EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103492/2017

Held in Glasgow on 21, 22, 23, 24, 25, and 28 January 2019; and 30 April 2019 (Final Hearing) 14 and 31 May 2019, and 10, 17 and 29 June 2019 (Written Representations); 10 and 11 July 2019 (Further Written Representations); and 31 March 2020 (Members' Meeting)

Employment Judge I McPherson
Tribunal Member Mrs L M Millar
Tribunal Member Mr D Frew

Miss Morag Jardine	**Claimant In Person**
The Scottish Ministers (Rural Payments and Directorate)	**Respondents**
	Represented by: Dr Andrew Gibson - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that: -

(1) The claimant's opposed application of 10 July 2019 for anonymisation of this Judgment, in terms of **Rule 50 of the Employment Tribunals Rules of Procedure 2013**, is **refused** by the Tribunal, it not being in the interests of justice to do so, given the principle of open justice, where the identities of specified parties, witnesses and other persons were referred to openly in the public hearing of this case at the Final Hearing held before the Tribunal, they were named and identified in the many documents produced to the Tribunal in parties' Bundles and spoken to in evidence, and her application for anonymisation was made after the close of the Final Hearing.

(2) However, to protect the specific identity of certain persons and premises who were inspected by the respondents, and / or who applied for and / or were in receipt of grants administered by the respondents, which detail is not relevant or necessary for the purposes of this Judgment, the Tribunal has redacted in this Judgment the identities of the specific premises concerned, in order to protect any applicable **Article 8** Convention rights of such persons to respect for their private and family life, and publication of which detail would otherwise likely lead to identification of those persons, and such premises have accordingly been referred to in this Judgment by the use of Alpha ciphers throughout, and referred to them as properties A, B, C &D.

(3) There was no extant complaint of automatically unfair dismissal in a health and safety case, in terms of **Section 100 of the Employment Rights Act 1996**, before the Tribunal in the claimant's ET1, as paragraphs 11 and 14 of the paper apart to that ET1 claim form, as accepted by the Tribunal on 14 September 2017, and relied upon by the claimant, do not contain any such complaint, but relate to alleged protected disclosures regarding raising health and safety issues, and, further, and in any event, the claimant did not make any such complaint as part of her evidence in this case as presented to this Tribunal at the Final Hearing.

(4) The alleged disclosures to the respondents, as relied upon by the claimant at this Final Hearing, do not constitute protected disclosures, in terms of **Section 43B of the Employment Rights Act 1996.**

(5) The claimant's complaint, in terms of **Section 103A of the Employment Rights Act 1996,** alleging automatically unfair dismissal for making a protected disclosure, is not well-founded, and her claim against the respondents is accordingly **dismissed** in its entirety by the Tribunal, as the Tribunal is satisfied that the reason for her dismissal was conduct, and that her dismissal by the respondents for that reason was not unfair.

REASONS

Introduction

1. This case first called before us, as a full Tribunal, on the morning of Monday, 21 January 2019, for a 6-day Final Hearing, for its full disposal, including remedy if appropriate, as previously intimated to parties' representatives by the Tribunal by Notice of Final Hearing dated 5 September 2018.

2. In the event, the Final Hearing did not conclude within the allocated sitting, and it had to be continued to one further day, on Tuesday, 30 April 2019, for closing submissions from both parties, as per Notice of Continued Hearing issued by the Tribunal on 12 February 2019.

3. While we reserved Judgment, following the close of that Continued Hearing, on 30 April 2019, there has subsequently been an unfortunate, but unavoidable, series of delays in our Judgment being progressed. Further, as detailed later in these Reasons, there was subsequent post Final Hearing correspondence from the claimant, which we have also had to take into account.

4. The delay in this Judgment being issued, since 30 April 2019, had initially been down to the Employment Judge's other judicial commitments, as well as some annual leave, and for that delay on his part, he offered his apology to both parties, as per email from the Tribunal dated 17 July 2019.

5. In that email, given parties' correspondence with the Tribunal, on 10 and 11 July 2019, about ***"identity disclosures***", and **Rule 50** anonymisation, they were advised that the full Tribunal would require to meet again to consider those matters and conclude their deliberations.

6. Yet further delay was thereafter occasioned by the Employment Judge being away on annual leave for about 3 weeks in July and August 2019, and thereafter, much more significantly, the Judge's sick leave absence from 16

September 2019 to 25 November 2019. Parties were advised of that absence by the Tribunal on 16 September 2019, at which stage it was not clear when the Judge would return to work, and be able to progress this Judgment and Reasons.

7. The Judge apologises to both parties for this further delay in concluding his draft for discussion with the lay members of the Tribunal, which has resulted in consequential delay in fixing a Members' Meeting to allow the Tribunal to conclude its private deliberations, in chambers, to take account of the evidence heard, closing submissions made, and subsequent further written representations from both parties.

8. While it had been hoped to have a Members' Meeting in January / February 2020, that proved impracticable due to other commitments of the Tribunal panel members, and Judge, and Tuesday, 31 March 2020, was the earliest mutually convenient time for the full panel to meet. On account of the ongoing Covid-19 pandemic, and Presidential Guidance and Directions, the Tribunal did not meet in person, but by telephone conference call.

Claimant's applications to postpone Final Hearing, and amend ET1 claim form, refused by the Tribunal

9. Throughout this Final Hearing, the claimant has acted as an unrepresented, party litigant, her former solicitor, Mr Stephen Smith from Beltrami & Co, Glasgow, having withdrawn from acting from her, on 7 January 2019, in the lead up to the start of the Final Hearing.

10. Further, in the lead up to the start of this Final Hearing, there was much interlocutory correspondence between the claimant, Dr Gibson as the respondents' representative, and the Tribunal. The claimant's application to postpone this listed Final Hearing was refused by the Judge, sitting alone, on 16 January 2019, it having been made at a late stage, and it not being in the interests of justice to postpone it.

11. Further, at the suggestion of the respondents' representative, Dr Gibson from Morton Fraser LLP, Glasgow, the Judge exceptionally arranged a Case Management Preliminary Hearing in private on the afternoon of Friday 18 January 2019, which both the claimant and Dr Gibson attended.

12. At 09:20 am that morning, 18 January 2019, and at that afternoon's Case Management Preliminary Hearing, the claimant intimated an extensive application to amend her ET1 claim form. Having heard from her, and the respondents' representative, opposing the amendment, the Judge refused her amendment application orally, and stated that a written Judgment with Reasons would follow in due course.

13. An email confirming the Judge's refusal, and setting out various case management orders, was sent to the claimant, and Dr Gibson, by the clerk to the Tribunal at 16:36 pm that same afternoon. Thereafter, on Monday, 21 January 2019, being day 1 of 6 of the listed Final Hearing, before this full panel, the Judge signed a written Judgement, entered in the register and copied to both parties that same day, under cover of a letter from the Tribunal dated 21 January 2019.

14. In that Judgment, the Judge refused the claimant's amendment application of 18 January 2019 on the basis that (1) it was not in the interests of justice to allow the proposed amendment, given the nature and timing of the amendment application made by the claimant at a very late stage in these proceedings, and (2) to have allowed the proposed amendment, in the terms sought by the claimant, would have had an adverse impact on the efficient and effective conduct of the listed 6-day Final Hearing.

15. Full Written Reasons, extending to some 20 pages, were issued later by the Judge, on 5 February 2019, to both parties, in terms of **Rule 62 of the Employment Tribunals Rules of Procedure 2013**.

16. Further, we pause here to note and record that while the claimant, on 1 and again on 13 February 2019, sought to have the Judge reconsider that Judgment, inviting reconsideration of the judgment to refuse to conjoin the **Equality Act 2010** claims made in her original ET1 submitted in August 2017 (which were never dismissed) and which she had re-submitted along with her fresh claim on 21 January 2019, the claimant later withdrew that reconsideration application by email to the Tribunal on 4 April 2019, copied to Dr Gibson for the respondents.

Fresh Claim against the Respondents

17. While, from the Case Management Preliminary Hearing held on 16 August 2018, it was anticipated that the claimant's then solicitor, Mr Smith, might bring a fresh claim against the respondents, before the start of this Final Hearing, that did not happen.

18. We also note and record here that, on 21 January 2019, the claimant herself submitted a fresh ET1 claim form and that claim was the subject of separate Tribunal proceedings against these respondents under case number **4100324/2019.**

19. An application by the claimant, at this Final Hearing, on 21 January 2019, to conjoin this claim with that new claim was refused by the Tribunal, as have subsequent applications by her in that other claim.

20. Following a public Preliminary Hearing before the Judge sitting alone, on 24 June 2019, that second claim by the claimant against the respondents was subsequently dismissed by the Tribunal, by a judgment dated 11 December 2019.

Claim and Response before this Tribunal

21. Following ACAS early conciliation between 5 and 31 July 2017, by ET1 claim form, presented on the claimant's behalf, by her then solicitor, Mr Stewart Healey, Livingstone Brown, Glasgow, on 29 August 2017, the claimant brought proceedings against the Scottish Government (Rural Payments and Inspections Directorate).

22. She complained of being automatically unfairly dismissed, contrary to **Section 103A of the Employment Rights Act 1996**, for making a protected disclosure, and further alleged that she had been discriminated against on the grounds of age, disability and sex, arising from the termination of her employment on 21 April 2017 as an Agricultural Officer employed by the respondents at Portree Area Office.

23. In the event of success with her claim, the claimant sought re-engagement and compensation from the respondents, albeit her claim form indicated she had got another job on 7 August 2017. Having less than two years' qualifying service, there was no complaint of "ordinary" unfair dismissal under **Section 94 of the Employment Rights Act 1996**. Her ET1 claim form was accepted by the Tribunal, on 4 September 2017, and a copy served on the respondents on that date for reply by 2 October 2017.

24. On 2 October 2017, Ms Kirsty Stevens, Solicitor, Scottish Government Legal Directorate, Edinburgh, lodged an ET3 response on behalf of the Scottish Ministers as proper respondents, resisting the claim, and raising preliminary issues about the Tribunal's jurisdiction regarding time-bar points under **Section 123 of the Equality Act 2010** as regards the discrimination claims, and seeking strike out of the claim for no reasonable prospect of success.

Procedural History

25. There was a telephone conference call Case Management Preliminary Hearing held on 10 November 2017, before Employment Judge James Henry, where the claimant was represented by her solicitor, Mr Healey, from Livingstone Brown, and the respondents by Dr Andrew Gibson, solicitor with Morton Fraser, Glasgow, who had been instructed on behalf of the

respondents. A written Note and Orders issued by Judge Hendry was sent to parties' representatives under cover of a letter from the Tribunal dated 25 November 2017.

26. In his Orders, Judge Henry allowed 21 days for Mr Healey to provide further and better particulars of the claim, with 21 days thereafter for the respondents to adjust their pleadings in reply, and it was agreed that a Preliminary Hearing should thereafter be listed to deal with the identified issues of time-bar and prospects of success.

27. The claimant's further and better particulars were intimated on 28 December 2017, by Mr Healey, and the respondents' reply thereto, from Dr Gibson, was intimated on 25 January 2018. It was not clear whether the further and better particulars were meant to replace the original ET1 paper apart in its entirety or supplement it, although Dr Gibson suspected the latter, and he sought to incorporate his answers into the respondents' original response by way of amendment.

28. Given Judge Henry's Order allowing adjustment, when the case first called before me, as an Employment Judge sitting alone, in private, for a Case Management Preliminary Hearing, held on 16 August 2018, I took it as being that the ET1 was to be read with the further and better particulars supplementing it, and the ET3 to be read along with the respondents' reply.

29. While, on 8 December 2017, a one-day Preliminary Hearing was assigned for 28 February 2018, on time-bar, in the event, that Preliminary Hearing did not proceed. It was cancelled, on 27 February 2018, by Employment Judge Shona MacLean, on the respondents' application, on the grounds that it was not required.

30. On 20 February 2018, Mr William McParland from Livingstone Brown, acting for the claimant, clarified that the claim was only for automatic unfair dismissal for making protected disclosures, the claims under the **Equality Act 2010** and

Section 12(3) of the Employment Relations Act 1999 having been withdrawn in Mr Healey's further and better particulars for the claimant.

31. On that basis, Dr Gibson, for the respondents, on 20 February 2018, confirmed that the respondents were no longer insisting on their preliminary pleas of time bar and no reasonable prospects of success. He asked for the Preliminary Hearing to be discharged and date listing letters issued for a Final Hearing in Glasgow in May / July 2018.

32. On 27 February 2018, Mr Mark Allison of Livingstone Browne advised that the claimant was agreeable to discharge of the Preliminary Hearing, and he proposed a procedural Preliminary Hearing within the following 2 to 3 weeks, as there appeared to be some confusion, on the claimant's part, from her emails to the Tribunal, about her claims, where, on 20 February 2018, she had advised the Tribunal that she "***felt press ganged into removing elements of my complaint.***"

33. Dr Gibson, in replying on 27 February 2018, confirmed he had no objection to Mr Allison's proposal, and a fresh Case Management Preliminary Hearing was listed, on 12 March 2018, to proceed for 2 hours on 23 March 2018 in person. In the event, that was itself postponed, on instructions from Employment Judge Mark Whitcombe, after Livingstone Brown withdrew from acting for her, on 22 March 2018, and so she was unrepresented, and the claimant herself requested more time to prepare.

34. Thereafter, on 10 April 2018, the Tribunal relisted the case for a fresh Case Management Preliminary Hearing, to proceed for 2 hours on 23 May 2018 in person. In the event, that was itself postponed, and relisted, on the claimant's application, on 15 May 2018, as she had not then secured new legal representation. It was relisted for 19 July 2018, but that too was cancelled. On 19 June 2018, the claimant emailed the Tribunal to advise that she was in discussions with Mr Stephen Smith of Beltrami & Co.

35. On 6 July 2018, Employment Judge Frances Eccles postponed the Hearing listed for 19 July 2018, on the claimant's application, no objection from the respondents, on the grounds that Mr Smith, the solicitor to be representing her, was unavailable until the end of July 2018. The case was then relisted, on 9 July 2018, for a 2-hours, in person, Case Management Preliminary Hearing to be held in private on 16 August 2018.

36. In advance of that Hearing, on 10 August 2018, Dr Gibson, for the respondents, emailed the Tribunal, with copy to the claimant and Mr Smith, attaching a copy of the Court of Appeal's judgment in **Khan v Heywood & Middleton Primary Care Trust [2006] EWCA Civ. 1087,** stating that once a claim has been withdrawn, it is not open to a Tribunal to set aside that withdrawal, as the proceedings have been brought to an end, and the fact that withdrawn proceedings have not been dismissed does not mean that they could be continued.

37. Dr Gibson submitted that there was no reasonable prospect of success for the claimant having the withdrawal of previous parts of her claim set aside, and he further advised that the respondents sought a one day Preliminary Hearing to determine the claimant's only remaining claim of automatic unfair dismissal as a result of making protected disclosures, and that that Preliminary Hearing should be to determine the question of whether the claimant did make any protected disclosures as defined by **Section 43B of the Employment Rights Act 1996.**

38. By email from the claimant, on 13 August 2018, to the Tribunal, copied to Dr Gibson and Mr Smith, she suggested that **Khan** is "***something of a red herring here",*** she was not convinced it was authoritative, and she believed her harassment and discrimination claims to have fair prospect of success, or she would not have included them, and she alleged that Livingstone Brown did not properly consult her, nor did she give her consent or instructions, for the revised claim, and as she had previously made clear to the Tribunal, she felt "***unduly pressured***" by Livingstone Brown.

39. By letter from the Tribunal dated 14 August 2018, issued on instructions from Employment Judge Robert Gall, he directed parties' correspondence of 10 and 13 August 2018 be placed on the casefile, and advised that the claimant's position on the principle and application of **Khan** could be discussed at the Case Management Preliminary Hearing, on 16 August 2018, as well as arrangements for a Final Hearing, including determination of the nature of that Hearing.

40. Finally, by email on 15 August 2018, Mr Smith confirmed that he was now instructed by the claimant, and he would be representing her, and he would address the Tribunal at that Case Management Preliminary Hearing on the claimant's position in respect of the elements of her claim against the respondents which her previous agents told the Tribunal in December 2017 were being withdrawn.

41. At that Case Management Preliminary Hearing, Mr Smith appeared, accompanied by the claimant, while Dr Gibson appeared for the respondents. Discussion then ensued, and various case management orders and directions by the Judge were made, including listing this 6-day Final Hearing, and followed up in his written Note and Orders dated 22 August 2018, copied to both parties' representatives under cover of a letter from the Tribunal dated 27 August 2018.

Part-Withdrawal of the Claim, and Rule 52 Judgment

42. In particular, Mr Smith advised that while the claimant intended to raise a fresh claim against the respondents, in respect of any parts of the claim, under the **Equality Act 2010**, previously withdrawn by her former solicitor, Mr Healey, she intended to pursue her remaining complaint against the respondents, in terms of **Section 103A of the Employment Rights Act 1996**, alleging automatically unfair dismissal for making a protected disclosure, as also what the claimant argued was an extant complaint, in the ET1 claim form, that she

was automatically unfairly dismissed by the respondents, in a health and safety case, contrary to **Section 100 of the Employment Rights Act 1996**.

43. At that Case Management Preliminary Hearing, Mr Smith withdrew, as intimated by Mr Healey, any claim under the **Equality Act 2010**, and / or any claim under **Section 12(3) of the Employment Relations Act 1999** (dismissal for seeking trade union representation at a disciplinary meeting), as per **Rule 51 of the Employment Tribunals Rules of Procedure 2013**, but the Judge reserved consideration of whether or not he should issue a **Rule 52** dismissal judgment in respect of those withdrawn parts of the claim in the respondents' favour.

44. Thereafter, on 29 August 2018, and as detailed in a supplementary written Note and Orders of 29 August 2018, the Judge issued a judgment under **Rule 52** dismissing the **Section 12(3)** complaint only, but not any claim under the **Equality Act 2010,** the claimant having expressed a wish to reserve the right to bring a further claim raising the same **Equality Act 2010** complaint against the respondents.

45. That **Rule 52** Judgment, and the Judge's supplementary Note and Orders of 29 August 2018, were both copied to both parties' representatives under cover of separate letters from the Tribunal dated 4 September 2018.

Final Hearing before this Tribunal

46. When the case first called before us, as the full Tribunal, on the morning of Monday, 21 January 2019, the claimant was in attendance, unrepresented, and unaccompanied. Dr Gibson attended, representing the respondents, and unaccompanied. At the Case Management Preliminary Hearing on Friday, 18 January 2019, the claimant had advised the Judge that she had not secured any alternative legal representation after Beltrami & Co had withdrawn, and that as she was no longer a member of the PCS trade union, she had no representation from that source either.

47. Much of the proceedings on the first day of this Final Hearing was taken up by housekeeping, by way of a further Case Management Preliminary Hearing in private before the Judge, but with both lay members in attendance, by agreement of both parties, seeking to clarify the issues in dispute between the parties, and setting forth an indicative timetable for the leading of witnesses from both sides, and for the claimant to provide an updated Schedule of Loss.

48. Although originally ordered on 16 August 2018, when the claimant had Mr Smith representing her, and he had provided a Schedule of Loss on 19 September 2018, answered by the respondents' Counter-Schedule from Dr Gibson, on 29 October 2018, that Schedule of Loss had not been brought up to date and intimated to the Tribunal, and / or respondents' representative, prior to the start of this listed Final Hearing. Similarly, there was no agreed List of Issues, nor any Joint Statement of Agreed Facts, again both of which had been ordered on 16 August 2018, at a stage when both parties were legally represented.

49. While a Bundle had been lodged by Dr Gibson, there was dispute by the claimant as to whether or not it was a Joint Bundle, and, in the course of the Final Hearing, we allowed various additional documents to be added to the Bundle, but so too did we refuse to allow other documents to be lodged.

50. Initially, as lodged, and in large white A4 ring binders, there were 81 documents, duly indexed and paginated, from pages 1 to 492, to which document 93A was added, after pages 93 to 114 of the Bundle, on the claimant's application, being her performance appraisal counter-signed by Mr Ewen MacPherson, Principal Agricultural Officer, on 19 December 2016, but marked up with her red pen typed revisals / comments, and deletions from the original text.

51. During the course of the Final Hearing, other documents were added, on application of either the claimant, or the respondents' representative, so that

by the close of evidence on day 6, the Joint Bundle had increased from 81 documents at 492 pages to 122 documents, and 625 pages.

52. Reverting now to the Joint Bundle, we note and record that, on day 3, we added to the Bundle, on Dr Gibson's application, documents 112 to 114, at pages 568 to 602, being the signed off final versions of Jane Stewart's dismissal letter and meeting note of 21 April 2017, and the appeal hearing notification of 19 May 2017, and appeal outcome letter of 3 July 2017, being Willie Cowan's decision following the appeal hearing of 27 June 2017, which were not in the original Bundle, despite being relevant and necessary documents for the Final Hearing. Scottish Government Probation Policy and Procedure, and Discipline Policy, were also added to the Bundle, not having been included in the original Bundle.

53. We further note and record here that, on day 2, being 22 January 2019, in respect of certain documents in the Bundle, lodged by him, there were documents, at pages 182, 200, 225 and 226, that were marked "***legally privileged advice"*** from the Scottish Government Legal Directorate, but Dr Gibson advised us that the respondents waived any legal privilege that attached to those documents, and so they were spoken to in evidence before us, without any objection.

54. The claimant provided an updated Schedule of Loss on 23 January 2019, seeking **£25,224.57,** rather than the **£10,640.96** set forth in her then solicitor's Schedule of Loss originally intimated by Mr Smith on 19 September 2018, as per page 492 of the Bundle. Her updated Schedule of Loss superceded page 492. She also confirmed that she was not seeking reinstatement or reengagement by the respondents, in the event of success with her claim, only an award of financial compensation from the respondents.

55. We record here that, for the good and orderly conduct of the Final Hearing before us, given the significant number of case management applications, and objections, that arose during the first 6 days of this Final Hearing, we noted

them fully in a series of four written Notes and Orders of the Tribunal, dated 23 January 2019, and 6, 7 and 11 February 2019, so as to place on record, and make available to both parties, for ease of reference, our various interlocutory rulings.

56. On account of that housekeeping, and various interlocutory rulings by the Tribunal, where we refused to postpone / continue the listed Final Hearing to another date, and conjoin it with the claimant's new claim, we refused to allow her to call Mr Philip Canavan as a witness, and we refused some additional documents, but allowed some others, evidence from the claimant did not start until late afternoon on day 1, and so her evidence was continued over to day 2.

57. On day 2, the claimant being late in attending, and on account of the need for further adjournments, and further interlocutory rulings by the Tribunal, where we allowed certain additional documents lodged by both parties, her sworn evidence did not resume until that afternoon, when it again had to be adjourned, part-heard, to resume the following morning.

58. On the morning of day 3, there was a further late start, occasioned by the claimant seeking to lodge additional documents, some of which we allowed, but we refused others, and Dr Gibson only started his cross-examination of the claimant later that afternoon, and continued to the following day.

59. On day 4, there was a further late start, occasioned by the claimant seeking to lodge yet more additional documents, and the Tribunal requiring to make an interlocutory ruling, some of which we allowed, but we refused others, and after the claimant's evidence concluded, Dr Gibson led the first of his witnesses, Mr David Wright, whose evidence concluded that afternoon.

60. Further, on day 5, the Tribunal had to start the day by considering a further application by the claimant, to lodge additional documents, which we allowed, so it was late morning before the Tribunal proceeded to hear sworn evidence

from the claimant's two witnesses, Mrs Katerina Munro, and Mrs Louise Kowalksa, followed by some evidence from the respondents' second witness, Mrs Jane Stewart, whose evidence had to be adjourned, part-heard to resume the following Monday morning.

61. On Monday, 28 January 2019, being day 6 of 6, the Tribunal had to start the day by considering a further application by the claimant, to lodge additional documents, which we refused, and to reconsider an earlier ruling of 21 January 2019 refusing to allow her to lodge a part transcript, and / or recording of her covert recording of her appeal hearing with Willie Cowan on 27 June 2017, which was again refused by the Tribunal for the reasons then given.

62. Accordingly, on that day 6, it was late morning before the Tribunal proceeded to hear further sworn evidence from Jane Stewart, and thereafter Willie Cowan, and by sitting late until 5.12pm that afternoon, we managed to conclude the evidence from the respondents, and thus the evidence in the case.

63. We thereafter made further case management orders, relating to the Hearing on Submissions, which we fixed for Tuesday, 30 April 2019, with outline written closing submissions to be exchanged by 23 April 2019. The Judge's orders were thereafter confirmed by letter from the Tribunal on 30 January 2019.

64. In summary, during the first 6 days of this Final Hearing, we allowed the claimant to lead evidence from herself, and then two further witnesses, **Katerina Munro, and Louise Kowalksa**, who were interposed, during ongoing evidence from the respondents' witnesses, as they could not attend at the close of the claimant's own evidence, but we refused to allow her to lead evidence from **Philip Canavan**, as we were not satisfied that he was a relevant and necessary witness for a fair hearing of the case. For the respondents, we heard evidence from **David Wright, Jane Stewart, and Willie Cowan**.

Correspondence post close of day 6 of the Final Hearing

65. In 4 separate items of correspondence to the Tribunal, on 13 February 2019, by email, over about ½ an hour, the claimant enquired whether further evidence could be heard, stating: "***There is a lot more evidence I would have liked the opportunity to state orally and submit in writing.",*** and she also enquired ***"if it would be efficient or practical to have full content of the second ET1 considered",*** and she further complained that Dr Gibson's Bundle, as she labelled it, ***"contained documentation which should have been provided to me during my FOI / SAR request provided to me in May and June 2017."***

66. On the Judge's instructions, an email was sent to the claimant, and copied to Dr Gibson, on 22 February 2019, stating that the opportunity for both parties to lead evidence was at the Final Hearing held between 21 and 28 January 2019, which had adjourned, for closing submissions on 30 April 2019, with evidence from both parties having been led, and concluded, and that 30 April 2019 had been scheduled solely for summing up.

67. That correspondence to parties further stated that as such it would not be possible for either party to have the opportunity to submit any more evidence unless, in the interests of justice, new evidence had become available since the conclusion of evidence on 28 January 2019, the existence of which could not have been reasonably known or foreseen at that time, and a party requested the case be re-opened for further evidence, and the Tribunal agreed to that, having heard from the other party first.

68. What was or was not provided to the claimant through FOI / SAR was stated to be a matter not within the jurisdiction of the Tribunal, and the claimant should take that up with the respondents, or the appropriate regulator, and not this Tribunal. It was also confirmed that as regards her new claim, it had not been combined with this case, and that it was proceeding towards a Case Management Preliminary Hearing assigned for 5 April 2019.

69. On 4 March 2019, the claimant emailed the Tribunal, with copy to Dr Gibson, stating that she had given thought to the Judgment in this case being anonymised, but she did not want it anonymised. The Tribunal, in its letter of 29 January 2019 to both parties, had asked them both to state, by 23 April 2019, whether or not they had any application to make to the Tribunal, under **Rule 50**, for anonymisation of the parties, witnesses, or other contents of the Tribunal's written Judgment and Reasons, which would be available for public access online after promulgation in due course.

70. In her reply, the claimant stated***: "This case was brought, along with other matters originally pled within the ET1, on the grounds of unfair dismissal for making protected or "public interest" disclosures. No matter how the case turns out legally, be my claims well pled or not, evidence permitted in what is mainly Dr Gibson's bundle, or not, I stand by my claims, and refute the combination of distorted versions of events and outright lies presented by Portree colleagues about me and which HR helped them to produce."***

71. On 14 March 2019, Dr Gibson advised the Tribunal, with copy to the claimant, that he had no comment to make on her correspondence of 4 and 5 March 2019. In the latter, she had proposed drafting a Statement of Facts, but no Agreed Statement of Facts was provided to us when we reconvened on 30 April 2019 for the Hearing on Submissions.

72. Further, on 10 April 2019, the claimant emailed the Tribunal, with copy to Dr Gibson, stating that she wished to submit evidence which was not available at the time of the Final Hearing in January 2019, but she did not detail what evidence, so, on the Judge's instructions, on 23 April 2019, an email was sent to her, copied to Dr Gibson, stating that any application to submit new evidence should be made, by written application, by 4.00pm that afternoon, being the date previously set, on 28 January 2019, for receipt of both parties'

closing submissions, and, any such application, if opposed, would be addressed at the start of the Continued Final Hearing on 30 April 2019.

73. On 17 April 2019, Dr Gibson intimated to the Tribunal, with copy sent to the claimant, the respondents' 7-page typewritten written submissions for the Hearing on Submissions scheduled for 30 April 2019. On 23 April 2019, at 11:24am, and again at 14:48pm, the claimant emailed the Tribunal, with copy to Dr Gibson, requesting an extension of time until 11.59pm that evening to submit her application to consider new evidence, and to submit her closing submissions. She stated that she would ***"struggle to manage today's deadline at 4pm."***

74. At 23.58pm that evening, the claimant sent a further email to the Tribunal, copied to Dr Gibson, stating that she was still struggling to submit a draft Joint Statement of Facts, new evidence, and closing submissions, and requesting a further extension to 4pm on Friday 26 April 2019, and for the Hearing on Submissions arranged for 30 April 2019 to be delayed until 3 May 2019 if possible. Further, at 00.55am on 24 April 2019, she submitted a further email, seeking to have an "***Appeal Timeline***" document submitted as new evidence.

75. On being referred to the Judge, on 25 April 2019, he noted Dr Gibson's email of 24 April 2019 stating that the respondents had no objection to an extension of time being allowed to the claimant to submit her closing submissions, but they would be opposing any application for new evidence to be submitted by her, and he also strongly opposed any application to adjourn the Hearing on 30 April 2019, stating that, in any event, he was not available on 3 May 2019, the other date suggested by the claimant.

76. On the Judge's instructions, a reply was sent by the Tribunal to both parties, at 09.53am on 25 April 2019, stating that parties' correspondence of 23 and 24 April 2019 had been noted, and the Judge had allowed the claimant until no later than 4pm on Friday, 26 April 2019 to lodge her closing submissions, but her application for an extension until 3 May 2019 was refused, as she had

had sufficient time since 30 April 2019 was fixed, and it was not in the interests of justice to postpone the listed Hearing on 30 April 2019.

77. When that reply was issued by the Tribunal, the claimant's further email of 25 April 2019 at 07.02am, seeking a further extension of time to "***first thing Monday morning, 29 April"*** had not been linked to the file, nor referred to the Judge. On being referred to the Judge, on 26 April 2019, a further letter was sent, on the Judge's instructions, to both parties, stating that the claimant's closing submissions must be received by the Tribunal, and by Dr Gibson, by no later than 9.30am on Monday, 29 April 2019, and that, at the Hearing on Submissions, on Tuesday, 30 April 2019, the Tribunal would only have regard to an agreed Joint Statement of Facts if it was mutually agreed and signed off as agreed by both parties.

78. Further, the Tribunal's letter of 26 April 2019 stated that as evidence had concluded at the Final Hearing held in January 2019, other than an update from the claimant regarding her current circumstances, and any change to her Schedule of Loss to reflect other earnings since the last day of the Final Hearing, it was not anticipated that there would be any further evidence led but, if the claimant sought to lead further evidence, she should detail what it was, and explain why it was not led at the Final Hearing, so that the Tribunal could consider her request, in light of any comments or objection by the respondents.

79. By email to the Tribunal, copied to Dr Gibson, sent at 10.19am on Monday, 29 April 2019, the claimant attached her 10-page typed closing submission, reserving the right to refine it slightly in advance of its presentation the following morning, and stating that she wished to submit her original appeal timeline as new evidence not previously available " ***as my own experience of this employment has been drowned out by the huge volume of allegations made against me. I wish to submit the {"property C"} emails as evidence",*** and "***anything else will be presented tomorrow***."

80. She attached a copy of a document entitled "***Evidence Item 19a***", running to some 28 pages, which we understood she had submitted to Willie Cowan as part of her internal appeal against dismissal, and some emails, about a specific sheep inspection at property C, running to a further 9 pages. On a Joint Statement of Facts, the claimant stated that "***the closest thing to this is probably the timeline which has been accepted into the joint bundle at 552-553",*** but she might present a revised version first thing the following morning.

81. Following referral to the Judge, of 4 emails from the claimant sent on 23 April 2019, and on his instructions, a detailed set of instructions for the conduct of the Continued Final Hearing on Tuesday, 30 April 2019, was emailed to both the claimant and Dr Gibson at 12.27pm on the afternoon of Monday, 29 April 2019.

82. The Tribunal's correspondence of 29 April 2019 clarified that this case, and the other linked case **4100324/19**, are not combined, but her two claims are separate, and distinct claims, each with its own casefile, and that correspondence about that other claim should not be included in correspondence about this claim, and that her concerns about her former legal representatives are not a matter for this Tribunal, but between her and her former agents at Livingstone Browne and / or Beltrami & Co, and the appropriate regulatory bodies for Scottish solicitors.

83. Further, following referral to the Judge of the claimant's email of 29 April 2019 at 10.19am, and on his instructions, a further email about the conduct of the Continued Final Hearing on Tuesday, 30 April 2019, was emailed to both the claimant and Dr Gibson at 13.24pm on the afternoon of Monday, 29 April 2019. It allowed the claimant's closing submissions to be received, although intimated after the extended time for compliance, stating that her application to add additional evidence would be discussed at the start of the Hearing the following morning, and reminding her of the Tribunal's overriding objective under **Rule 2**, and her duty to assist the Tribunal in that regard.

Continued Final Hearing / Hearing on Submissions

84. When the case called again before us, on the morning of Tuesday, 30 April 2019, the claimant was in attendance, unrepresented, and unaccompanied, and the respondents were again represented by Dr Gibson, again unaccompanied. As we record later in these Reasons, we heard closing submissions from both the claimant and Dr Gibson for the respondents. Thereafter, we had some initial private discussion, in chambers, but adjourned to allow the Judge to prepare a draft written Judgment and Reasons for discussion with the lay members of the Tribunal, at a Members' Meeting on a date to be thereafter arranged.

Additional Written Representations from Parties

85. After the close of the Continued Final Hearing, held on 30 April 2019, we allowed the claimant, as per email sent to both parties on 1 May 2019, 14 days to produce to the Tribunal, with copy sent at the same time to Dr Gibson, documentary evidence of her earnings from her current employer to 30 April 2019, by producing either P60 to 5 April 2019, and copy payslips thereafter, or copy payslips from 23 January to 30 April 2019, so as to update the mitigation evidence received by the Tribunal at the 6 day Final Hearing held in January 2019.

86. As this is a convenient place to do so, we note and record here that the claimant's email of 14 May 2019, copied to Dr Gibson, and enclosing P60, and some copy payslips from Robertson Group Ltd, we have treated as written representations from the claimant, to which no comment or objection has been made by Dr Gibson on behalf of the respondents. Accordingly, we have used the pay records information provided in drafting our findings in fact, set forth later in these Reasons. We have not taken into account the claimant's additional commentary, in her email of 14 May 2019, about lack of training opportunity, post her suspension from work by the respondents, nor

her comments about a relocation package offered to a male new start, as that was not requested by us, and it was not relevant to what we had asked her to provide to us.

87. The claimant wrote again to the Tribunal, on 31 May 2019, about the value of that relocation package, stating that while this information might not be relevant to our decision, she was providing it because she had said she would, and in the possibility that it was of relevance. That said, she added that it was not being submitted as evidence regarding the overall decision of this case, and it would be a supporting document to consideration of her earnings, and Schedule of Loss.

88. On 8 June 2019, the respondents' representative, Dr Gibson, was asked by the Tribunal, on the Judge's instructions, to submit any comments by 17 June 2019. Thereafter, on 10 June 2019, the claimant sent the Tribunal two further emails about the relocation package.

89. Following consideration by the Judge, the claimant was advised by the Tribunal, on the Judge's instructions, on 13 June 2019, that this correspondence would not be taken into account by the Tribunal, in its ongoing private deliberations, as the relocation packages emails from May 2017, as produced to the Tribunal by the claimant on 10 June 2019, were not part of the documentation produced to the Tribunal during the course of the Final Hearing , and evidence in this case was closed.

90. Further, the Tribunal's email of 13 June 2019 advised that what had been produced by the claimant extended beyond the remit of the Tribunal's order of 1 May 2019 about updating and vouching further earnings from current employment, to update that aspect of her Schedule of Loss, and it is self-evident that if the claimant wished to introduce emails between herself, her trade union, and the respondents, concerning the matter of the relocation package, then these are documents that must have been in her possession at the time of the Final Hearing, and not something that was unknown to her.

91. Specifically, the Tribunal's email stated that this is not a case of new evidence coming to light the existence of which could not have been reasonably known of or foreseen by the claimant at the time of the Final Hearing and, in those circumstances, the Judge did not require any comment from the respondents' representative, Dr Gibson, notwithstanding the claimant's emails to the Tribunal, copied to him, seemed to be inciting him to respond to a number of points.

92. On 17 June 2019, the respondents' representative, Dr Gibson, advised the Tribunal by email, copied to the claimant, that the respondents had no further comment to make in regard to the matter of the claimant's Schedule of Loss than they had already made within their submissions.

93. Thereafter, on 29 June 2019, the claimant emailed the Tribunal, with copy to Dr Gibson for the respondents, with two emails entitled "***Criminal Justice***". She stated that, as she had said during the Final Hearing, Willie Cowan's appointment as Appeal Officer, as well as failing to be truly independent, made her feel "***criminalised.***" Further, the claimant stated:

> "***The point I was trying to make was that I was condemned to death of service rather than given the opportunity to demonstratively disprove the false allegations made about me via any of the multitude of (remedial) options open to such a large, well curved*** (sic) ***and significant employer as the Scottish Government who, it seems, prefer to rely on aggressive legal denial."***

94. Read in context, we have taken the claimant's words "***well curved***" to be a typographical error for "***well resourced***." Following referral to the Judge, and on his instructions, a reply was issued by the Tribunal, on 4 July 2019, stating that, following referral to the Judge, he had instructed that the claimant's correspondence is noted, but no further action taken, other than to

acknowledge receipt and advise that these further emails will not be taken into account by the Tribunal, in its ongoing private deliberations.

95. Given the terms of the Tribunal's previous communication to both parties, on 13 June 2019, the Judge was disappointed that the claimant had chosen to write to the Tribunal about matters that are irrelevant to the case being decided by the full Tribunal. The claimant's comments about Mr Willie Cowan, the Appeal Officer in her case, and about the Scottish Land Court, are matters between her and them, and / or the appropriate department of the Scottish Government, and not a matter within the jurisdiction of the Employment Tribunal.

96. The Tribunal's reply of 4 July 2019 made it clear that Mr Cowan's role as Appeal Officer in the claimant's case formed part of the evidence led at the Final Hearing, and it would be assessed as part of the whole evidence before the Tribunal. The claimant should, as previously instructed, not correspond with the Tribunal on other, irrelevant matters. Further, while the claimant had referred to the "***Kevin Ruddy case***", and advised that she was not sure if it could apply as precedent in this Tribunal, Judge McPherson had stated that it is not for the Tribunal to advise the claimant, and she should take independent advice from elsewhere.

97. While the claimant had not cited the full citation for the **Ruddy** case to which she made reference, the Judge thought it likely that she may be referring to the appeal judgment from the Court of Session in **Kevin Ruddy v Chief Constable, Strathclyde Police & the Lord Advocate [2013] CSIH 73, [2014] SCLR 145**. If so, that was a personal injury action, and not an ET claim.

98. Had she wished to refer to that judgment, the Judge stated that the claimant could have done so in her closing submissions to this Tribunal, if she considered it necessary and relevant to her Tribunal case, and Dr Gibson could have responded, at that time. She did not do so, and it was not appropriate for her to seek to do so then, for that would entail the Tribunal

having to seek comments from the respondents' solicitor, and so deflect the Judge from the task then in hand to complete the Tribunal's draft Judgment and Reasons, based on the evidence led and closing submissions made to the Tribunal.

99. In those circumstances, the Tribunal's reply of 4 July 2019 stated that the Judge did not require any comment from the respondents' representative, Dr Gibson, and if she so wished, the claimant should pursue those matters elsewhere, and only correspond with this Tribunal on matters relevant to the current case.

100. The Judge reiterated that as this case was at the stage of Judgment being prepared, it was not envisaged by him that there would be the need for any further correspondence from either party, until after the Judgment and Reasons were issued to both parties in due course, when the standard reconsideration and appeal rights would be advised to both parties, as per standard practice.

101. As per previous correspondence from the Tribunal, it was confirmed that the Judge was still working on a draft Judgment and Reasons. Given it was then in the summer holiday period, fixing a Members' Meeting was subject to availability of the full panel, but the Judge sought to progress to that stage at the earliest possible date mutually convenient for the full panel. Both parties would be further updated when that Members' Meeting date was fixed.

Rule 50 Anonymisation requested by the Claimant

102. Thereafter, on 10 July 2019, the claimant emailed the Tribunal, with copy to Dr Gibson for the respondents, with an email requesting that ***"the names within this case, including my own, be anonymised".***

103. Specifically, her email of 10 July 2019 stated as follows:

"I am writing to request that the names within this case, including my own, be anonymised.

I have recently been invited by a former colleague to apply for a role with a new employer. Following interview, I am now being appointed to a client facing role with greater responsibility which will have its own probation period.

Due to this change in my circumstances, and the possibility that the Scottish Government is a client of my new employer, I would now prefer my details to be anonymised.

This does not indicate any change of stance on my part regarding the veracity of my public interest disclosures, nor any change in my belief that the disclosures, which were made appropriately both during and following my employment (in good faith), remain a matter of public interest.

I wish to retain the right to disclose my own identity in future should I choose to do so.

Thank you for you (sic) *consideration of this request, which is being made in writing after contacting an ET clerk earlier today. I understand the reserved judgement decision reasons are still being drafted and any agreement to anonymity could be applied without causing too great an inconvenience to yourselves."*

104. In reply, Dr Gibson, solicitor for the respondents, replied to the Tribunal, with copy sent to the claimant, that same day, 10 July 2019, stating that:

"It does not strike the Respondent that the Claimant's application for an anonymity order satisfies the legal test as set out in Rule 50 of the

Employment Tribunals Rules of Procedure 2013 that such an order be necessary in the interests of justice.

The basis of the application appears to be to prevent a prospective employer becoming aware that the Claimant brought a claim in the Employment Tribunal against The Scottish Ministers.

That in the Respondent's view would be contrary to the principle of open justice.

The Respondent is strengthened in this view by the Claimant's position that she wishes to "retain the right to disclose my own identity in future should I choose to do so."

The application is made for the Claimant's own personal convenience and not in the interests of justice.

The application is opposed."

105. Thereafter, by way of her own response to Dr Gibson's objections to her application, the claimant sent a further email to the Tribunal, with copy to Dr Gibson, on 11 July 2019, stating as follows:

"I have requested anonymity for all individual parties, including former individual colleagues and third parties (within my email sent on 10 July at 16:52).

Dr Gibson's assumption is incorrect.

I do not wish my new employer to be put at any risk of being seen to condone action which I have taken against a former employer. This is not a matter which will be concealed from my new employer. This

request was made as a precaution only. I fully stand by my claims and my being identified in relation to these.

However, as this claim was raised before this employment and the outcome will be produced after I have taken up post. I can also explain to my new employer that anonymity was opposed by Dr Gibson (which I believe to be a malicious, rather than principled, objection) intended to harm me for having the 'audacity' to challenge the wrongdoing of my former employer, which also maliciously undermines my legal right to place this case before the Tribunal through fear of detriment, or potentially to cause fear and silencing of other whistleblowers.

I am committed to the ET weighted principles of Employment Rule 50, which are stated at ET rule 50(2) as being those of open justice and the (Human Right) of Freedom of Expression, regardless of the outcome.

As per rule 50, I leave it to the initiative of the Tribunal to determine any restriction of information."

106. Following referral to the Judge, and on his instructions, a reply was issued by the Tribunal, on 17 July 2019, stating that parties' correspondence of 10 and 11 July 2019, relating to "***identity disclosures***", and any **Rule 50** anonymisation, had all been received, and placed on casefile, and that the Judge had instructed that this further correspondence from both parties was noted.

107. Further, parties were advised that the claimant's opposed application of 10 July 2019 would be considered by the full Tribunal panel, in its ongoing private deliberations, when it met in due course, when it would consider this latest correspondence, as further written representations from both parties, along with the **Rule 50** submissions made in earlier correspondence to the Tribunal, and in parties' closing submissions on 30 April 2019.

108. In those circumstances, the Tribunal's reply of 17 July 2019 advised both parties that the Judge did not require any further comment from either party on this matter, and, as per previous correspondence, it was confirmed that both parties would be further updated when the Members' Meeting date was fixed to discuss the draft Judgment and Reasons.

109. For parties' information, the Judge's annual leave dates were given, and that, as a result, subject to Member availability, it was anticipated that the Members' meeting would be late August / into September 2019. Parties were further updated by the Tribunal, on 16 September 2019, as detailed earlier in these Reasons at paragraphs 6 and 7 above. It is only now, at our Members' Meeting held on 31 March 2020, we have had the opportunity to conclude our private deliberations.

Findings in Fact

110. We have not sought to set out every detail of the evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

111. As detailed in paragraph (2) of our Judgment above, while we have refused the claimant's opposed application for a **Rule 50** Anonymisation Order, in writing up this Judgment, including drafting our findings in fact, we have not referred to the specific identity of certain premises which were inspected by the respondents, and / or who applied for and / or were in receipt of grants administered by the respondents, but instead we have redacted that detail, by the use of Alpha ciphers throughout, and referred to them as properties A, B, C & D.

112. Notwithstanding the case management orders previously made by the Judge, on 16 August 2018, at the Case Management Preliminary Hearing held before him on that date, at a stage when both parties were legally represented, there was no Joint Statement of Agreed Facts intimated to the Tribunal before the start of this Final Hearing.

113. Further, while, in the Tribunal's email to parties on 30 January 2019, after the close of evidence at this Final Hearing, it was stated that, if between then, and the Continued Final Hearing, on Tuesday, 30 April 2019, parties could jointly agree material facts, then the Tribunal would consider receiving such a jointly agreed Statement of Facts, provided it was to hand by no later than 23 April 2019, no such document was provided to us.

114. On the basis of the sworn evidence heard from the various witnesses led before us over the course of this Final Hearing, and the various documents in the Bundles of Documents provided to us, the Tribunal has found the following essential facts established: -

1. The claimant, who was dismissed from the respondents' employment on 21 April 2017, was formerly employed by the respondents, as an Agricultural Officer, within the Scottish Government's Agricultural and Rural Economy Directorate, Rural Payments and Inspections Division, and she was based at the Portree Area Office.

2. Her employment with the respondents commenced on 1 August 2016, and it was subject to a 9-month probationary period, which, if successfully completed, would result in her appointment to the Scottish Government being confirmed.

3. The Tribunal had produced to it, at pages 85 to 92 of the Joint Bundle, a copy of her permanent appointment letter dated 1 August 2016, and her contract of employment was entered into with the Scottish Ministers.

4. In terms of that appointment letter, it was stated that: *"You will be on probation for 9 months. At the end of this period your appointment will be confirmed provided you have shown that you can meet the normal requirements of the job to an effective standard, and your attendance and conduct have been satisfactory….. If you do not reach the required standard your appointment will normally be terminated. Under certain circumstances the probationary period may be extended., Your appointment may be terminated at any time during the probationary period for misconduct (see 'Conduct and Discipline' in the attached Schedule) or if your service is unsatisfactory and it is clear that you will not be able to reach the required standard before the end of the probationary period. You are expected to remain in the same post during your probationary period."*

5. There was also produced to the Tribunal a copy of the Scottish Government's guide to standards of behaviour, at pages 437 to 444 of the Joint Bundle, being the rules on Conduct and Discipline referred to in paragraph 13 of the Schedule of Principal Terms and Conditions of Appointment attached to the claimant's letter of appointment; Scottish Government probation policy, at pages 605 to 607 of the Joint Bundle; and Scottish Government discipline policy, at pages 613 to 619 of the Joint Bundle.

6. In terms of the probation policy, failure to satisfactorily complete the probation period might lead to termination of appointment. The disciplinary procedures applied to all staff employed by the Scottish Government who had completed their probationary period.

7. Further, in terms of the probation policy, managers and employees had to agree performance objectives at the outset of the probationary period, and managers should explain the requirements that need to be

met, and regularly monitor performance, attendance and conduct during the probationary period.

8. The respondents' probation policy was not followed correctly as there were no monthly conversations between the claimant and her line manager, Catriona Macaskill, Higher Agricultural Officer, from 1 August 2016 until 24 February 2017.

9. Employees must meet the requirements set and comply with the respondents' principles and rules on conduct, being the rules on Conduct and Discipline referred to in paragraph 13 of the Schedule of Principal Terms and Conditions of Appointment attached to the claimant's letter of appointment.

10. The claimant was employed on the basis of 37 hours per week, for which she was paid at the pay range B1 rate of £23,383 p.a. gross salary, producing £1,948 per month gross pay before tax, producing monthly net normal take home pay of £1,460.

11. A copy of her payslips from the Scottish Government dated 31 March and 30 April 2017 were produced to the Tribunal at page 603 of the Joint Bundle, showing £1,948.58 gross, and £1,460.39 net, and at page 604 of the Joint Bundle, showing £1,948.58 gross, and £1,471.55.

12. The claimant's role as an Agricultural Officer involved, amongst other things, assessing and deciding on applications for crofting agricultural grants, inspecting agricultural properties, and carrying out livestock and land inspections.

13. Within the Portree Area Office, the claimant worked with other staff employed by the respondents, and she was line managed by Catriona Macaskill, Higher Agricultural Officer, who was in turn line managed by

Ewen Macpherson, Senior Agricultural Officer at Portree. Mr Macpherson was line managed by and reported to David Wright, Principal Agricultural Officer in Inverness. The other Higher Agricultural Officer at Portree was Cathie Tuncay. Amongst others, she worked with Alan Sillence, and Maggie Smith, both Agricultural Officers.

14. Following a review meeting with the claimant on 6 December 2016, her line manager, Catriona Macaskill, emailed the claimant, on 20 December 2016, with her 4-month interim probation report, sending copy report and email to Ewen Macpherson and Jane Stewart (HR). Ms Macaskill had previously consulted with Mr Macpherson, and sought HR advice from Ms Stewart, who was an HR Professional Adviser, Scottish Government People Directorate, Edinburgh.

15. As reporting officer, Ms Macaskill had marked the claimant's performance as "***Partly Effective***", on 7 December 2016, and that had been countersigned, on 19 December 2016, by Ewen Macpherson, who stated that he agreed with the contents of Ms Macaskill's report on the claimant. "***Partly Effective***" is the marking for staff who are not achieving their objectives and who need to work on their development to become effective.

16. A copy of the performance appraisal report, as issued to the claimant on 20 December 2016, was produced to the Tribunal as additional document 93A added to the Joint Bundle. The copy included in the Joint Bundle, at pages 93 to 108, is the copy provided by the claimant in reply to the respondents, with her added red-ink typed revisals, comments and annotations.

17. In particular, the claimant challenged the performance marking of "***Partly Effective"***, stating that this was "***not an accurate reflection of overall scoring"***, and she described Ms Macaskill's performance appraisal of her as being "***neither fair nor straightforward – most***

comments are very one sided and mostly heresay (sic)". Further, the claimant described the reporting officer notes by Ms Macaskill as "***excessive, unfair and partial."***

18. On 16 February 2017, following a telephone conversation between them the previous day, the claimant met with Jane Stewart, HR Professional Adviser, in Inverness, to discuss her interim probation report. At that meeting, the claimant was accompanied by Mark Falconer, a trade union representative. Ms Stewart's notes of that meeting were produced to the Tribunal at pages 146 and 147 of the Joint Bundle.

19. By email of 24 February 2017, copy produced to the Tribunal, at page 148 of the Joint Bundle, the claimant confirmed that she was content with Ms Stewart's note of the meeting, but she suggested some minor changes, in consultation with Mr Falconer, her trade union representative, as shown on the copy produced at pages 150 and 151 of the Joint Bundle.

20. The claimant had previously emailed Ms Stewart, on 1 February 2017, with her probation notes, personal learning plan, and two supporting emails, stating that she was happy to meet with HR and the union to discuss her points further in person.

21. In that email, the claimant had stated that she would like a fair opportunity to settle into the role, receive constrictive feedback and get on with her work, but that she did not believe that she had been properly supported to do so. A copy of that email of 1 February 2017 was produced to the Tribunal at page 138 of the Joint Bundle.

22. Following Ms Stewart's meeting with the claimant in Inverness, on 16 February 2017, where the claimant confirmed that she wished to appeal her interim probation report marking, David Wright, Principal

Agricultural Officer in Inverness, was instructed to carry out an appraisal review.

23. In her email to him, on 21 February 2017, copy produced to the Tribunal at pages 152 and 153 of the Joint Bundle, Ms Stewart stated that she considered that it was not appropriate for any further discussion with Ms Macaskill and given Mr Macpherson had agreed her report, she felt that he had effectively ruled himself out as an impartial adjudicator, and therefore she advised that it fell to Mr Wright to act as countersigning officer, and to do so as soon as possible, given the end probation date of 1 May 2017, being 9 months from start of the claimant's employment with the respondents.

24. On 24 February 2017, having received an email from the claimant, seeking union representation, and requesting the meeting take place in Inverness rather than Portree, Mr Wright had advised her that the meeting was a standard appraisal review, being carried out by him as opposed to Mr Macpherson, and as such it was not appropriate to have a third-party present.

25. Further, Mr Wright advised the claimant that he did not see the need to have her travel to Inverness, as he could use the rest of the day to meet with the rest of his staff in Portree. Mr Wright sent the claimant a meeting request on 27 February 2017, and he met with the claimant at Portree office the following day. Relevant copy emails were produced to the Tribunal at pages 160 and 161 of the Joint Bundle.

26. Mr Wright took notes of that interim probation meeting, and a copy of his notes, dated 6 March 2017, were produced to the Tribunal, at pages 162 to 168 of the Joint Bundle, being the version with the claimant's 26 annotated comments, returned by her on or about 14 March 2017, by email to Mr Wright, and copied to Ms Stewart (HR), as per copy produced to the Tribunal at page 223 of the Joint Bundle, in response

to Mr Wright's email of 7 March 2017 to the claimant, as per copy produced to the Tribunal at page 223 of the Joint Bundle.

27. On 2 March 2017, following a monthly conversation with the claimant, on 24 February 2017, the claimant received an informal, management warning from her line manager, Catriona Macaskill, regarding her conduct, following a couple of issues that had gone wrong, and giving guidance as to how the claimant should behave in the future.

28. A copy of the email of 2 March 2017 was produced to the Tribunal at pages 178 and 179 of the Joint Bundle. The claimant was advised that any further breaches might result in termination of her appointment. The claimant's line manager, Catriona Macaskill, tried to meet with the claimant subsequently, on 13 March 2017, to discuss further conduct issues that had arisen, but the claimant refused to meet her without trade union representation.

29. As per copy emails of 10 March 2017, between Ms Macaskill and the claimant, as produced to the Tribunal at pages 196 to 198 of the Joint Bundle, the claimant stated that : "***I am so concerned at the way you are treating me that I feel I cannot attend a meeting with you and Ewen unless there is someone there to accompany me."***

30. Further, the claimant also stated there that: "***It is abundantly clear you do not wish me to remain in post. At present I do not feel able to attend a meeting with you and Ewen because I do not believe you wish me either to be able to complete my probation, nor do you have any genuine concern for my success or wellbeing."***

31. Following issue of that informal warning, the claimant's line manager, Catriona Macaskill, considered that the claimant continued to behave in an undermining and disruptive manner within the workplace, and that she undermined her line manager to such an extent that the claimant

became unmanageable, and arrangements had to be made to have another manager support the claimant's line manager in carrying out some management functions.

32. Further to these additional incidents of what the claimant's line manager, Catriona Macaskill, saw as disruptive conduct by the claimant, where she was advised that working relationships at Portree office had broken down, and it was alleged that these poor working relationships with colleagues had impacted on their health and wellbeing, the claimant was hand delivered by her line manager, Catriona Macaskill, with a letter on 15 March 2017 from Jane Stewart, HR Professional Adviser, Scottish Government People Directorate, outlining further allegations about the claimant's conduct within the workplace.

33. A copy of Ms Stewart's letter of 15 March 2017 to the claimant, with the claimant's acknowledgement of receipt, was produced to the Tribunal at pages 237 to 239 of the Joint Bundle. This letter invited the claimant to attend a meeting on 5 April 2017, at Saughton House, Edinburgh, with Ms Stewart, to discuss the allegations. She was advised that she might be accompanied at the meeting by a colleague or trade union representative.

34. Because of the impact that the claimant's behaviour was reported to have had on her work colleagues, the claimant was suspended from work, with immediate effect, to allow investigation of the allegations against her. It was confirmed, in Ms Stewart's letter to her, that this suspension was not a disciplinary sanction and that the claimant would remain on full pay for the period of suspension, which would be kept under review.

35. On 24 March 2017, Ewen Macpherson submitted to the respondents his final report on the claimant, dated 20 March 2017, a copy of which

was produced to the Tribunal at pages 248 to 254 of the Joint Bundle. As stated therein, Mr Macpherson reported that: ***"I found Morag to be an unmanageable colleague, who is incapable or unwilling to accept and follow reasonable management instructions…. She is reluctant to accept responsibility for her actions and behaviour and instead seeks to deflect by referring to the actions of third parties or alleging that she has been bullied when poor performance or conduct is raised with her. Her unwillingness to recognise that her behaviour may have contributed to poor working relationships or to accept responsibility for her actions leads me to believe that her conduct is unlikely to improve to satisfactory levels should probation be extended."***

36. On 24 March 2017, the claimant was send a copy of Mr Macpherson's report dated 20 March 2017, prior to attending her meeting with Ms Stewart on 5 April 2017, and the claimant replied to Ms Stewart, by email on 31 March 2019, copy produced to the Tribunal at pages 255 to 299 of the Joint Bundle, responding to the allegations against her in Mr Macpherson's report, as also statements by Maggie Smith on 9 March 2017, Cathie Tuncay on 23 March 2017, and Catriona Macaskill on 27 March 2017, all of which had also provided to the claimant, on 28 March 2017, for her comments.

37. In her summary statement of 31 March 2017, copy produced at page 256 of the Joint Bundle, the claimant stated that: ***"This is a very long list of allegations which I find to be light on substance. This report uses the word FAILURE on fourteen (14) occasions within the list of conduct and performance allegations being made against me. This negative language demonstrates that the management behaviours within this office are unconstructive and malicious. The suspension is vexatious and has been designed to prevent progression of my interim probation report appeal or raising a grievance over the way I have been treated since I started working***

here, having raised a number of concerns and having these ignored or dismissed on a number of occasions."

38. Further, the claimant also stated there that: "***I really enjoy my job, being able to interact with customers, working in a rural environment but unfortunately I seem to be treated with a lot of fear and suspicion by this staff group. Perfectionism is one of my weaknesses, I'm happy to take on board constructive suggestions for improvement. It is difficult to do that when matters are not raised in a timely fashion nor clearly specified. I think my work must be of an ok standard that the majority of allegations all seem to be unspecified, undetailed and inferred issues of conduct."***

39. In addition to that summary statement, the claimant also provided to Ms Stewart a detailed set of comments, along with annotated comments on the statements from Maggie Smith, Cathie Tuncay and Catriona Macaskill. Additionally, on 31 March 2017, the claimant submitted to Ms Stewart a typed statement by Katerina Munro, about events on 20 December 2016, as per the email and copy statement produced to the Tribunal at pages 297 to 299 of the Joint Bundle.

40. The claimant attended the meeting on 5 April 2017, with Ms Stewart, at Saughton House, Edinburgh where she was accompanied by Kerry Marshall, an HR Adviser as notetaker, and the claimant was accompanied by Ruth Henderson, PCS trade union representative. At this meeting, details of the allegations against the claimant were discussed, and she was afforded an opportunity to respond, both at the meeting, and in her written submissions beforehand.

41. A copy of Ms Marshall's notes of that meeting, dated 7 April 2017, were produced to the Tribunal, at pages 300 to 304 of the Joint Bundle. No decision was given by Ms Stewart at the end of the meeting on 5 April

2017, and she advised the claimant that she would issue her decision to the claimant in due course.

42. Following that meeting on 5 April 2017, and after Ms Stewart had drafted a proposed outcome letter to go to the claimant, the claimant emailed Ms Stewart, on 20 April 2017, attaching a typewritten, 4-page outline grievance. A copy of that email, and attached grievance, was provided to the Tribunal at pages 386 to 310 of the Joint Bundle.

43. The claimant's grievance letter stated that her grievance, under the Scottish Government Fairness at Work policy, was being raised in outline form, due to ***"the delay in my being made clearly aware of my right to raise a grievance."*** In that grievance, the claimant stated further that: ***"Overall, I wish to raise this grievance because I believe I have not been fairly supported as a probationer within the Portree office."***

44. Following the meeting on 5 April 2017 with Ms Stewart, the claimant was dismissed by the respondents, with effect from 21 April 2017, by Ms Stewart's detailed, 6-page letter of dismissal addressed to the claimant, copy produced to the Tribunal, at pages 316 to 321 of the Joint Bundle, and entitled: "***UNSATISFACTORY CONDUCT DURING PROBATION - NOTIFICATION OF DISMISSAL".***

45. In that letter of dismissal, it was stated by Ms Stewart that: "***I have concluded that you have failed to meet the terms of your probation and that your permanent appointment will not be confirmed. Accordingly, this letter confirms that you have been dismissed from your appointment with the Scottish Government. Your dismissal is effective from the date of this letter, 21 April 2017 and this will be your last day of service. In arriving at this decision, I have concluded that the allegations about your conduct and disruptive behaviour during your probationary period are established and because of that, you have failed to***

meet satisfactory levels of conduct (behaviour) during your probation. I have also concluded that concerns about your performance are established."

46. Ms Stewart's letter to the claimant on 21 April 2017 set out the reasons for her decision, enclosed the notes of the meeting held on 5 April 2017, and also explained the terms of the claimant's dismissal. She stated that, had she not decided that the claimant be dismissed, her suspension (since 15 March 2017) would have been lifted and her appeal and grievance would have been considered in line with the Scottish Government's Probation and Fairness at Work Policies.

47. A full copy of that letter of dismissal, and meeting notes, and all other enclosures, was provided to the Tribunal at pages 568 to 591 of the Joint Bundle.

48. The claimant was advised of her right to appeal against the decision to dismiss her, within 10 working days of the date of that letter of dismissal dated 21 April 2017. Further, despite the letter saying the claimant was dismissed, with immediate effect, Ms Stewart's letter advised the claimant that she was entitled to 5 weeks' pay in lieu of notice, and that she was not required to work that notice period.

49. The claimant appealed the decision to dismiss her in accordance with the opportunity for an internal appeal against dismissal offered to her in that letter of dismissal. She did so, after having made various subject access requests to the respondents, under the Data Protection Act 1998, in May and June 2017.

50. On 4 May 2017, Jane Stewart (HR), in updating Mr Wright, with copy to Mr Macpherson, as per copy email produced to the Tribunal at page 326 of the Joint Bundle, stated that it was understood the claimant was

in discussion with the trade union about submitting an appeal against her dismissal.

51. She advised them that, in advance of her meeting with the claimant, on 5 April 2017, the claimant had provided her with a written statement making a number of allegations about work related matters in Portree and, as she had been advised that it might be that there were elements of a "***whistleblowing case***", she needed their comment on the claimant's allegations, as the expectation was that the claimant would raise this with the Appeals Officer in the context of her appeal against dismissal. Ms Stewart asked them for a "***warts and all***" response to the claimant's allegations.

52. The claimant submitted detailed grounds of appeal, by letter dated 8 May 2017, which she revised and expanded on 20 June 2017, by letter addressed to June Culpan, People Directorate, Scottish Government, as per the copy produced to the Tribunal, at pages 401 to 413 of the Joint Bundle.

53. In doing so, in a detailed, 13-page typewritten letter of appeal, the claimant appended supporting documents (evidence items 1 to 29c) as evidence for consideration by the respondents' Appeals Officer. Her appeal letter was copied to her PCS trade union representative, Louise Kowalska.

54. In particular, at paragraph 41 of her appeal, the claimant detailed her requested outcomes, including that "***the decision to dismiss me be overturned and for the malicious claims against me to be removed from my employment record"***, and "***to be exonerated of the false and malicious claims made regarding my conduct and performance and to be assured a clean reference will be provided to any future prospective employer."***

55. Further, the claimant's appeal also stated that she sought "***to be re-instated as a B1 employee at an alternative location, or, due to the possibility of being bullied elsewhere within the highly integrated network of RPID, consideration given to re-deployment to another suitable equivalent role or high priority vacancy."***

56. Following the claimant's email to Ms Stewart, on 8 May 2017, appealing against the decision to dismiss her, the claimant's appeal was acknowledged by Kerry Marshall, HR Adviser with the respondents' People Directorate, Edinburgh, by letter emailed to the claimant on 19 May 2017, as per the copy letter produced to the Tribunal at pages 592 and 593 of the Joint Bundle.

57. Following Ms Stewart's email of 4 May 2017 to David Wright, and Ewen Macpherson, Ms Stewart received from Mr Macpherson, by email of 18 May 2017, copy produced to the Tribunal at pages 338 to 372 of the Joint Bundle, his 151 responses to the allegations in the claimant's email of 31 March 2017 to Ms Stewart, at pages 255 to 299 of the Joint Bundle.

58. Further, Ms Stewart also received from Mr Wright, by email of 22 May 2017, copy produced to the Tribunal at pages 327 to 336 of the Joint Bundle, his findings and observations dated 22 May 2017 upon the casework issues raised by the claimant in her report ***"dated 3 March 2017".***

59. There was no report of 3 March 2017, and in his evidence before this Tribunal, Mr Wright accepted that that 3 March 2017 date was an error on his part, and it should have referred to the claimant's report of 31 March 2017.

60. Ms Marshall's letter of 19 May 2017 letter invited the claimant to attend an appeal meeting on 16 June 2017, at Saughton House, Edinburgh,

with the respondents' Appeals Officer, Mr Willie Cowan, Deputy Director of Criminal Justice at the Scottish Government and, as such, a member of the Senior Civil Service.

61. The letter stated that the appeal would give Mr Cowan, who had not previously been involved in the case, the opportunity to review the dismissal decision, and further stated that he had the authority to either uphold the original decision, overturn it or recommend a lesser penalty. The claimant was also advised that she might be accompanied at the appeal meeting by a colleague, or trade union representative.

62. The appeal meeting did not take place on 16 June 2017, but the claimant attended an appeal meeting with the Appeals Officer, Mr Willie Cowan, held at Saughton House, Edinburgh, on 27 June 2017. Mr Cowan was accompanied at that appeal meeting by June Culpan, HR Professional Adviser, and a Julie Forrest as notetaker.

63. While, in his evidence to this Tribunal, Mr Cowan was clear that he had received from HR an appeal pack, with extensive papers to pre-read, he advised the Tribunal that he did not get any index of papers, so he could not recall, with certainty, what documents he had received and pre-read, although he did recall that the claimant's 500 page SAR documentation was only provided to him by the claimant towards the close of the appeal meeting.

64. At that appeal meeting, the claimant was accompanied by Louise Kowalska, her PCS trade union representative, and the claimant was afforded an opportunity to put forward her grounds of appeal, both at the meeting, and in her written submissions beforehand. Mr Cowan had pre-read the extensive amount of material that the claimant had submitted in advance of this appeal meeting.

65. The Tribunal was provided, at pages 414 to 418 of the Joint Bundle, with a copy of Ms Forrest's notes, dated 28 June 2017, of that appeal meeting held on 27 June 2017. The respondents' notes of this meeting were not thereafter jointly agreed as correct by the claimant. While the notes of the appeal meeting refer to Mr Cowan as Appeal Panel Chair, and to him introducing the panel members, there was no panel, and he alone was the Appeals Officer who determined the claimant's appeal.

66. No decision was given by Mr Cowan at the end of the appeal meeting, and he advised the claimant that he would issue his decision to her in due course.

67. The outcome of the appeal meeting was that the claimant's dismissal by the respondents was upheld. A copy of Mr Cowan's appeal outcome letter to the claimant dated 3 July 2017 was produced to the Tribunal, at pages 594 to 597 of the Joint Bundle, together with a further copy of the notes of the appeal meeting, at pages 598 to 602 of the Joint Bundle.

68. The claimant's date of dismissal remained 21 April 2017, which both parties are jointly agreed was the effective date of termination of her employment with the respondents.

69. In his appeal outcome letter, Mr Cowan advised the claimant that: ***"I reviewed all the relevant information and evidence before me including your grounds of appeal, the additional information you had gathered and your written and oral responses. I am satisfied that the appeal process was carried out in accordance with relevant Scottish Government (SG) disciplinary procedures."***

70. Further, Mr Cowan's letter advised the claimant that he had decided to uphold the decision to terminate the claimant's appointment with the Scottish Government, and he set out his reasons for that decision at

length. In particular, Mr Cowan stated that he was satisfied that ***"a fair process to dismissal was followed".***

71. Further, while Mr Cowan noted that the claimant did not accept her conduct was inappropriate, and she considered herself a "***very self-aware person"***, his outcome letter stated that, based on the extensive evidence he examined, the material the claimant presented, and her conduct at the appeal meeting, where she did not answer questions and blamed others, he could not agree that she was a very self-aware person, in that she appeared to him to be totally unaware of or indifferent towards the impact of her conduct on her colleagues.

72. Mr Cowan also was satisfied that the claimant's conduct amounted to unacceptable behaviour, and that her conduct was therefore unsatisfactory. He stated that he was not persuaded that the information presented by the claimant at her appeal was such that he should overturn the dismissal decision, and that he was satisfied that a fair process was followed, that it was appropriate and in line with Scottish Government policy for Ms Stewart to take the decision to dismiss, that that decision was arrived at on reasonable grounds, and that it was proportionate having regard to the evidence before Ms Stewart. As such, Mr Cowan upheld her decision to dismiss, and confirmed that the internal appeal process was therefore concluded.

73. On 5 July 2017, the claimant notified ACAS for the purposes of early conciliation. Thereafter, on 31 July 2017, ACAS issued an early conciliation certificate to the claimant, R155154/17/32, a copy of which was produced to the Tribunal at page 18 of the Joint Bundle.

74. By handwritten letter dated 24 August 2017, addressed to Willie Cowan, Deputy Director, Criminal Justice, copy produced to the Tribunal at page 436 of the Joint Bundle, the claimant acknowledged receipt of his letter dated 3 July 2017, but stated: "***However I do not***

acknowledge the validity of its contents which do not accurately reflect this case, nor the note of meeting. I have my own full note of meeting and list of disclosures and SAR findings, which I intend to use for the purposes of Employment Tribunal. A Government which does not govern nor employ fairly or justly is not really a Government; more of a cronyistic cartel. God help criminal justice because you are unjust towards innocent people."

75. On the evidence before this Tribunal, it is not very clear whether this letter of 24 August 2017 addressed to Mr Cowan was actually received by the respondents and, if so, when and by whom. In his evidence to the Tribunal, Mr Cowan stated that as it was addressed to him, so he must have received it, and on receiving it, he would have passed it to HR for them to deal with.

76. However, the Tribunal notes that neither party to these Tribunal proceedings produced to the Tribunal any follow up correspondence to the claimant, on or after 24 August 2017, seeking to reply to any letter from her dated 3 July 2017.

77. Thereafter, on 28 August 2017, the claimant presented her ET1 claim form to the Employment Tribunal, through her then representative, Mr Stewart Healey, solicitor with Livingstone Brown, Glasgow. A copy of that ET1 claim form was produced to the Tribunal at pages 1 to 17 of the Joint Bundle.

78. The respondents resisted the claim, by ET3 response form submitted on 2 October 2017 by their then representative, Ms Kirsty Stevens, solicitor with the Scottish Government Legal Directorate, Edinburgh. A copy of that ET3 response form was produced to the Tribunal at pages 24 to 37 of the Joint Bundle.

79. On 28 December 2017, further and better particulars of the claim were provided to the Tribunal, by the claimant's then representative, Mr Stewart Healey, solicitor with Livingstone Brown, Glasgow. A copy of those further and better particulars was produced to the Tribunal at pages 18A to 23 of the Joint Bundle.

80. The claimant averred that she was dismissed for making a number of protected disclosures. In particular, she averred that "***the respondent considered that she was asking too many questions and challenging management in connection with a number of issues that they were not prepared to investigate or acknowledge as being genuine concerns.***"

81. At paragraphs 6 to 48, the claimant's solicitor provided a description of each of her alleged protected disclosures, being Scottish Land Court disclosure, Alan Sillence croft inspection, fence incident at Alan Sillence's croft, inspection at "***property A***", speeding, inspection at "***property B***", "***property C***" sheep inspection, "***property D***" farm inspection, DSE lighting issue, advance warning of sheep inspections, and crofters agricultural grants scheme (CAGS).

82. Thereafter, on 25 January 2018, the respondents, through their solicitor, Dr Andrew Gibson, Morton Fraser LLP, Glasgow, provided their response to the claimant's further and better particulars. A copy of that response was produced to the Tribunal at pages 38 to 43 of the Joint Bundle.

83. The respondents denied that the real reason for the claimant's dismissal were these alleged protected disclosures. They denied there were any qualifying protected disclosures, and stated that the reason for her dismissal was for a reason unconnected to any such disclosures, namely her disruptive behaviour during her probation period.

84. Further, they denied that the claimant had been unfairly dismissed. They specifically denied that she was dismissed because she made qualifying disclosures or that she made qualifying disclosures at all, and they stated that the claimant was dismissed because she was insubordinate, unmanageable and failed to follow reasonable management instructions. For these reasons, they explained, her conduct during her probation was considered unsatisfactory and for this reason that her employment was terminated.

85. Post termination of employment with the respondents, the claimant secured new employment. In particular, while unemployed, and in receipt of State benefits through Employment Support Allowance, she obtained some temporary employment in various jobs, including grass cutting with a landscaper, Dasan Solutions, from 7 August 2017, and, latterly, from 23 October 2017, temporary, then permanent employment with the Robertson Construction Group as an administrator, and, from 5 March 2018, as a bid co-ordinator.

86. At this Final Hearing, the claimant provided an updated Schedule of Loss, and she confirmed that, as she had lost confidence in the Scottish Ministers as an organisation, she was not seeking reinstatement or reengagement by the respondents, in the event of success with her claim, only an award of financial compensation from the respondents. She advised the Tribunal that she did not regard reinstatement, or re-engagement, by the respondents as tenable.

87. At the Hearing on Submissions before the Tribunal, on 30 April 2019, the claimant advised the Tribunal that she was seeking £25,000 + compensation from the respondents, and a clean reference from the respondents as her former employer.

88. When the claimant provided an updated Schedule of Loss to the Tribunal, on 23 January 2019, it superceded that previously provided

and included in the Joint Bundle at page 492. Prepared by Beltrami & Co, and intimated on 19 September 2018, that original Schedule of Loss had sought a total award of £10,640.96, being no basic award, compensatory award of £6,340.96 for total wage loss, £4,000 for injury to feelings (top of lower band Vento), and £300 loss of statutory rights. It also stated that the claimant had claimed ESA benefit @ £73 pw from 1 June 2017 to 6 August 2017.

89. In the updated Schedule of Loss, provided by the claimant herself on 23 January 2019, the claimant sought a total award of £25,224.575 (sic), being no basic award, compensatory award of £12,179.66 for net total wage loss, including loss of statutory rights @ £1,000, plus 25% uplift for respondents' failure to follow ACAS Code (assessed at £3,044.915 (sic)), plus £10,000 for injury to feelings (middle band Vento). It also restated that the claimant had claimed ESA benefit @ £73 pw from 1 June 2017 to 6 August 2017, but now quantified the benefits received at £657.

90. Following the close of the Final Hearing, on 14 May 2019, the claimant provided to the Tribunal, with copy to the respondents' representative, copy of her latest P60 end of year certificate to 5 April 2019 for HMRC, and payslips from January 2019, with her current employer, Robertson Group Limited, vouching monthly pay w/e 25 April 2019 at £2,100 gross, and £1,678.15 net.

Tribunal's assessment of the Evidence

115. In considering the evidence led before the Tribunal, we had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the Bundles of Documents lodged and used at this Final Hearing, which evidence and our assessment we now set out in the sub-paragraphs: -

(1) Miss Morag Jardine: Claimant

(a) The claimant, aged 42 at the time of the Final Hearing, was the first witness heard by the Tribunal on 21, 22 and 23 January 2019, and again, briefly, at the Hearing on Submissions on 30 April 2019, when the Judge allowed her to give further evidence restricted to clarifying whether or not there had been any changes in her circumstances since the close of evidence on 28 January 2019.

(b) As she was acting as an unrepresented, party litigant before this Tribunal, the claimant's evidence in chief was elicited by the Judge asking her a series of structured and focussed questions, cross-referring when necessary to documents in the Bundles before us, before asking her to add anything else that she felt was required, before she was then cross-examined, in the usual way, by Dr Gibson, solicitor for the respondents. After cross-examination, her evidence was clarified in several respects by questions from the panel.

(c) In giving her evidence to the Tribunal, in chief, the claimant was relatively at ease, being asked questions by the Judge, but when it came to her being cross-examined by Dr Gibson, her demeanour and responses changed, she became more argumentative and challenging, and often sought not to answer the specific question put to her, but sought to evade it, rephrase it, or simply repeat her own position, as stated in chief. The claimant had to be frequently reminded by the Judge that the purpose of the Final Hearing was to hear relevant and necessary evidence on the issues in dispute before the Tribunal, and that the Hearing was not a roving, public enquiry into the claimant's concerns about the respondents, and / or the running of the respondents' Portree office.

(d) It became clear to us, as the evidence in the case was led before the Tribunal, that the claimant has her own perception of what she recalls has happened to her, and to her that perception is her reality, even if it is not a

view shared by others, or vouched in contemporary documentation between the parties at or around the time of material events.

(e) In all the circumstances, where there was a material dispute between the claimant's evidence, and that heard from the respondents' witnesses, we have preferred the respondents' evidence as being the more likely version of events based on the balance of probability. We found the claimant to be a very confused and confusing witness.

(f) With the passage of time from the material events to date of this Final Hearing, it seemed to us that the claimant's recollections in evidence were such that, with the benefit of hindsight, she was not a clear historian, and she was perhaps recalling things in a way that she felt best suited her own case against the respondents. Overall, we did not find the claimant to be a credible or reliable witness. She appeared to only see things from her own perspective, and appeared unwilling, if not unable, to take a wider, and more holistic view.

(g) Indeed, from her evidence to the Tribunal, we found that she is a person who very much sees things in black and white, with no room for grey, and she seeks herself to keep strictly to the rules and be risk averse, and report to management everything by others that she sees as being contrary to the organisation's rules. This was illustrated by her frequent reference to the Nolan standards for life in the public sector, and applicable ethical standards of conduct for civil servants.

(h) While critical of many of the respondents' employees, the claimant did not take any steps before the Tribunal to call other staff members, who the respondents had decided, for whatever reason, not to lead as witnesses at this Final Hearing. There were no applications, by either party, for any Witness Orders to compel a person to attend and give evidence to us. All this Tribunal could do is to assess the evidence from the witnesses led before us, and while we had, in the Bundles, documents prepared by certain others, we did not

have the benefit of their oral evidence, open to cross-examination, and clarification by the Tribunal.

(2) Mr David Wright: Respondents' Principal Agricultural Officer

(a) The respondents' first witness was Mr Wright, from whom the Tribunal heard evidence on 24 January 2019. Aged 63, he is the respondents' Principal Agricultural Officer based in Inverness. He had line management responsibility for the Portree office where the claimant worked for the respondents.

(b) His evidence was heard immediately after the close of the claimant's own evidence, as the claimant's proposed witnesses, Katerina Munro, and Louise Kowalksa, were not available until the following day.

(c) In giving his evidence to the Tribunal, Mr Wright did so referring, when appropriate, to relevant documents in the Joint Bundle before the Tribunal.

(d) In assessing his evidence, we felt that Mr Wright was giving his best recollection of events relating to his own involvement in the claimant's case, and he did so in a relatively straight forward, matter of fact way. His evidence was not seriously undermined by the claimant's cross-examination of his evidence, although that cross-examination did raise an issue with the reliability of some aspects of his evidence, but not with his overall credibility as a witness.

(e) We felt that Mr Wright had a poor recall of certain of the key facts relating to his own involvement in the claimant's case , including key dates, and the matters dealt with in his investigation report, suggesting perhaps that he recognised it now, with hindsight, as cursory at best, rather than thorough, yet at other times, when it suited his own purposes, and how he had acted, his recall was much better.

(f) In these circumstances, that vague and general evidence from Mr Wright raised a doubt in our minds about his overall reliability, but we did not form the view that he was deliberately telling untruths, more likely that he had not well prepared for giving evidence. As a senior manager, we were surprised to hear him tell us that he had never heard of a protected disclosure "before last week", thus suggesting he had no knowledge of whistleblowing at material times when dealing with the claimant.

(3) Ms Katerina Munro: Formerly Administrative Officer, Portree

(a) This witness for the claimant, and the next, Ms Kowalksa, who were both interposed, during ongoing evidence from the respondents' witnesses, as they could not attend at the close of the claimant's own evidence, gave evidence to the Tribunal on 25 January 2019.

(b) Aged 42, Ms Munro was formerly an Administrative Officer, grade A3, at the respondents' Portree office, until she left in February 2017. She is still a civil servant with the Scottish Government, now the Business Manager in the Office of the Advocate General in Edinburgh.

(c) Ms Munro gave evidence to the Tribunal, in answer to questions from the claimant, which were more about office culture and behaviours at Portree when she was employed there, than related directly to the claimant's own employment. She was cross-examined by Dr Gibson, as well as being asked questions of clarification by the Tribunal.

(d) In giving her evidence to the Tribunal, it was clear that Ms Munro had her own agenda, and that she was critical of the respondents' practices at Portree, and of their treatment of the claimant. This raised an issue for us about the objectivity of this witness, but, viewed in the round, this witness was of limited value to the Tribunal in assessing the whole evidence led before us, so we need say nothing further.

(4) Ms Louise Kowalksa: Claimant's PCS Trade Union Representative

(a) This further witness for the claimant, like Ms Munro before her, gave her evidence to the Tribunal on 25 January 2019, having been interposed during the respondents' evidence being led before the Tribunal.

(b) Aged 59, Ms Kowalska is a civil servant with the Scottish Government, at Saughton House, Edinburgh, and Group Officer for the PCS trade union. She had acted as the claimant's trade union representative in appealing against Ms Stewart's decision to dismiss the claimant, and she accompanied her to the appeal meeting with Willie Cowan, the respondents' Appeals Officer, on 27 June 2017.

(c) Ms Kowalska gave evidence to the Tribunal, in answer to questions from the claimant, and she was cross-examined by Dr Gibson, as well as being asked questions of clarification by the Tribunal. In giving her evidence to the Tribunal, she did so referring, when appropriate, to relevant documents in the Joint Bundle before the Tribunal.

(d) In giving her evidence to the Tribunal, it was clear that Ms Kowalska was doing her best to recall matters from her own involvement in the claimant's case, where she was critical of the respondents' treatment of the claimant, and that she had been unsuccessful in her internal appeal refused by Mr Cowan.

(e) A particular, memorable part of her evidence in chief, is that she was very critical of Mr Cowan for not having shaken hands with the claimant at the close of the appeal meeting. She seemed to be suggesting that the appeal was, for this reason alone, somehow unfair, although that was not a matter raised by the claimant in her ET1 claim form, or further and better particulars of claim, nor pursued by the claimant in her cross-examination of Mr Cowan.

(f) The evidence from Ms Kowalksa raised an issue for us about the objectivity of this witness, but, viewed in the round, this witness was of limited value to the Tribunal in assessing the whole evidence led before us, so we need say nothing further.

(5) Ms Jane Stewart: Respondents' Dismissing Manager

(a) The respondents' second witness was Ms Stewart, from whom the Tribunal heard evidence on 25 and 28 January 2019. Aged 55, she is an HR Professional Adviser with the respondents, with 20 years' experience in HR, and a CIPD member.

(b) As well as supporting the claimant's line management locally, as part of the respondents' central services functions based in Edinburgh, in this particular case, Ms Stewart was also the dismissing manager, who decided to terminate the claimant's employment on 21 April 2017.

(c) In giving her evidence to the Tribunal, Ms Stewart did so referring, when appropriate, to relevant documents in the Joint Bundle before the Tribunal. She was very much the respondents' key witness at this Final Hearing.

(d) In assessing her evidence, we felt that Ms Stewart was giving her best recollection of events relating to her involvement in the claimant's case, and she did so in a relatively straight forward, matter of fact way, referring to contemporary documents regarding her involvement at material times. She spoke openly of how she trusted the local line managers she was providing HR support and advice to. Her evidence was not seriously undermined by the claimant's cross-examination of her evidence, although that cross-examination did raise an issue with the reliability of some aspects of her evidence, but not with her overall credibility as a witness.

(e) At best, she came over as disingenuous at certain points in her evidence, but we did not find it established that, as the claimant alleges, she

was central to an orchestrated conspiracy to dismiss the claimant from the respondents' employment. While she had been advised that it might be that there were elements of a "***whistleblowing case***", which is why she asked the claimant's line managers for a "***warts and all***" response to the claimant's allegations, her evidence in this regard was at odds with that later given by Willie Cowan, the respondents' Appeals Officer, whose evidence on the applicable procedures was superficial, and demonstrated a lack of knowledge.

(**6) Mr Willie Cowan: Respondents' Appeals Officer**

(a) The respondents' third and final witness was Mr Cowan, from whom the Tribunal heard evidence on 28 January 2019. Aged 53, and with 37 years' experience as a civil servant, he is a member of the Senior Civil Service, currently Deputy Director of Criminal Justice, part of the Scottish Government Justice Directorate, based at St Andrew House, Edinburgh.

(b) The claimant told us that, essentially by reason of his job title, she felt "***criminalised***" by Mr Cowan's role in her case. We refer to her email to the Tribunal, on 29 June 2019, as we have reproduced earlier in these Reasons at paragraph 93 above. As that submission was made after the close of the Final Hearing, the Tribunal has left it out of account in our private deliberations, but we have taken note of her evidence to us, in the course of the Final Hearing, that she did not believe him to be a truly independent Appeal decision maker.

(c) On the evidence available to us, Mr Cowan was not previously involved in the claimant's employment, or events leading to her dismissal, and significantly no objection was taken at the time of the appeal hearing, by the claimant or her trade union representative, to any reason why Mr Cowan should not act as Appeal Officer.

(d) In giving his evidence to the Tribunal, Mr Cowan did so referring, when appropriate, to relevant documents in the Joint Bundle before the Tribunal. It

is of note that he appeared to have poor recall of what particular documents had been provided to him by the respondents' HR as his "appeal pack".

(e) In assessing his evidence, we felt that Mr Cowan, like the respondents' other witnesses, was giving his best recollection of events relating to his own involvement in the claimant's case, and while he did so in chief, in a relatively straight forward, matter of fact way, he came across to the Tribunal as unconvincing, sometimes vague, and bordering on arrogant, particularly when cross-examined by the claimant in person, when he often answered on the basis of his "working assumption", and against his further evidence that this was his first probationer dismissal appeal (which was at odds with Ms Stewart's earlier evidence to us that he had done lots).

(f) That said, Mr Cowan's evidence was not seriously undermined by the claimant's cross-examination of his evidence, although that cross-examination did raise an issue with the reliability of some aspects of his evidence, but not with his overall credibility as a witness. In particular, he did not come across as knowledgeable about the specifics of the respondents' different procedures, practices and procedures for staff, including probationary employees, or about whistleblowing and protected disclosures. During his cross-examination by the claimant, he described matters as "***We're on the head of a pin here, you say there were protected disclosures, I say there were questions of process in an office environment.***" He also conceded that he was "***not immediately familiar with"*** the test for a protected disclosure.

Issues before the Tribunal

116. Notwithstanding the case management orders previously made by the Judge, on 16 August 2018, at the Case Management Preliminary Hearing held before him on that date, at a stage when both parties were legally represented, there was no jointly agreed List of Issues before the Tribunal at the start of this Final Hearing.

117. At the stage of that Case Management Preliminary Hearing, on 16 August 2018, parties' legal representatives had agreed that the claimant's complaint, in terms of **Section 103A of the Employment Rights Act 1996,** alleging automatically unfair dismissal for making a qualifying protected disclosure, could proceed to listing before a full Tribunal for a Final Hearing on its merits, reserving for determination as part of that Final Hearing, the preliminary or jurisdictional issues raised by the respondents as to (a) whether or not the claimant made any qualifying protected disclosure, in terms of **Section 43B**, and (b) whether or not there was an extant **Section 100** complaint of automatically unfair dismissal in a health and safety case before the Tribunal in the claimant's ET1.

118. Further, while, in the Tribunal's email to parties on 30 January 2019, after the close of evidence at this Final Hearing, it was stated that, if between then, and the Continued Final Hearing, on Tuesday, 30 April 2019, parties could jointly agree a List of Issues for determination by the Tribunal, then the Tribunal would consider receiving such a jointly agreed List of Issues, provided it was to hand by no later than 23 April 2019, no such document was provided to us.

Reserved Judgment

119. When proceedings closed on the afternoon of Monday, 28 January 2019, with evidence from both parties having concluded, the Tribunal advised both parties that it would hear closing submissions from them at a Continued Hearing on Tuesday, 30 April 2019, and formal Notice of Continued Hearing was thereafter issued by the Tribunal on 12 February 2019.

120. Further, to confirm the further case management orders made by the Judge, and announced orally at the close of proceedings on 28 January 2019, an email was issued to both parties, on the Judge's instructions, on 30 January 2019, setting out 3 specific matters for parties to comply with, with dates for compliance by 23 April 2019, and reply by 30 April 2019, and timetabling their

oral submissions at the Hearing on Submissions on 30 April 2019 to no more than one hour each.

121. Having now carefully considered parties' closing submissions, and their further written representations, this unanimous Judgment and Reasons of the Tribunal represents the final product from our private deliberations, and reflects the unanimous views of us as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

Parties' Closing Submissions

122. As part of the case management orders previously made by the Judge, on 16 August 2018, at the Case Management Preliminary Hearing held before him on that date, at a stage when both parties were legally represented, a detailed set of directions were given by the Judge as to written closing submissions from both parties, and as to the conduct of the Hearing on Submissions listed for day 6 of 6 of the listed Final Hearing on 21 / 28 January 2019.

123. On 24 January 2019, Dr Gibson's written submissions for the respondents were intimated to the Tribunal. In the Tribunal's email to both parties' representatives, on 30 January 2019, issued following the Employment Judge's oral directions at the close of proceedings on 28 January 2019, specific and detailed Case Management Orders were made for the preparation and exchange of Dr Gibson's revised outline closing submissions, to supplement those previously lodged in light of further evidence heard since 24 January 2019, and to be lodged with the Tribunal, and copied to the claimant, by no later than 4pm on Tuesday, 23 April 2019. The claimant's submissions were to be lodged by the same date and time.

124. While Dr Gibson's written submissions were intimated, on 17 April 2019, the claimant, on 23 April 2019, requested an extension of time to lodged hers, by 4pm on Friday, 26 April 2019, and that extension request was not opposed by the respondents, although they did oppose a request by the claimant to relist

to 3 May 2019. Following consideration by the Judge, the extension of time was granted to the claimant, but not the request to relist. That request was refused by the Judge, as the claimant had had sufficient time since 30 April 2019 was fixed, and it was not in the interests of justice to postpone the listed hearing on 30 April 2019.

125. On 25 April 2019, the claimant then applied for an extension of time to first thing on Monday morning, 29 April 2019. That request was granted by the Judge, on the basis that the claimant's closing submissions must be received by the Tribunal and Dr Gibson, by email, not later than 9.30am on Monday, 29 April 2019. Her written submissions were emailed to the Tribunal and Dr Gibson at 10.19am on that date

List of Authorities

126. There was no jointly agreed list of authorities. For the respondents, Dr Gibson referred us to the following cases:

- **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979**
- **Parsons v Airplus International Limited UKEAT/0111/17**

127. The claimant, in her submissions to the Tribunal, referred us to the following cases:

- **Onyango v Berkeley (t/a Berkeley Solicitors) UKEAT/0141/09**
- **Millbank Financial Services Ltd v Crawford UKEAT/0290/13**
- **Learning Trust and others v Marshall UKEAT/0107/11**
- **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979**
- **Parsons v Airplus International Limited UKEAT/0111/17**

Respondents' Closing Submissions

128. In coming to our Judgment on this case, we have paid careful attention to the full terms of Dr Gibson's written submissions for the respondents. As a copy is held on the case file, we do not consider it appropriate, or proportionate, to repeat its full terms here, but what we do note, by way of the respondent's position, is our own summation of its main points.

129. Dr Gibson intimated his written submissions and submitted, in brief, that none of the facts relied upon by the claimant had demonstrated that she made any qualifying disclosures to the respondents. He reviewed each of the alleged disclosures in turn, and detailed why they did not support the claimant's case that she had made protected disclosures to the respondents.

130. Further, Dr Gibson submitted that, even if the Tribunal were to find that the claimant did disclose information which, in her reasonable belief tended to show the things alleged, she was not disclosing that information in the public interest, and, in particular, the alleged Scottish Land Court disclosure was not relevant to her work with the respondents, and informing her employer of something going on in her private life in relation to her own croft is not something done in her capacity as a worker under whistleblowing legislation.

131. On the **Section 103A** case against the respondents, we consider that it is appropriate to note the full terms of that part of Dr Gibson's written submissions, reading as follows:

Section 103A Challenge

In the Respondent's submission the Claimant has entirely failed to establish that the reason for her dismissal was that she made a protected disclosure. There was simply no evidence led which would support such a contention. There was a multitude of evidence in regards to the actual reason for the Claimant's dismissal. The Respondent would submit that even if the burden

of proof was reversed the Respondent would have proved that the reason for her dismissal was conduct.

Even if the Claimant was to show that any of the issues above amount to a qualifying disclosure, she has failed to establish any link between these purported disclosures and her dismissal. She has failed to bring any evidence which would call into question the stated positions of Ms Stewart and Mr Cowan that the reason for her dismissal was her conduct.

The facts surrounding this matter which support the Respondent's unrefuted position that the reason for her dismissal was the Claimant's conduct and not anything whatsoever to do with purported protected disclosures are as follows: -

As early as December 2016 (only 4 months into the Claimant's employment) her second line manager was of the view that the Claimant should be dismissed. The content of the probation review report allude to matters of misconduct. The manager's were pulled back from this by Ms Stewart who felt that at that stage the Claimant should be given further time to improve. This pre-dates the making of any alleged protected disclosure.

When making their decisions Ms Stewart and Mr Cowan had a lengthy report from the Claimant's second line manager, Euan MacPherson, her first line manager, Cat MacKaskill, the other HAO in the office, Cathie Tungay and a colleague, Maggie Smith detailing issues about the Claimant' conduct.

The Claimant was given a warning about her conduct on 2 March 2017.

Following the warning of 2 March 2017 allegations of further unsatisfactory conduct were made on 13 March 2017. Due to the nature of the allegations the decision was taken to suspend the Claimant on full pay pending investigation.

A meeting was held on 5 April 2017 to discuss the allegations. The conduct allegations included a failure to follow reasonable management instructions, the display of disruptive behaviours, that she did not listen to, accept or act on management instructions or take heed or have regard to warnings issued by her managers. Issues of her performance were also discussed at this meeting.

On 21 April 2017 the decision to dismiss the Claimant was taken by Jane Stewart, HR Professional Advisor.

The Claimant appealed that decision. Her appeal was heard and rejected.

This has only been pled in this way because the Claimant did not have two years service. The section 103A claim is an afterthought by a solicitor seeking to shoehorn a claim out of a set of clear facts that this was a conduct dismissal.

There is simply no basis for this claim and it should be dismissed.

Claimant's Closing Submissions

132. In coming to our Judgment on this case, we have also paid careful attention to the full terms of the claimant's own written submissions for the Tribunal. As a copy is held on the case file, we again do not consider it appropriate, or proportionate, to repeat its full terms here, but what we do note, by way of the claimant's position, is our own summation of her main points.

133. In setting out her closing submissions, the claimant explained the context of disclosures being made regarding the actions of civil servants within a Scottish Government department with responsibilities to the public interest, and she referenced the Audit Scotland definition of whistleblowing, and how, in her view, there is arguably a greater degree of fidelity placed on an

employee who is a civil servant, directly employed to serve the public interest and bound by the Nolan Principles of Public Life.

134. It is the claimant's position that all of the facts and evidence relied on by her demonstrate qualifying disclosures of information were made internally to the respondents and they documented those disclosures, and they were fully conscious of and aware that the protected information disclosures being made amounted to whistleblowing according to the definitions listed at **Section 43B of the Employment Rights Act 1996.**

135. Further, the claimant submitted, it is clear that Audit Scotland guidelines on how public sector bodies they audit, including Scottish Government RPID, should acknowledge, respond and manage protected information disclosures or whistleblowing were not followed, and that no protection to the employee was given.

136. The claimant submits that the majority of events which led to protected information disclosures and her questioning of or refusal to go along with improper practices all occurred before the interim probation report meeting on 6 December 2016. Further, she states:

> "*This evidence clearly negates any vexatious claim by the respondent that the claimant's case was only made as an 'afterthought' to a conduct dismissal. In any case, legal protection is afforded to information disclosures, including those made following dismissal (Onyango v Berkeley (t/a Berkeley Solicitors UKEAT/0141/09). The applicant has clearly suffered the detriment of colleague's reactions and false accusations of poor conduct in response to the applicant's questioning of workplace practices, even when that questioning did not explicitly take the form of a protected information disclosure and this intensified once clear disclosures were made. Detriment was incurred by the applicant during employment in the form of bullying and false allegations, ultimately in the event of dismissal and is still being*

experienced due to loss of reputation, wages, emotional hurt and inability to work in the public sector, which severely limits the ability to work close to home, which incurs the additional financial burden of working away."

137. Specifically, in her closing submissions to this Tribunal, the claimant has submitted that:

"HR had an absolute disregard for equalities law and protection of a employee making protected information disclosures. Their only concern was minimisation of legal risk to the Scottish Government. Ironically, this was also the claimant's concern, in highlighting practices which placed the Scottish Government at financial, legal and reputational risk."

138. The claimant also submitted that the Scottish Government failed to follow any of the best practice guidelines set out in the BEIS Guidance for Employers and Code of Practice (2015) setting out best practice for employers regarding whistleblowing. This includes ensuring employees are aware of whistleblowing policy, feel safe to make disclosure and are protected in the event of doing so.

139. She further submitted that, whilst there is no legal obligation to follow or implement a whistleblowing policy, this best practice should have been followed by the Scottish Government as a public governing entity administering EU, UK and Scottish taxpayer's money and the associated responsibilities set out by the Nolan principles.

140. Later in her closing submissions the claimant addresses what she sees as the respondents' failure to comply with their contractual obligations towards her. Specifically, she submits that:-

"*The Respondent failed to comply with its contractual obligations towards the claimant, particularly with regard to the probationary period. There were no 'monthly conversations' carried out between 1st August 2016 and 24th February 2017 despite this being a clearly stated requirement of the probation policy.*

When the applicant met with David Wright on 28 February 2017 she was told that an action plan would be put in place. This did not happen and HR instead proceeded to suspension and dismissal. The applicant received a warning letter regarding conduct which appears to be completely dislocated from the concurrent process regarding the mid probation appeal process where a number of false allegations regarding conduct were challenged and protected information disclosures made.

Furthermore, David Wright's report into the protected disclosures of information made was deeply flawed in that it did not confirm or clarify all the details of the disclosures with the claimant before the investigation was carried out. The investigation was incorrectly based on the responses to staff allegations report submitted on 31 March 2017 rather than the disclosures made to HR and David Wright prior to being suspended. The applicant emailed David Wright in early March and informed him that the list of information provided was "not exhaustive" but no effort to gain further information to support investigation was made.

… My outline grievance letter of 20 April 2017 clearly conveyed information linked to serious public interest and organisational risk issues which my employer failed to investigate further or provide me with adequate protection for, despite being legally obligated to do so.

Furthermore, the respondent has not clearly communicated and does not even seem clear about which policy it has applied to the claimant's

case. The appeal outcome letter only refers to failure regarding terms of probation (JB, page 433) but the respondent's ET3 (JB page 24-37) and response to further and better particulars (JB, page 38-43) repeatedly states that the claimant was dismissed in accordance with the discipline policy. That is not possible, because the discipline policy was not followed correctly, particularly in relation to the investigating officer and decision maker being the same person, and the same person to whom a number of protected information disclosures were made, namely HR Professional Advisor, Jane Stewart (see discipline policy and procedure at JB, page 613-619). Nor was the dismissal decision communicated to me in a timely fashion. The policy suggests this should be the same day. I was kept waiting from 5th April until 21st April and the "meeting" was not a discipline panel. The invitation to the meeting was not titled a discipline either. The invitation to the meeting to "discuss" was combined with the suspension letter and did not make the investigation process clear either. The discipline policy states that the HR Advisor involved should have had no prior involvement in the case (JB page 618)."

141. On the matter of public interest, the claimant made the following submission to us :-

"The claimant, as a civil servant, has by default of being knowingly and consciously bound by the Nolan Principles of Public Life, made disclosures in the public interest, and acted in good faith in making those protected information disclosures both as an individual public servant and as an employee of a public body with legal and moral obligations to administer public funds fairly, legally and in accordance with regulations relating to that particular organisation's function.

… With reference to this public interest test, the claimant not only subjectively believed the public interest disclosures to be in the public interest, the information disclosed, by its very nature of its being done

so by a public civil servant relating to public money, organisational financial risk and reputation, fair treatment of members of the local community and animal welfare and traceability, with far wider reaching implications for local and national European agricultural markets was by default in the public interest.

The facts of the nature of the claimant's employment as a public civil servant, employed to serve the public interest is an objective fact which outweighs the subjective speculation as regards motive or belief. Therefore, it is not necessary to invite the Tribunal to substitute any view when the matter is a fact and record of public interest by the very nature of the claimant's contract as a civil servant with a regulated public body legally and morally obligated to serve and administer according to the public interest.

… It is not possible for the claimant to act out of self -interest in making public interest disclosures because the claimant was a civil servant and therefore the risk was borne equally between the claimant and the organisation which the claimant was a part of. The claimant had a duty to make "protected" information disclosures in order to protect the public sector organisation which the claimant was a part of, not separate from, and to expect reasonable protection for making disclosures in the best interests of both the organisation and the public. At no time has the claimant suggested the disclosures were made out of concern for her own liability only.

142. On the matter of reasonable belief, the claimant submitted as follows:-

"… the public interest test can be satisfied where the worker genuinely believed that the disclosure was made in the public interest, and the tribunal concludes that this belief was objectively reasonable. In assessing reasonableness, the tribunal is not restricted to matters that were in the mind of the worker at the time. The question of reasonableness is to be judged objectively.

Working in a regulatory environment assessing casework, administering public money in the form of grants, carrying out regulatory work and investigating possible statutory breaches of responsibility as is the case for this applicant, surely evidences that the applicant had sufficient reasonable belief of wrongdoing in relation to the law and responsibilities of post when the protected information disclosures were made."

Relevant Law

143. Both parties' written closing submissions addressed the Tribunal on some aspects of the relevant law, both by reference to statutory provisions, and the cases cited to us in their lists of authorities. We do not understand the relevant law to be in dispute between the parties, but it is the application of that relevant law, to the facts of this case, that has required our specific judicial determination.

144. As such, we do not consider it either appropriate, or proportionate, that we set out the relevant law at length, and instead we have given ourselves a self-direction on the relevant law and, where appropriate, we make reference to the relevant law, and to parties' respective written closing submissions in the Discussion and Deliberation sections of these Reasons.

Discussion and Deliberation: Claimant's Rule 50 Anonymity Request

145. In considering this matter, we have had regard to parties' competing submissions, as recorded earlier in these Reasons, at paragraphs 102 to 105 above. Further, we note and record how, at the close of evidence at the Final Hearing, on 28 January 2019, Dr Gibson advised the Tribunal orally that the respondents were not seeking any **Rule 50** Order from the Tribunal.

146. At that stage, the claimant advised us that she was unsure about her position, and stated that she needed time to think about it, given the Judge clarified that that the Tribunal's Judgment and Reasons would be published online, so we allowed both parties to make any **Rule 50** application they felt appropriate by 23 April 2019, the date we fixed for written closing submissions, for use at the Hearing on Submissions before us, on 30 April 2019.

147. Further, we also note and record here, as detailed earlier at paragraph 67 of these Reasons above, that the claimant, on 4 March 2019, advised the Tribunal, by email, with copy sent to Dr Gibson, that she did not want this Judgment anonymised.

148. At the Hearing on Submissions before us, on 30 April 2019, after we had heard both parties' closing submissions, the claimant enquired whether she could seek anonymisation of what she referred to as the respondents' "***customers***". Dr Gibson replied, initially stating that he was adopting a "***neutral***" position, but then proceeding forthwith to add that he could not imagine that such people are entitled to confidentiality as regards inspections, etc, and so he was not convinced that anonymisation for them was necessary.

149. In response to Dr Gibson's observations, the claimant advised us that the respondents' customers have businesses, and so identification of them in a public Judgment could impact on their businesses, as it could be harmful to people in a small, rural community. In closing proceedings, at 1.20pm that afternoon, we advised parties that we had reserved Judgment, and we would take these points about anonymisation for customers into account during our private deliberations thereafter. We did not ask for any further submissions on the point, so the claimant's subsequent email of 10 July 2019 was unexpected by us.

150. **Rule 50 of the Employment Tribunals Rules of Procedure 2013** provides as follows:

Privacy and restrictions on disclosure

50.—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above—

(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;

(b) it shall specify the duration of the order;

(c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

(d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998.

151. Having carefully reflected on parties' competing submissions, we have decided to refuse the claimant's opposed application of 10 July 2019 for anonymisation of this Judgment, it not being in the interests of justice to do so, given the principle of open justice, where the identities of specified parties, witnesses and other persons were referred to openly in the public hearing of this case at the Final Hearing held before the Tribunal, they were named and identified in the many documents produced to the Tribunal in parties' Bundles and spoken to in evidence, and her application for anonymisation was made after the close of the Final Hearing.

152. While an application can be made at any stage of the proceedings, the lateness of the application is a factor for the Tribunal to take into account in evaluating competing rights, balancing one against another before reaching a decision, on whether or not to grant a **Rule 50** Order.

153. There was nothing put before us by either party to make us satisfied that a **Rule 50** Order was necessary to protect the Convention rights of any person,

or in the circumstances identified in **Section 10A of the Employment Tribunals Act 1996** which relates to disclosure of confidential information.

154. **Rule 50(6)** defines "***Convention rights***" as having the meaning given to it in **Section 1 of the Human Rights Act 1998**. **Section 1(3)** sets out the applicable Articles of the **European Convention on Human Rights,** and these are as detailed in **Schedule 1**.

155. In **Schedule 1, Part I, Article 8(1)** ("***Right to respect for private and family life***") reads: "***Everyone has the right to respect for his private and family life, his home and his correspondence."***

156. However, that right to respect for private and family life is then subject to the exceptions specified in **Article 8(2)**, but otherwise there shall be no interference by a public authority with the exercise of that Convention right. An Employment Tribunal falls within the **Section 6(3)** definition of a "***public authority",*** which includes a court or tribunal.

157. However, while we have refused the claimant's application for anonymisation, to protect the specific identity of certain persons and premises who were inspected by the respondents, and / or who applied for and / or were in receipt of grants administered by the respondents, which detail is not relevant or necessary for the purposes of this Judgment, the Tribunal has redacted in this Judgment the identities of the specific premises concerned, in order to protect any applicable Article 8 Convention rights of such persons to respect for their private and family life, and publication of which detail would otherwise likely lead to identification of those persons, and they have accordingly been referred to in this Judgment by the use of Alpha ciphers throughout.

158. Dr Gibson in his oral submissions to us, on 30 April 209, had queried whether any Convention rights were engaged. It is not necessary for us to make a specific ruling on that matter, and instead we have ordered redaction as being both appropriate and proportionate in all the circumstances, in order to protect

any applicable Article 8 Convention rights of such persons to respect for their private and family life. We lay emphasis on our use of the words "***any applicable Article 8 Convention rights***".

159. While the claimant's position changed, as between her email to the Tribunal, on 14 March 2019, when she stated clearly that she did not seek any **Rule 50** Anonymity Order from the Tribunal, and her application on 10 July 2019, when she then sought such an Order, we did not regard that as particularly significant, as the latter application explained why it was then being made, and so it was only one of several factors for us to take into account in deciding whether or not to grant the claimant's request.

160. What we did regard as more significant is that, in making her application on 10 July 2019, the claimant sought to "***retain the right to disclose my own identity in future should I choose to do so".*** In his objections for the respondents, Dr Gibson had stated that: ***"The basis of the application appears to be to prevent a prospective employer becoming aware that the Claimant brought a claim in the Employment Tribunal against The Scottish Ministers."***

161. Dr Gibson's objections, which spoke of the application having been made "***for the Claimant's own personal convenience***", explained that, in the respondents' view, it would be contrary to the principle of open justice to grant the application sought by the claimant. We agree with that submission, for the claimant's application does not meet the legal test of **Rule 50** which refers to such an order being "***necessary in the interests of justice***." The interests of justice need to have regard to not just the interests of one party in a litigation, but both parties, as also the wider interests of the public, and the proper administration of justice, giving full weight to the principle of open justice, as per **Rule 50(2).**

162. While the claimant, in her reply to Dr Gibson's objections to her application, described those objections as "***malicious, rather than principled***", we do not

accept her categorisation of his objections, which we regard as well-founded, being the respondents' articulated basis on which they argued the claimant's application did not meet the applicable legal test. For that reason, we have refused the claimant's application. She has not satisfied us that she meets the applicable legal test.

163. Further, and in any event, we pause to note and record that, by the date of the claimant's application on 10 July 2019, it was already the fact that the Judge's Preliminary Hearing judgment dated 21 January 2019, confirming the oral ruling made by him on 18 January 2019, in this case, had been published online, on 3 July 2019, in the Employment Tribunal Decisions database of publicly available ET judgments published by Gov.UK.

164. That 2-page online Judgment (being Judgment only, with Written Reasons to follow) named both parties, as they are named in this Judgment, although, as is the practice with online judgments, the claimant's address was not provided, although her full name was given. No other identifying features were included in that Judgment so as to readily allow a reader to identify this claimant as the claimant in that case, although five ET jurisdictional codes are given on the online published page, identifying the types of claim brought by the claimant against the respondents.

Discussion and Deliberation: Scope of the Claim before the Tribunal

165. One of the matters for consideration by us was the scope of the claim before the Tribunal. Unfortunately, neither party's written closing submissions expressly dealt with this matter, despite the Judge's case management order of 16 August 2018 leaving this as a reserved matter for determination at the Final Hearing.

166. Looking at the ET1 claim form, as presented, the claimant relies on paragraphs 11 and 14 of the paper apart, which we pause to note and record, stated as follows:

11. The disclosures that the claimant made (and upon which she avers were the real reasons for her dismissal) are as follows:

- *For exercising the statutory right to bring an application to the Scottish Land Court to challenge crofting registrations and conducting personal research in order to conduct this statutory right.*
- *Discrimination on the basis of 'mental wellbeing' alleged / complained by the Senior Agricultural Officer of Portree Area Office to HR.*
- *Age / Gender discrimination – relating to personal relationship status.*
- *For raising health and safety issues.*
- *For making protected disclosures.*
- *Persons appointed to investigate my disclosures, review my probation review, investigate allegations made about me, and hear my appeal were not sufficiently independent to consider any of these matters fairly or appropriately.*

14. Details of the complaint regarding raising health and safety issues are as follows:

On 2 August 2016 I submitted a DSE assessment highlighting glare from an overhead striplight. The health and safety liaison officer later removed the bulb. After I made disclosures to HR on 16 February 2017 the bulb was replaced when I returned to work on 17 February 2017. When I asked the H & S liaison officer to consider solutions to this issue on 21 February 2017, I was sent a written warning by my line manager on 10 February. (sic)

16 February 2016 (sic) – Disclosing to HR Advisor Jane Stewart that colleague, Maggie Smith, had failed to have concern for her and my health and safety on two occasions and asked to me toile if asked about an accident she had after climbing over an unstable section of fencing I had warned her was unsafe on 16 August 2016. On 21 November 2016 I was asked to break the speed limit by Maggie Smith

in a work car, which I refused to do. I reported this verbally to my line manager on 20 December 2016.

I also raised a number of other staff driving issues with HR in my responses to allegations made about me."

167. Having ourselves carefully considered this matter, we have decided that there was no extant complaint of automatically unfair dismissal in a health and safety case, in terms of **Section 100 of the Employment Rights Act 1996**, before the Tribunal in the claimant's ET1, as paragraphs 11 and 14 of the paper apart to that ET1 claim form, as accepted by the Tribunal on 14 September 2017, and relied upon by the claimant, do not contain any such complaint, but relate to alleged protected disclosures regarding raising health and safety issues, and , further, and in any event, the claimant did not make any such complaint as part of her evidence in this case as presented to this Tribunal at the Final Hearing.

168. It is of note that when her then solicitor, Mr Healey, intimated further and better particulars of her claim, on 28 December 2017, paragraph 4 stated that : ***"The claimant is not advancing an argument that she was dismissed for making a health and safety complaint except to the extent that health and safety issues are raised below."*** There then followed her list of protected disclosures relied upon to found her complaint of automatically unfair dismissal for making protected disclosures.

Discussion and Deliberation: Protected Disclosures

169. The relevant law, so far as material for present purposes, is to be found in **Sections 43A to 43C of the Employment Rights Act 1996**, which provides as follows:

43A. Meaning of "protected disclosure"

In this Act, a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B. Disclosures qualifying for protection

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

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

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

42C. Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure (a) to his employer….

170. As per Dr Gibson's written closing submissions for the respondents, their position is that:

> *"It is the Respondent's position that none of the facts relied on by the Claimant have demonstrated that she made any qualifying disclosures to the Respondent."*

171. Further, even if the Tribunal were to find that the claimant did disclose information which in her reasonable belief tended to show the things alleged, the respondents submitted that the claimant was not disclosing this information in the public interest.

172. As Dr Gibson put it, in his written closing submissions: "*It is simply denied that the Claimant disclosed information which, in her reasonable belief was in the public interest."* Further, he stated : *"If the Tribunal are to look at the source documentation of these various purported disclosures they will find that they were done either maliciously to throw mud at colleagues, or out of concern for her own position, be it liability or job security."*

173. The claimant's closing submissions to the Tribunal, on the other hand, are that she did make protected disclosures, and that she was acting in the public interest in making such disclosures to the respondents.

174. In considering this issue, and whether the alleged disclosures to the respondents, as relied upon by the claimant at this Final Hearing, do or do not constitute protected disclosures, we have had to look carefully at the constituent parts of the **Section 43B** test.

175. The protected disclosure regime came under scrutiny from the Employment Appeal Tribunal in **Cavendish Munro Professional Risks Management Ltd-v-Geduld [2010] ICR 325**. Giving judgment, Slade J stressed that the protection extends to disclosures of information, but not to mere allegations. Disclosing information means conveying facts.

176. In **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, the Court of Appeal noted that an allegation can contain factual information and may be boosted by context or surrounding communications. Allegations are therefore to be subjected to evaluative judgment by the Tribunal in light of all the circumstances of a case.

177. The Court of Appeal in **Kilraine** endorsed observations made by Mr Justice Langstaff when that case was before the EAT that '***the dichotomy between "information" and "allegation" is not one that is made by the statute itself' and that "it would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined."***

178. Further, the Court of Appeal in **Kilraine** went on to stress that the word '***information'*** in **S.43B(1)** has to be read with the qualifying phrase '***tends to show'*** — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur.

179. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in **Section 43B(1)(a)–(f).** It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures.

180. Furthermore, as explained by Lord Justice Underhill in the Court of Appeal's judgment in **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2017] EWCA Civ 979; [2018] ICR 731**, this has both a subjective and an objective element: -

    a. ***The Tribunal must determine whether the worker subjectively believed at the time that the disclosure was in the public interest and, if so, whether the belief was objectively reasonable.***

b. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the Tribunal should not substitute its own view.

c. The reasons why the worker believes disclosure is in the public interest are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to the Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

d. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief." which is not the same as "motivated by the belief…"

e. There are no "absolute rules" about what it is reasonable to view as being in the public interest. Parliament had chosen not to define what "the public interest" means in the context of a qualifying disclosure, and it must therefore have intended employment tribunals to apply it "as a matter of educated impression".

181. Where a disclosure is made to an employer, it does not need to be true to qualify for protection but the employee must reasonably believe it to be true (**Darnton v University of Surrey [2003] IRLR 133** and **Babula v Waltham Forest College [2007] IRLR 346**).

182. The test of reasonable belief must take account of what a person with that employee's understanding and experience might reasonably believe (**Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4**). Reasonableness depends not only on what is said in the disclosure but the basis for it and the circumstances in which it was made.

183. The EAT gave guidance on the findings a Tribunal should make in **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416,** at paragraph 98, per HHJ Serota QC, as follows:

> "***It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.***
>
> ***1. Each disclosure should be identified by reference to date and content.***
>
> ***2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.***
>
> ***3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.***
>
> ***4. Each failure or likely failure should be separately identified.***
>
> ***5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate***

failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."

184. The Court of Appeal in **Chesterton Global Ltd v Nurmohamed [2017] IRLR 837** held that to be in the public interest, a disclosure had to serve more than a private or personal interest of the worker making the disclosure. As Underhill LJ put it, the question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but he held that counsel, Mr Laddie's fourfold classification of relevant factors which he reproduced at para 34 of the judgment might be a useful tool.

185. The factors referred to as a useful tool were:

> ***(a) The numbers in the group whose interests the disclosure served;***
>
> ***(b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed - a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of a trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;***
>
> ***(c) The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;***
>
> ***(d) The identity of the alleged wrongdoer, as the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest – though this should not be taken too far.***

186. Finally, as both parties referred us to it, and it contains a very helpful summary of the statutory framework and the case law, we gratefully adopt the guidance from the EAT Judge, Her Honour Judge Eady QC (as she then was, now Mrs Justice Eady in the High Court), in **Parsons v Airplus International Ltd [2017] UKEAT/0111/17**, at paragraphs 23 to 29, as follows:-

> *23. As to whether or not a disclosure is a protected disclosure, the following points can be made:*
>
> > *23.1. This is a matter to be determined objectively; see paragraph 80,* ***Beatt v Croydon Health Services NHS Trust*** *[2017] IRLR 748 CA.*

*23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; **Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540 EAT.*

*23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; **Kilraine v London Borough of Wandsworth** [2016] IRLR 422 EAT.*

*24. As for the words "in the public interest", inserted into section 43B(1) of the **ERA** by the **2013 Act**, this phrase was intended to reverse the effect of **Parkins v Sodexho Ltd** [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).*

*25. More generally, in **Chesterton**, Underhill LJ offered the following guidance. First, as to the approach that has to be taken in general:*

"27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of s.43B as expounded in Babula (see paragraph 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the 'range of reasonable responses' approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to 'the Wednesbury approach' employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking - that is indeed often difficult to avoid - but only that that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not

substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

26. More specifically, where the disclosure relates to something that is in the worker's own interest:

"37. … where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be though that such a disclosure was in the public interest. The question is one

to be answered by the tribunal on a consideration of all the circumstances of the particular case …"

27. *Turning then to the question whether a dismissal was because of a protected disclosure and thus automatically unfair. Section 103A of the* ***ERA*** *provides:*

> ***"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."***

This requires an enquiry into what facts or beliefs caused the decision-taker to decide to dismiss. This may require the ET to do more than simply consider what was the reason for dismissal by reference to any particular protected disclosure, in isolation; it might be necessary to consider that question against a history of protected disclosures and to ask whether, taken together in that history, the prohibited reason was the reason or principal reason for dismissal; see ***El-Megrisi v Azad University (IR) In Oxford*** *UKEAT/0448/08.*

28. *A further issue that may arise when determining what was the reason for dismissal, is sometimes referred to as the question of separability: the ET may need to resolve whether the real reason (or principal reason) for the dismissal was the protected disclosure itself or the manner in which that disclosure was made. In addressing this issue in* ***Panayiotou v Chief Constable of Hampshire Police*** *[2014] IRLR 500, the EAT gave the following guidance:*

> ***"49. First, as a matter of statutory construction, s.47B of ERA does not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes about the process of dealing with protected disclosures. A protected disclosure is 'any disclosure of information' which in the reasonable belief of the employee tends to show the existence of one of the state of affairs specified in s.43B(1) of ERA, eg that a criminal offence has been or is being committed or that a***

person is failing or is likely to fail to comply with a legal obligation or that a miscarriage of justice has occurred, is occurring or is likely to occur. There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed.

50. Secondly, that distinction accords with the existing case law which recognises that a factor which is related to the disclosure may be separable from the actual act of disclosing the information itself. In Bolton School v Evans [2007] IRLR 140, the Court of Appeal recognised a distinction between disclosing information - in that case, that the school's computer system was not secure - and the fact that the employee hacked into the computer system in order to demonstrate that the system was not secure. Disciplining the employee on the ground that he had engaged in unauthorised misconduct by hacking into the computer system did not involve subjecting the employee to a detriment on the grounds that he had made

a protected disclosure. The conduct, although related to the disclosure, was separable from it. The Court of Appeal noted, however, that a 'tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself' (see the comments of Buxton LJ at [2007] IRLR 140 at paragraph 18).

51. The Employment Appeal Tribunal reached a similar conclusion in Martin v Devonshires Solicitors [2011] ICR 352. That case concerned discrimination contrary to s.4 of the Sex Discrimination Act 1975 (essentially victimisation of a person for doing a protected act) rather than the provisions governing protected disclosures under ERA. The principle is, however, similar. The appellant in that case had made allegations of sex discrimination against two partners in the firm of solicitors involved. The statements were in fact untrue. However, the appellant, who had mental health difficulties, did not appreciate that they were untrue. The fact that the appellant had done protected acts, in that case making complaints of sex discrimination, formed part of the facts leading to her dismissal. The reason why the employer dismissed the appellant, however, was not the making of those complaints but rather the fact that the complaints involved false allegations which were serious, that they were repeated, that the appellant refused to accept that they were untrue and that she had a mental condition which was likely to lead to unacceptably disruptive conduct in future. The reason for the dismissal was that the appellant was mentally ill and the management problems to which that gave rise. The Employment Appeal Tribunal accepted that the reason for the dismissal constituted:

'23. … a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint.'

52. Those authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did.

53. That conclusion is not, in my judgment, altered by the decision in Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773. That case involved alleged victimisation. The appellant had lodged a series of grievances alleging racially discriminatory conduct against himself. The grievances had been investigated and ruled to be unfounded. The appellant, however, remained of the view that he had been subjected to racially discriminatory conduct and the fact that his grievances had been rejected reinforced that conclusion in his mind. The employer decided to dismiss the appellant. The appellant had always done his job properly and there were

no doubts about his abilities when performing his job and that was not the reason for the dismissal. Rather, the tribunal found that the reason for the dismissal was that the employer considered that the appellant was convinced that the managers were treating him in a racially discriminatory fashion and so concluded that he, the employee, had lost trust and confidence in the employment relationship. The Employment Appeal Tribunal considered that, on the facts, there were no features which were separable from the fact of making the grievances. The features relied upon by the employer involved a view of the appellant's subjective state of mind and the possibility that he may make further complaints in future. In reality, the Employment Appeal Tribunal considered that, on an analysis of the tribunal's findings the reason for the dismissal, described in terms of a loss of confidence and trust by the employee in the employment relationship, was the fact that the appellant had made complaints of racial discrimination. The factors relied upon were not therefore properly separable on the facts of that case from the doing of the protected acts.

54. The Employment Appeal Tribunal in Woodhouse suggested that, in such cases, it would only be exceptionally that the detriment or dismissal would not be found to be done by reason of the protected act. In my judgment, there is no additional requirement that the case be exceptional. In the context of protected disclosures, the question is whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, in fact, the reasons why the employer acted as he did. In considering that question a tribunal will bear

in mind the importance of ensuring that the factors relied upon are genuinely separable and the observations in paragraph 22 of the decision in Martin v Devonshires Solicitors [2011] ICR 352 that:

> ***'Of course such a line of argument is capable of abuse. Employees who bring complaints often do in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purposes to object to "ordinary" unreasonable behaviour as that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.' "***

*29. Further, see **Beatt** at paragraph 94:*

> ***"94. … it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest. Those questions will ultimately be judged by a tribunal, and if the employer proceeds to dismiss it takes the risk that the tribunal will take a different view about them. I appreciate that this state of affairs might be thought***

to place a heavy burden on employers; but Parliament has quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. If there is a moral from this very sad story, which has turned out so badly for the Trust as well as for the appellant, it is that employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected (or, in a case where Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 is in play, that a distinction can clearly be made between the fact of the disclosures and the manner in which they are made)."

187. Having carefully considered parties' competing submissions, we have decided that the claimant did not make any protected disclosures, in terms of **Section 43B of the Employment Rights Act 1996**, to the respondents. Our reasons for coming to that decision are set out as follows, taking each alleged protected disclosure in turn.

Scottish Land Court

188. The claimant's e-mail to David Wright dated 12 January 2017 advising him, in case he considered there to be any conflict of interest to her current role, that she had raised "two application to the Scottish Land Court to challenge two different common grazing registrations, and a third application is currently being submitted to ask the Court define my croft boundaries, in order that I might register my own croft", is not a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with a legal obligation to which they are subject, or that a miscarriage of justice has occurred, is occurring or is likely to occur, which is the Section 43B(b) and (c) of the Employment Rights Act 1996 upon which the claimant relies.

189. That she had raised these applications was of absolutely no relevance to the work of the Scottish Government's Agriculture and Rural Economy Directorate whatsoever. The Agriculture and Rural Economy Directorate was not a party to this action, as the claimant's claims within the Scottish Land Court were against the Crofting Commission. It was a personal matter between the claimant and the Crofting Commission. In his reply of 13 January 2017, Mr Wright advised the claimant that in no way was her raising a claim within the Scottish Land Court a conflict of interest with her employment by the respondents as an Agricultural Officer.

190. As Dr Gibson put it, in his written closing submissions for the respondents, informing your employer that an organisation completely unconnected with your employer may have acted in a way so that a miscarriage of justice has occurred, is occurring or is likely to occur is not made in the public interest. Raising the court case in the first place might potentially be in the public interest but telling your employer that you have done so is not.

191. We agree with Dr Gibson's submission that the claimant here was disclosing this information in her own interest - to get an assurance that her personal life was not creating a conflict of interest with her working life. It might arguably be said she was also doing so in her employer's interest as they would not wish an employee to be acting in conflict of interest, but that falls short of making the disclosure in the public interest.

192. Further a qualifying disclosure is made by a worker. We agree with Dr Gibson's submission that it is logically inherent in the wording of the legislation that to be a qualifying disclosure the information must be in someway relevant to the worker's work. Simply informing your employer of something which is going on in your private life is not done in your capacity as a worker.

<u>Alan Sillence Croft Inspection</u>

193. We accept, as well-founded, Dr Gibson's submission that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, was made in the public interest and tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he is subject, as per Section 43B(b) of the Employment Rights Act 1996 upon which the claimant relies.

194. The claimant was not asked to carry out this inspection on 16 October 2016. It was her colleague, Maggie Smith, who was carrying out the inspection. Ms Smith was the reporting officer in regards to the inspection. Even if the claimant did state that she had been asked to carry out inspections, she could not reasonably believe that being asked to do so, and indeed doing so, amounted to a failure to comply with a legal obligation.

195. Nothing specific is averred by the claimant in her ET1 further and better particulars as to what that legal obligation might be, other than she refers to there being a practice that employees working within the Portree office were prohibited from carrying out inspections on fellow colleagues' crofts.

196. The Tribunal heard evidence from Mr Wright that he did not agree that employees working within the Portree office were prohibited from carrying out inspections on fellow colleagues crofts. He stated that this happened in a small office in a small community and there were no express rules against it. He alluded to Alan Sillence being a temporary inspection officer and not senior to Maggie Smith so there would be no seniority issues of a junior member of staff being asked to carry out an inspection of a more senior member of staff. Mr Wright could think of no legal obligation which would have been breached by Maggie Smith carrying out this inspection.

197. Further, we note Dr Gibson's observation that while the claimant says this happened on 16 October 2016, in her own averments, in her ET1 further and better particulars, she does not raise it until 1 February 2017. As Dr Gibson asked, in his closing submissions, if this was such a vital protected disclosure

made in the public interest, then why on earth would the claimant wait so long to actually bring it to anyone's attention?

Fence incident at Alan Sillence's croft

198. On this matter, the claimant alleged that, on 16 October 2016, she was asked by her colleague, Maggie Smith, during the inspection of her colleague, Alan Sillence's croft, to climb over a rotting fence, but she was not prepared to do so, as the fence looked unsafe, and when Ms Smith proceeded to climb over it, the claimant says that Ms Smith suffered an accident as a result. The claimant further alleges that Ms Smith then asked her not to disclose the fact that she had requested that the claimant put her own health and safety at risk.

199. The claimant states that she disclosed this information to Jane Stewart (from HR) in a report dated 1 February 2017, and further disclosed it to Ms Stewart during a telephone conversation on 9 February 2017, and at a meeting on 16 February 2017. The claimant believes that this was a disclosure of information that her safety had been put at risk by the negligent instructions of Ms Smith, and it was also a disclosure of information that Ms Smith had attempted to cover up the fact that the claimant's health and safety had been placed at risk, and that all this qualified for protection pursuant to Section 43B(d) and (f) of the Employment rights Act 1996.

200. As per Dr Gibson's submissions, the respondents' position on this matter is that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered, or that information tending to show that had been, was being or was likely to be deliberately concealed, as per Section 43B(d) and (f) of the Employment Rights Act 1996 upon which the claimant relies.

201. We agree with Dr Gibson's argument that it is somewhat ludicrous for the claimant to be suggesting that this was deliberately concealed when Ms Smith

had put in an accident report. This matter was known to the respondents. Again, the incident occurred on 16 October 2016, yet in her own averments, the claimant does not raise it until 1 February 2017. If this was such a vital protected disclosure made in the public interest, then why on earth would she wait so long to actually bring it to anyone's attention?

202. On the evidence available to us, we accept as well-founded Dr Gibson's submission that the fact is it did not happen. We agree that it seems more likely than not that this is something the claimant has embellished to throw mud when it is her own performance which is being seriously called into question as part of the probation process. There is no protected disclosure here.

203. Even taking the claimant's case at its highest, it is not a protected disclosure. Telling your employer that a colleague asked you to do something and that you refused is not providing your employer with information that tends to show that the health or safety of any individual has been, is being or is likely to be endangered.

Inspection at property A

204. The claimant avers that, on 14 November 2016, while carrying out a sheep inspection with Maggie Smith, she was told to overlook errors with the tagging of sheep. While she identifies the legal obligation on crofters and farmers in the Sheep and Goat (Identification and Traceability) Regulations, her account of this alleged protected disclosure, which she states she made to Catriona Macaskill on 20 December 2016, is not substantiated by David Wright's later investigation, where he looked at the data capture of the sheep inspections and all seemed in order.

205. The respondents' position on this matter, as per Dr Gibson's closing submissions, is that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, is made in the public

interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and/or that the health or safety of any individual has been, is being or is likely to be endangered, as per Section 43B(b) and (d) of the Employment Rights Act 1996 upon which the claimant relies.

206. In these circumstances, we are of the view that there is no protected disclosure here. Again, as per Dr Gibson's submission to us, we accept that it appears that this is the claimant again throwing mud at others to divert from her own failings, and it is the pattern to this entire case.

Speeding

207. This relates to an allegation by the claimant that, on 21 November 2016, she was driving, with Maggie Smith, to carry out a sheep inspection, where the claimant alleges that Ms Smith asked her to exceed the speed limit and therefore commit a criminal offence and risk their and other road users health and safety, but the claimant refused to do so.

208. The claimant asserts that this was a disclosure of information that a criminal offence was likely to be committed and that the health and safety of individuals were being endangered, as per Section 43B(b), (c) and (d) of the Employment Rights Act 1996.

209. As per Dr Gibson's closing submissions, the respondents' position in regards to the claimant's purported qualifying disclosure that she told her manager, Catriona Macaskill, on 6 December 2016, that her colleague, Ms Smith, asked her to exceed the speed limit is that this simply did not happen.

210. On the evidence before us, we agree with Dr Gibson's submission that what actually happened is that on 6 December 2016 the claimant told her manager, Ms Macaskill, that she felt picked on by her colleague, Ms Smith, because her colleague had asked her to slow down to 40mph in a 40mph zone and speed up once she was in a 60 mph zone.

211. As Dr Gibson comments, this unreasonable response to her colleagues concerns and describing this as being picked on was one of the numerous examples of conduct by the claimant which *in cumulo* was deemed by the respondents to amount to unsatisfactory conduct by the claimant.

Inspection at property B

212. The claimant avers that, on 29 November 2016, while carrying out a sheep inspection, her colleague, Maggie Smith, told her to turn a blind eye to errors and anomalies. She further avers that she disclosed this verbally to Ms Macaskill on 20 December 2016, and also disclosed it to Jane Stewart on 9 and 16 February 2017, and to David Wright on 28 February 2017. She believes it is a protected disclosure for the purposes of Section 43B(b) and (d) of the Employment Rights Act 1996.

213. As per Dr Gibson's closing submissions, the respondents' position on this matter is that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and/or that the health or safety of any individual has been, is being or is likely to be endangered.

214. On the evidence led before this Tribunal, we are satisfied that David Wright looked at this allegation, and he found that the paperwork noted that 4 tags had been replaced during the inspection. He could not see it as credible that Ms Smith would have told the claimant to ignore this and then record it in her notebook that 4 were missing and retagged. Further a letter had been issued confirming that 4 animals with lost tags had been found. As Mr Wright notes through out these allegations were either made by the claimant without checking the facts or done so maliciously.

Property C Sheep Inspection

215. The claimant avers that, on 28 November 2016, when asked to go to a sheep inspection with Alan Sillence, during the sheep inspection, it was discovered that the customer in question had a number of tagging errors within their flock of sheep, and when the claimant advised the customer that she would have to issue a 28 day tagging letter, to rectify the errors identified or else the customer would risk losing subsidy payment, or further action, she alleges Mr Sillence dissuaded her from issuing the letter.

216. She also alleges that Mr Sillence suggested that she re-tag the sheep for the customer, and that he stated that he intended to re-tag the sheep for the customer. She further avers that when she returned to her office and spoke with Maggie Smith about the incident, Ms Smith confirmed that the letter should be issued, and clarified that staff could assist customers with re-tagging.

217. The claimant further avers that she disclosed this information to Ms Macaskill on 17 January 2017 during a meeting, and also disclosed it to David Wright by email on 28 February and 1 March 2017. She believes it is a protected disclosure for the purposes of Section 43B(b) and (f) of the Employment Rights Act 1996.

218. The respondents' position on this matter, as per Dr Gibson's closing submissions, is that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and/or that information tending to show that is being or is likely to be deliberately concealed.

219. On the evidence before the Tribunal, we were satisfied that David Wright looked at this and found that it was actually the claimant and not Alan Sillence

who had offered to go and retag the sheep and the only evidence of wrongdoing in the file was on the part of the claimant.

Property D Farm Inspection

220. The claimant avers that, on 17 February 2017, she emailed the Animal Inspections Team at Saughton House, Edinburgh, to disclose that her name was being used to sign-off an inspection which had been carried out prior to the inspection being completed, and that this went against inspection guidance stating that a customer undergoing a sheep inspection should only sign-off on the inspection after it was completed.

221. She believed that this was a disclosure of information that a person had failed, is failing or was likely to fail to comply with a legal obligation, as per Section 43B(b) of the Employment Rights Act 1996.

222. As per Dr Gibson's closing submissions, the respondents' position on this matter is that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

223. Far from being a protected disclosure, Dr Gibson submitted that this was the claimant seeking to undermine her manager, Cathy Tungay. He pointed out how, in evidence, David Wright was of the view that the first port of call if an Agricultural Officer is unsure of anything is their line manager. The claimant simply said that Ms Tungay would dismiss her concerns which in his view illustrated the problem with the claimant not her manager. In any event, the data capture was all in order, following Mr Wright's investigation into this matter.

DSE Lighting Issue

224. On this matter, the claimant asserted that, on 21 February 2017, she submitted a DSE self-assessment form to Peter Macdonald, a health and safety officer, regarding the lighting in her office, which she complained was making her unwell. She believed that this was a disclosure of information that she and her colleagues' health and safety was at risk and this a protected disclosure pursuant to Section 43B(d) of the Employment Rights Act 1996. She complained that, following upon that disclosure, she received correspondence from her line manager, Catriona Macaskill, that she was to be investigated for not following management instruction regarding how she was to raise complaints with management,

225. The respondents' position on this matter, as per Dr Gibson's closing submissions, is that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered.

226. Having heard evidence led before this Tribunal, we accept as a valid observation Dr Gibson's submission to us that this issue relates to nothing more than the claimant showing a lack of respect for her colleagues and insubordination to her manager. She asked Peter Macdonald to change lighting without consulting with her colleagues or manager. There was no health and safety disclosure.

Advanced Warning of Sheep Inspections

227. Here, the claimant alleges that she disclosed to Jane Stewart (HR) on 31 March 2017, in writing, that Cathy Tuncay had given advanced warning to the Tallisker Sheep Stock Club that they were going to be inspected, noting that Ms Tuncay's husband was employed by the Club.

228. She believes that this is a disclosure of information which qualifies for protection under Section 43B(b) and (d) of the Employment Rights Act 1996,

being a disclosure that a person is failing to comply with a legal obligation which they are subject to, and that the health and safety of an individual is being or is likely to be endangered.

229. As per Dr Gibson's closing submissions, the respondents' position on this matter is that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and/or that information tending to show that is being or is likely to be deliberately concealed.

230. On the evidence led before the Tribunal, David Wright looked into this issue concerning the Tallisker Sheep Stock Club and felt that the implication from the claimant that Ms Tungay had acted improperly did not stand up to informed scrutiny. He again stated that the allegation had either been made with the claimant not checking the facts or doing so maliciously.

CAGS Grant

231. On this matter, the claimant alleges that, on 2 February 2017, she emailed Ewen Macpherson to disclose that Crofters Agricultural Grants Scheme (CAGS) financial assessments were not being assessed correctly or consistently, and she specifically queried a grant that had been initially assessed by her at 60%, but later increased by Alan Sillence to 80%.

232. The claimant further states that she verbally disclosed this same information to Cathy Tuncay on 1 February 2017, and that she discussed it with Jane Stewart on the phone on 9 February 2017, and at a meeting with Ms Stewart on 16 February 2017, during which she said that either Mr Sillence or Ms Tuncay were being dishonest regarding the assessment of this grant.

233. She believed this was a disclosure of information that the respondents were failing to comply with a legal obligation to which they were subject, being a qualifying disclosure pursuant to Section 43B(b) of the Employment Rights Act 1996, and that someone was trying to conceal the failure to comply with that legal obligation, pursuant to Section 43B(f).

234. The respondents' position on this matter, as per Dr Gibson's closing submissions, is that the claimant did not disclose information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and/or that information tending to show that is being or is likely to be deliberately concealed.

235. Again, from the evidence led before us, we know that Mr Wright looked into this allegation, and he found that the claimant had been correct about the correct rate of grant at 60%, although the office had believed it should be 80%, but this was subsequently shown to be wrong.

Discussion and Deliberation: Automatically Unfair Dismissal

236. We have reminded ourselves that the claimant did not have the requisite 2 years' qualifying service to raise an "ordinary" unfair dismissal claim, under **Part X of the Employment Rights Act 1996**.

237. The relevant law is to be found in **Section 103A of the Employment Rights Act 1996**, which provides as follows:

"***103A Protected disclosure***

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the

principal reason) for the dismissal is that the employee made a protected disclosure."

238. The burden of proof is on the claimant to establish that the reason for her dismissal was that she made a protected disclosure - **Smith v Hayle [1978] IRLR 413,** applied in **Ross v Eddie Stobart Ltd [2013] 8 WLUK 88**.

239. In his written closing submissions for the respondents, Dr Gibson set forth his challenge to the claimant's **Section 103A** complaint as follows:

"In the Respondent's submission the Claimant has entirely failed to establish that the reason for her dismissal was that she made a protected disclosure. There was simply no evidence led which would support such a contention. There was a multitude of evidence in regards to the actual reason for the Claimant's dismissal. The Respondent would submit that even if the burden of proof was reversed the Respondent would have proved that the reason for her dismissal was conduct.

Even if the Claimant was to show that any of the issues above amount to a qualifying disclosure, she has failed to establish any link between these purported disclosures and her dismissal. She has failed to bring any evidence which would call into question the stated positions of Ms Stewart and Mr Cowan that the reason for her dismissal was her conduct…..

This has only been pled in this way because the Claimant did not have two years service. The section 103A claim is an afterthought by a solicitor seeking to shoehorn a claim out of a set of clear facts that this was a conduct dismissal.

There is simply no basis for this claim and it should be dismissed."

240. The claimant, however, in her written closing submission to the Tribunal, invites us to uphold her claim against the respondents. Having carefully considered parties' competing submissions, we have decided that the claimant's complaint, in terms of **Section 103A of the Employment Rights Act 1996,** alleging automatically unfair dismissal for making a qualifying protected disclosure, is not well-founded, and her claim against the respondents is accordingly dismissed in its entirety by the Tribunal.

241. From the evidence led before this Tribunal, we are satisfied that the reason for her dismissal was the claimant's conduct and not anything whatsoever to do with purported protected disclosures. We are satisfied that the reason for her dismissal was conducted related, and even if she had made any protected disclosures to the respondents, that was not the reason for her dismissal. Her complaint of automatically unfair dismissal fails, and so we have dismissed it. Her dismissal by the respondents for that conduct related reason was not unfair.

Closing Remarks

242. As we have not found for the claimant, on any of her heads of claim against the respondents, we do not require to address the competing submissions about what sums to award her by way of compensation. In her oral closing submissions, she stated that she still sought about £25,000 in compensation, along with what she referred to as a "***clean reference***" from the respondents.

243. Had we required to do so, while the claimant sought £10,000 for injury to feelings, which Dr Gibson described as an inflated figure, given there was no evidence before the Tribunal to support such an award at that amount, even if the claim was successful, which they disputed, we have to say that the claimant did not produce any independent vouching, from a family member, friend, treating physician or other medical practitioner, about the nature and extent to which her feelings were injured by the respondents.

244. Accordingly, on the limited evidence provided by only her to this Tribunal, we would not have been satisfied that this a case falling within the **Vento** middle band, and, had we been making any award to the claimant, we would have been inclined to consider an award at the lower end of the **Vento** bottom band, currently £900 to £8,800, and thus well below the £10,000 award suggested by the claimant.

245. In that regard, we refer to the unreported EAT judgment of His Honour Judge David Richardson, in **Esporta Health Clubs & Anor v Roget [2013] UKEAT 0591/12,** which makes it clear that a Tribunal has to have some material evidence on the question of injury to feelings. Here, we had the claimant's limited evidence, and no evidence from any GP or indeed any other person with knowledge of the claimant's case about the nature and extent of the claimant's injured feelings.

Employment Judge:	I McPherson
Date of Judgement:	16 April 2020
Entered in Register,	
Copied to Parties:	23 April 2020