Daly was to join them on the holiday. This was in October 2013 at a time when the claimant and Mr Daly had started speaking again as the claimant was pregnant. The holiday allowed the children to spend time with their dad. As a result, they planned another trip to Florida, which took place in 2015.

212. Mr Daly joined the claimant, their children and other members of the claimant's family, to a trip to Norway. This was to visit the claimant's younger brother, with whom Mr Daly was friends (they had shared a flat in Seagate in 2012 and 2013). This was a surprise for the claimant's brother's 30th birthday.

213. The claimant and Mr Daly attended two weddings together with their children after their separation. They were both family weddings. The claimant and Mr Daly maintained good relationships with each other's families. One of the weddings was Mr Daly's sister, and the claimant attended with the children as she wanted the children to meet their cousins. During those weddings, photographs were taken of the claimant, Mr Daly and their children together.

214. Mr Daly also joined the claimant, their children, and other members of the claimant's family at Christmas in 2015 in Applecross, which is where the claimant's sister lives. This allowed Mr Daly to see his children at Christmas. The claimant and Mr Daly travelled there separately and stayed in separate accommodation.

215. The claimant has not yet divorced, mainly because after separating in June 2012 she focused on potentially moving to Aberdeen, and then having a baby (unexpectedly) and subsequently being involved in the proceedings which led to her dismissal. The claimant is also concerned about whether she can afford to divorce. She has to date kept her married name out of convenience, and also because her children use the name Daly.

216. The claimant was subject to a compliance check into her tax credit claim for the year 2012/13. She provided documentation, including a Council tax notice for the year 2013/14 in her own name. She explained the mortgage was in joint names, but that she was looking to secure affordable housing for herself and her children after which a decision would be taken on whether to sell the house. The claimant confirmed that she had put her name down for social housing in Aberdeen and Dundee. The claimant was subsequently informed there was to be no change to her tax claim for 2014.

*Conclusion on whether the conduct was blameworthy*

217. My conclusion is that the claimant and Mr Daly had an amicable separation and took steps to make things work as best they could, for the benefit of their children. I do not consider that the claimant becoming pregnant means

they were in a relationship. Notwithstanding a night away in Edinburgh in November 2013, instigated by Mr Daly, they did not reconcile as a couple. They spent some time together, mainly with the claimant's extended family on occasions which centred around weddings, Christmas and special holidays. I am satisfied there is a reasonable explanation for matters such as the joint mortgage and bank account remaining in place and the claimant not initially claiming a single person Council tax discount. The claimant also took steps to clarify her relationship status when requested.

218. I therefore do not consider the claimant's conduct to have been blameworthy, and as such it would not be appropriate to make any reduction to the compensatory award on the basis of contributory conduct.

*Contributory conduct: the basic award*

219. With regard to the basic award, the issue is whether it would be just and equitable to make a reduction.

220. The claimant has been unfairly dismissed, and the basic award is intended to reflect her past service and loss of job security. I have already concluded that her conduct was not blameworthy.

221. In these circumstances, I do not consider it would be just and equitable to reduce the basic award.

**Total award**

222. The total monetary award is **£6933.80**.

223. For recoupment purposes, the prescribed element is £1367.03 (£9113.52 less 85%). The relevant government department will serve a notice on the respondent stating how much is due to be repaid in respect of jobseeker's allowance.

224. In the meantime, the respondent should only pay to the claimant the amount by which the total monetary award exceeds the prescribed element. The balance will be payable when the respondent receives the said notice.

**Employment Judge:** **Giles Woolfson**
**Date of Judgment:** **05 April 2019**
**Entered in register:** **05 April 2019**
**and copied to parties**