EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103399/2020

Final Hearing held remotely by Cloud Video Platform on 8, 9, 10, 13, 14, 15, 16 and 17 December 2021, deliberation day 20 December 2021

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Employment Judge A Kemp
Tribunal Member F Parr
Tribunal Member A Perriam

15 **Ms D Fitzpatrick** — **Claimant**
In person

The Scottish Ministers — **Respondent**
Represented by:
20 **Dr A Gibson**
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the claims do not succeed, and the Claim is dismissed.

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REASONS

Introduction

1. This was a Final Hearing of the claims made by the claimant for unfair
35 dismissal, that the dismissal was automatically unfair as the reason or principal reason for it was for having made a protected disclosure, and for breach of contract. All claims were defended.

2. This claim follows an earlier claim by the claimant against the respondent
40 under case number 4101694/2017 (“the earlier Claim”). That was an

entirely different claim with different remedies sought on what were partly different matters of fact. At a Preliminary Hearing almost all of the claims made were held to be outwith the jurisdiction of the Tribunal, and at the Final Hearing the remaining claims were dismissed, on a majority decision.

3. There had been earlier Preliminary Hearings in this case. One was on case management on 17 May 2021 after which orders were issued. Another was on 16 November 2021 to address an application to amend, which was allowed in two respects but otherwise refused. The third was on 26 November 2021 to address the claimant's applications for document orders, and witness orders, which were refused save for a witness order. In the email to the parties confirming that decision, which had been issued orally further matters of case management were also addressed.

4. The Final Hearing was originally to have been held in person, but the claimant latterly applied for it to be held remotely, and that was granted in the most recent Preliminary Hearing. It was therefore held by Cloud Video Platform. It was conducted successfully on that basis.

Issues

5. The Tribunal identified the following issues for determination, and raised them with the parties at the commencement of the hearing. They confirmed their agreement. The list of issues is:

   (i) What was the reason, or principal reason, for the claimant's dismissal?

   (ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 ("the 1996 Act") was it fair or unfair under section 98(4) of that Act?

   (iii) Did the claimant make protected disclosures under section 43B of the 1996 Act to the respondent on 17 September 2010 or by email to George Cunningham in February 2011?

(iv) If so, was the making of such disclosures the sole or principal reason for the dismissal under section 103A of the 1996 Act?

(v) Was the termination of the contract of employment by the respondent a breach of contract?

(vi) If any claim is successful, to what remedy is the claimant entitled? In that regard (a) should the claimant be re-instated as her principal remedy, (b) what if any award should be made for injury to feelings if the dismissal was automatically unfair (c) what basic and compensatory awards if any should be made, which include issues of the extent of losses sustained, any adjustment in respect of the alleged failure to follow the ACAS Code of Practice, whether the claimant mitigated her loss, whether there should be any ***Polkey*** deduction and was there any contribution to the dismissal by the claimant?

6. During her evidence the claimant confirmed that she did not seek to be re-instated so as to return to her role. She confirmed that she sought re-engagement outwith Marine Scotland the agency of the respondent in which she worked. She had submitted a Schedule of Loss seeking a total sum in excess of £500,000.

Preliminary Issues

7. The claimant sought an order under Rule 50 that certain evidence she wished to give on particularly traumatic events in her personal life be heard in private, and not be disclosed publicly. The respondent did not consider the evidence relevant to the issues but did not oppose the application if the Tribunal allowed the evidence. The Tribunal raised with the claimant both whether she did wish to give such evidence, and if she did so whether she had appropriate means of psychological support available to her. She confirmed that she did, in each respect. The Tribunal considered that the evidence could potentially be relevant to the claim of breach of contract at least, as it may go to credibility and reliability, and therefore allowed that evidence. It also granted an order under Rule 50 that that aspect of the claimant's evidence be heard in private, restricted to the evidence given

by the claimant as to those events solely, and not more widely. It explained that the claimant should state when that evidence was to be given so that the arrangements to do so in private could be made, after which the hearing would resume in public. It considered that that was in accordance with the overriding objective, had regard to the principle of open justice and Convention rights, which was addressed in the case of ***L v Q Ltd [2019] EWCA Civ 1417*** and that doing so to that extent was proportionate. That evidence has been referred to in the most general terms in this Judgment because of that.

8. The claimant sought documents which she had asked the respondent for, and said that documents she had sent for inclusion in the documentation had not been included, being two notebooks. The respondent referred to pages which it thought contained them. After a break the claimant said that they had not been, and the matter was to be addressed by the respondent which provided the missing pages. The respondent had not provided the other documents sought as they did not consider that they were relevant to the issues. The claimant had made an earlier application for documents, but that application was refused at the Preliminary Hearing on 26 November 2021. The Tribunal did not consider that the application made to it was well founded at that stage, but stated that the claimant could raise the issues of what documents existed in her cross examination of witnesses, and if a document was relevant to the issues and so referred to in evidence an application for it could be made at that stage. That was considered to be proportionate and in accordance with the overriding objective. On that basis, the hearing of evidence commenced. No such issue was in the event raised with any witness during evidence.

9. Prior to the hearing of evidence the Judge explained to the claimant how the Final Hearing would be conducted. He explained that the respondent would give its evidence first as it had the onus to prove the reason for dismissal, and that the claimant was in repudiatory breach of contract entitling it to terminate the contract without notice. He explained that the witnesses for the respondent could be cross-examined, and that doing so should cover firstly evidence that was challenged as to its accuracy and

secondly where the witness did not address matters understood to be within the knowledge of that witness but which the claimant would cover in her evidence or in that of her witnesses. He explained that the Tribunal could ask questions, and that re-examination permitted further questioning on matters raised only in cross examination or by the Tribunal's questions. That process would be repeated for all the respondent's witnesses. He explained that the claimant would then give her evidence. The Judge explained that documents before the Tribunal should be referred to where relevant, including identifying what the document was and the part of the document considered to be relevant, as if it was not referred to in evidence the document would not be considered. He explained that after the evidence for the claimant was given it would be subject to the same process of cross examination, Tribunal questions and re-examination. He stated that once the party's case was closed it was only in exceptional circumstances that further evidence was permitted, and therefore this was the opportunity to give evidence whether oral or written. He added that following the closure of the claimant's case there would be an opportunity to make submissions on the law, the facts, and the application of the law to the facts, and the Tribunal would then consider matters and issue a written Judgment, which would be sent to parties and then added to the online Register of Judgments. He explained that breaks would be taken regularly and that if either side wished to seek a break it could ask for that at any point.

10. Neither side had any question on the procedure to follow and no further issues to raise at that stage.

Evidence

11. Evidence was given by the respondent first, commencing with that of Mr G Hart, then Mr D Wallace, Mr J Borwick was interposed during that evidence, and finally Mr N Rennick. The claimant then gave evidence herself. She provided to Dr Gibson a copy of questions and answers she had prepared, rather than an aide memoir, and he confirmed he did not object to her using that for her examination in chief only, not for cross-

examination. That condition was agreed to by the claimant. She then called Mr C Watts and Mr M Clark.

12. As the allegations made by the respondent included that the claimant had lied about the chair incident, including when giving evidence under oath in the earlier Claim, and in effect the forging of all or parts of emails, the claimant was informed by the Judge before she gave her evidence that she had the right not to answer any question or given any evidence that might incriminate her.

13. The parties had prepared a substantial Bundle of Documents, of approximately 2,000 pages, most but far from all of which were spoken to in evidence. A small number of additional documents were added to that during evidence, without objection.

Facts

14. The Tribunal found the following facts, material to the case before it, to have been established:

15. The claimant is Ms DeeAnn Fitzpatrick. Her date of birth is 23 February 1969.

16. The respondent is the Scottish Ministers. It operates a number of departments and agencies of the Scottish Government including Marine Scotland.

17. Prior to her employment with the respondent referred to below the claimant had suffered traumatic experiences as a child and as a young woman, (which she described in evidence but the detail of which is not recorded in this Judgment for reasons set out above).

18. The claimant commenced employment with the respondent on 19 June 2006 as a Fishery Officer. She was later promoted to Senior Fishery Officer.

19. The claimant worked at the Scrabster office of Marine Scotland ("the office"). Those working at the office were involved in the enforcement of laws in relation to fishing in particular. That included the investigation of whether the catches landed were within applicable laws, and related matters.

20. The claimant was employed under a contract of employment dated 23 May 2006. At that time she was employed by an agency of the Scottish Government named the Scottish Fisheries Protection Agency. With effect from 1 April 2008 a new agency was created being Marine Scotland, to which the claimant was transferred on the then terms and conditions of employment.

21. A schedule of principal terms of employment sent to her with the contract of employment contained a provision that the Crown's employees cannot demand a period of notice as of right when their appointments are terminated.

22. The respondent had a number of policies, which included its Discipline Policy. It included that

> "Serious disciplinary offences (including gross misconduct) will be dealt with promptly and in the following manner:
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> 1. Where the facts are not clear an independent investigating officer (not previously involved in the complaint against the officer) will be asked to make investigations. The investigating officer should be at least band B level….
> 4. The investigating officer will report the facts in writing to the appointed HR Adviser. The HR Adviser will decide whether there is a case to be answered…..
> 8. A disciplinary hearing will be convened during which the officer may make oral representations…..
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> Appeals

All staff have a right of internal appeal against a disciplinary penalty including dismissal, and will be informed of the procedures to follow."

23. After initial discussions with HR with regard to her concerns over the office culture and related matters the claimant started to keep a diary of events. She did so in the period from May 2009 to August 2010. In August 2010 she handed the diary to HR. The diary did not contain any entry dated 10 August 2009.

24. On 10 August 2009 at 20.04 a photograph was taken of the claimant taped to a chair in a room in the office with a form of parcel tape which both went around her body six times, and attached her to the chair ("the photograph"). The room was one normally occupied by two members of staff with administrative duties, Mrs Evelyn Richards and Ms Alison Sutherland. Their normal hours of work were approximately 9am to 5pm. The chair was one without handles, and was not situated close to any desk. A further piece of tape had been placed over her mouth. After about 10 minutes the tape around her body was cut with a knife, and the claimant was freed from the chair.

25. The photograph of the claimant was taken in the office by Mr Reid Anderson, an employee at the office. The incident had also involved Mr Jody Paske, another employee. Mr Anderson took the photograph on an iPhone. On a later date, on a date not given in evidence, he moved the file containing the photograph from his phone to his office computer, on which it was stored as a file on an H-drive on a Scottish Government server. The file contained data which recorded that the photograph was created on 10 August 2009 at 20.04 and had been last modified at 20.38 on the same date.

26. The claimant did not raise the issue of her being taped to the chair in that manner with anyone at that time.

27. There were a number of office behaviours which had been commonplace by that time. Such behaviours included putting ice down clothing, taping

someone who had fallen asleep to his chair, placing tape on the beard of another member of staff, pouring shredded paper over a member of staff, throwing or launching paper projectiles, using a pen casing as a "peashooter" and sending pieces of paper or parts of a Sellotape dispenser towards the claimant, and similar.

28. A copy of the photograph was sent by Mr Anderson to others in the office, on a date or dates not given in evidence, but not to the claimant. The photograph was discussed within the office by staff working there afterwards, on a date or dates not given in evidence, including by the claimant who did so as if in a light-hearted manner.

29. Although the claimant did not maintain a diary of events after handing it to HR she did email herself from work with a record of any events, but no such emails were before the Tribunal.

30. In September 2010 the claimant witnessed another member of staff, Mr Peter Fenwick, making a gesture to throw a punch behind the back of another member of staff, Ms Alison Sutherland. Both he and another employee Mr Derek Yuille used offensive terms about Ms Sutherland. The claimant was involved in the reporting of that incident to managers being Mr George Cunningham who was based at the office, and Mr Duncan Macgregor who was not, he being based in Shetland. Her having done so was widely known within the office.

31. The claimant discussed the issue involving Ms Sutherland with Mr Malcolm Clark, her trade union representative. He sent an email on 17 September 2010 to Ms Miriam McCloy of the HR department of the respondent, and copied to others, reporting the allegation involving Ms Sutherland. He referred to those who had witnessed the incident, which included the claimant, but did not disclose that the claimant had reported matters to him. He asked that the issue be investigated, and said that it was only one of a "series of threatening, misogynist and racist comments" from that office. The claimant was referred to in that email only as one of the witnesses to the matter. Both Mr Fenwick and Mr Yuille were

suspended and disciplinary proceedings against them were later commenced.

32. On 30 December 2010 the claimant sent a WhatsApp message to Mr Anderson regarding her looking after his pets, including feeding them, over the new year 2010/11 when he and his partner were away. Her message included “I hope you and [Mrs Anderson] have a wonderful Happy New Year’s celebration. I wish you all the best for 2011.”

33. On 26 January 2011 Ms Carol Heatlie of the respondent’s HR department sent a Note to a number of addressees including the claimant with an “update on ongoing staffing matters in the Scrabster office”. The claimant replied to that email shortly afterwards, in about late January 2011 (the date was not given in evidence). The claimant commented on gossip being spread about Ms Sutherland and her in connection with a disciplinary investigation into the September 2010 incident involving Ms Sutherland. The claimant did not make any reference to any incident on 16 December 2010 or the photograph.

34. In early February 2011 Mr Paske left the employment of the respondent. At around the time that he did so he sent to the claimant an email with a file containing a copy of the photograph. He said to her something to the effect that it was the right thing to do.

35. On 12 April 2011 Mr Duncan McGregor arrived in the office around mid-afternoon. He had travelled overnight from Lerwick to Aberdeen on the ferry over the night of 11 April 2011. The claimant met him later that day in the office, and sought overtime for doing so. He stayed in an hotel near Scrabster on the night of 12 April 2011.

36. On 15 June 2011 Mrs Joyce Clemie of HR wrote to the claimant about a formal complaint she had made to HR (which complaint was not before the Tribunal). There was no mention in that letter of the claimant having raised any incident on 16 December 2010 or the photograph. The claimant was invited to a meeting to seek her views on her experience, which she did not take up.

37. On 28 September 2011 Mr Clark wrote to Paul Gray, the Director General Governance and Communities, with detailed commentary as to the circumstances of the office, and the events involving the claimant. There was no mention in that letter of any incident involving the claimant on 16 December 2010 or the photograph.

38. In October 2011 the Superintendent of Marine Scotland Mr Simon Dryden exchanged emails with Mrs Clemie with regard to the claimant and Mr Cunningham. He sought to move both of them from the office to other locations. Mrs Clemie replied to him to state that if he wished to dismiss the claimant he would require to provide evidence to support a charge of gross misconduct. Although there was a discussion about the claimant moving from the office to another office in the Outer Hebrides she resisted that move, and it did not take place. She remained working in the office. The email exchanges involving Mr Dryden and Mrs Clemie were left on an open calendar and seen by others. It was later reported to the claimant.

39. On 26 April 2012 the claimant attended an appeal hearing following a hearing into an allegation of misconduct after which she had been issued with a written warning. The note of that meeting recorded that "DF asked if she could show something. DF said that she was told that she should learn to keep her mouth shut or suffer the consequences then held up a picture of herself where she was taped to an office chair." The picture referred to was a printed out copy of the photograph. No date was given for the incident or photograph. A letter of decision was issued on 28 May 2012 allowing the appeal, that included a comment that "the culture that prevailed historically in the Scrabster office was not acceptable. We wish to acknowledge the failings that you experienced." It also referred to a significantly improved culture in the office. It suggested that if the claimant had "evidence that you have been treated in an unfair and inconsistent manner or that you have been deliberately targeted, you should provide it to HR for investigation". The claimant did not contact HR at that time to raise any incident on 16 December 2010 or the photograph.

40. On 22 June 2012 Mr Clark wrote to the then Permanent Secretary of the Scottish Government referring to the incident in September 2010 and a later attempt to move the claimant's place of work. He alleged institutional harassment of the claimant. There was no reference to any incident on 16 December 2010 or the photograph.

41. In 2013 the claimant made a number of complaints about the way she had been treated at work under the Fairness at Work policy. The complaints she made did not include the photograph or the incident she alleged had taken place on 16 December 2010. Ms Rachel Johnson of the respondent undertook an investigation into the complaint which had been raised by the claimant. The claimant met Ms Johnson on 24 April 2013. The scope of the investigation was agreed between HR, the claimant, and Mr Clark. It did not include any allegation of an incident on 16 December 2010 or make reference to the photograph.

42. Ms Johnson met Mrs Clemie on 5 December 2013. She stated that she had met the Deputy Director of Marine Scotland, Mr Cephas Ralph, to discuss what was "clearly a dysfunctional office". She said that the key recommendation she had made was to place a good, strong manager in the office for 3 - 6 months to tackle the poor behaviours being demonstrated by some staff. That did not take place, and it was noted that Ms Clemie was very disappointed at that.

43. Ms Johnson issued a report, which was sent to the claimant by letter dated 17 January 2014. The claimant attended a meeting with Ms Lorna Gibbs, the deciding officer, who then issued a decision on 4 March 2014. There was no reference in that report to any allegation from the claimant in relation to an incident on 16 December 2010. Ms Gibbs' report was issued to the claimant on 7 March 2014.

44. The claimant appealed the decision by Ms Gibbs. Mr Clark sent a letter of support for the appeal on 2 April 2014. It raised various issues of concern including the interception of emails between him and the claimant but did not mention any incident on 16 December 2010 or the photograph.

45. The appeal was heard by Mr Paul Johnstone on 20 May 2014 and a decision on it was issued on 28 May 2014. He stated in that letter "I am sorry that you have experienced behaviour from colleagues that has caused considerable hurt and distress and that falls short of what you were entitled to expect." He added that "the culture at the Scrabster office was not acceptable. We wish to acknowledge the failings that you experienced. You were correct to take steps to challenge and address those aspects of the culture that were incompatible with the Scottish Government values."

46. Disciplinary charges were levelled against the claimant in relation to the charges 1 - 3 referred to further below, by letter dated 14 November 2016. The letter apologised for the delay in the period since an earlier letter on 1 February 2016 and set out an explanation for that. During an investigation meeting, held on a date not given in evidence, the claimant was alleged to have made dishonest claims for overtime. She was shown a timesheet, but pointed out that it was not hers but Mr Cunningham's. That allegation did not proceed. The charges which were made were to have been addressed at a hearing on 30 November 2016, but that did not proceed due to a bereavement in the claimant's family. Thereafter the claimant commenced a period of absence.

47. On 8 June 2017 the claimant presented a Claim Form to the Tribunal against the respondent, alleging harassment under section 26 of the Equality Act 2010 over a period dating from 2006. She had legal advice from a solicitor to do so. Her claim referred to over 30 alleged acts against her. The allegations did not include an allegation that she had been taped to a chair on 16 December 2010 nor did it refer to the photograph. It did include an allegation that "between September 2010 and March 2011 the conduct of the claimant's colleagues at [the office] continued to violate the claimant's dignity and create an intimidating, hostile degrading humiliating and offensive environment" for her. The claim was defended.

48. A Preliminary Hearing was held on 15 November 2017, during which in cross examination the claimant gave evidence in relation to the incident

depicted in the photograph, including that it had been on 16 December 2010 and was as a result of her involvement in reporting the incident in September 2010, which she alleged to have been a protected disclosure or "whistleblowing". She also alleged that "I was taped to a chair by two of my colleagues and told this is what happens if you speak out."

49. That evidence attracted publicity in media channels and on social media.

50. On 17 November 2017 Karen Hay, Professional HR Adviser of the respondent, wrote to the claimant to refer to her evidence, and that the claimant had "made an allegation that you were taped to a chair by two of your colleagues. The Scottish Government takes allegations of unacceptable behaviour by any employee very seriously and therefore I would ask you to provide further information about that incident, in order for us to consider the matter and take appropriate action."

51. The claimant replied by two emails dated 23 November 2017, the former of which included "I was restrained by Reid Anderson and then taped to the chair by Jody Paske. I was told that this was a lesson to shut my big mouth and for speaking out about the boys. Then Jody taped me to the chair. Jody Paske took the picture and before he left Marine Scotland he shared this photo with me. …."

52. The Employment Tribunal issued a Judgment on 29 January 2018 which provided that all allegations bar those relating to cards sent to the claimant were struck out as being outwith the jurisdiction of the Tribunal.

53. On 16 February 2018 the claimant was informed by Ms Hay of a formal review which re-stated the said three earlier charges and added a fourth charge, referred to below, which was said may amount to gross misconduct if well founded. The charges were:

"1. On 12 August 2015 you failed to behave in an acceptable manner when carrying out an inspection of the Genesis, you used inappropriate language towards William Calker, Scrabster

Seafoods, including “I bet you think I am a right bitch” and you caused offence to a service user, namely Mr Calder.

2. On 22 October 2015 you were rude and made inappropriate comments to William Calder, Scrabster Seafoods, when he offered condolences following the passing of your mother. For example you said “you were not sorry when you were sticking the knife in my back” You caused offence to Mr Calder, a service user, and prompted him to complain about your behaviour.
3. When asked by Gregor McKenzie, Head of Coastal Operations to apologise to Mr Calder for your behaviour towards him you unreasonably refused to do so,
4. From the period from April 2015 to 1 February 2016 (that is the date you were advised of the disciplinary investigation)
   a) You were disrespectful and insubordinate towards your line manager, John Bruce
   b) You made false and malicious allegations about him, other Marine Scotland staff, and external stakeholders
   c) You behaved towards colleagues and stakeholders in a way that fell below the SG’s Standards of Behaviour and in particular the standards expected of a senior fishery officer
   d) Your actions towards your manager, colleagues and stakeholders undermined the relationship of trust and confidence between you and your management at Marine Scotland and had an adverse effect on the operation of the Marine Scotland Fisheries Office in Scrabster”.

54. There was reference in the letter to Occupational Health (OH) reports received. It stated that Mr Hart would be in touch shortly to take a statement about the claimant’s allegations that she was taped to a chair and spat on. It referred to a meeting with a Deciding Officer on the four disciplinary charges and other issues related to the claimant’s health, return to work and the impact of the situation on working relationships.

55. An investigation was instructed by the respondent into the allegations made by the claimant in relation to the photograph and that Mr Anderson

had spat at her under the respondent's Discipline Policy. Mr Gerard Hart, of Disclosure Scotland, was instructed to do so. Mr Anderson remained an employee, but was by then working at the Campbelltown office. "Terms of reference" were agreed on 9 February 2018 between Mr Hart and the People Advice and Wellbeing Manager of the respondent, Ms Susan Macdonald, as being to investigate the following allegations:

- "On 16 December 2010 RA [Reid Anderson] restrained DF [the claimant] in a chair and taped her mouth shut while another colleague taped DF in the chair:
- On a number of occasions in or around October 2010 RA, along with another colleague, spat at DF".

56. Mr Hart commenced his investigation. He spoke to the claimant on 14 March 2018 and obtained an account from her of the incidents alleged. In brief summary, she maintained that the incident had happened on 16 December 2010 and was a reaction to her being a "whistleblower" in relation to the incident involving Ms Sutherland in September 2010. She provided him with documentation. An account of their meeting was prepared and sent to the claimant and her trade union representative Mr Clark for comment. It is a reasonably accurate record of their meeting. That same process of having a note of meeting prepared by a note taker was followed for other witnesses Mr Hart interviewed, and the notes taken are reasonably accurate. He met Mr Anderson on 13 April 2018. In brief summary he denied the allegations, and said that the incident had occurred in 2009 during what he described as "high jinks". He said that he had taken the photograph but had not tied the claimant to the chair. He said that the claimant had not struggled such that her glasses had fallen off as had been claimed. He said that they were "having a laugh". He provided Mr Hart with evidence including WhatsApp messages sent to him by the claimant, and data with regard to when the photograph was taken. Mr Hart spoke to Mr Duncan Macgregor on 31 May 2018. He said that he could not recall receiving email messages from the claimant on 12 April 2011 alleging any form of assault on her in December 2010, and provided receipts and other evidence with regard to his location on and around

12 April 2011. He spoke to Mrs Evelyn Richards on 1 June 2018 who said that the photograph had been viewed in the office and spoken about in a jocular manner including by the claimant. Mr Hart interviewed the claimant further on 6 June 2018. She maintained her position as to the timing of the photograph, and made comments that included agreeing that she had sent the WhatsApp messages to Mr Anderson explaining why she had done so, and disputed Mrs Richards comments about her speaking about the photograph in the office in a jocular way. He spoke to Mr Peter Fenwick on 6 June 2018 who said that he had seen the photograph when working in the office and that that was prior to September 2010. He spoke to Mr Kevin Kelly on 18 June 2018 who said that there was a culture of bullying in the office and that that included by Mr Macgregor. Mr Kelly had retired in April 2018. He did not comment on the photograph or the incident it depicted. Mr Hart spoke to Mr Paske by telephone on 20 June 2018, who said that the incident had occurred earlier than alleged, perhaps in August 2010, and that it was part of office carry on, with everyone laughing. He spoke with Mr Gareth Jones on 20 June 2010 who said that he had in about 2007 been bound with tape when he had fallen asleep in a chair in the office. The records of all such meetings and conversations made by Mr Hart with the assistance of a note-taker are reasonably accurate. He attempted to secure a statement from Ms Sutherland but she declined to do so. He also attempted to secure a statement from Mr Cunningham but he was not well enough to provide such a statement.

57. In about May 2018 the photograph appeared on social media and was widely circulated in the press and other organisations. On 10 May 2018 Ms Hay emailed the claimant referring to her “duties and responsibilities under your terms of appointment. You should consider these carefully before you discuss matters relating to your employment with the BBC or other media.”

58. On or around 20 June 2018 the claimant gave an interview to Mr Mark Daly of the BBC. In that interview she stated that during the incident she was kicking, and “because I was making noise one of them told the other guy ‘give me some tape I shuts her up’. He took the tape and placed it

over my mouth, then he said 'that's what you get for speaking out about the boys'". She said that she could not make a move, and just froze.

59. The report of that interview led to a large volume of commentary on social media. Much of it was directed against Mr Anderson in particular. The comments included threats of violence against him in particularly crude terms from those who did not reveal their identities.

60. Mr Hart prepared a Report on 22 June 2018 setting out his findings. It had attached to it 14 Appendices with the evidence that he had gathered.

61. A police investigation took place. Mr Anderson and Mr Paske were interviewed by the police. The police concluded, in about early August 2018, that there was insufficient evidence to proceed with any charges, and informed Mr Anderson, Mr Paske and the claimant.

62. By Judgment dated 10 August 2018 the Tribunal dismissed the claimant's claims against the respondent on a majority decision.

63. A disciplinary hearing was convened in relation to Mr Anderson on 26 September 2018. It was heard by Ms Lesley Fraser, Director. Mr Anderson denied the allegations against him. Ms Fraser issued a decision letter on 8 November 2018 and concluded that given the passage of time and competing evidence it was not possible to make a finding in fact as to whether he did tape the claimant to a chair on 16 December 2010 or earlier in August 2009. She considered that there was a lack of conclusive evidence about who was responsible and the extent to which the claimant was a willing participant. She also was satisfied on the balance of probability and on the evidence presented to her that the photograph was likely to have been taken in August 2009. (The full extent of the evidence before Ms Fraser, including a note of the hearing with Mr Anderson, was not before the Tribunal.)

64. The social media comments, police investigation and internal disciplinary process caused Mr Anderson substantial anxiety and distress. On

10 November 2018 his wife emailed the First Minister to state that the last few months had been “a living hell” for them, and that the claimant had been harassing and bullying them, including by a petition on a website called Change.org.

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65. On 29 November 2018 the claimant wrote an email to the First Minister, Permanent Secretary and Director General Organisational Development and Operations in which she objected to the presence of Mr Gregor McKenzie at a meeting proposed to be held with HR and her saying “I
10 don’t ask for sympathy nor do I play on your heart strings but on the respect for a broken woman not to have to face her abuser. It is like having to sit with a rapist while he gets away with the crime is the only way I can explain it.”

15 66. Mr Hart was requested by Ms Sue Macdonald of HR in the respondent to provide a second report following the decision being made by Ms Fraser. He was informed by Ms Macdonald that the conclusion of the deciding officer, Ms Fraser, was that the said photograph had been likely to have been taken in August 2009. The terms of reference were to investigate the
20 date on which that photograph had been taken, specifically whether it had been on 16 December 2010 as the claimant alleged, or 10 August 2009 as Mr Anderson alleged and Ms Fraser concluded was likely, and whether emails the claimant alleged she had sent to Mr Cunningham and Mr Macgregor in the period February to April 2011 were genuine “to
25 enable people directorate to consider whether DF [the claimant] has a case to answer”.

67. Ms Macdonald wrote to the claimant on 25 January 2019 to inform her of that investigation, and that a meeting with him had been arranged for
30 28 January 2019 under the respondent’s disciplinary procedure.

68. Mr Hart commenced an investigation. He decided that he wished to have expert evidence to assist him, and secured authority to do so. The HR department of the respondent recommended the expert to instruct. He
35 instructed Mr J Borwick of KJB Forensic Computing, who prepared his

own report. He send a jpeg image of the photograph which had some data but not all data that the original photograph contained. Mr Borwick later attended at the Campbelltown office of the respondent, where Mr Anderson worked. He spoke to Mr Anderson about the photograph. Mr Anderson provided him with access to his work computer which allowed Mr Borwick to access the server on which an electronic file containing the said photograph was, Mr Anderson said, located. Mr Borwick accessed the file and took a copy of it by use of a zip file. He later examined the records of the same. Those records included file data in relation to the photograph which stated that it was created on 10 August 2009 at 20.04, and that it was last modified on the same date at 20.38. There was separate data with regard to the device on which the photograph had been taken, called EXIF data. Mr Borwick noted that the Global Positioning System (GPS) data for the photograph did not show the location of the office where it had been taken. He conducted a test on another photograph taken on the same phone, which was a version 3, and found that its GPS data was also inaccurate. He concluded that that was because the phone did not use accurate GPS data. He did not consider that the inaccuracy of the GPS data was material.

69. EXIF data is easy to manipulate, so as to change the date on which a photograph was recorded as having been taken. The file data obtained from the server, which contained the photograph, is not as easy to manipulate. File data includes a date of creation. If that date is changed, that change may be evidenced by an amendment to the last modification date, and an amendment to the header of the records, but that is not always the case..

70. Mr Borwick considered that the data he had seen established beyond doubt that the photograph had been taken on 9 August 2009. He also considered that it had been moved, in the sense of a transfer from the mobile telephone on which it had been taken to the server such that the server version was the principal record of the photograph rather than that there had been the taking of a copy and transferring that copy to the server whilst retaining the principal on the phone. Mr Borwick was not able to

ascertain when the photograph had been moved from the mobile telephone.

71. He also considered emails that the claimant alleged she had sent in relation to the incident. One was alleged to have been sent to George Cunningham her manager on 11 February 2011 at 13.48. It stated, she claimed:

> "Hi George. Just to keep you updated. Since the 16.12.10 when Reid and Jody bound me to the office chair in Alison's room. Reid restrained me and Jody taped me to the chair and then Reid placed tape over my mouth and told me that this is what happens when you speak about the boys. Jody took a picture of this. I have not been comfortable in the office. …"

Reference was made to a "sick line" attached. It was alleged that Mr Cunningham replied at 1.48pm

> "….. I will speak to Duncan about what happened and I will have a word with Reid and Jody. I am sure that they meant no harm and that was the boys just being boys".

72. The claimant alleged that she had replied at 2.50pm

> "Hi George. I don't think that it is acceptable that it is just the boys being boys. Even [sic] since I stood up for Alison a lot of things have been happening and Reid has said a lot more to me. They have been trying to work out who reported the incident about Pete and Derek. I know we are not allowed to talk about this but I should not have to put up with such treatment at work."

73. One was alleged to have been sent to Mr Cunningham's manager, Mr Macgregor, said to have been sent on 12 April 2011 at 8.17am. It was said to have stated

"Hi Duncan. Did you manage to speak to Reid and Jody about the 16.12.10 when they restrained me to the chair in the FA's room. Things are getting out of hand here. I look forward to your response. When I first told you you said that you would deal with it right away and when I came back from Christmas break there would be no more trouble".

74. She alleged that he replied at 9.01am that day

"Thanks DeeAnn. There are several issues here which I will have to consider. I plan to visit Scrabster within the next 2 weeks and will speak then."

75. Mr Hart sought to arrange a meeting with the claimant. She wished to know details of the questions she would be asked before doing so, and she cancelled a meeting that had been planned for 28 January 2019. They did not meet. In due course he sent a series of questions in writing to the claimant and her trade union representative, to which written responses were provided, including by Mr Clark in an email on 7 March 2019. In that message Mr Clark said that his personal recollections of being told by the claimant about the assault issue were not strong, and that although the claimant had sent him the photograph before the Appeal hearing in April 2012 "it was just in so much else and not fully appreciated." Mr Hart also interviewed Mr Cunningham, and Mr Anderson again. Mr Anderson provided him with an impact statement setting out the effect of the allegations on him, including an attendance at a police station voluntarily for interview. Mr Hart sought to interview her former partner Mr Doug Munro. Those attempts did not succeed. He sought to arrange a meeting with him in June 2019.

76. Mr Hart was then instructed by HR in the respondent to conclude his investigation without waiting for evidence from Mr Munro, and on 9 May 2019 emailed the claimant and Mr Clark giving them one week to submit a final written document with any points they wished him to consider. They

did not do so. Mr Clark had wished there to be a further meeting, and had expected that to take place in June 2019.

77. Mr Hart then prepared a detailed report, dated May 2019 (no specific date was provided). That report concluded that the photograph had been taken on 9 August 2009. It attached a number of appendices including notes of interviews, which were reasonably accurate, and the report from Mr Borwick, who said firstly that the photograph had been taken on 9 August 2009 and secondly that he had not been able to verify the said emails that the claimant alleged she had sent to Mr Cunningham and Mr Macgregor, and that the only way to examine emails correctly was to do so as it was received in the recipient's inbox. He stated that doing so "would seem a prudent course of action".

78. Mr Hart did not seek to recover the said emails either himself or by request to the IT department of the respondent.

79. The general practice of the respondent at about that time was to retain emails for three years.

80. Mr Hart issued his report by email to Ms Macdonald, which email was not before the Tribunal.

81. On each of 11 May and 4, 10, 14 and 15 June 2019 the claimant's sister-in-law Ms Sherrie Fitzpatrick made an entry on a website called Change.org with regard to the claimant and her circumstances.

82. The respondent received an occupational health (OH) report from its adviser Dr Glen on 21 June 2019. It provided an opinion that included that the claimant was not fit to carry out her normal duties, that the claimant was likely to be a disabled person under the Equality Act 2010, that the claimant had symptoms of Post Traumatic Stress Disorder and depression which would be likely to last indefinitely without treatment, and that if attendance was required of her at a disciplinary hearing "there would be a significant risk of her psychological health being adversely affected."

83. The respondent wrote to the claimant on 19 August 2019 with regard to the OH report, and stated that the respondent considered the claimant absent from 10 July 2019 but that she would be paid full pay until the date of the letter.

84. The respondent wrote further to the claimant on 30 August 2019 noting that the GP fit notes were that the claimant could return to work with support from the employer but that the respondent had concluded that she was not fit to return to work.

85. The claimant was suspended from work on medical grounds on 2 September 2019. The reason given was what was said by the respondent to be conflicting medical advice from the OH report and subsequent GP fit notes, and a concern that as the claimant alleged to have suffered injury at work the respondent could not put her in the position of being at risk of suffering worsening ill health.

86. On 1 October 2019 the respondent wrote to Dr Glen seeking a further report. The letter noted that the respondent had received fit notes from the claimant's GP which advised that she was fit for work. It raised a number of issues including that the GP had advised that she was fit for work but not to attend a disciplinary hearing.

87. On 3 October 2019 the respondent wrote to the claimant and set out a series of allegations against her. It included the four charges intimated to her earlier, and new charges in relation to the incident of being taped to a chair. Those new charges were set out in charge 5 as follows:

> "1. On several occasions as summarised at annex A and as detailed in the accompanying documents, you made false statements about the chair incident, in particular that: the incident occurred in December 2010; and that it was an assault on you because you were a whistleblower in relation to an incident in September 2010.

2. These false statements were made publicly, including to the employment tribunal whilst you were on oath, and to the media on repeated occasions. For details of the impact of this conduct on SG [the Scottish Government] and Marine Scotland see annex B and accompanying papers.

3. You made false statements to the media about SG colleagues, in particular Reid Anderson. See annex A and related media documents including in accompanying papers. Reid Anderson was then subject to offensive and threatening comments on social media. For details of the impact on him, see annex A and accompanying papers.

4. In March 2018 you provided a false account of the chair incident to the IO [Investigating Officer, Mr Hart] in his initial investigation and repeated this false account in March 2019 in your statement to his later investigation.

5. In March 2018 you presented to the IO emails purporting to be sent by George Cunningham on 15 February 2011 and by Duncan Macgregor on 12 April 2011 which had been deliberately created or altered by you at an earlier date to refer to the chair incident as having occurred on 16 December 2010. In March 2019 you falsely stated to the IO that these emails were genuine.

6. You or a person acting on your behalf gave these emails to the media to support you false account of the chair incident.

7. You or a person acting on your behalf published on the website Change.org derogatory and offensive statements about named SG and Marine Scotland colleagues including Reid Anderson, John Bruce, Derek Yuille, Peter Fenwick, Duncan Macgregor and Carol Heatlie. This continued to happen despite an explicit warning to you on 16 May 2016. This had a significant negative impact on some of those staff in particular Reid Anderson and John Bruce. See Annex B.

8. In March 2018 you made false statements to the IO about having no knowledge of how information about the chair incident, including the photograph, came to be in the media. You repeated this false statement to the IO in March 2018.

9. On 29 November 2018 in response to a request from HR to attend a meeting to discuss matters related to the chair incident, you sent an

email to the First Minister, The Permanent Secretary and Director General, Organisational Development and Operations, in which you objected to the presence of your line manager, Head of Coastal Operations Gregor Mckenzie, at a meeting with yourself and HR and stated 'I don't ask for sympathy and nor do I play on your heart strings but on the respect for a broken woman not to have to face her abuser. It is like having to sit with a rapist while he gets away with the crime is the only way I can describe it.' The language used in this statement was derogatory and grossly offensive about your manager and completely inappropriate in the circumstances, namely responding to a meeting invitation."

88. The letter referred to policies, which were the SG's Standards of Behaviour, the Civil Service Code, the Data Protection Policy, the Confidentiality and Official Information Policy, and the Counter Fraud Policy, together with detailed parts of the said policies. The claimant was informed that she had a right to be accompanied at the hearing, and that if the charges were held well founded the penalty may include dismissal.

89. On 4 October 2019 a copy set of disciplinary papers was sent to the claimant's home address, and acknowledged by her on 9 October 2019. The papers subsequently went missing from the claimant's property.

90. On 21 November 2019 the respondent received a further OH report. It included that the claimant was now fit to phase back to her full and normal duties, but added that "I am of the opinion that, although the lady is now fit to return to work her Treating Psychiatrist is of the opinion that she would require at least the first 10 sessions of EMDR before being able to meet with management for a disciplinary hearing (ie in about 2.5 months' time)

91. On 4 December 2019 the claimant wrote to the First Minister asking for an independent investigation and a meeting with her.

92. The respondent suspended the claimant on full pay with effect from 13 December 2019 by letter of that date, pending a hearing into disciplinary allegations.

5 93. On 15 January 2020 the respondent wrote to the claimant in relation to the disciplinary allegations, and arranging a hearing for 19 February 2020. The letter addressed what the respondent said were inconsistencies in the OH reports, and inconsistencies with other relevant information including the Judgment of the Employment Tribunal in August 2018 and the finding
10 by the deciding officer in relation to the allegations against Mr Anderson that it was likely that the said photograph had been taken in August 2009. The letter explained that if the claimant did not attend the hearing it may proceed in her absence, and that a set of papers would be hand-delivered to her by two members of staff.

15

94. On 30 January 2020 the claimant's psychiatrist Dr Ali wrote a letter advising that the claimant be allowed a period of six months to stabilise before going through a stressful hearing. He referred to an "upcoming Employment Disciplinary Tribunal".

20

95. On 7 February 2020 Ms Lyndsey Cairns of the respondent emailed the claimant to remind her that any adjustments she considered were appropriate for the hearing to take place would be considered, stated that there had been a decision to proceed with the hearing, referred to Dr Ali's
25 letter, and expressed the view that "there is no certainty that you would attend a hearing, even in six months' time."

96. On 17 February 2020 the claimant's solicitors emailed the respondent to argue that the hearing should not proceed. Mr Clark the claimant's trade
30 union representative emailed the respondent shortly before the hearing to similar effect.

97. The hearing took place in the claimant's absence before Mr David Wallace, who decided that it should proceed notwithstanding the
35 applications for adjournment. He was accompanied by Ms Kim Hunter of

HR. Apart from an occasion giving the claimant training and answering a query from her briefly she had not been involved in with the claimant to any extent.

5 98. Mr Wallace set out his decision in a letter dated 24 March 2020. He explained in that letter that he had decided to proceed notwithstanding the submissions for it to be delayed, and that he accepted the assessment of the respondent's HR department that it would not be appropriate to postpone the hearing any longer. He held that charges 1 – 4 should not 10 have a decision made on them given the passage of time.

99. In respect of Charge 5 and its 9 sub-charges. Mr Wallace found that all of them had been established, and that they amounted to gross misconduct. He held that it was absolutely clear from the evidence of Mr Borwick that 15 the photograph had been taken at 20.04 on 10 August 2009 and not in December 2010 as she alleged. There was reference to other evidence supporting that conclusion, including that of Mr Fenwick who had heard of the incident whilst working at the office, which he had left by September 2010. He noted that Mrs Richards had said that the said photograph was 20 the subject of humour and high spirits in which the claimant had participated. He said that the claimant's evidence of the said incident was contradictory and not believable. It was not reported at the time and Facebook entries show that the claimant was on friendly terms with Mr Anderson on 30 December 2010. All of the charges were held to have 25 been established for reasons set out in that letter.

100. Mr Wallace set out a number of breaches of policies that he believed had occurred. He held that the charges that had been found established amounted to gross misconduct. In relation to penalty he considered the 30 length of service and disciplinary record, but concluded that dismissal without notice was appropriate. He addressed an allegation that the claimant was a whistle-blower, and denied that the decision was made because of that. The claimant was informed of her right of appeal.

101. The letter was delivered to the claimant by two members of the respondent's staff on 26 March 2020.

102. The claimant intimated an appeal through letter from her trade union representative Mr Clark on 20 April 2020. It attached a letter to him from the claimant dated 17 April 2020. Mr Clark and Ms Lyndsey Cairns of the respondent commenced email correspondence with regard to the appeal arrangements. Mr Clark argued that the claimant was not fit to attend an appeal hearing.

103. On 7 April 2021 an appeal hearing took place before Mr Neil Rennick, with Ms Julie McFadyen as HR representative in attendance, and another member of HR to act as note-taker. The claimant attended with Mr Clark. All attended virtually. A note of that meeting is a reasonably accurate summary of it. The meeting took approximately three hours. The meeting continued on 8 April 2021 for over two hours. A note of that meeting is a reasonably accurate summary of it.

104. About a week prior to the meeting the claimant had produced a very substantial volume of documentation for her appeal. Mr Rennick was also provided with a very substantial volume of documentation by the respondent, being the documents before Mr Wallace, and his letter of decision, together with the claimant's appeal. Mr Rennick read all of the documentation he had been provided with carefully.

105. On the first day of the hearing Mr Rennick clarified with the claimant and her trade union representative the grounds of appeal she wished to pursue. He allowed the claimant to make whatever comments on matters that she wished to. During that day she produced an email from a Mr Stansbury with comments on how data on a file for a photograph could be easily amended. Mr Standbury also expressed the opinion that the inaccuracy of the GPS data was such that the data was not reliable generally.

106. Mr Rennick considered that email overnight. On the second day of the hearing Mr Rennick sought clarity on the documentation relevant to the grounds of appeal, and what the claimant's position was in relation to the date of the photograph, and the circumstances in which she claimed the data had become manipulated. He sought to understand the claimant's position on each of charges 5.1 – 5.9.

107. Following the hearing Mr Rennick took some time to consider all that had been raised with him.

108. Mr Rennick issued his decision on the appeal by letter dated 4 May 2021. He set out a detailed response in relation to the appeal in an annex. His conclusion was that it was valid for Mr Wallace to have proceeded in the absence of the claimant or her representative. He considered that the evidence provided by the claimant as to the chair incident was not credible or reliable. He did not consider the claimant's evidence as comprehensive as the report from Mr Borwick. He did not believe her account of how the data had been manipulated on the file for the photograph. He considered that it did not match their subsequent actions and that a much more likely and compelling explanation was that provided by Mr Borwick. He held that untrue allegations had been made by the claimant and upheld charges 5.1, 5.2, 5.3 and 5.4. He held that there had been falsification of emails by the claimant, charge 5.5 given the other findings and the evidence of Mr Macgregor being in the office on the day an email was allegedly sent to him. He held that charges 5.6, 5.7 and 5.8 were also established. The claimant had not denied engaging with the media but argued that in the circumstances she had been entitled to do so. He considered that any civil servant engaging with the media without authorisation is highly unusual, that there were a number of opportunities for the claimant to raise her concerns internally that she had not taken and that the statements made had included false allegations. He also held that only the claimant or someone acting on her behalf could have provided the material produced online. He held that the sharing of information with the media caused reputational harm to other individuals, Marine Scotland and the Scottish Government. He held that given the claimant's circumstance charge 5.9,

whilst well founded factually, should not be upheld, and he allowed the appeal to that extent. He concluded otherwise that the decision of the disciplinary hearing should be upheld and that the penalty be maintained. He addressed the allegation as to whistleblowing or institutional harassment, and did not uphold either of them for the reasons he set out. Having considered the issue of the penalty he said that he could not agree to adjust the penalty as the claimant proposed.

109. Prior to the dismissal the claimant had a gross salary of £3,124.64 per month and a net salary of £2,273.20. She was a member of the respondent's pension scheme. She paid employee contributions of £157.91 per month. The employer contribution was £624.93 per month.

110. Since the dismissal the claimant has received State benefits. She has not worked in paid employment. She has been certified as unfit for work since her dismissal. She continues to receive treatment for PTSD.

111. In 2009 - 2010 iphones did not have access to accurate GPS data. If a photograph was taken indoors it sought as location details the mast from which it derived a signal, and provided the location of the mast. When a photograph was at that time taken on an iphone a digital file was created of the image. It had four numbers generated automatically within it. Two sets of data were created, called metadata. One set was file data, in relation to the creation of the file, and had information as to when it was modified and accessed thereafter. The other set was "EXIF" data in relation to the photograph and included GPS data, a time stamp, and information such as the aperture used.

112. Software programmes existed at about that time which could be searched for on the internet, and then downloaded for free. To change both the file and EXIF metadata two separate programmes would require to be identified, downloaded and used such as "File Changing" and "EXIF Editor".

113. Mr Fenwick was dismissed by the respondent following the incident involving Ms Sutherland, and Mr Yuille was disciplined. Both appealed,

and the dismissal of Mr Fenwick was overturned, and a lesser penalty given for both him and Mr Yuille, on dates not given in evidence.

114. The claimant commenced early conciliation on 13 May 2020.

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115. The Certificate for early conciliation was dated 20 May 2020.

116. The Claim Form for the present claim was presented to the Tribunal on 19 June 2020.

10

Submissions for respondent

117. The following is a basic summary of the submission made. Dr Gibson sent a written submission which he spoke to orally. He argued that the Tribunal
15 should accept the credibility and reliability of the respondent's witnesses. He submitted that Mr Hart had undertaken a fair and balanced investigation, and that the argument that the remit should have been wider was not correct given the earlier investigations, the then current Tribunal proceedings amongst other issues. It was very difficult to separate the
20 disciplinary procedure for Mr Anderson with that which followed against the claimant. Mr Wallace had been particularly confident when explaining his decisions both to proceed with the hearing and then to dismiss. Mr Borwick was an expert who had expressed an opinion on when the photograph was taken. He had travelled to view the documents in situ.
25 Mr Watts's attacks on him were not reliable, nor was the email from Mr Stanbury. Mr Rennick had been very analytical and careful. He was the most compelling witness as he had assessed the claimant's credibility and reliability directly. He criticised the evidence of the claimant and Mr Clark, and suggested that the evidence of Mr Watts did not extend to the date of
30 the photograph or actual manipulation of data. He then addressed the band of reasonable responses, and argued that there had been a genuine belief in conduct as the reason for dismissal, that there had been a reasonable investigation and that the belief was reasonable. He argued that the procedure had been a fair one, and addressed the decision to hold
35 the disciplinary hearing in the claimant's absence. He submitted that the

claimant had lied about the date and circumstances of the incident, and that the evidence justified the conclusion that emails had been forged. In an ideal world they would have been retrieved but there was evidence that they were only retained for three years. As to penalty there was dishonesty of a most extreme kind, and honesty and integrity were at the cornerstone of the Code. The claimant was indirectly responsible for the police investigation, the internal investigation and the abuse on social media Mr Anderson had suffered. He further argued that there had been no protected disclosures, and although initially he argued that there was no disclosure in the public interest accepted during submission that that matter did not arise given the date of the alleged disclosure. He argued that even if there was a protected disclosure that was not the reason or principal reason for dismissal. On the claim for breach of contract the Tribunal should prefer the respondent's evidence including from Mr Borwick. The claimant sought re-engagement as her remedy but that was not reasonably practicable. If there was any procedural unfairness a fair dismissal was in any event what would have happened, and further the appeal cured any such defect. Clause 11 of the contract meant that there was no right to notice. He invited the Tribunal to dismiss all the claims. In the written submission made there was reference to authority, some of which are referred to below.

Submissions for claimant

118. The following again is a basic summary of the submission which the claimant gave orally. She described the office as "feral" and had kept a diary of events. Mr Fenwick had thrown a punch at Ms Sutherland and called her a whore, and Mr Yuille had encouraged that. She had reported them to Mr Clark, who had reported it to the respondent on her behalf. There had been bullying and inappropriate behaviour. She had been restrained on 16 December 2010 as a lesson to keep her mouth shut. She believed that Mr Anderson and Mr Paske had been put up to that. She became a target for senior managers. In October 2011 she was threatened with a move from the office and dismissal. Mr Dryden had disciplined her and she had appealed. Ms Heatlie had labelled her a serial

complainer. Emails she sent had been read without her knowledge. Emails had been deleted. Matters improved for a few months after she was promoted but then slipped into bullying and harassment. Disciplinary charges were made when her mother passed away. Her father later was on life support and she went to Canada to be with him. She received cards which ended in the Tribunal. She became suicidal and self-harmed. She gave evidence about the restraint of her in the Tribunal hearing. Mr Hart made his investigation and she met him twice and gave written detail by email. She was unable to attend the disciplinary hearing as she was unwell and provided letters to ask for postponement. Further investigations could have been carried out. She made claims under section 103A and 94. Mr Anderson and Mr Paske had lied about the details of the September 2010 incident. Ms Richards said that the claimant could not get rid of Mr Fenwick and Mr Yuille and was now going after Mr Anderson and Mr Paske, showing vengeance. The evidence about Mr Jones being taped to a chair was not consistent. Mr Borwick should have tested the authenticity of the data and the emails. Mr Cunningham had problems with memory. Ms Fraser gave Mr Anderson the benefit of the doubt, and so should she. HR and senior managers took advantage of her poor mental health. There had been a cover up. It was easy to alter metadata. The chair incident was one of many incidents she had been victim to. Reference was made to the case of ***Jhuti.***

Law

(i) The reason for dismissal

119. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 (“the Act”).

120. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

5 These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated 10 that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

121. If the reason proved by the employer is not one that is potentially fair under 15 section 98(2) of the Act, the dismissal is unfair in law. Fair reasons include conduct.

(ii) Fairness

20 122. Section 98 of the Act provides, so far as material for this case, as follows:

> **"98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> 25 (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the 30 employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> 35 (b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……………

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."………………..

123. The terms of sub-section (4) were examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

124. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?

(ii) Was that belief reasonable?

(iii) Was it based on a reasonable investigation?

125. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

"in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

5 in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the

10 decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

15 126. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***.

20 127. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

"in the case of misconduct, the employer will normally not act

25 reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

128. Guidance on the extent of an investigation was given by the EAT in ***ILEA

30 v Gravett 1988 IRLR 497,*** that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to

35 increase."

129. What is required is consideration of that which is reasonable in all the circumstances, as explained in ***Shrestha v Genesis Housing Association Ltd [2015] IRLR 399.*** In ***Sharkey v Lloyds Bank plc UKEATS/0005/15*** the EAT explained further that

> "…procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together."

130. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

131. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

132. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

133. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. The following provisions may be relevant:

"4. Employers should carry out any necessary investigations to establish the facts of the case…..

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence….

134. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428.*** The question is whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13.*** If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record. The law in this area was reviewed very recently in ***Hope v British Medical Association [2021] EA-2021-000187***.

135. When considering the procedure that was followed, a non-statutory Guide issued by ACAS on Discipline and Grievances at Work includes the following comments:

"**What if an employee repeatedly fails to attend a meeting?**
There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting. This may be for various reasons, including genuine illness or a refusal to face up to the issue. Employers will need to consider all the facts and come to a reasonable decision on how to proceed"

It then lists a number of considerations.

136. The Guide says the following with regard to investigations

"Investigating Cases
When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against."

(iii) Appeal

137. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that employers must act fairly in relation to the whole of the dismissal procedures. The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** being a conduct dismissal case, in which it was held that a fairly heard and conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall.

(iv) Protected disclosures

138. The relevant section of the Employment Rights Act 1996 are 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"

Section 43C Disclosure to employer or other responsible person

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

Section 103A Protected disclosures

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 his dismissal is that the employee made a protected disclosure."

139. The onus remains on the respondent to prove the reason or principal reason for dismissal, where the claimant has the service for an unfair dismissal claim, ***Kuzel v Roche Products Ltd [2008] IRLR 530***.

140. The words 'in the public interest' in s 43B(1) were introduced by amendment with effect from June 2013. They are not therefore applicable to a disclosure said to have been made before that date.

141. The issue of what amounts to a 'disclosure of information', was addressed in ***Kilraine v Wandsworth London Borough Council [2018] ICR 1850***, in which it was confirmed that there was no rigid distinction between information and allegations, and that the full context required to be considered. What was necessary was the disclosure of sufficient information. That issue was also addressed in ***Simpson v Cantor Fitzgerald [2021] IRLR 238*** at the Court of Appeal.

142. The question of what was the reason or principal reason for dismissal in such a claim was addressed in ***Eiger Securities LLP v Korshunova 2017 IRLR 115.*** The test is not the same as for detriment under section 47B, or in discrimination law, but is to apply the statutory language and ascertain the reason or principal reason for the dismissal. That was later confirmed in ***Secure Care UK Ltd v Mott EA- 2019-000977.*** It was held in ***Beatt v Croydon Health Services NHS* Trust *[2017] IRLR 748***, that although establishing the reason requires the tribunal to consider the employer's state of mind when dismissing, the question whether the disclosures were or were not protected is an objective one, to be determined solely by the tribunal.

143. The law in this area was reviewed by the EAT in ***Watson v Hilary Meredith Solicitors UKEAT/0090/20.*** A Tribunal must be careful that arguments as to the reason or principal reason for dismissal being other than for making any protected disclosures are not abused. The Tribunal must also be alive to the possibility of a procedure being manipulated so as to cause a dismissal by someone ignorant of all material facts***, Royal Mail Group v Jhuti [2020] IRLR 129***.

(v) Breach of contract

144. A claim in respect of breach of contract may be pursued in the Employment Tribunal under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994, provided that it is outstanding on termination of employment. In the present case the respondent accepts that it terminated the employment of the claimant summarily. There is a question as to whether as a Crown employee the claimant has the entitlement to notice under statute. It was raised in evidence and submission but had not been included in the Response Form, as originally drafted or as amended.

145. There is a right to a minimum period of notice under section 86 of the 1996 Act. That right may not apply to Crown employees under section 191 however. It is addressed further below. If the claimant does have the right, the onus falls on the respondent to prove on the balance of probabilities that the claimant's conduct was repudiatory so as to entitle it to do so. That was confirmed, if that be needed, in a recent EAT case ***Hovis Ltd v Louton EA-2020-00973***. The general entitlement to a minimum period of notice is established in section 86 of the 1996 Act and is for one week of notice for each year of continuous employment up to a maximum of 12 weeks. If there is a breach of contract that gives rise to a right to damages subject to the principles of mitigation of loss under Scots law.

(vi) Remedy

146. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116 as follows:

> "(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for re-instatement it shall then consider whether to make an order for re-engagement and if so on what terms.

(3) In so doing the tribunal shall take into account –

(a) any wish expressed by the complainant……

(b) whether it is practicable for the employer…. to comply with an order for re-engagement and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms…..”

147. It is for the employer to provide evidence to show that it is no longer practicable to employ the claimant in her original role (***Port of London Authority v Payne [1994] ICR 555***.) In this context ‘practicable’ means “capable of being carried into effect with success”, not simply ‘possible’ (***Coleman v Magnet Joinery Ltd [1975] ICR 46***.) When considering practicability, either for reinstatement of re-engagement, issues as to whether trust and confidence have broken down; whether the employer genuinely, albeit unreasonably, believed in the Claimant’s guilt; whether the relationship has so soured to make it impracticable, will be directly relevant. It is the Tribunal which makes the assessment of practicability at first instance. This will include, for example, an assessment of whether the employer’s view that trust and confidence has broken down is real and rational. It is the employer’s view of trust and confidence which is material in this context ***United Lincolnshire Hospitals NHS Foundations Trust v Farren (UKEAT/0198/16),*** subject to scrutiny by the Tribunal.

148. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123

and is “such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer”. The Tribunal may increase the award in the event of any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Awards are calculated initially on the basis of net earnings, but if the award exceeds £30,000 may require to be grossed up to account for the incidence of tax. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

149. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included “perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct.” Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant’s conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.)*** In respect of the assessment of the compensatory award it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but that a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed. A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16).*** There are limits to the compensatory award under section 124, which are applied

after any appropriate adjustments and grossing up of an award in relation to tax – ***Hardie Grant London Ltd v Aspden UKEAT/0242/11.***

150. Where there is a finding that there was a breach of section 103A the Tribunal may make an unlimited award of compensation, and make an award for injury to feelings.

151. Where there is a finding of breach of contract an award can be made for loss during what ought to have been the period of notice, subject to proof of that loss and the duty to mitigate that loss. There may be a need to avoid double recovery with the unfair dismissal remedy if the same period of time is covered.

Observations on the evidence

152. The Tribunal's assessment of each of the witnesses who gave oral evidence is as follows:

153. **Mr Hart** was we concluded an honest witness. He was an independent investigator. He had wide and lengthy experience in conducting investigations. He conducted two investigations. The first was in relation to disciplinary allegations against Mr Anderson that followed from the claimant giving details of the chair incident both in the Tribunal hearing into the earlier claim, and in subsequent email correspondence with the respondent. The second was in relation to disciplinary allegations against the claimant that her description of the timing and circumstance of that incident were false.

154. We had some issues with precisely how his investigation had been conducted, and considered whether he did so within the band of reasonable responses. It was not a simple matter. He might have started by seeking to ascertain from records of shifts, overtime, absence or annual leave who was on duty on each of the possible dates for the photograph. Mr Hart might have sought from Mr Anderson and Mr Paske a more detailed explanation of how the event unfolded, including how it started (it

was unclear whether it was that the claimant was asleep or not, for example) and how taping someone's mouth was part of so-called high jinks. He appeared to accept that it was that, but might well have explored more of the background alleged by the claimant of a dysfunctional, if not corrosive, office environment, and sought further detail of what was meant by high jinks. Mr Anderson might have been asked to comment on why the photograph had been taken, and then sent to others but not at that stage the claimant. He might have been asked to comment on the detail of the photograph and what might be drawn if anything from it. If any questions asked were not answered, or not answered fully or clearly, that could have been set out. The same issues generally could have been raised with Mr Paske, whose statement was even more sparse than that for Mr Anderson. We accepted that recollections generally may be less clear after the passage of about a decade, but an incident such as the one involving the taping of the claimant to a chair was not one that was likely to be easily forgotten, however long the passage of time.

155. He could in particular have followed up on Mr Borwick's recommendation to check the inboxes of recipients for emails said to have been sent, which was disputed, and there was no full explanation for that not being done. It was a step that was simple and straightforward to take by making a request of the IT department, and would have either led to the response that the emails were no longer available, or existed as the claimant alleged, or did not exist and therefore provided very strong if not conclusive evidence of their having been fabricated. Given that that was a serious allegation, and one simple to seek to verify, that was we considered a surprising omission. He also might have considered in more detail the dossier of evidence that he was provided with by the claimant. In that regard he said initially that he had "flicked through" it, but latterly that he had read it. He did not use it, rather he passed it on to HR and there is no evidence that anyone did anything with it thereafter. His investigation was limited to the issues he had been told he required to keep to, within his terms of reference, and that meant that it was not as wide an investigation as it could have been. The second report in particular did not actively seek evidence that might exculpate the claimant, such as

by seeking to verify the position as to the emails. Its narrow remit, and the abrupt manner in which the second investigation was instructed to be brought to an end, led to a risk of the kind of manipulation of circumstance that the authority of ***Jhuti*** referred to.

156. But he did gather a large body of evidence and presented that with commentary as to the strength of that evidence where he felt that appropriate. That was done for two separate reports. He was instructed to bring the second one to a quick resolution, and did so. He followed the instructions given to him by HR in that regard. He was the investigator, not the decision-maker.

157. **Mr Wallace** was clearly a credible witness, who sought to address the matters before him professionally. He stated that it was his decision to proceed in the absence of the claimant, and considered that the reasoning set out by Ms Cairns in her letter to the claimant about that also explained his own reasoning for doing so. We did however have concerns as to that decision for a number of reasons. Firstly there was a concern that it was based on having read the written materials submitted with the disciplinary letter, which had a clear risk of prejudgment of the issues. Secondly both Ms Cairns and Mr Wallace proceeded in the face of occupational health advice. They were not medically qualified or experienced. Whilst the OH report confirmed that the claimant met the DWP tests for ability to conduct a disciplinary hearing the report from Dr Glen stated that there was a significant risk of harm to the claimant if she was required to attend it, and no account or certainly no proper account was we consider taken of that. Thirdly the claimant's description of events was challenged as the basis for the OH and other reports, including those from her consultant psychiatrist, without referring those concerns to Dr Glen who was the subject specialist for an opinion. The decision taken in that circumstance, having read the documents submitted in support of the allegations and with no contradictor, had a real risk of unfairness. We address below an argument made in submission.

158. **Mr Borwick** was an expert witness whose evidence we accepted as credible and reliable. His expertise was clear. He was independent of the respondent. He conducted a thorough review of matters, including seeking a better version of the photograph, and attending at the Campbelltown office to do so. That led him to securing a version of the photograph from the respondent's server. He took that by way of zip file and we were satisfied that doing so was both appropriate and led to reliable evidence of the data in relation to that photograph in particular that it had been created on 10 August 2009. Mr Borwick did not reach a similarly conclusive view on the emails that had been sent to him, but he recommended, in effect, that they be recovered if that be possible. That they were not was not his responsibility.

159. **Mr Rennick** was we considered both a credible and reliable witness. His evidence was impressive in a number of respects. Firstly he had given the clamant the first day of the appeal to present it in the manner that she wished to. He did not place any constraints on what may be raised by her or considered by him. He did so in an open manner, and without any hint of prejudgment. He allowed her a very long time to make her arguments as fully as she wished to. Secondly he read all the materials that he was given by the claimant, which was very extensive indeed, and did so to the extent that when asked about points of detail in many respects in cross examination he was able to answer from memory without checking the source materials before him at the time. That showed the care with which he undertook his role. Thirdly he checked with the claimant and her representative as to the grounds of appeal, and then sought to ensure that they were linked in some way to the evidence being presented to him so that he understood the points being made. Fourthly he investigated matters independently of the earlier processes, and asked the claimant to explain a number of points of detail in the version of events she gave, what had happened both at the time and thereafter, and to assess her answers against the evidence as a whole. In that process he was aware of the possible effect of trauma and that that may result in an issue not being reported at the time. He undertook that exercise both with care for detail and consideration for the circumstances of the claimant. Finally he set out

his decision with a clear explanation of what he had held, and why that was, in a manner that we considered to be convincing both in the terms of that letter and in his evidence before us.

5 160. **The claimant** gave her evidence clearly and calmly. She remained adamant that the chair incident had happened on 16 December 2010 and not earlier, that it had been against her will, and was a reaction to her having been identified as the person who reported the incident involving Alison Sutherland. She maintained that the emails challenged by the
10 respondent had been genuine, and sent at the time. One was on 15 February 2011 referring specifically to an incident dated 16 December 2010 and therefore less than two months after she claimed it had taken place. It was clear from the history of matters that the respondent did accept that the culture of the office had been inappropriate, and on
15 occasion it apologised for that and the way that the claimant had been treated. The Tribunal accepted her evidence on how she had been the victim of a number of unacceptable behaviours in the office, such as having paper pellets fired at her through the casing of a pen. The Tribunal also considered that part of her description of how the incident that was
20 depicted in the photograph had taken place, but not all of it.

161. There were a number of issues in her evidence that caused the Tribunal a degree of concern as to its reliability, which are addressed further below. The most obvious matters that make it more difficult to accept her
25 evidence, apart from the issue of expert evidence, is the fact that the claimant did not make any formal report or complaint on or around 16 December 2010, she did not report it in clear terms to Mr Clark, she did not produce any email or similar record of it she may have taken at the time in accordance with the practice she spoke to after handing over her
30 diary of events, she did not call as a corroborating witness her former partner Mr Munro who she claimed she had told of the incident on the day it occurred, she did not take up various opportunities to raise the circumstances of that incident in the years that followed until it was raised in the Tribunal, although she did raise other issues including matters as to
35 what could be harassment or victimisation when raising the issue would

normally be expected, particularly with those who were on the face of it accepting much of what she alleged, and there was a failure to plead the chair issue at all in the first Claim Form despite having legal advice at that time. Against that body of evidence is the claimant's explanation that earlier substantial traumas in her life meant that she did not wish to address the issue at all at these points. That matter however is not consistent with what happened at the meeting in April 2012 when the photograph was produced by the claimant and referred to in support of her appeal, albeit somewhat fleetingly as we address further below. She raised it at that time in that context, rather than refrain from doing so at all. It is very surprising in all the circumstances that both the claimant did not make any clear comment about what is now alleged, or do so in the period afterwards to an extent close to that she now argues for.

162. There are some inconsistencies in the description of events depicted in the photograph that we address below, but which include not giving Mr Hart a description of the event that included her kicking out, but doing so with Mr Daly of the BBC, stating that the photograph was taken by Mr Paske when we considered that that was not the case, and referring in her interview with Mr Hart to being at or near a desk, which was not what the photograph showed. Her explanation for the data in her own copy of the photograph giving a date of 10 August 2009 was not we considered credible, and the suggestion of a conspiracy involving many in HR and senior management was not we consider likely to be correct.

163. In short there were some aspects of the claimant's evidence that we accepted, but many other aspects that we did not.

164. **Mr Watts** was a witness who was very well qualified to give evidence. He did so clearly, and candidly. We accepted his evidence that it was possible in around 2010 to use software to change metadata on a file of a photograph taken on a mobile phone. The validity of the data that Mr Borwick found was not, we concluded, as certain as Mr Borwick set out in his evidence. There were however two particular issues with Mr Watts's evidence that are important, firstly he did not have evidence to state that

the data had been manipulated, simply that it was a possibility, and secondly he could not state an opinion on when the photograph had been taken. We also require to consider matters in light of all of the evidence we heard, which is a great deal more than Mr Watts had before him.

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165. **Mr Clark** gave evidence in support of the claimant. He had been involved with her situation from 2009. He clearly believed that she was a whistle-blower, and that her dismissal had been effected because she had done so. He was cross examined on his evidence that the claimant had disclosed the incident in December 2010 to him at the time. In his email to Mr Hart he had accepted that his recollection was not clear. It appeared to us that he did not recall when the claimant had provided him with the detail of the incident or the photograph with any real accuracy. It is also instructive that when he saw the photograph initially he did not appreciate its significance. That only arose, he said, at the appeal hearing in 2012. But not long after that hearing he did not raise the issue with the respondent despite having several obvious opportunities to do so. It appeared to us that that could only be consistent with the claimant not arguing, at that time, that this was an assault, instigated because of the report of the Alison Sutherland incident. If that had been what was alleged at that time, it appears to us most likely that a trade union representative would have raised the issue with HR or senior managers in very clear terms, and seek the suspension of the alleged perpetrator (Mr Anderson, as Mr Paske had by then left the employment of the respondent). We did however accept his evidence that it was not realistic to expect him to represent the claimant in her absence at the disciplinary hearing given the circumstances. That others in other situations do so regularly is not the point. He was acting entirely appropriately in not attending a meeting that, he considered, ought to have been postponed. Separately he was candid in accepting that the appeal was undertaken well by Mr Rennick, and that his criticisms were of earlier aspects of procedures, and that candour was to his considerable credit.

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Discussion

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166. The decision of the Tribunal was reached unanimously. The present case is a complex one, with a substantial amount of competing evidence. It follows the earlier claim before the Tribunal involving the parties at which the claimant made allegations as to the chair incident on oath which attracted publicity, after which some time later there was dissemination of a photograph of the incident, which again attracted a great deal of publicity.

167. The parties sought to present the Tribunal with a choice between:

(i) the claimant as someone who had made a protected disclosure by email from her trade union representative on 17 September 2010 being assaulted on 16 December 2010 by being taped to a chair against her will by two male colleagues, including having tape placed over her mouth, in reprisal for having spoken out against two other male colleagues in that disclosure, and

(ii) the claimant as someone who had been a willing participant in an office prank which took place on 10 August 2009, raising that in evidence at the Employment Tribunal alleging that it occurred in a different manner and on the incorrect date, perjuring herself when doing so, repeating that dishonesty to Mr Hart and the media, fabricating emails to Mr Cunningham and Mr Macgregor in support of her lie, and providing information to others who used it online, all to the substantial distress and upset of Mr Anderson who was investigated by the police, subjected to internal investigation and then received the most dreadful threats online.

168. Each party took therefore a diametrically opposite position. The claimant suggested that she was the subject of a conspiracy between senior managers and HR staff of the respondent for nearly a decade to dismiss her because she had made a protected disclosure. The respondent presented her as a liar and forger who had been caught out as such after giving evidence in the first claim, and then repeating it on several occasions thereafter.

169. What matters in the claims that we heard is the evidence presented to us, and our consideration of that evidence against the law set out above. That evidence was not as complete as it could have been. Some of those who might have given evidence before us, as we address below, did not do so. Some written evidence that we might have been presented with was not put before us. Although we noted the terms of the earlier Judgment we formed our own separate view of the credibility and reliability of the claimant, and that of the other witnesses before us.

170. We decided in relation to each of the issues as follows:

What was the reason, or principal reason, for the claimant's dismissal?

171. We concluded that the sole reason for the dismissal of the claimant was a belief that there had been misconduct by the claimant in lying about the date and circumstance in which the photograph came to be taken, in particular that it was taken in December 2010 and was a reaction to a protected disclosure by the claimant in September 2010 when neither was true, and that she had fabricated the terms of emails between her and Mr Cunningham and Mr Macgregor. Mr Wallace gave evidence on that issue, and explained both that that was his belief and the basis for his coming to that belief. We accepted his explanations on that. He placed great store, understandably, on expert evidence placed before him that the claimant was certainly wrong on the date of the photograph, and therefore her claim that it was because of what she had claimed was her making of a protected disclosure in September 2010, which was after the date on which the photograph had been taken in August 2009, could not have been right. That was compelling evidence that such a belief was genuinely held by him. There was also however much other evidence to support the belief, including that of the witnesses Mr Hart interviewed, but also the failure of the claimant or Mr Clark her representative to make any allegation as to the incident at the time it happened, or in the years that followed up to November 2017 including in the Claim Form for the first claim save for a brief reference to it in April 2012. That there are issues with the procedure followed and the evidence considered in some respects does not detract

from the fact of his belief at the time. The dismissal was also considered on appeal, and Mr Rennick gave clear and convincing evidence as to the reason for his decision being the claimant's conduct, which we accepted. He did so after a long hearing over two days, and a very large volume of documentation before him. He considered all of it with an open mind and with great care, as we address further below. He did not believe what the claimant said, and concluded that the dismissal was justified for very similar reasons to Mr Wallace, but with the benefit of having heard directly from her. We were satisfied that the respondent had established that it had a belief in the conduct of the claimant and that was the sole reason for her dismissal. We address the separate issue of the alleged protected disclosures below.

If potentially fair under section 98(2) of the Employment Rights Act 1996 ("the 1996 Act") was it fair or unfair under section 98(4) of that Act?

172. Conduct is a potentially fair reason for dismissal. We required to consider whether in all the circumstances of this case the dismissal was fair or unfair applying the wording of section 98(4) of the Act. There were many factors that bore on this issue. It is important to stress in this connection that we are not entitled to substitute our view for that of the employer. We cannot ask how we would have handled matters, and then, if that was different to how the respondent did so, conclude that the dismissal was unfair. We require to apply the band of reasonable responses to all steps of the process. We do so having regard to the fact that the respondent is the Scottish Ministers, effectively the Scottish government, in light therefore of the resources available to that respondent, and all the circumstances of the case.

173. The process that led to dismissal had a lengthy history. The claimant alleged that she was the victim of a decade long campaign against her culminating in her dismissal. Assessing matters against the background of a very large volume of documentation and a wide range of disputes on so many factual matters, where far from all of those involved at the time of each gave evidence before us, indeed it was only the claimant who did

so, is not simple. Our task is to find the facts relevant to the issues from the evidence we heard, and apply the law to those facts. We have sought to do so.

5 *(a) Proceeding in the claimant's absence*

174. The first issue we address is the decision of the respondent to proceed with the disciplinary hearing in the claimant's absence, and in the face of the advice from its own OH expert. This is an aspect of the procedures 10 followed, which we also address further below. The respondent explained its reasons for doing so in the correspondence establishing the meeting, in the letter of decision by Mr Wallace and in his evidence. We required to assess those decisions against the band of reasonable responses. The present circumstances are unique. There is no direct guidance from 15 authority. It appeared to the Tribunal however that where the assessment of a medical professional instructed by the respondent was based on matters reported to him, which the respondent considered factually incorrect, it was not open to the respondent to proceed as it did. No reasonable employer would have done so, in our view. The OH report did 20 not say that the hearing could be held in two and a half months, as the respondent sought to argue. It stated in terms that she required treatment first, and it was clear that the period of two and a half months was an estimate of that. It stated in terms that there was a significant risk of harm to her if she was required to attend the disciplinary hearing until fit to do 25 so. The report further expressed the view that she was a disabled person. No competent claim of discrimination on grounds of being a disabled person is before the Tribunal, but that opinion of the respondent's own OH adviser is part of the background facts. The respondent, on advice from HR and then by decision of Mr Wallace, decided to proceed in the face of 30 that OH opinion, in effect contradicting it. Mr Wallace did so because the basis on which the medical evidence had been given, as he understood it, was not accepted by him, although he had no medical qualifications or experience, and also from what appears to the Tribunal to have been a form of prejudgment of matters by the reference to the terms of the written 35 documentation from Mr Hart's report. In that decision to proceed in the

claimant's absence he was clearly heavily influenced by the views of HR. That is we consider shown by his letter of dismissal stating that the letter from Ms Cairns of 15 January 2020 advised the claimant that if she did not attend the hearing "it would proceed in [her] absence", whereas that letter had said only that it "may" do so.

175. The decision on what to do was not a simple one, but in all the circumstances in such a case as the present we consider that no reasonable employer would have proceeded to dismissal at that point. All reasonable employers would have sought additional OH advice on the arguments that the respondent put forward for not believing the claimant both generally and with regard to her medical condition, and including issues such as what had caused the PTSD which she had been diagnosed with, whether the claimant was genuine when describing symptoms, whether the claimant had received any treatment she needed, if not when that would start and how long that would take, and whether any other adjustments to the process could be considered. All reasonable employers would have adjourned the disciplinary hearing to do so on what was the first occasion. That detail could have been sought during what was in fact the four week period between the date of the hearing held in absence and the date of the decision. Once advice on such matters was received a decision on how to proceed could have been taken. That could have included consideration of whether to suspend without pay under the terms of the Discipline Policy, which permitted that.

176. It was not however clear on the evidence before us whether or not the claimant was on full pay at all at the time of Mr Wallace's decision. Her evidence had been that she had exhausted her entitlement to sick pay before then, although that was given after cross examination had been concluded an in answer to a question from the Tribunal. The respondent did not tender evidence themselves on what pay she had been in receipt of at or around that time. It is true that the suspension letter referred to her being on full pay but that was not put to her in cross examination. We were left unclear on that issue, and unable to make a positive finding in fact.

177. It was also we considered surprising that there was neither a minute taken of the meeting, recording the absence of the claimant or her representative or a letter to her at that stage recording her failure to attend and that there was to be a decision taken in her absence but that that would take time given the volume of papers to consider. A reasonable employer could further have considered the terms of the Guide, which refers to an employee not attending the hearing on at least the first occasion given its terms. The ACAS Guide does not require to be taken into account, unlike the Code, but the Court of Appeal has held that its terms may be considered - ***McMillan v Airedale NHS Foundation Trust*, *[2014] IRLR 803*.** Not all reasonable employers would necessarily have done so, but the terms of the Guide are a factor that we take into account, and that is so in this case in particular as Ms Cairns referred to the Guide specifically in her letter. As she did not give evidence she could not be asked how she had done so given its terms and the circumstances.

178. What was most surprising however was that a further reason for proceeding in the claimant's absence was put forward, raised only in submission. That was that there was the potential for substantial delay, the pandemic had led to "lockdown" on the day before Mr Wallace's letter was dated, and the claimant had been told that she was on full pay during suspension by the letter informing her of that. It was expressed that there was a concern of the claimant having an open-ended period on full pay all the while avoiding a disciplinary hearing, and that was why the decision to proceed was taken or at least a significant factor in that decision. That concern over an open-ended financial liability was however not the reason given in the letter of dismissal where it explained the reason for proceeding in absence. Nor was it the reason in evidence given by Mr Wallace. It had no evidential base at all. That there was that new argument, made solely in submission, tended to support the view that the reasons given for proceeding in absence were not within the band of reasonable responses.

179. We concluded that no reasonable employers would have proceeded in absence at the stage of the first disciplinary hearing, but would have adjourned it, sought clarification from Dr Glen on a number of issues, and given the claimant one further opportunity to attend a meeting at a later

date, either in person or remotely by some form of video platform, telephone, written submission or similar, after receiving such further OH advice. That view is supported by the experience of the two Tribunal lay members. We considered that that was of such materiality that it of itself could have led to the dismissal decision being held to be unfair, subject to analysis of the effect of the appeal, as referred to further below.

(b) Reasonable investigation

180. The second issue, which is at the heart of the issue of fairness, is whether there was a reasonable belief, based on a reasonable investigation, that the claimant had repeatedly lied about the chair incident. We address the investigation first. It was alleged that the claimant was firstly not truthful about the date, in that the photograph was said to have been taken on 16 December 2010. That date is significant as it is after the incident with Alison Sutherland said to be the source of a protected disclosure. The second aspect of the allegation is that the incident did not occur as she alleged, being a reaction to her making a protected disclosure (as she claims it to be) on 17 September 2010, being forcibly restrained by two male colleagues with tape placed around her body and across her mouth with remarks made about speaking out about the boys, but was with her consent as part of the pattern of (admittedly unacceptable as we address below) behaviours in the office. The third aspect is in relation to emails said to have been sent by the claimant about the December 2010 incident the respondent alleges were fabricated, the claimant claims were not. That was a stark difference between the two versions of events.

181. The provisions of the ACAS Guide on investigating cases are set out above. We were concerned that a number of matters that might have been the subject of investigation were not. We addressed them above.

182. We also considered that the decision to have Mr Hart investigate both what were in effect initially allegations by the claimant against Mr Anderson in particular, and then investigate almost the opposite allegations made latterly against the claimant, was not best practice. It

was an investigation where the witness, the claimant, became the accused who was the subject of the investigation. Although Mr Hart was a fact-finder the context was so different that we consider that someone new ought as a matter of best practice to have been identified, and that was so particularly given the size and resources of the respondent. That is exemplified by the following. Mr Hart had not gone into much detail with Mr Anderson and Mr Paske in their interviews in his first report, but he had done so to at least an extent in the two interviews with the claimant. He then raised questions with her in writing in the second report process. The questions were asked after the decision in relation to the disciplinary hearing against Mr Anderson. The outcome of that separate disciplinary hearing which did not involve the claimant, including a belief that the earlier date for the photograph was likely to be correct, was either irrelevant to the second investigation or if considered to be relevant the materials that led to that belief were then ones that were potentially of significance. Mr Hart did not however seek the minutes of Mr Anderson's disciplinary hearing, when one would assume that at that hearing Mr Anderson gave an account of the incident. That account may have contained relevant material but was not sought by him, nor was it put before the Tribunal, and as we deal with more fully below the emails the claimant said she had sent her managers were not followed up by Mr Hart. There was something of a selective approach to the way in which evidence was gathered, and it was not dealt with in as balanced a manner as good practice would suggest, in our view.

183. There is we consider a sense that on receipt of Mr Borwick's report the view was taken that it was conclusive and that little further investigation was required. The report did state that the author was certain that the photograph had been taken on 10 August 2009. But the report also suggested further investigation of the emails which were in dispute. Had that been undertaken material evidence on whether or not those emails were genuine could have emerged, and that may possibly have led to a different perspective as to the certainty of the date of the photograph. It was far from being definitely the case that it would have so emerged, but it was possible. The email accounts of at least the claimant,

Mr Cunningham and Mr Macgregor could have been examined by the IT department. It is possible that earlier emails had been retained, or otherwise stored in some form of back-up. That that was not instructed by any of Mr Hart, Mr Wallace or Mr Rennick is a cause for concern. But best practice is not the test that we must apply. We must assess overall whether what was done fell within the band of reasonable responses.

184. This issue also requires to be seen in the context that there was a body of other evidence that was taken into account. That included the evidence from Mr Anderson given to Mr Hart that he had taken the photograph in 2009, that the event was therefore much earlier in time than the claimant had indicated, and in circumstances that must have been very different if in 2009 as it could not have followed the incident with Alison Sutherland. Whilst the genuine nature of the emails and the date of the incident depicted in the photograph are not inextricably linked, they are so closely linked that it was at least possible for a reasonable employer to have regarded them as if inextricably linked. The evidence further included that of Mrs Richards, whose comments to Mr Hart are not possible to reconcile with the evidence of the claimant. Mrs Richards did not give evidence before us, but Mr Hart stated that the claimant had accepted her as not being someone tainted by issues from the office, and he considered her to be a balanced and fair witness. Those views are not conclusive, but are apt to take into account. There is further Mr Borwick's evidence as to the date of the photograph, supporting Mr Anderson's evidence on that, which the employer accepted in circumstances where the contradictory technical evidence was limited to an email of what might be possible (Mr Watts had not been instructed at that stage) and concerns over the GPS data, which Mr Borwick had in both respects discounted as being factors that militated against the soundness of his conclusions.

185. In addition there were some issues with the reliability of the claimant's evidence. She alleged that Mr Paske had taken the photograph, when we considered it far more likely that Mr Anderson had done so, as he accepted, for the reasons set out below. There was an obvious inconsistency between her evidence and that of Mrs Richards which was

given to Mr Hart, and Mrs Richards was generally thought to be someone relatively impartial. There is the WhatsApp message sent by the claimant to Mr Anderson about two weeks after the date she claims was the date of the incident in what are, on the face of it, friendly terms. Whilst that is not conclusive by any means the terms used are not easy to reconcile with what the claimant alleges Mr Anderson did to her not many days beforehand. There is a large chapter of evidence where the claimant had opportunities to raise the incident, particularly after she had the photograph in early February 2011, but did not directly do so. She had the photograph sent to her by Mr Paske in early February 2011, and therefore had it at the time she claims to have emailed Mr Cunningham. It is not we considered credible that she would email him in such terms without either attaching the photograph or referring to it, as it was evidence that could support the claims made she had very recently been given. There are other issues with the email she sent to him that we refer to below.

186. The only occasion when the photograph was referred to was on 26 April 2012 in the context of an appeal against a disciplinary warning, but it was not raised in that meeting in terms as a substantial issue in itself but towards the end and rather fleetingly, and it was not followed up either then or afterwards by the claimant (who did not take up the invitation to provide evidence to HR) or Mr Clark (who emailed the Permanent Secretary at the time two months later and did not mention it). The long sequence of occasions when the incident and photograph was not mentioned is significant.

187. We must also in this part of the analysis consider how Mr Rennick conducted the appeal, allowing the claimant a full opportunity to bring new details to him (albeit not Mr Watts' report as that had still not been instructed), considering all the documentation she provided, and all that she said. He in effect conducted part of the investigation himself in doing so, and that part was significant. As is referred to in authority, the investigation by Mr Hart is not conducted in a vacuum, but is part of the whole process. Whilst he did not follow up on the issue of the emails that

were alleged to have been fabricated we refer to that further below and consider that he was entitled to take the view that he did about it.

188. Charges 5.6 – 5.9 had not been the subject of any investigation by Mr Hart, or otherwise under the respondent's Disciplinary Procedure, and were added by HR, none of whose members gave evidence to us. We were not satisfied that the these allegations were appropriately and sufficiently investigated so as to fall within the band of reasonable responses. They were added, we concluded, as makeweights to the principal allegations. That does however leave those allegations.

189. We considered that, in all the circumstances, there had been an investigation in respect of charges 5.1 – 5.5 that, just, fell within the band of reasonable responses, despite our reservations about the manner in which it had been carried out and the matters that might well have been further investigated.

(c) Belief

190. We then considered whether the belief founded on that investigation was one that a reasonable employer could have held. We were asked to consider whether a reasonable employer could have concluded that the date of the incident was not 16 December 2010 as the claimant alleged, but over a year earlier and over a year before the alleged protected disclosure that was said to have been the trigger for the incident, such that the other matters were also established as the claimant must have been lying about everything. We did not consider that the position was as stark as that. We did not consider that the determination of what happened as one that was appropriate to make in such binary form. We also required to consider the allegation that the claimant was dishonest, in the sense of telling an untruth known to be so. It is not necessarily the case that providing a wrong date leads to that conclusion of itself. As we address below we consider that the analysis require to be more nuanced. It was also required for each of the sub-charges individually.

191. We concluded that the belief held by the respondent for charges 5.1 – 5.5 was within the band of reasonable responses. The reasons for the decisions by Mr Wallace and Mr Rennick were set out in their decision letters in some detail. We accepted that they were genuinely the reasons on which they reached their decisions. We accepted that that was the case in particular for the reasons given by Mr Rennick in his decision letter, after his two meetings with the claimant. We came to that conclusion for the following reasons:

(i) The evidence of Mr Borwick was clear that the date of the photograph was 10 August 2009. He was in effect certain about that. He based his conclusion on examination of files on the Scottish government server at Campbelltown, which he visited. His report explains the process he followed. He is an independent and suitably qualified expert. That was very strong evidence indeed against the claimant. Before Mr Wallace there was no contradictory expert or technical evidence, and before Mr Rennick was only the email from Mr Stanbury which set out the possibility of the data being unreliable only. It did not establish that the photograph had been taken on the date the claimant alleged.

(ii) The claimant did not report the incident at or around the time, either to her managers, or HR, or otherwise in the respondent or to the police. Given what she claimed had happened that is very surprising.

(iii) There was not even produced an email or similar written evidence of the claimant either recording the incident herself or reporting the incident to Mr Clark on or around 16 December 2010, although she had been keeping a diary up to August 2010, and Mr Clark had been assisting her from 2009.

(iv) Mr Anderson and Mr Paske denied the allegation of an assault by them on her. They argued that it was a form of office prank which she had not been coerced into, and that it had occurred earlier than she had claimed. Whilst those in their position may not have admitted any guilt, there was a measure of consistency between their two statements, at least in part.

(v) Other members of staff reported her as having been involved in discussions about the incident and doing so in a form of light-hearted or jocular manner in the office. That was particularly the case with Ms Richards.

(vi) Other witnesses supported the suggestion that the incident was earlier than she claimed, such as Mr Fenwick who had left the office by September 2010 but said that he was aware of it.

(vii) Emails said to have been sent to Mr Cunningham and Mr Macgregor were not remembered by them when one would expect them to be recalled if they were genuine. Mr Macgregor was in the office later in the day when the email dated 12 April 2011 suggested that he was not and would not be so for two weeks. The evidence of his being there that day was compelling. As we address below it is not impossible that there is an explanation for it, but it is not a likely one. The conclusion we drew, the reasons for which we set out in more detail below, is that those emails were not valid, and had not been sent when it was alleged that they were. We concluded that the respondent was entitled on the evidence before it to reach the view that it did on those emails, even in the absence of the further investigations Mr Borwick recommended.

(viii) The claimant did not attend a meeting with Mr Hart for his second report, and appeared to avoid the meeting with him that had been arranged, seeking advance notice of the points to be addressed. That is surprising given all the circumstances and the earlier two meetings. It was not properly explained in our view.

(ix) Mr Anderson on the other hand was open with both Mr Hart and Mr Borwick, and gave access to devices, and information. He gave an account of the timing of the photograph consistent with the evidence Mr Borwick later found and reported on. His account, whilst not as detailed as it might have been, was consistent. He also accepted that he had taken the photograph. The claimant alleged that Mr Paske had done so. It was very surprising indeed for Mr Anderson to have made the admission he did if he had not taken the photograph. It is far more likely that his admission is

accurate, and that that aspect of the claimant's evidence is not correct.

(x) Mr Paske had left the respondent's employment and did not co-operate with the investigation as well as one might have hoped, but also denied the allegation. Whilst it is the case that the description he gave was very limited indeed, he was answering the questions asked of him, which were not as full as they could have been. His position was in effect the same as Mr Anderson and contradicted the allegation of an assault.

(xi) The evidence of those two alleged perpetrators was supported by other evidence of a culture at the office described variously as high jinks and like a kindergarten. What might loosely be called pranks took place on a not infrequent basis. Whilst entirely wrong for such an office, those facts tend to support Mr Anderson and Mr Reid at least to an extent, in particular of their own perspective on what had happened and why and contradict the evidence from the claimant that the incident had been a reaction to her disclosing the September 2010 circumstances involving Ms Sutherland.

(xii) The claimant said that the incident was on 16 December 2010 at between 3 and 4pm. That date was a Thursday. The room in which the photograph was taken was occupied by Mrs Richards and Ms Sutherland. They not being there at 8pm on a Monday, being 10 August 2009, is we considered more likely.

(xiii) If there was a manipulation of the date of the incident, it is not easy to understand why such a person would also change the time of it from about 4pm to about 8pm. Doing so is contrary to common sense.

(xiv) The claimant did not mention the incident or photograph in her pleadings in the first claim in 2017, despite her having legal advice to prepare it, and despite the terms on which the claim was otherwise pled. That was particularly surprising given her position taken in the investigation by Mr Hart and then before Mr Rennick.

(xv) Mr Rennick explored the claimant's position in great detail with her, and considered conscientiously all that she said to him, and all the written material she gave him. He did not consider her explanations

to be credible, in particular her explanation as to why there would be manipulation of the data in the photograph. He considered that the data had not been manipulated. He accepted the report from Mr Borwick, which he considered was consistent with the other evidence, save for that given to him by the claimant which he rejected. He was entitled to form that opinion. It is an issue that we address further in the next paragraphs with regard to procedure.

e) Procedure

192. We then considered whether the dismissal was procedurally fair, which includes considering all the circumstances against the band of reasonable responses. We did not consider that there was any breach of the ACAS Code of Practice. What is material in this regard in particular is the appeal before Mr Rennick. That was in the context of our finding above in relation to proceeding with the disciplinary hearing in the claimant's absence. The hearing before Mr Rennick was a very full appeal hearing, held over two days, before and after which Mr Rennick read all the materials placed before him, followed by detailed consideration of matters and a lengthy letter of decision setting out his analysis of the issues before him. He considered in detail all of the written and oral evidence the claimant gave to him. It was a full rehearing of the issue, and a full and open opportunity for the claimant to make her case. It was an entirely different process therefore to that before Mr Wallace.

193. Mr Rennick in his very careful analysis placed considerable reliance on the report of Mr Borwick, as he was entitled to do. At that stage there was very little substantial evidence from another expert to consider, being only an email from Mr Stanbury, which was in general terms as to how data might be manipulated. Other evidence was also considered by Mr Rennick. There was, importantly, no credible explanation given by the claimant as to how a photograph taken in December 2010 could have data as to its creation in August 2009. The explanation put forward by the claimant was to the effect that those involved changed the data to cover

the incident and photograph up, and did so between 16 December 2010 and April 2011 (at the stage of the appeal hearing the claimant argued that Mr Paske had done so when he left employment in April 2011, but in her evidence she accepted that he had left in early February 2011). That would however have required a level of technical expertise to fool someone as experienced as Mr Borwick, and against the background that one of those concerned (the claimant said it was Mr Paske, although he did not accept that in the investigation statement) provided her with what she said was a "doctored" photograph, with a change to its date. The note of the second day of the appeal hearing records that the claimant "could not explain why they would manipulate the picture other than to cover up evidence, and she was also unable to explain why [Mr Paske] had passed the picture to her". In her evidence she alleged that he had done so as it was the right thing to do. Someone doing so in the circumstances the claimant alleged did not however accord with common sense, in our view, and Mr Rennick was entitled to consider that the events in practice did not match the version the claimant sought to give him. His conclusion was that he did not find the claimant's evidence to him credible. We consider that at the very least he was entitled to form that view (we address our own conclusion below). We consider it likely that had he considered the claimant's version of events to be generally credible he would then have instructed further investigation of email accounts and similar issues. He might also at that point have considered whether the photograph itself provided him with any evidence, rather than discount it as being something too speculative to seek to address. That he did not do so is explained by his conclusion that the claimant was not credible and reliable, and that he had sufficient evidence to decide the appeal. In this regard whilst we may have come to other views on charges 5.5 – 5.9, and we disagree on the issue of the adjournment of the disciplinary hearing which he endorsed, these are not points that make any difference to the outcome in this regard.

194. It may be thought that allowing the appeal on charge 5.9 did not make any real difference, but we considered that it did show both the care with which

Mr Rennick considered matters, and his consideration for the claimant's circumstances.

195. Mr Clark argued that although it had been a fair appeal the earlier procedural flaws meant that the claimant had not had a fair process. That is not however what the caselaw referred to above provides.

196. Our conclusion is that the defects in the procedure identified at the earlier stage before Mr Wallace, in particular the proceeding with the hearing in her absence but also matters with regard to the investigation by Mr Hart into allegations 5.1 – 5.5 were all remedied by the very full and open appeal heard by Mr Rennick, and that considering the process as a whole it was not unfair.

(e) *Penalty*

197. The final aspect is whether the penalty of summary dismissal falls within the band of reasonable responses. We were of the view that in light of the beliefs the respondent held as to a level of dishonesty that was material, which included what the respondent believed was dishonesty about the date and circumstances of the incident when the claimant was tied to the char, being dishonest with Mr Hart and others, and the falsification of emails, with what were material consequences for Mr Anderson in particular, it was certainly within the band of reasonable responses to conclude that dismissal was appropriate. It was at the least a permissible option. These were matters that directly bore on trust and confidence in the claimant.

198. It follows that we must dismiss the claim under section 94 of the Act, as it was not unfair under the terms of section 98(4).

Did the claimant make protected disclosures to the respondent, and if so was that the sole or principal reason for her dismissal under section 103A of the 1996 Act?

199. We did not consider that there was sufficient evidence of a qualifying disclosure having been made. The statutory test is clear, in that disclosure of information is required by "the worker" being the claimant. She alleged that an email sent by Mr Clark which commented on the attempted assault, as it was alleged to be, on Ms Sutherland amounted to a disclosure by her. But although the claimant said that it was made on her behalf it did not say so. The email only referred to the claimant as one of a number of persons who had witnessed the alleged incident. It was not possible to tell from its terms that the claimant was providing information at all. The Tribunal did not regard that email from Mr Clark as, for the claimant, meeting the statutory test. It was not a disclosure by her, but him. It would only have been hers if he had identified her as the source of the information similar to the disclosure of a principal under the law of agency. It was claimed by the claimant and to some extent by Mr Clark that he had later provided her name to Ms McCloy but Mr Clark could not recall when that was, or how, and that later message to Ms McCloy was not part of the alleged disclosure said to have been made by the claimant when seeking to amend her claim, and which the Tribunal permitted. She had relied only on the email itself. The respondent did not have notice of that additional argument and the Tribunal did not regard it as appropriate at such a late stage to permit a yet further amendment to add it, given the prejudice that would result and the need for enquiry to be made, which would be far from easy given both the lack of any specification as to date or method and the substantial passage of time. The Tribunal did not consider that the claimant had proved that she had made a protected disclosure on the basis of the email on which she founded.

200. The claimant also relied on what she claimed was her email to Mr Cunningham dated 15 February 2011. That email was disputed by the respondent, which argued that it had been fabricated. There was again competing evidence on this. Mr Wallace expressed the opinion that if the photograph was not taken on 16 December 2010 as the claimant alleged, then the email referring to the incident on that date must have been false. The date of the email is under two months from that alleged incident. If in fact the photograph had been taken not two but 18 months before, then it

is very likely indeed that the email is not one sent at that time. It is just possible that the claimant was confused over the date of the incident when emailing in February 2011, but that was at no stage her position. The terms of the email make no sense given that issue of timing, and is evidence that the email was not genuine.

201. The Tribunal did take account of the fact that the respondent failed to act on Mr Borwick's recommendation to search for the emails. There was some evidence that they might not have been retained, with a policy of deleting them after three years, but without looking that could not be clarified. The failure to follow that issue up was an error on the part of the respondent, but having regard to all of the evidence we did not consider that that changed our conclusion. We could not know what such a search would have revealed, it might have been that there were no emails left to seek, or that they did not exist, or that they did exist. The email to Mr Cunningham on 15 February 2011 came from the claimant's private email address. She could have followed that issue up herself using the email address and device from which she sent it, but did not do that either directly with Mr Rennick or with her expert Mr Watts.

202. There are four other factors that led us to conclude that it was likely that the challenged emails were not genuine. The first is that the header of the email is "Sick note". That is a very odd header if what was being included in the first paragraph was a report of an assault for whistleblowing, as she claimed. It suggests that the first paragraph was added later, without the header being checked. The second is that the terms of the email regarding the alleged assault are not ones that might be expected if that information had, as the claimant alleged, already been given to Mr Cunningham. They had the air of a first disclosure, not a follow up. Thirdly and perhaps most importantly the email was sent shortly after Mr Paske sent her the photograph in early February 2011. It is astonishing that the email neither attaches it, nor refers to it. That is not, we concluded, likely to be credible. If the claimant did not have it on that date we consider that it would almost certainly have been referred to in a follow up email very shortly afterwards. That that was not done in the email or shortly afterwards led us to

conclude, having regard to all the evidence, that the email was not genuine. Fourthly in the appeal hearing in April 2012 the claimant referred to the photograph, but in doing so made no mention of having raised the issue with her managers, including by emails in which she set out the circumstances she alleges, and that they did nothing in response. She had the photograph with her at that hearing to show it to those involved, which indicates a degree of preparation for the hearing. She also had the assistance of her trade union representative who was present. It is not we consider likely that the claimant would not at the same time have raised those emails if they had genuinely been sent earlier. We assessed the disputed terms of the email on the evidence before us, and that evidence led us to conclude on balance that the claimant, who has the onus of proof of having made a disclosure, had not sent it in the terms that she claimed. The conclusion is that the claimant did not make protected disclosures by the two documents on which she relies.

203. In any event, even if they had been held to be protected disclosures, it was clear to us that the sole reason for dismissal was the belief by the respondent, specifically each of Mr Wallace and Mr Rennick, that the claimant had been guilty of gross misconduct in lying about the chair incident as to its date and circumstance. That is at the heart of their decision. Other issues arose, but it was what they considered was a lie that had serious consequences which was the principal reason for dismissal. There are issues as to other allegations, and issues as to process to which we have referred, but at the heart of it they each disbelieved the claimant on both when the photograph had been taken, and in what circumstances. Mr Wallace specifically denied both in his letter and evidence that any alleged disclosure affected that decision. It is of importance in this connection that the very long gap in time between the alleged disclosures and dismissal, of about nine years, suggests that the claimant's position in this regard is unlikely. Whilst it is not impossible, that factor is a strong indicator against it. Secondly however the first investigation about the photograph was in effect against Mr Anderson, not the claimant. It was because that investigation and subsequent decision of the Deciding Officer in the hearing with Mr Anderson that the

photograph was likely to have been taken in August 2009 that the second investigation was commenced directed to the claimant. The third aspect of the allegation is that there was a long conspiracy between senior managers and HR to dismiss the claimant, commencing from Mr Dryden's emails in October 2011. But it is instructive that HR did not support the suggestion of a dismissal then at all, rather the response was to caution against doing so, and it was not done. There were later processes including the Fairness at Work hearing, and then appeal. The response from Mr Johnstone to the appeal was to apologise for what happened and to say that the claimant had done the right thing in bringing it to the respondent's attention, to paraphrase his letter. These are not acts of a conspiracy against the claimant. The evidence as a whole persuaded us that this part of the claimant's case was not well founded, although we did retain concerns over the role of HR in a number of respects as referred to in the following paragraph. Separately to Mr Wallace's process, we were satisfied that the appeal by Mr Rennick considered issues entirely afresh, and that his decision was wholly unaffected by any protected disclosure if made. He addressed that both in his letter of decision and oral evidence before us. We did not consider that there was part of a conspiracy against the claimant as she alleged.

204. In coming to those conclusions we did consider carefully whether there had been a form of manipulation of the evidence as suggested is possible in ***Jhuti.*** The facts of that case are very different to those of this. We were nevertheless concerned that some of those in HR of the respondent had firstly been involved in bringing a series of charges against the clamant which included taking a charge of serious misconduct and then re-stating it as a charge of gross misconduct, not explained as no HR witness gave evidence, and alleging dishonesty in claims for overtime although that was on the basis of Mr Cunningham's timesheet; secondly imposed a narrow limitation on the extent of investigation; thirdly instructed Mr Hart to bring the second investigation to a prompt end, fourthly adding additional allegations themselves without there having been an investigation into them, and finally argued very strongly in favour of proceeding with the disciplinary hearing contrary to OH advice in the circumstances set out

above. We were concerned at that body of evidence, and that none of the HR employees involved gave evidence before us. The extent of influence by HR was high in those regards. We were also concerned that a new reason for proceeding with the disciplinary hearing in absence was given in submission.

205. We were however satisfied that there had not been the kind of manipulation or improper actions to secure an outcome that otherwise would not have taken place so as to fall within the principle established in ***Jhuti***. Mr Wallace accepted that the decision to proceed in absence was his, and he stood by it. We accepted that it was his own conclusion on that, reached independently, albeit with advice from HR. We did not consider that that reasoning was affected by any alleged disclosure.

206. He had considered the evidence over a lengthy period before making a decision on the basis of what was presented to him, and that is not suggestive of any earlier disclosure playing a part in his thought processes, as otherwise he could have made the decision very much more quickly.

207. The hearing before Mr Rennick did not have the same issues as factors, as he had a meeting with the claimant and her representative, and gave them every opportunity to raise whatever issues they wished to. Mr Rennick's evidence as we have stated we accepted, and we were satisfied from it that the decision he took was not affected by any improper manipulation or restriction of matters. He denied in clear and we considered entirely credible terms that the issue of the alleged protected disclosures had played any part in his decision. He took what we considered to be an entirely independent decision, not affected to any extent by anything other than the evidence before him, which included all that the claimant had wished to present to him. She did so to a very substantial extent. If there had been any sense of HR seeking to limit the evidence she was able to remedy that, and did so.

208. We did consider the claimant's evidence as to a form of mindset against her evidenced by emails from Mr Dryden in October 2011, charges against

her being laid thereafter, including charges said to be gross misconduct, and that those charges continued up to the hearing before Mr Wallace, together with the arrangements made for the hearing which proceeded in absence and other aspects of our concerns over the role of HR. We did not consider it at all likely however that there was a form of intent to remove the claimant for almost ten years, which eventually came to fruition, as she sought to argue. We considered that Mr Clark was correct in his evidence that in October 2011 those involved in the emails were looking at options. The option of dismissal at that stage was not taken. There was also a possibility of the claimant being moved from the office to the Outer Hebrides, but that too did not materialise. Mrs Clemie gave evidence to Ms Johnson in her interview that the office was dysfunctional and that she was disappointed that the recommendations for it were not acted on. That is not someone acting as part of a conspiracy against the claimant. There was a very long gap in time between those issues, later disciplinary charges that were not taken to a hearing at that point, and the dismissal. The delay in progressing the earlier disciplinary charges does not support the suggestion of a conspiracy to dismiss the claimant, simply as so long was taken to do anything. The claimant was also promoted to Senior Fisheries Officer, which is not consistent with a desire to dismiss her.

209. If HR were seeking to dismiss the claimant latterly (which appears to us to be likely in all the circumstances including instructing Mr Hart to end his second investigation, not accepting the OH advice, and seeking to proceed with the disciplinary hearing whether or not the claimant attended) that, we concluded, arose from a form of prejudgment of her guilt of the principal allegations within allegation 5, from a belief, at least from receipt of Mr Borwick's report but perhaps earlier for example when Mr Anderson's disciplinary hearing concluded, that the photograph had not been taken when the claimant alleged it to have been. Even although the HR witnesses were not led before us we did not consider that it should be inferred from that, and the other circumstances, that the alleged disclosure was what was truly the sole or principal reason for dismissal as we were satisfied that each of Mr Wallace and Mr Rennick's evidence on this issue

should be accepted. We considered that the sole reason for dismissal was the belief in the claimant's misconduct each of them held.

210. It follows that we dismiss the claim under section 103A of the Act.

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Was the termination of the contract of employment by the respondent a breach of contract?

211. There is a preliminary issue to address under the 1996 Act and terms of the contract of employment. The contract has a provision excluding the claimant as a Crown employee from the right to a period of notice. Section 86 of the Act provides for a minimum period of notice as an entitlement for employees, and to contract out of that provision is unlawful under section 203. That is however subject to the terms of section 191 which provides for certain provisions of the Act to apply to Crown employees. Section 86 appears in Part IX, and for that part the sections that apply are only sections 92 and 93. The effect is that the right in section 86 does not, we conclude, apply to Crown employees in general terms. On that basis, the Tribunal concluded that the claimant may not in law have a right to notice under the statute. The respondent did not however make any reference to that issue in its pleadings. There was no issue taken as to whether or not the claimant did have such a right, either under the terms of the contract or by the terms of section 191 of the Act. The claimant had no fair notice of that argument. We concluded that in that circumstance it was appropriate that we address the claim for breach of contract on the merits of the same.

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212. This was the most complex of the assessments, as the test is on the balance of probabilities, with the onus of proof on the respondent. The respondent did not call all the witnesses it might have, for example Mr Anderson who remained its employee, and Mr Paske who did not but in respect of whom an application for witness order could have been made. It sought to refer to a statement from Mr Bruce, in which he alleged that the claimant had made false accusations against him, but did not call him to speak to it. It relied in a number of respects on what is hearsay

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evidence from Mr Hart in his witness statements, including those such as Mr Cunningham, Mr Macgregor, and Mrs Richards. Such hearsay evidence is nevertheless admissible in such a case, and it is our duty to consider all of the evidence before us. Where a person might have been called but is not, we considered that little weight could generally be given to the statements given by that person. The evidence could not be tested by cross examination, and the credibility and reliability of the person could not be assessed by the Tribunal having seen and heard from him or her. But the evidence requires to be assessed as a whole, and there is a degree of consistency in for example the details given by Mrs Richards to Mr Hart about discussions involving the claimant and others in the office when the photograph was looked at in a light hearted way, and other evidence including that from Mr Fenwick, and the claimant's own failure to raise the issue at the time.

213. The evidence includes expert evidence from two witnesses. The expert evidence was of particular importance to us in this aspect of the case. Both expert witnesses were very well qualified to give evidence, and were impressive when doing so. The differences between them were focused on how Mr Borwick had undertaken his role, and what each had before them. They also had differences of approach in general terms, which is not unusual between experts.

214. We considered that although Mr Watts was likely to be correct that metadata in the file for the photograph could have been changed, that was a possibility that did not reach the level of probability on the whole evidence before us. We concluded that on the balance of probability the data had not been changed, and that it accurately recorded that the photograph had been taken on 10 August 2009 at 20.04 hours.

215. We came to that conclusion for the following reasons

(i) Mr Watts accepted that he saw no evidence that the data had been changed, such that he could not say positively that there had been

manipulation of the data, still less that the photograph had been taken on 16 December 2010 as the claimant alleged.

(ii) He did not see the file examined by Mr Borwick taken from Mr Anderson's H-Drive, although in Mr Borwick's report he said that a copy could be made available. Mr Watts did not ask to examine it.

(iii) Mr Watts considered that a forensic image of the H-drive used by Mr Anderson should have been taken. Mr Borwick did not do so, but took what was effectively a copy of the file of the photograph file by way of a zip file. We did not consider that the method used by Mr Borwick was improper or unreliable, and we accepted his evidence that such methods as zip file copies are regularly used by law enforcement agencies worldwide, amongst others, and take a wholly accurate copy of the file. That Mr Watts would have carried out the task differently, and most likely in a more effective manner, is not, in this context, sufficient to doubt that what Mr Borwick did was within the conduct of a reasonably competent expert in the field.

(iv) Mr Watts did not, either directly or through the claimant, ask to have access to the H-drive.

(v) To make the changes to the EXIF and file data necessary there would require to be knowledge of the software to use, and both securing and then using two different programmes to do so. It is possible that someone in Mr Anderson's position could have had that in late 2010 and the first two months of 2011, but there was nothing in the evidence to suggest that that was likely to have been the case. The claimant did not suggest in her evidence for example that he was a particularly astute user of computers or mobile telephones, or had a special interest in computer programming or similar.

(vi) The claimant had a copy of the photograph in early February 2011. The version she provided to Mr Watts is likely to have been that which she was given by Mr Paske at that time. It had metadata showing its date of creation as 10 August 2009.

(vii) For there to have been any change made to that metadata therefore required someone, between 16 December 2010 and early

February 2011, to have existing knowledge of the necessary software, or to have carried out a search for that to find it, utilised the software programmes to do so, and then stored that changed version of the photograph at that time, before it was sent to the claimant.

(viii) Given the attitude to the event by Mr Anderson and Mr Paske, that is, the Tribunal concluded, extremely unlikely. It appeared to the Tribunal that they had acted under the belief that nothing seriously wrong had taken place. Mr Paske providing the claimant with the photograph is not consistent with his either personally or with knowledge of acts by someone else, most likely Mr Anderson, having made such changes to the data. It would be providing the victim with evidence of guilt of such manipulation, which is contrary to common sense.

(ix) Mr Anderson is we consider the person likely to have taken the photograph. He said to Mr Hart when questioned that “If I had anything to hide I would have ditched the photograph”. That appeared to the Tribunal to be a credible comment, which made sense given all the circumstances. Mr Anderson was, from the statement he gave, open with Mr Hart, provided access to all devices, made reference to the date of the photograph when doing so, and gave access to his work computer willingly.

(x) The claimant did provide the photograph in her appeal against a misconduct written warning, in April 2012. Having done so in that context it is not easy for her to argue that she had “buried” the incident psychologically, as she suggested she had because of the traumatic incidents earlier in her life.

(xi) She had shown it to a senior manager in doing so. It is not we consider credible that, if the incident happened as she alleged before us, she did not say that to the senior manager at that time, and that becomes more surprising still when that manager allowed her appeal. It is also significant that at the appeal hearing she did not mention at all the emails she alleges she sent to managers in February and April 2011 and their lack of action in relation to the matter. That was an occasion when there was an opportunity to

raise these issues, with someone who might have been supportive of her, which was not taken.

(xii) Mr Clark said that he did not appreciate the significance of the photograph until that appeal meeting. He had it in his possession but it appeared that he had not understood what the claimant said it showed, or otherwise understood what it depicted. In fact even after that hearing he did not follow it up formally with the respondent shortly afterwards at all. It is therefore not at all surprising that HR also did not appear to appreciate that it was significant at that hearing. Very little was said about it at the time, and it was not clearly stated that there had been a form of assault on the claimant by two male colleagues who had taped her to a chair against her will, placed tape across her mouth, and had done so because of her role in reporting the September 2010 incident. The claimant did not act on the invitation to raise any such matter with HR in the decision letter thereafter issued.

(xiii) The claimant alleged that the incident occurred between 3pm and 4pm on 16 December 2010, which was a Thursday, when the Tribunal considered that it was more likely that at least one of the assistants in whose room the incident occurred would be present. It did not accept as likely her evidence that both had been allowed to leave by then as it was near Christmas, as that was over a week away. The Tribunal considered that those assistants not being in the office at around 8pm, the time suggested by the metadata of the photograph, was more likely.

(xiv) It did not appear to us likely that someone manipulating the date of the metadata would also manipulate the time from 3 – 4pm to around 8pm, as doing so made little if any sense. That tended to suggest that the time and date had not been manipulated.

(xv) Mr Anderson also gave the claimant access to his house around 31 December 2010. That is not likely to be consistent with him personally or through another manipulating the data on the photograph.

(xvi) Mr Borwick considered from what he knew that the photograph had been “moved” from the iphone to the work computer. That means

that the same file is transferred from the phone, on which it is no longer stored, to the computer where it is stored. If that was done, which we consider likely, that file on the computer is the best evidence of the photograph at that time. Mr Watts did not dispute that, if the file had been moved rather than copied. It also appears to us that to all intents and purposes, if not precisely, the file version of the photograph on the H-drive is the same as the original file created on the phone when the photograph was taken using it.

(xvii) Mr Watts set out in his report the documents he had been sent, but did not include some which he had been sent being the statements to Mr Hart of Mr Anderson and Mr Paske.

(xviii) Whilst the GPS data was inaccurate as to location, Mr Watts confirmed that in around 2009/2010 an iphone when used to take a photograph inside would be likely to use as location the mast from which it derived a signal. In all the circumstances we did not consider that the difference in the GPS data on the photograph data to the location of the office rendered the likely date of the photograph's creation unreliable, and we accepted Mr Borwick's evidence in that regard.

(xix) Mr Borwick had access to the H-drive of Mr Anderson. Whilst the photograph stored was a copy of an electronic file, he did not see any evidence of manipulation of it. Anything held electronically might be capable of manipulation, but the prospect of that being done to a file held on a government server in the circumstances of the present case was we concluded extremely remote. It would require a level of conspiracy and of forethought we did not regard as credible

(xvi) The claimant's version of events has not been entirely consistent. Different details emerged at different times, for example a reference to kicking was only given to Mr Daly of the BBC, and not to Mr Hart. She alleged that Mr Paske had taken the photograph. Her comments had included that she was sitting at a desk, but no desk is shown in the photograph. There is no written record of any kind made by the claimant of the incident, either on 10 August 2009 or 16 December 2010, or shortly after either date. Her evidence as to

the emails we have addressed above, and did not consider credible.

(xvii) There were areas of evidence from the claimant which did not accord with other evidence. For example she did not agree that the scope of issues in Ms Johnson's investigation was agreed with her and Mr Clark, saying it was the union which did so. That is not what the record indicated, and Mr Clark would not act entirely independently in such a matter in our view.

(xviii) The claimant alleged that Mr Anderson had been put up to carrying out the incident by Mr Yuille. Mr Yuille had however been suspended in early September 2010 and was not in the office. The suggestion she made was not supported by any evidence at all, and was not we considered at all likely to be correct. Neither Mr Anderson nor Mr Paske made such a suggestion in their evidence to Mr Hart. The claimant's allegation was not we considered one that was at all reliable, and that detracted from the reliability of her evidence more generally.

(xx) Although it is not impossible that the emails the claimant sought to rely on are genuine, the claimant did not produce her own copies of them although some had been sent from her private email account, she did not through Mr Watts seek them from the respondent, and it is not clear whether they were able to be obtained in any event.

(xxi) It is possible that the email to Mr McGregor was sent at around 9am when he was in or around Aberdeen having arrived from the overnight ferry, not intending to go to the Scrabster office, and later deciding to do that because of the claimant's messages to him, but that is a possibility rather than a probability in all the circumstances. It is more likely that if he had decided to change his plans and travel to the Scrabster office he would have emailed the claimant to tell her, and there was no evidence of that.

(xxii) The claimant's version of events is that there was a conspiracy to remove her lasting for almost 10 years, and not only is that most unlikely in the circumstances where the allegations relating to Ms Sutherland led, after appeal, to neither Mr Fenwick nor Mr Yuille

being dismissed or moved respectively, such that the issue was primarily a local one for the office rather than one directly affecting a large number of people in the main offices in Edinburgh, but also that was not a part of her grounds of appeal with Mr Rennick

(xxiii) Overall we did not consider the claimant's evidence to be credible and reliable in material respects.

216. The claimant remains adamant as to the date and circumstance of the incident. It is not impossible that she is correct. It is possible that the data on the files of the photographs was manipulated as she claims, and that the emails she sent are genuine. For her version of events to be accepted however there would require to be an almost immediate acknowledgement by those involved that the photograph contained incriminating evidence of what was a form of assault, an attempt to manipulate the data which succeeded in fooling Mr Borwick, and also a very broad conspiracy of many people to dismiss the claimant for her making protected disclosures nearly a decade later. A large number of those interviewed by Mr Hart would have required to have been dishonest. Some of them had little if any obvious incentive to do so, for example, Mrs Richards who said that she had seen the photograph at work being discussed, with the claimant involved, in terms that can be described as light-hearted. Why there would be such a conspiracy in the circumstances alleged was not clear, as there was an investigation, and actions taken against Mr Fenwick and Mr Yuille, albeit later amended on appeal, and if there was one, the respondent could have taken opportunities far earlier to dismiss the claimant (as Mr Dryden appears to have considered for example).

217. We scrutinised the photograph as closely as we could. It is not determinative. One cannot easily tell from it, or at least the Tribunal was not able to tell from it, whether it was taken in circumstances of duress, fully or partly, or with full participation by the claimant. The tape on the mouth is nevertheless particularly concerning. The photograph does not look like high jinks as that term is normally understood. High jinks is not normally a term one would expect to be used for events at a government office charged with enforcing the law. It is a term that has dangers. It can

cover on the one hand conduct in which every participant plays an equal part and enjoys, and on the other hand conduct which is perceived by the recipient to be discriminatory, and is in fact harassment. It is a term not unlike "banter", which is a word that can describe an innocent joke, but also be a cover for the use of racist language, for example. This photograph shows an event that the Tribunal does not consider to be acceptable high jinks, if high jinks are ever acceptable in a government workplace. The photograph itself shows an image that has elements that are sinister, in particular that tape is placed across the claimant's mouth.

218. Mr Rennick did not consider the photograph directly as evidence as he did not wish to speculate. He was concerned in effect that doing so was unreliable. We can see why he held that view, and it was one within the band of reasonable responses, but that is not the test in a breach of contract claim and for our part we did not agree with it. The photograph itself is evidence, and a degree of consideration of what it shows is we consider merited. Dr Gibson argued that it showed the claimant smirking. No witness said that, and his suggestion in cross-examination is not evidence, particularly when the claimant rejected it. We do not consider that the photograph shows the claimant smirking as he put it. The expression on the face is not easy to see, but it does not appear to us to show someone enjoying what is depicted. That is not surprising with tape over the claimant's mouth. That is not a situation one would ordinarily equate with having fun. The tape used is parcel tape, which is strong, and it is also wound tightly around the claimant's knees and torso. Her arms are at her side, taped into place.

219. We have concluded that it is likely from the evidence before us that Mr Anderson and Mr Paske were acting beyond the bounds of what was proper conduct at that time, as the respondent had accepted in some of its correspondence to the claimant, but that in their own minds what they were doing was part of the general office culture of puerile pranks. It was at the furthest extreme of such misbehaviour, and was quite unlike any other act given as examples. Our conclusion is that at the time of the incident they were likely to have believed that it was a form of practical

joke that they were playing. It had nothing to do with any disclosure made, because of its timing. There may well have been nothing that triggered it other than the dysfunctional office culture. That may explain why the photograph was taken and then shared with others as part of an office joke, albeit not sent to the claimant at that time, rather than that it was destroyed lest it be evidence of their having undertaken an assault with criminal consequences potentially for them. For the reasons given above we did not consider that it had had data manipulated. It would have been a highly risky strategy firstly to manipulate the data, and then provide the photograph with that manipulation. The less risky and more obvious course of action would have been to destroy it.

220. But the incident involved two males taking steps to bind a female to a chair, and the winding of the tape around her six times, and placing it over the mouth, indicates use of a degree of force, even if they thought that that was in a form of jest. Their perspective about the incident was not the same as that of the claimant, we concluded. We consider it likely that at the time she was privately upset by it, but that she did not actively and openly protest about it at the time either with her line mangers or HR as a means of fitting in to the office, and dealing with the general practice of misbehaviour which had taken place directed towards her and others. The level of upset we consider likely was in the context of a series of other acts targeted at her which were also inappropriate, including firing pieces of paper at her through a pen, and the use of derogatory terms in the office, and others. She did not, we infer, consider it sufficiently important at the time either to record it in writing or to raise it clearly with Mr Clark. She also did not raise the incident formally when she received the photograph in early February 2011 as she did not consider it such a serious matter at that time. She did do so over a year later, in April 2012 in an appeal hearing, but somewhat fleetingly and not saying in terms that she had been the victim of an assault. Nor in that hearing did she mention emails to her managers of any alleged lack of action by them at the time. Mr Clark did not follow it up after that hearing. These facts indicated to the Tribunal that at that stage the claimant did not treat it as a serious matter, but just as another in a series of pranks that had gone too far. She raised

it as a real issue only when being cross-examined in the earlier claim, but that was several years later, in November 2017, when she gave evidence that was a mixture of what had happened to her, with what had not. She dishonestly added a substantial layer of fictional detail to her recollection of the event, that being some of its detail, its date, and by adding reference to her alleged protected disclosures.

221. These comments are our inferences from all the evidence led before us. We did not hear evidence from a psychiatrist or psychologist for the claimant. We had her own evidence that she had not raised the issues at the time because of the earlier traumatic events in her life and how they had occurred, such that she had "buried" it, but that was not, as stated above, consistent with her raising the photograph in April 2012. We were also not provided with her medical records and with any entries either from December 2010 or August 2009 which referred to the incident having been reported to the GP as having caused distress. Mr Munro to whom she said she reported it on the day she claims it happened, which was 16 December 2010, did not give evidence before us. That was most surprising if he could give evidence to corroborate her own evidence as to the date, as she claimed in her evidence. He could have been the subject of an application for a witness order if he did not agree to attend voluntarily. What was also surprising was that there was no written evidence at all about the incident depicted in the photograph. It was not mentioned in the diary, nor was any email produced sent by the claimant from her work email to her home email address recording what had happened and dated on or shortly after 16 December 2010, although she said that she did send such emails as a record of matters after handing her diary to HR in August 2010.

222. The image shown in the photograph and the possibility that its data were manipulated, together with the evidence of the claimant herself, is not we concluded sufficient evidence to outweigh all of the other evidence that is against the claimant. She maintained her position as to its date, and that position is we concluded wrong. It follows from that that the suggestion that it was a form of retaliation for her "blowing the whistle", as she put it,

on the incident involving Ms Sutherland, cannot be right. Those two facts were the basis of the first allegation against her in charge 5. They were well founded. She wrongly set out that position before Mr Hart. The likelihood is that an email alleged to have been sent to Mr Cunningham on 15 February 2011 by her was false in the reference to the date and incident, and were added later, as were similar parts of emails from him, and emails to and from Mr Macgregor. We concluded from all the evidence before us that she had been dishonest and not simply mistaken, not only as that issue of mistake was not ever her position, but also as it was we considered not realistically possible to reconcile the date of the photograph, the comments she made regarding the incident with Ms Sutherland in September 2010, with the emails she claimed to have sent to Mr Cunningham on 15 February 2011. We concluded that those emails and the date of the incident were so closely related that if the date of the photograph was not as the claimant alleged, her dishonesty in relation to the claims she made in those emails did follow from that.

223. We were satisfied that there was a level of dishonesty in relation to allegations 5.1 - 5.5 which was sufficiently high as to amount to repudiation of the contract by the claimant. Taking all of the evidence before us into consideration we concluded that the respondent had proved that it was entitled to terminate the contract without notice as a result. We accordingly must dismiss the claim for breach of contract.

If any claim is successful, to what remedy is the claimant entitled?

224. This issue does not now arise.

Conclusion

225. In light of the findings made above, the Tribunal dismisses the Claim. In so doing we wish to make some additional remarks. The photograph of the claimant is in the view of all of the members of the Tribunal not acceptable in the modern workplace, nor was it in 2009, even if it was taken by those involved believing it to be a form of prank. Some of the

details of the incident were not clear, such as how it started, precisely who did what, whether the claimant kicked out and if so whether either of those involved responded to that, and others. It is now over 10 years since it was taken, but then and now it is far beyond the pale of what we consider could ever be acceptable behaviour in the workplace, as did taking a photograph of it and sending it to others (not at that stage the claimant) which was we believe not an acceptable act in itself. Nothing in our Judgment should be taken as condoning the behaviours of those involved to any extent.

226. We have commented that we did not hear from some witnesses who might have appeared before us. The photograph has not been suggested to have been a fabrication in respect of what it depicts. We acknowledge that Mr Anderson and Mr Paske have not given evidence and to that extent all that might have been said has not been, but we conclude that we can make the comments that we have from our consideration of the photograph itself, and the evidence of it being sent to others by Mr Anderson and only later, by Mr Paske, to the claimant, and the other evidence we heard.

227. We would also wish to state that the online abuse suffered by Mr Anderson which was put before us was itself so dreadful as in our view in at least one case was likely to amount to a crime under Scots law, and could have been worthy of investigation by the police. However inappropriate his actions and those of Mr Paske may in our view have been, the reaction of some of those online was wholly unacceptable.

228. The claimant had the perception that she had been the victim of a bullying culture for a very long period. Whilst we have made the findings that we have, not all that she said in evidence was, we considered, unreliable or untrue. Some of the behaviours at the office were entirely wrong. It was not a kindergarten, which is the term one person spoken to by Mr Hart used, but a government office charged with enforcing the law. It was at least for a material period dysfunctional given the evidence of how those working there conducted themselves and not all steps that were recommended to be taken to remedy that were.

229. As to whether those matters have been addressed by the respondent as well as they could have been we have material doubts. Best practice was not followed in certain respects. There was evidence of some of those in HR suggesting steps to remedy the dysfunctional aspects of the office which were not introduced, with the obvious risk that dysfunction continues, of HR limiting the extent of the investigation and later instructing Mr Hart to bring the second investigation to an end quickly, of advising Mr Wallace to bring the disciplinary hearing to a head contrary to at least one view of the evidence of the respondent's occupational health physician, and of expressing views that we considered amounted to prejudgment. No one from HR gave evidence. Mr Hart conducted the investigations, but thought that he was to an extent constrained by what he described as his terms of reference. We were not clear why "terms of reference" were thought appropriate for what was or became a disciplinary investigation. It would be expected that the investigation be in relation to allegations that were set out, and include whatever reasonably comes from them either to establish guilt or innocence of them. There was we concluded some prejudgment by HR of the allegations. By the respondent taking the form of binary approach to the claimant's position that we have referred to, all of the issues raised by the claimant have been rejected out of hand when at least some of them were issues that merited proper examination, and we include the precise circumstances that are depicted in the photograph in that. Those precise circumstances are not clear.

230. It was not however any part of our function to conduct a broad enquiry into such matters ourselves. We do not know what witnesses who were not called before us might have said. We do not know what documents not provided to us stated. We must address the issues identified above in light of the evidence led before us, not make up new issues ourselves.

231. Whilst the respondent has succeeded on those issues, it may nevertheless wish to reflect carefully on how it handled all the matters addressed in this Judgment.

Employment Judge	**S Kemp**
Date of Judgement	**13 January 2022**
Date sent to parties	**13 January 2022**

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