EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103392/2018

Held in Glasgow on 3 October 2018, 4 October 2018, 10 December 2018, 18 December 2018, 16 January 2019 and 23 January 2019

Employment Judge: Rory McPherson

Claimant
Ms A McMahon

Represented by:
Mr Mowatt

Respondent
Mr W Finlayson t/a Finlaysons

In person

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) the claim for unfair dismissal succeeds; and

(2) the respondent is ordered to pay the monetary award for unfair dismissal in the sum of **Sixteen Thousand and Thirty Pounds and Fourteen Pence (£16,030.14).** The prescribed element of this award is **Ten Thousand Eight Hundred and Thirty Two Pounds and Eighty Seven Pence (£10,832.87)** and as the monetary sum exceeds the prescribed element by **Five Thousand One Hundred and Ninety Seven Pounds and Twenty Seven Pence (£5,197.27)** that sum is payable immediately to the claimant.

REASONS Introduction

Preliminary Procedure

1. This claimant brought a complaint for unfair dismissal. The claim is denied by the respondent.

Issues for the Tribunal

2. The Tribunal identified the following issues

   (a) what was the reason for the claimant's dismissal?

   (b) if the reason was potentially fair, was that dismissal unfair in terms of section 98(4) of the Employment Rights Act 1996 (ERA 1996)?

   (c) would a fair dismissal have resulted from a different procedure, and if so what appropriate reduction in compensations should be made?

   (d) was the claimant provided with terms of conditions in terms of section 1 of ERA 1996

   (e) had the claimant contributed to the dismissal?

   (f) has the claimant minimised her loss losses?

   (g) what, if any, is the extent of the claimant's losses?

In addition, the tribunal required to consider what, if any, remedy the claimant is entitled to.

Evidence

3. The Tribunal heard evidence from the claimant, and the claimant's mother Helen McMahon. The respondent gave evidence on his own behalf.

4. The respondent is a sole legal practitioner operating in Kilwinning who acted on his own behalf who also gave evidence on his own behalf.

5. The Tribunal was also referred to sets of documents prepared by the claimant's representative and Mr Finlayson and which were updated in advance of the continued hearing dates.

6. Both the claimant and Mr Finlayson provided written and supplementary oral closing submissions.

Findings in fact

7. The claimant was employed from 4 August 2015 to 24 November 2017 as a typist/receptionist within the respondent's legal practice in Kilwinning, Ayrshire situated approximately ¾ of a mile away from her home. The claimant cannot drive. The claimant is, now, a lone parent with primary caring responsibilities for her 4 school age or younger children being 14,11 7 and 2. Since the birth of her 4th child in 2016 the claimant has not worked outside Kilwinning.

8. The respondent operated as a sole practitioner with a high street legal practice focused on family and other legal disputes. The respondent is an experienced court practitioner. The respondent employed his wife Joan Finlayson as office administrator overseeing the day to day operation of the legal practice. In addition, he initially employed the claimant together with Shirley Boyd who carried out similar role to the claimant, Rosa Mckay an audio typist together with a trainee solicitor. The claimant's secretarial work included occasional typing of the respondent's dictation on the firm's family law cases however she has no specific knowledge in this area.

9. Although the claimant had been employed since 4 August 2015 she had not be provided with written terms and conditions of employment. While not in dispute the claimant understood she was employed from 9am to 5pm with a lunch break and worked Monday to Friday each week, no written terms set this out. There was no policy notifying employees on any mechanism for reporting sickness absences. There was no written guidance provided as to what information the respondent considered it may reasonably require for the purpose of determining the duration of any period of entitlement to sickness pay (whether Statutory Sick

Pay or through any opt out mechanism). There was no written guidance in the office as to acceptable computer use during working or other hours. There were no disciplinary rules giving example of acts which the respondent regarded as acts of gross misconduct.

10. The claimant was paid the National Living Wage for 35 hours per week which corresponded to £252.00 per week gross and £249.00 per week net. During any period of sickness absence, the claimant would receive Statutory Sick Pay which at the time was £89.35 per week. The claimant was a member of the respondent's auto enrolment pension scheme. Increases to the National Living Wage on 1 April 2018 would have increased the claimant's net earnings to £260.00 per week and £262.50 per week gross. The employer met the statutory minimum pension contribution requirement which in 2017 1% until 5 April 2018 when it increased to 2% contribution.

11. On Monday 30 October 2017 the claimant on return from a scheduled lunchbreak was made aware by a colleague Ms Boyd that the respondent's wife, Joan Finlayson, had viewed the computer the claimant had been operating that morning and had advised the claimant's colleague Ms Boyd, that the claimant had been carrying out internet shopping during the allocated work period. Joan Finlayson did not speak to the claimant that afternoon and although she advised the respondent who was in attendance in the office that afternoon, of the computer usage, he also did not speak to the claimant regarding the use of the computer.

12. On Tuesday 31 October the claimant was unable to attend work due to ill-health and telephoned the office to advise that she would not be at work. The claimant initially advised the claimant's wife Joan around 9 am advising that she would not be in that day due to ill health, no specific information was provided as to the nature of the ill-health.

13. In the evening of Tuesday 31 October 2017, the respondent and his wife had dinner at the claimant's parent's home with whom they were friends. During the

dinner conversation the respondent from comments made, formed the view the claimant was unhappy with aspects of his wife's management of the legal office.

14. On Wednesday 1 November, after the claimant had spoken to her doctor who advised the claimant to self-certify as absent from work for 7 days, she telephoned the respondent's office and spoke to her colleague Ms Boyd and confirmed that she was self certifying for 7 days.

15. On Monday 6 November 2017 the respondent wrote the claimant seeking her comments regarding her (self-certified) sickness absence stating "*As you will know we received a telephone call to the office on the morning of 31st October Stating that you would not be coming into work and that you had an appointment from your doctor. On 1st November we received a further phone call with a message that you would not be into work and that you had seen the doctor who stated that you were stressed and had high blood pressure and were told to self certify to the end of the week. Other than that, I have received no further communication from you and had expected that you would have returned to employment today, Monday 6 November 2017. You have not contacted the office within the required time to advise of your continued sickness or intentions to return to work. Please contact me to advise what is your position. As this is your seventh day of absence (Saturday's and Sundays count for Statutory Sick Pay purposes) you will require to provide us with a doctor's certificate in relation to your absence and any further absence. It had been my intention to speak to you about a number of matters on Tuesday 31st October 2017, so please contact me to arrange a suitable time in order that this may be attended to."*

16. The claimant attended her doctor at Kilwinning Medical Practice who provided a signed Fit Note dated Monday 7 November 2017 covering the period to November 20 November 2017 confirming that the claimant was not fit for work in that period due to "*stress related illness/anxiety".*

17. The claimant replied to the respondent's letter on Tuesday 8 November 2017, which letter was hand-delivered to the respondent' office by the claimant's sister that day and which confirmed that the claimant was self-certifying for the period

Tuesday 31 October 2017 to Monday 6 November 2017, confirming that she would have been due to return to work on Tuesday 8 November 2017. The letter also contained a copy of her doctor's Fit Note dated Monday 7 November 2017. The claimant further confirmed that she had telephoned the respondent's office 3 times, initially on Tuesday 31 October 2017 advising that she was awaiting an appointment with her general practitioner, thereafter on Wednesday 1 November 2017 advising a colleague that she was operating under 7 day selfcertification arrangements but did not disclose the medical reason for her absence and commented "*so I am unsure where you sourced the info of stress"* and high blood pressure, and confirming that her final call to the respondent's office was on Monday 7 November 2017 when she advised that she would not be into work that day as she was awaiting a call from her doctor. The claimant's letter thereafter stated "*Your letter arrived that afternoon. I didn't bother to call back in afternoon but instead replied to your letter in writing to clarify and avoid confusion as to my current position. I will be in touch to arrange a suitable time to speak with you regarding matters at a later date as at this moment in time it is not suitable".*

18. On Tuesday 8 November 2018 the respondent published Facebook posts which the claimant became aware of. The claimant who was not aware of the actual context and genuinely but wrongly believed to make reference to her departure. The posts included the phrase "*Chill in the knowledge that the source of your anxiety is unlikely to come back at you."*

19. The respondent replied to the claimant's letter on Thursday 10 November 2017, narrating the respondent's view that the claimant had initially called the office on 31 October 2017 with "*a sore throat*", while the second call was on Wednesday 1 November "*which relayed to me that you had seen a Doctor and he had advised you to self-certify until the end of the"* working week. The respondent's letter continued "*During self-certification you are meant to update me about matters. I heard nothing else from you prior to me writing the letter on*

6 November 2017…" . The respondent continued "On *Monday 30th October you attended for work and appeared to be flustered and red in the face. After you returned from lunch break you were much worse and seemed both angry and close to tears for most of the afternoon".* The respondent continued that his wife "*was collecting her car from your parents' home that evening and expressed her concerns about you to her. In conversation with your mother"* and she "*was advised that you had been to the doctor and had stress and anxiety and high blood pressure. This is where the information came from…"* the respondent continued that he, and his wife had been "*invited to you parent's house for dinner on 3 November and we obviously asked how you were. I was shocked to be told that you were blaming you condition on things which were happening in my office, and were upset that "your" computer had been looked at, and that was why you did not come back to work on 31 October 2017… I am left in the situation of not knowing what you are attributing your current condition but I do not accept for one moment that is caused by anything at work".* The letter continued, setting out a number of criticisms of the claimant's work, commenting on the claimants' history and concluded *"To state that it is not suitable this time to speak to me can only make matters worse. That needs to aired sooner rather than later. I need to discuss with you how we go forward"* and described that in the respondent's view non-work matters were *"having an effect on your ability to effectively carry out your job".* Prior to this date the respondent had not raised any issues with the claimant's ability to effectively carry out her job.

20. The claimant wrote to the respondent on 14 November 2017 which letter was again hand delivered to the respondents' office. The claimant's letter confirmed that she had an appointment with her doctor on Thursday 16 November 2017. The claimant indicated a concern that communications from the respondent were accessible by colleagues and commented *"I would appreciate if correspondence could be kept confidential given I will be working alongside said colleagues who don't need to know anything…"* the claimant continued stating that she was not "*at present"* in a fit condition to discuss matters with the respondent but "*will confirm"* both the respondent and his wife had been made

aware of matters by the claimant's mother and that non work matters had not contributed. The claimant concluded *"I do understand you won't be aware of them fully as I haven't spoken to you personally given that Joan is your wife but hopefully will resolve matters in time*". The claimant enclosed a further Fit Note again completed by her General Practitioner confirming that the claimant was not fit to attend work from 16 November 2017 to 4 December 2017 due to "*stress related illness".* As at this date it was the claimant's intention to return to return to work. While prior to her absence due to ill-health the claimant had perceived that she had encountered issues arising from the respondent's wife's management of the office, such as in allocation of typing work and from the respondent's wife speaking to her colleague regarding the identification of computer useage on Monday 10 November, she anticipated that they would be resolved with the support of the respondent.

21. The respondent wrote to the claimant in letter dated Thursday 16 November 2017 inviting the claimant to a disciplinary hearing to take place on Tuesday 21 November 2017 the letter headed Absence from Employment stated *" I have still heard nothing from you in respect of meeting to discuss the outstanding issues surround your employment… having taken advice from ACAS, I hereby intimate that a Disciplinary Hearing will take place on Tuesday 21 November 2017"* at the respondent's work office. The letter continued *"should you choose not to attend, the hearing will proceed in your absence and a decision taken on the information I have. The decisions open are:-* (*1) issue a written warning (2) issue a final written warning (3) dismissal for gross misconduct. In the meantime, as narrated in my previous letter I do not accept that you are absent from work for a genuine medical reason and in these circumstances consider your absence to be unauthorised ad you will not bepaid for them. The issues to be discussed at the Disciplinary Hearing are as undernoted. You conduct in respect of each is detrimental to my business and cannot continue. Please confirm if you will be attending the Hearing on 21st November.*" The letter which was signed by the respondent had a PS "*Since writing the above I have received*

your letter dated 16 November and further sick note". In addition, the letter undernoted a number of direct criticisms of the claimant's work:

"(*1) Issues to be discussed. Use of internet during working hours"* setting out the respondent views on time spent by the claimant on non work related activity,

"(2) Time Keeping" setting out that the respondent considered the claimant has been persistently late for work and returning from lunch breaks and set out a narrative of an occasion in the month of October it was suggested that a colleague made contact with the claimant as she was 30 minutes late from returning from lunch;

"(3) Productively & Quality" the respondent asserted that the claimant productively had deteriorated considerably between his going on holiday in late September and returning mid-October and asserted that that the quality of the claimant's work output "*has been considerable worse since that time"* and

(4) As stated above, I do not accept that you have been absent from work for legitimate reasons. We were originally advised that you had a sore throat, but have since received conflicting information for your absence".

22. There was no offer to the claimant to be accompanied by a trade union representative or colleague at the proposed disciplinary hearing. While it was the respondent's view and intention that this proposed disciplinary hearing would not result in any significant sanction against the claimant, he did not make the claimant aware of same. The specific direct criticisms of the claimant's ability to carry out her job set out in the respondent's letter of 16 November 2017 had not been previously communicated to the claimant by, or on behalf of, the respondent.

23. The claimant replied to the respondent by letter dated Friday 18 November 2017, which letter was hand delivered to the respondent's office on Tuesday 21 November 2017. In this letter the claimant stated that she was not in a condition to discuss matters "*let alone attend a disciplinary hearing at this time"*. The

claimant continued that "*I am shocked that ACAS would not have also advised you that I do not need to attend, not can you go ahead in my absence unless I have been on long term sick, (your **persistent harassment** has prolonged my illness giving me more stress)"* .The claimant continued *"should the hearing proceed in my absence please note my objections, which I had not previous knowledge of until my illness arroused and after you were informed of your wife's bullying towards me, then did your Disciplinaries come to light*". In addition, the claimant set out responses to each of the matters identified including commenting that that she had not been told that she could not use the internet during breaks or lunches and commented on what she regarded as comparable use by colleagues including Joan Finlayson. The claimant further set out that she had never been made aware that she had been late "*let alone persistently",* in relation to productively/output the claimant notes it is asserted that this had deteriorated since late September but had not been raised for 6 weeks and only after the respondent was made *"aware of your wife's bullying"*. The claimant set out the reasons for her absence were the Fit Note signed by her Doctor and her self-certification note. The claimant set out that she considered the respondent had set out inaccurate reasons for her absence and had ignored the doctor's Fit Note and concluded "*Please note pay is not something I have even thought about my main priority is my health which you are not helping… would appreciate some empathy as my employer in my recovery without the added stress."* The claimant did not offer to resign in this letter and it remained the claimant's intention to return to work following the cessation of her period of ill health absence.

24. The respondent acknowledged the claimant's letter of Friday 18 November 2017 in the respondent's letter in reply to the claimant dated Wednesday 22 November 2017 which stated "*I refer to your letter dated 18th November 2017 which was handed into this office on 21 November. As a result of the receiving this letter the disciplinary hearing did not take place. You have accused me of "**persistent harassment**". This is a serious allegation of criminal conduct which I totally refute, and destroys the employer/employee relationship which requires*

to exist. I cannot envisage how you can possibly ever come back to work for me now. In these circumstances I now consider that you have committed an act of gross misconduct warranting instant dismissal. You have the right to appeal against this decision and if you wish do so please let me have you reasons in writing within the next seven days…. Your P45 and any sums due to you will be forwarded in due course".

25. The claimant received the respondent's letter confirmed in her letter of Tuesday 28 November 2018 she wished to appeal stating " *I am appealing my dismissal on grounds that I asked you to stop writing to me at this moment to allow me to recover from my medical condition which I have verified by a dr (outwith your opinion of it being unauthorised) you still continued to write to me causing me more stress. I am going to seek advice on matters one I have recovered and will be in touch in due course"*

26. The respondent wrote on Wednesday 29 November 2017 enclosing a cheque encompassing the respondent's calculation of outstanding monies together with a P45. In particular the respondent paid Statutory Sick Pay of £268.05 covering the period Tuesday 31 October 2017 to Thursday 23 November 2017. The respondent paid outstanding holiday pay.

27. The claimant wrote to the respondent on Thursday 14 December 2017 stating that having spoken to ACAS the claimant was willing to attend an appeal hearing "*preferably at*" her own home, describing that *"I don't leave house often and certainly will not enter your office again. I do not wish any ex staff members in attendance given Joan's mannerisms towards me*" and suggesting that the respondent's wife had expressed negative views to the claimant on employees who had left previously. The claimant set out that she had now an opportunity to "*think over things. I appreciate that you stopped writing to me allowing this."* The claimant set out that she intended taking matters regarding the respondent's wife *"further …as I feel I have been treated unfairly by her gradually until my departure with ill health."* The claimant continued "*I now find myself in this situation regarding my dismissal which I believe to unfair – I asked you to stop writing at that moment explaining that due to my ill health in 3 letters*

(which was in response to yours within 10 days of each other) but rather than stopping you continued to write which further found to be harassing". The claimant suggested that the respondent's letters may not have been solely authored by the respondent and may have been influenced by his wife. The claimant continued *"I understand that I have a time limit regarding my Appeal so I feel the need to get moving with this first and deal the with other issues at a later date once I am fitter. I believe I have earned a decent reference as I don't feel there were faults within my work over the years I have been employed by you. So this with Joan shouldn't reflect in any reference I may require in the future. I sincerely wish this situation resolved and rectified as soon as possible. Please note I am in no way wanting by job back I am appealing against your decision regarding the whole thing".* The claimant's letter was written against the background that having been instantly dismissed for gross misconduct she considered that she required to focus on supporting her 4 children in the period before Christmas and New Year period. The claimant previous desire to return to work with the respondent had changed only because of the respondent's decision to dismiss instantly for gross misconduct. She did not however accept that the respondent's decision was merited. She believed that an appeal would overturn the respondent's decision and did not wish to appear to be "begging" for her previous job back.

28. The claimant changed her Facebook status on 31 December 2017 to identify that she had "*left job at solicitors".*

29. The respondent acknowledged the request for an appeal in his letter of Wednesday 10 January 2018 requesting that she contact his office to arrange a suitable time for a hearing.

30. The respondent arranged an appeal to take place on Wednesday 7 February 2018 at the respondent's office. The claimant had not been advised of any right to be accompanied by trade union representative or colleague and attended on her own. The respondent attended both in his capacity as the dismissing employer and the decision maker for the appeal. In addition, he

arranged for a trainee solicitor employed by him and under his supervision to be present to provide him with assistance. The respondent during the appeal set out a number of propositions to the claimant including his proposition that "*persistent harassment"* she ought to see that that phrase and word had the specific meaning he attributed to it, namely one of criminal wrongdoing and that an assertion of persistent harassment was an allegation of criminal wrongdoing that would cause a breakdown in the employer -employee relationship. The claimant sought to explain that she had not intended to suggest criminality and simply understood the words and phrase have its common not any legal meaning and this is what she had intended. The respondent did not explain to the claimant that he would be willing to provide a reference which, despite the terms of his letters of 10 and 16 November 2018 would not be critical of the claimant capabilities. The respondent put to the claimant the proposition that she did not want her job back and sought her agreement that the purpose of an appeal hearing is only for someone to get their job back. The claimant did not strenuously disagree with respondent's proposition that she was only seeking compensation and that she did not wish to return to her previous employment as the claimant did not wish to be seen to *"beg*" for her job back. The respondent asserted that given his view of the claimant's position and criticisms of his wife it would be very difficult for the claimant to return to the firm. The claimant did not feel able to reject the respondent's proposition against the background that throughout the hearing it had not appeared to her that the respondent considered that she had an option to return. The claimant, however, did not consider that the terms of her letter of 18 November 2017 including the words

"*persistent harassment"* ought to have resulted in the termination of her employment. The respondent did not overturn his own decision and decided his original decision was correct.

31. Following on the from the Appeal Hearing on Wednesday 7 February the respondent wrote to the claimant on that date stating "*You have accepted that you accused me of persistent harassment and you have accepted that the employer – employee relationship has broken down to the extent that you stated*

that you could not come back to work here, although you give different reasons. You state that you did not in fact want your job back but were seeking compensation. As advised, when I received your letter accusing me of harassment I was upset. I was of the view that this broke the requisite working relationship between us and that my decision to dismiss you was justified. You have explained that this was not your intention, but having worked in our office you would have been aware that harassment has specific legal connotations. I am still of the view that I had not alternative other than to end your employment as this constituted Gross Misconduct as defined, and I am not upholding your appeal in the circumstances."

32. Despite the terms of the respondent's letters of 10 and 16 November the respondent was not critical of any aspect of the claimant's work. The respondent however did not communicate this to the claimant at any material time.

33. While the respondent was willing to provide a reference, which would not have been critical of the claimant's work, to the claimant and or an alternate prospective employer, this willingness was never communicated to the claimant.

    The claimant was not provided with any form of guidance by the respondent that any reference which respondent would give to a potential employer would be anything other than reflective of the respondent's letter of Thursday 16 November 2017.

34. The claimant's General Practitioner again certified the claimant as unfit to work through a Fit Note which expired on 18 December 2017. From 19 December 2017 the claimant has been fit to work at all material times.

35. The claimant changed her social media Facebook status, available to her friends, to "*housewife/stay at home mum*" on or about 26 February 2018 in order to remove reference to having been employed by a solicitor practice and was intended as jocular comment reflecting the factual position that she was not working at that time. This did not reflect a statement that she did not wish to work.

36. The claimant through her Facebook page on 21 March 2018 stated *" I'm fed up no working so anyone looking for childcare I'm ur woman. Fully qualified nurse…"*

37. The claimant has made efforts to seek alternate employment both full and part time roles including domestic roles and administrative office jobs primarily through the online website Indeed. Although the claimant had worked with the respondent for over 2 years, she had not had experience of conveyancing work which was commonly sought in potential legal type administrative roles she identified. The claimant applied through an online jobsearch service Indeed having placed a geographical limitation of 15 miles from the claimant's home reflecting her then existing family commitments including, at the time of dismissal, shared child care of 4 children one of whom was under 5. The claimant focused her jobsearch in Ayrshire. In the majority of posts applied for where no response was received the claimant did not follow up with a request for further information. The claimant did not seek feedback where she had been unsuccessful in interview.

38. The claimant applied for two jobs provisionally pending the outcome of her appeal. The claimant had anticipated that the appeal process would have resolved the termination of her employment in a positive manner against the background that the dismissal had been expressly stated as due to gross misconduct and she anticipated that this would impact on securing alternate employment.

39. Following the outcome of the appeal the claimant applied for a number of posts. The claimant applied for 1 post after the appeal in January 2018 and 6 posts in February 2018. The claimant applied for 12 jobs she identified as potentially suitable having regard to her skills, location and commitments primarily through the online job search service Indeed in March 2018. She applied for 13 jobs she identified as potentially suitable having regard to her skills, location and commitments through Indeed in April 2018. There are only 2 other legal firms in Kilwinning and neither was seeking to recruit since the claimant's departure.

40. In response to one possible job application which would have required the claimant to have an existing PVG Certificate (Disclosure) in early April 2018 the claimant e-mailed the possible employer "*Thank you for your advice I will ok into that once I have my PVG".* The claimant did not subsequently apply for a PVG Certificate although she had hoped that a local youth group with which she volunteers would have assisted her in securing a PVG certificate however she was unable to allocate time to continue in this voluntary work following her separation from her partner in May 2019. The claimant wished to move beyond the legal sector, against the background of her experience with the respondent, into the care sector as she had a SVQ Levels 2 & 3 Early Years Care and Education qualification from 2003 which she had not subsequently used. While some employers in the care sector expect a pre-existing PVG certificate, some offer employment subject to the individual either securing a PVG certificate or otherwise support an individual to whom they wish to offer employment such a certificate. Beyond applying for posts the claimant made approaches to volunteer with Health Scotland and the Samaritans in May 2018 and with Barnardo's in August 2018 and had in July 2018 applied to Skills for Life programme for the unemployed.

41. The claimant for many years, and prior to the dismissal, had carried a role as an Avon representative buying product from the company wholesale and selling retail on a door to door basis working occasional evenings and sharing the role with her school age daughter. The role did not and does not generate significant income with less than £50 being generated as income in July 2018. The claimant continued to support her daughter in this role after the respondent terminated the claimant's employment. The claimant announced in a Facebook post on 19 December 2018 that due to specific medical reasons the claimant was ceasing to sell Avon products.

42. In May 2018 the claimant separated from her partner and became the lone parent in the household. At this time the claimant continued to the lone parent for her 4 children including one child under 5.

43. The claimant, who continued to use the Indeed job website to identify possible jobs to her, applied for 10 jobs, both full and part time, she identified as potentially suitable having regard to her skills, location and commitments through Indeed in May 2018. In the month of June, the claimant only identified one post as potentially suitable having regard to her skills, location and commitments through Indeed. She applied for this post on 30 June 2018. In the month of July, she applied for 6 posts she identified as potentially suitable having regard to her skills, location and commitments through Indeed. In August 2018 the claimant applied for 2 posts on 4 August and 12 posts on 14 August 2018 she identified as potentially suitable having regard to her skills, location and commitments through Indeed. The claimant did not make a further application for a post until 6 September 2018. The claimant was unsuccessful in an interview for the role of childcare practitioner on 12 September 2018 which she had applied for on 14 August 2018. The claimant was interviewed for, but unsuccessful, a role as a nursery nurse which she had also applied for on 14

August 2018. The claimant did not apply for possible posts in the period between 14

August and 6 September 2018 as her children were on school holidays during this period. The claimant did apply for posts after this period.

44. Had the claimant used Job Centre Plus in July 2018 she might have identified up to 10 further possible jobs she could have applied for. Had the claimant used s1 jobsite she might have identified up to 8 further possible jobs.

45. Had the claimant used Job Centre Plus on or about 27 September 2018 she might have identified up to 10 further jobs she could have applied for. Had the claimant used s1 jobsite on or about 27 September 2018 she might have identified up to 10 further possible jobs.

46. The Tribunal hearing was notified to the parties on 4 August 2018 as scheduled to start on 3 October 2018.

47. Following the claimant's separation from her partner in around May 2018 the claimant made contact with Job Centre Plus and was advised that as she was a lone parent with a child under 5 she would be eligible to apply for Income Support. The claimant made the application for Income Support. The claimant was notified by letter dated 23 June 2018 that she was awarded Income Support backdated to from 7 June 2018 payable on a fortnightly basis at the rate of £73.10 per week. In addition, and as a lone parent the claimant started to receive Housing Benefit which is paid direct to her landlords towards the rent for the accommodation which the claimant continued to stay in with her 4 children, the cost of which accommodation had been formerly met by her partner, an increase in child tax credit allowance and a reduction in council tax which has been applied since September 2018. In addition, and through an agreement with her now separated partner she receives £100 per month financial support for their 4 children. The claimant is not financially better off after the termination of her employment.

48. The claimant did not apply for Job Seekers Allowance.

49. The claimant's mother, who at the material time provided childcare support for up to 8 school age or younger children, had several years earlier operated a small business and had been looking at opening a new café business in April 2019. However, she had not been in a position to offer a paid role to the claimant since the dismissal.

Submissions

50. Both the claimant and Mr Finlayson provided written and supplementary oral closing submissions. Both parties had the opportunity to exchange their respective written submissions prior to submitting same to the Tribunal.

The Respondent's Submissions

51. The respondent supplemented his submissions with Counsel's Opinion from Mr George C Gebbie Advocate dated 19 January 2019 to which I shall return together with extracts of the Criminal Justice (Scotland) Act 2010 s 39,

Protection from Harassment Act 1997 s 2A(3)(b), Criminal Procedure (Scotland) Act s 234A, together with copies of *Harvie v Murphy* 2105 SCCR 363, *BHS v Burchell* 1979 ICR 303, *Polkey v AE Dayton Services Ltd* 1987 UKHL 8, *Iceland Frozen Foods* 1983 ICR 17, *Tayleh v Barchester Healthcare Ltd* 2013 EWCA Civ 29 and copy of the ratio in *British Labour Pump Ltd v Byrne* 1979 IRLR 94 together with 2 extract guides from UK Government websites No11 Income Support (3 pages) printed 27 September 2018 and No 12 Job Seekers Allowance (3.5 pages) printed 19 December 2018.

52. The respondent's position was that he had fulfilled the requirements of s98 of ERA 2006, in that he has given the principal reason for dismissal and that it is a reason falling with s98 (2) and in particular s98(2)(b) as it relates to the conduct of the claimant. In terms of s98 (4) having regard to the reason shown by the employer (a) depends on whether, in the circumstances (including having regard to the employer's size and administrative resources) the employer acted reasonably or unreasonably in treating it as sufficient reasons for dismissing the employee and (b) shall be determined in accordance with the equity and the substantive merits of the case.

53. The respondent confirmed the claimant was dismissed for gross misconduct which he described as being an act so serious it justifies dismissal without notice or pay in lieu for a first offence and being an act so serious that it destroys the relationship of trust and confidence between the employer and employer making the working relationship impossible to continue.

54. The respondent identified that the relevant test is known as the Burchell Test laid down in *BHS v Burchell* 1979 ICR 303 and set out that in his view this required that employer has to satisfy the following; whether there was a genuine belief on the part of the employer that the employee was guilty of misconduct; whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation; and whether a reasonable employer would have dismissed the employee for that misconduct.

55. On the questions the respondent set out, and on genuine belief, the respondent stated "In this instance there was much more that a genuine belief. There is no doubt whatsoever that the claimant wrote the letter accusing the Respondent of persistent harassment. There is certainty as a matter of law that such an accusation is one of criminal conduct towards the Claimant by the Respondent. These facts were known to the Respondent at the time the letter was read by him."

56. The respondent asserted on the question of "whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation. Again, there was certainty, not just a reasonable belief… there was nothing more to investigate…." it was the claimant's letter "it contained an accusation of "persistent harassment" which is an accusation of criminal conduct… The accusation … was directed personally at the respondent, the decision maker in respect of her employment…. ACAS guidelines refer to carrying out investigations and giving the Claimant an opportunity to comment on them… There was nothing which she could say to change the facts of the facts ... the respondent was aware that the claimant had knowledge of the implications of accusing someone of harassment from working with files where such allegations had been made… much of the Respondent's business involved family matters, and in particular fathers attempting to see their children when the mothers will not let them… Even if the Tribunal accepts that the Claimant did not fully appreciate that she was making an accusation of criminal conduct… she did reluctantly accept that being accused of such conduct "not a good thing". Her perception does not change the facts".

57. The respondent continued that that even if the Tribunal considers the respondent acted unfairly procedurally in dismissing the claimant it must assess the question of whether the claimant would have still been dismissed and referred to *British Labour Pump Co Ltd v Byrne* 1979 IRLR 94. The respondent argued that it was never suggested that there would have a different outcome if ACAS procedures "were followed to the letter*".* The respondent noted that the after the dismissal letter the claimant maintained that the respondents' letters

were harassment, the respondent argues "that the Claimant did not seek to argue that she had not intended to make an accusation of criminal conduct but in fact confirmed her position in the knowledge that this is how it was perceived by the Respondent. The claimant having destroyed the employer employee relations by her accusations of criminal conduct had caused a situation that there was no alternative to dismissal". The respondent maintained that any Polkey reduction must be 100% as that is the certainty that dismissal would have the outcome" there being no evidence that the respondent would have taken a different view.

58. On the next question which the respondent expressed as whether a reasonable employer would have "dismissed for this misconduct", the respondent commented that accusing the respondent of criminal conduct goes to the core of the relationship, and that he "considers the allegation to be very serious having regard to the potential consequences for him as a Solicitor".

59. The respondent commented that while there is much case law covering the position when an employee is dismissed following an accusation of criminal conduct but "none where the employee accused the employer of criminal conduct and is dismissed". The respondent suggested that it "is probable that, that if the employee is subjected to criminal conduct by the employer they would leave and claim constructive dismissal. The employee would in all probability succeed… as such conduct would have destroyed the employer-employee relationship". The respondent noted that the claim here is not one of "constructive dismissal … the claimant chose not to terminate her employment, made no claim for constructive dismissal and the proceedings proceeded on the basis … she was unfairly dismissed."

60. The respondent set out that the Tribunal required to consider the decision against the objective standard of a hypothetical reasonable employer rather than by the Tribunal's own subjective views and has to consider whether the employer acted "within a "band of range of reasonable responses" to the

particular misconduct found of the particular employee" by reference to *Iceland Frozen Foods v Jones* 1983 ICR 17.

61. The respondent argued that the Tribunal would have to find that no reasonable employer would have dismissed the claimant.

62. The respondent, noting that the Tribunal may not accept the respondent's position that the conduct complained of is an allegation of criminal conduct, commented that the respondent "gave evidence regarding the law demonstrating that the accusation was an accusation of criminal conduct. The respondent argues that Persistent harassment is a contravention of s39(1) of the Criminal Justice and Licencing (Sc) Act 2010. The respondent noted that contravention of s 39(1) can result in the imposition of a Non Harassment Order by the Court in terms of the s 243A of the Criminal Procedure (Sc) Act 1995.

63. The respondent commented that reference was also made to s8 of the Protection from Harassment Act 1997 for definitions and noted that the Tribunal had indicated that authority would be appropriate. "The Respondent cannot think what more authority can be given, but as the tribunal does not seem to accept the Respondent's expertise, knowledge and experience... the Respondent has obtained Counsel's opinion from Mr George Gebbie an Advocate of 32 Years standing, specialising almost exclusively in criminal litigation... terms, are held to be incorporated… persistent harassment is an accusation of criminal conduct".

64. The respondent argued that the claimant knew it was a "serious accusation… having worked in the Respondent's office where many of the clients have been the subject of criminal and civil allegations of harassment and the claimant has dealt with their files." The respondent in response to a question to the effect that the claimant was not qualified and therefore a lay person commented that "All of the Respondents clients are lay persons and grasp the concept of harassment and the consequences for them readily. It would be reasonable to expect that the Claimant working with a number of different files, would also have grasped the concept. It is not a particularly difficult concept.".

65. The respondent summarised that his was small office, in a single location, with a total of 5 people including the claimant and that "the Claimant accepted that the Respondent was entitled to feel the working relationship was at an end…This is when it changed … to the Respondent bullying her… The Tribunal will recall the respondents utter shock when it was put to him that the claimant had no issue with his wife, only him".

66. The respondent concluded this aspect of his submission that "Had the Claimant not broken the Employer – Employee relationship with her accusation of criminal conduct against the Respondent she would not have been dismissed. The Claimant by her accusations against the Respondent immediately broke the Employee- Employer relationship and therefore the dismissal was not unfair."

67. The respondent further argued that the claimant did not mitigate her loss and comments that the claimant did not either apply for benefits or for another job in the initial period following dismissal. The respondent criticised the claimant's evidence to the effect she spent her time "preparing for Christmas with her children". The respondent criticised the claimant as she did not start applying for jobs in earnest until after the appeal, although she did apply for 2 jobs prior to the appeal. The respondent argued that any loss up to the expiry of the final Fit Note on 18 December 2017 could only be at the level of statutory sick pay. The respondent in addition criticises the claimant who he notes did not submit her Fit Notes to the DWP "seeking a benefit payment for her period of incapacity".

68. The respondent through the lists of post applied for identified gaps in the job applications including between 22 February and 7 March 2018 and from 9 May to 30 June 2018 noting in this period there was a limited reference to volunteering and a "Cornerstone chat update". The respondent was critical of the claimant's evidence in relation to the latter gap that "she probably has things going on in her life at that time". The respondent was further critical of the claimant that she did not secure a PVG Certificate (Disclosure) following an email exchange on 5 April 2018 with a possible employer "Thank you for your

advice I will ok into that once I have my PVG" and noted that she still had no done so despite the claimant's assertion that she would wish to work in the care sector where the such a certificate may be required. The respondent did not comment on the contrary assertion that some employers will assist a potential employee secure a PVG certificate once an offer of employment is made. The respondent is critical of the further gap in applying for posts between 14 August 2018 and 6 September 2018.

69. The respondent was critical of the geographical search area adopted by the claimant, he asserted that the claimant was unable to identify the actual location of 3 jobs she had applied for and criticised her in respect that a job which she secured an interview for was in Ayr some 18 miles from her home which was out with the claimant indicated geographical search area of 15 miles. The respondent was critical of the claimant having ruled out travelling to Glasgow which was 1 hour by train from her home while she was willing to travel to Ayr which he said would have taken her longer.

70. The respondent criticised the claimant in respect that she had restricted her job searching to one search website Indeed. The respondent had through Job Centre Plus and S1 job identified a number of jobs on 9 July 2018 which he felt the claimant ought to have applied for. In particular the respondent identified, in the Tribunal hearing, 10 jobs on JobCentre Plus on 9 July 2018 he considered the claimant could have, if she had seen those posts, applied for 8 of those posts. On S1 Jobs the respondent identified, in the Tribunal hearing, 20 possible jobs although he conceded that approximately 15 of the roles would not have been appropriate due to skill requirements or locations. Further the respondent identified, in the Tribunal hearing, 10 jobs listed on JobCentre Plus on 27 September 2018 and considered the claimant could have, if she had identified those posts, applied for 8 of those posts. On S1 Jobs the respondent identified, in the course of the Tribunal hearing 29 possible jobs listed on 27 September and contended that between 9 or 10 of the roles would have been appropriate for the claimant to apply for.

71. The respondent criticised the claimant for failing to applying for jobs within the legal sector and while the claimant suggested that she considered that the respondent had communicated to her that she was "rubbish at her job" while the respondent's position was that his unchallenged evidence was that "he had no difficulty with the Claimant's ability to carry out her work" and that he had given evidence that the question of a reference had been discussed at the Appeal Hearing. The respondent further noted that the claimant had applied for two legal posts, with a legal firm in Kilmarnock and one in Johnstone.

72. The respondent argued "The claimant is only able to claim losses directly resulting from the acting's of the Respondent in dismissing her. That her domestic circumstances changed at the end of May is not as a result of the actings of the Respondent… The tribunal requires to recognise that the Claimant was not a lone parent from November 2017 until May 2018 and her change in personal circumstances were not of the Respondent's making. The claimant confirmed under oath that she is now trying to rekindle their relationship. The Respondent believes that they have been engaging in their relationship since around September/October".

73. The respondent is critical of the claimant in respect that in majority of applications where no response was received, she had not followed up the application. The respondent maintains that the claimant's mother who has responsibility for up to 4 other children would be able to provide child care for the claimant's children.

74. The respondent considers that the claimant "is in fact better off not working. She has had no loss since she separated from her partner in May 2018. While benefits may not be deducted from any award, they can be taken into account in assessing the credibility of the Claimant and in particular whether or not they are genuinely seeking work".

75. The respondent is critical of the claimant in respect that she is in receipt of Income Support. It is the respondent's position that this is a benefit only available to individuals who do not require to register as "unemployed". The

respondent contend that the claimant would, if she had been seeking employment, been eligible for Contribution Job Seekers Allowance. No authority was provided to the effect that absent applying for such a benefit the claimant should be treated for purposes of calculating per termination losses as if they were. No authority was provided for any proposition that a Tribunal requires to draw adverse conclusions where an individual does not claim a specific benefit. The respondent maintains that as the claimant had confirmed to the respondent in questioning that she met his description of the criteria for eligibility for Contribution Based Job Seekers Allowance "at the time of her dismissal and all the criteria for Income" Based Job Seekers Allowance "at the date she separated from her partner. If she is telling the truth, then as a matter of law the claimant should not be receiving Income Support but Job Seekers Allowance. If she is not telling the truth and the fact that she is in receipt of Income Support suggests she is not that she unfit for work, or both. If she is unavailable or unfit for work, she has no loss as result of her dismissal."

76. The respondent was in addition critical of the claimant's credibility amongst other matters relying on a specific Facebook posting by the claimant on 19 November 2018 which referred to her evening role with Avon which she shared with her daughter, and which he not provided in any of the supplementary inventories provided over the course of the hearing until mid-afternoon Wednesday 16 January 2018. The respondent did not however comment on the absence of any objection to the late introduction of this document.

The Claimants Submissions

77. The claimant supplemented the authorities identified by the respondent in his written submissions with a copy of the *Norton Tool Company Ltd v Tewson* 1972 EW Misc and referred to *Besseden Properties v Corness* 1974 IRLR 338 and *Wilding v British Telecommunications plc* 2002 IRLR 524.

78. The claimant argued that the respondent had no reasonable basis to conclude that the claimant was guilty of gross misconduct.

79. The claimant argued that while the respondent maintains that he was being accused an office in terms of s39 of the Criminal Justice and Licensing (Scotland) Act 2010 (the 2010 Act) it is the claimant's position that the legislation identifies as "stalking" as a criminal offence and the term harassment is not synonymous. The claimant maintains that the term "persistent harassment" was not used in the context of any meaning in family law. The claimant was simply wishing the respondent to stop writing to her to allow her to recover from a period of ill health. The claimant contends that while the courts in Scotland, in the context of the prosecution of the crime of stalking, may impose as a remedy, a non-harassment order and the breach of such a court imposed order may amount to a further criminal offence, there was no reasonable basis to conclude that the claimant was accusing the respondent of a criminal offence. The claimant goes further and had she make such an accusation action taken by the respondent may be been potentially unlawful under the Protected Disclosure provisions of the Employment Right Act 1996.

80. The claimant asserts that the word "harassment" is used beyond the criminal law. It appears in civil law context in the Protection from Harassment Act 1997. Further the words deployed "persistent harassment" are used in everyday speech. The claimant argues that it was wholly understandable that the claimant wrote to the respondent in the way she did. There was no reasonable basis for the respondent's response. In summary the dismissal was substantively unfair.

81. The claimant further argued that the dismissal was procedurally unfair. The claimant argued there was no disciplinary process and notes that the respondent considered that a disciplinary process would have made no difference and argues that the respondent did not consider matters in a balanced and reasonable manner from commencement of the sickness absence as evidence by the respondent's attitude to the Fit Note. The claimant argued that no reasonable employer would have approached the matter in the way he did. The claimant argued that while the respondent offered a right of appeal the respondent "wholly disregarded the ACAS code of practice" and

argues that the dismissal is procedurally unfair and seeks a finding that the claimant was unfairly dismissed.

82. The claimant further argued that there being no reasonable basis to dismiss the claimant for gross misconduct, and to conclude that the claimant was in material breach of contract and in summarily dismissing the respondent breached the claimant's contract and thus argues that the claimant is entitled in terms of s86 of the ERA 1996 to a sum equivalent to 2 weeks paid notice of termination

83. On remedy the claimant set out the claimant's schedule of loss which the they had updated to the date of the hearing and argued that the claimant was entitled to a basic award reflecting 2 years continuous employment.

84. In relation to the compensatory award the claimant referred to the general principles set out in *Norton Tools v Tewson* 1972 IRLR 86 describing that the purpose is to compensate fully but not award a bonus and the amount to be awarded is what is just and equitable in all the circumstances.

85. The claimant maintained that compensation should reflect her loss of net earnings since her dismissal. The claimant argued that she applied for benefits following the separation from her partner and having explained her position to the DWP she was put on to Income Support and was advised that she was entitled to continue in her attempts to seek employment while on this benefit. The claimant noted that in the event that the claimant was successful the benefit potentially stood to be recouped in whole or in part in terms of the Employment Protection (Recoupment of Benefit) Regulations 1986 while other benefits such

as tax credits, child benefit and housing benefit do not fall to be taken into account.

86. The claimant further submitted that having sold Avon products for a number of years, any income from same should not be applied to reduce her losses following dismissal. The claimant denied that she has been unfit to work since her dismissal and while in a Facebook post on 19 November 2018 described certain medical issues which had resulted in her deciding to cease selling Avon

products there was no basis to suggest that she had been incapable of working more generally.

87. The claimant argued that her attitude to continued employment with the respondent changed in light of the dismissal. The claimant had anticipated that an apology would arise from the appeal. It was argued that the claimant's position was "wholly understandable… she had been dismissed for an unjustified reason while on sick leave and with no disciplinary procedure" and the claimant argues that her loss of earnings is directly attributable to the dismissal.

88. In relation to the respondent's criticisms for an alleged failure of mitigate the claimant's loss, the claimant argued that she had taken reasonable steps to find alternative employment and referred to *Besseden Properties v Corness* 1974 IRLR 338. In addition, the claimant referred to the observations of Sedley LJ in *Wilding v British Telecommunications plc* 2002 IRLR 524 at para 55 "It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed; he must show it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. it is where, and only where, the wrongdoer can show affirmatively that the other party acted unreasonably in relation to his duty to mitigate that the defence will succeed*"*. The claimant argued that she applied for a wide range of posts, registered with agencies, had applied for training courses and had looked into volunteer work. The claimant's mother who had operated a business in the past was not in a position to offer a post to the claimant. The claimant argues the claimant should be awarded loss of earnings

from the date of dismissal to the date of conclusion of the hearing (excluding the period of notice pay) and suggested the Tribunal should accept the claimant's evidence that she would find it easier to find employment once a decision was issued on her behalf and on this basis the claimant should be awarded a further 12 weeks loss of earnings.

89. The claimant further seeks an award for the loss of her statutory rights, an increase to the compensatory award in terms of s207A of the Trade Union and Labour Relations Consolidation Act 1992 and an award under s1 of the ERA

1996 in respect that it was accepted that the respondent had not provided her with a written statement of employment and a further increase in the compensatory award of 4 weeks' pay.

90. The claimant argued that there is no basis to make "a Polkey reduction".

91. In respect of the claim for breach of contract the claimant seeks the equivalent to 2 weeks' pay being the equivalent to the earnings the claimant would have received had her employment been terminated with notice.

Discussion

Credibility

92. While some inconsistencies in evidence occurred over the course of this lengthy hearing, I am satisfied that in all relevant matters the witnesses were credible in their evidence. Where such inconsistencies occurred, I am satisfied that they arose out of genuine misunderstanding of the meaning of some of the lengthier questions or otherwise from attempts to overly contextualise responses to the extent that the specific answer to a question could become obscured. While lengthy questions are of themselves not always objectionable and indeed the use of leading questions in cross is broadly permissible I have throughout this hearing reminded myself of the terms of Rule 41 of the Schedule 1 to Employment Tribunals (Constitution & Rules and Procedures) Regulations
2013 which provides that "The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The Tribunal shall seek to avoid undue formality and may question the parties or witness so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law regarding the admissibility of evidence in proceedings before the court" and to *Scott v IRC* 2004 IRLR 713 identifying the continuing duty to

disclose relevant documentary evidence. Equally and in relation to assessing credibility I have regard to the guidance in Walker and Walker The Law of Evidence in Scotland (4th edition) para 12.5.1 that questions should be "clear and unambiguous and as short as possible…", together with the commentary at 12.5.5 on double questions and indeed the comments of Lord President Dunedin in *Bishop v Bryce* 1910 SC 426 at 431 that certain the putting of statements to witnesses can have the effect that a response "is a worthless answer."

Relevant Law

(a) Unfair Dismissal-Applicable Test

93. Section 98 of the Employment Rights Act 1996 (ERA 1996) 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—

(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 employee held.

(2) A reason falls within this subsection if it—

(a) ………

(b) relates to the conduct of the employee,

(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."

94. The approach for the Tribunal is set out in the case of *British Home Stores Ltd v Burchell* [1978] IRLR 379, in which the EAT stated: "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.

First of all, there must be established by the employer the fact of that belief; that the employer did believe it.

Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief.

And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."

95. Subsequently and in *Iceland Frozen Foods Ltd v Jones* [1982] ICR 432 the EAT stated, referring to the then statutory provision now found in section 98(4) of the Act

"We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by s.57(3) of the 1978 Act is as follows.

(1) the starting point should always be the words of s.57(3) themselves;

(2) (2) applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

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

(4) 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;

(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the 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."

96. While an investigation and hearing may not always be required, the importance of doing so normally in the case of alleged was set out by the House of Lords in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, in which Lord Bridge made the following comments: "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [ERA 1996 s 98(2)]. These, put shortly, are:

(a) that the employee could not do his job properly;

(b) that he had been guilty of misconduct; (c) that he was redundant.

> But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus…….; in the case of misconduct, the employer will normally not act 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;..
>
> If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness posed by [s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [s 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [s 98(4)] may be satisfied."

97. While the respondent referred to *British Labour Pump Ltd v Byrne* 1979 IRLR 94, the House of Lords in Polkey overturned the material aspects of that decision.

98. The foregoing guidance was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 536 where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of

the employer's fair conduct of a dismissal in those respects, the Tribunal then had

to decide whether the dismissal of the employee was a reasonable response to the misconduct.

99. I have further reminded myself of the comments of the EAT in *Boys and Girls Welfare Society v McDonald* [1997] ICR 693 "Whilst accepting unreservedly the importance of that test, we consider that a simplistic application of the test in each and every conduct case raises a danger of industrial tribunals falling into error in the following respects.

(1) The burden of proof

… as a result of the 1980 amendment, it was no longer necessary for the employer to satisfy the tribunal that it had acted reasonably. The burden of proof on the employer was removed. The question was now a "neutral" one for the industrial tribunal to decide.

The risk that by following the wording of Arnold J.'s test in Burchell a tribunal may fall into error by placing the onus of proof on an employer to satisfy it as to reasonableness is not confined to industrial tribunals.

(2) Universal application of the Burchell test

Setting aside the question of onus of proof, it is apparent that the threefold Burchell test is appropriate where the employer has to decide a factual contest. The position may be otherwise where there is no real conflict on the facts. …

(3) The range of reasonable responses test

It should always be remembered that at the conclusion of the three-fold test in *Burchell* Arnold J. observed that it is the employer who manages to discharge the onus of demonstrating those three matters, who must not be examined further… Leaving aside the onus of proof, we do not understand

Arnold J. to be saying that the converse is necessarily true; that is to say, an employer who fails one or more of the three tests is, without more, guilty of unfair dismissal. In *British Leyland U.K. Ltd. v. Swift* [1981] IRLR 91 the Court of Appeal formulated the range of reasonable responses test. Lord Denning M.R. said, at p. 93:

> "It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was … reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may have not dismissed him."

The test was further formulated by the appeal tribunal in *Iceland Frozen Foods Ltd. v Jones* [1983] ICR 17, 24–25:

> "Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the Act of 1978 is as follows:
>
> (1) the starting point should always be the words of section 57(3) themselves;
>
> (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;
>
> (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) 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;

(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the 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."

100. I have similarly reminded myself of the comments of the Court of Appeal in *Foley v Post Office, HSBC Bank (formerly Midland Bank) v Madden* [2000] ICR 1283:

"(1) 'The band or range of reasonable responses' approach to the issue of the reasonableness or unreasonableness of a dismissal… remains binding…

(2) The tripartite approach to (a) the reason for, and (b) the reasonableness or unreasonableness of, a dismissal for a reason relating to the conduct of the employee… remains binding… Any departure from that approach indicated in *Madden* [2000] IRLR 288 (for example, by suggesting that reasonable grounds for belief in the employee's misconduct and the carrying out of a reasonable investigation into the matter relate to establishing the reason for dismissal rather than to the reasonableness of the dismissal) is inconsistent with binding authority"

"The possibility of an employment tribunal or of the Employment Appeal Tribunal substituting its own view for that of the employer in question could, in theory, arise in at least three different situations:

(1) Either tribunal may be tempted to substitute its own views as to the correct conclusion to be arrived at as to the employee's responsibility for the misconduct complained of.

> (2) The employment tribunal is charged under s.98(4) with the determination of the question whether the dismissal is fair or unfair and, in so doing, has to decide whether the employer acted reasonably or unreasonably in treating the s.98(2) reason as a sufficient reason for dismissing the employee.
>
> (3) The Employment Appeal Tribunal may be tempted to substitute its own views as to the s.98(4) question of reasonableness or unreasonableness.
>
> In my judgment, only the second of those three alternatives is legitimate. As a matter of authority binding in this court, that determination required by statute is to be answered by the employment tribunal with the assistance of the 'band of reasonable responses' approach set out in the judgment of Browne-Wilkinson J in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439".

101. I have further reminded myself of the comments of Lord Wilson in the Supreme Court in *Reilly v Sandwell Metropolitan Borough Council* [2018] that "no harm has been done by the extravagant view taken of the reach of the judgment of Arnold J in the *British Home Stores* case. In effect it has been considered only to require the tribunal to inquire whether the dismissal was within a range of reasonable responses to the reason shown for it and whether it had been preceded by a reasonable amount of investigation. Such requirements seem to me to be entirely consonant with the obligation under s 98(4) to determine whether, in dismissing the employee, the employer acted reasonably or unreasonably."

Discussion and Decision

(a) Unfair Dismissal-Applicable Test

102. While the Supreme Court has expressed the view the Burchell is rather better suited to identifying the reason for dismissal than answering the question set by ERA 1996 s98(4) concluding that the Court of Appeal had long applied the Burchell test when determining reasonableness in all the circumstances. In the

absence of full argument, no harm appeared to have resulted, and so the test remains good law.

103. This all means that an employer need not have conclusive direct proof of an employee's misconduct, but a genuine and reasonable belief reasonably tested. In terms of the Burchell guidance it is appropriate to consider whether the respondent had a reasonable belief in the misconduct of the claimant.

104. The respondent asserts the use of the phrase "persistent harassment" was an act of gross misconduct. That is not however the end of the matter, the question is whether it can be said that the respondent had a belief which in all the circumstances can be said to be reasonable. While the respondent in his submissions notes that the claimant is not claiming constructive dismissal this is of course correct. It was the respondent who dismissed the claimant. The claimant could not claim constructive dismissal in the circumstances where the respondent had dismissed her.

105. While the respondent provided a copy of *Tayleh v Barchester Healthcare Ltd* 2013 EWCA Civ 29 no specific comment was provided in the respondent's written submissions. I note that the Court of Appeal in that case concluded on the facts of that case the Tribunal had had not been entitled to substitute its own view that a false medical record was less serious than a false time sheet or pay documentation noting that organisations such as the care home were dependent on the keeping of proper records as a check on the treatment which patients received and were entitled to expect that professional nursing staff would have completed them accurately. While noting the judgment it is fact specific and does not alter the approach outlined above.

Relevant Law

Persistent Harassment and Gross Misconduct

106. Although not referred to by either party I have reminded myself that there is existing guidance on meaning of words and have had regard to the approach

advocated by Lord President (Rodger) in *Bank of Scotland v Dunedin Property Investment Co* 1998 SC 657 (at 661), quoting Lord Mustill in *Charter Reinsurance Co v Fagan* [1997] AC 313 (at 384):

> "...most expressions do have a natural meaning, in the sense of their primary meaning in ordinary speech. Certainly, there are occasions where direct recourse to such a meaning is inappropriate. Thus, the word may come from a specialist vocabulary and have no significance in ordinary speech. Or it may have one meaning in common speech and another in a specialist vocabulary; and the content may show that the author of the document in which it appears intended it to be understood in the latter sense. Subject to this, however, the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used".

107. Against the factual and legal matrix of the present matter I have set out below at some length statutory provisions to avoid the context of language being obscured by taking phrases out of context.

108. The Protection from Harassment Act 1997 (the PfH Act 1997) as it applies in Scotland sets out at Section 8:

> **"8 Harassment**
>
> (1) Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and— (a) is intended to amount to harassment of that person; or
>
> (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.
>
> (1A) Subsection (1) is subject to section 8A.
>
> (2) An actual or apprehended breach of subsection (1) may be the subject of a claim in civil proceedings by the person who is or may

be the victim of the course of conduct in question; and any such claim shall be known as an action of harassment.

(3) For the purposes of this section—

"conduct" includes speech;

"harassment" of a person includes causing the person alarm or distress; and a course of conduct must involve conduct on at least two occasions.

(4) It shall be a defence to any action of harassment to show that the course of conduct complained of—

(a) was authorised by, under or by virtue of any enactment or rule of law;

(b) was pursued for the purpose of preventing or detecting crime; or

(c) was, in the particular circumstances, reasonable.

(5) In an action of harassment, the court may, without prejudice to any other remedies which it may grant—

(a) award damages;

(b) grant—

(i) interdict or interim interdict;

(ii) if it is satisfied that it is appropriate for it to do so in order to protect the person from further harassment, an order, to be known as a "non-harassment order", requiring the defender to refrain from such conduct in relation to the pursuer as may be specified in the order for such period (which includes an indeterminate period) as may be so specified, but a person may not be subjected to the same

prohibitions in an interdict or interim interdict and a nonharassment order at the same time.

(6) The damages which may be awarded in an action of harassment include damages for any anxiety caused by the harassment and any financial loss resulting from it.

(7) Without prejudice to any right to seek review of any interlocutor, a person against whom a non-harassment order has been made, or the person for whose protection the order was made, may apply to the court by which the order was made for revocation of or a variation of the order and, on any such application, the court

may revoke the order or vary it in such manner as it considers appropriate."

109. I set out below the full terms of Section 11 of the PfH Act 1997 which provides:
"11. Non-harassment order following criminal offence

After section 234 of the Criminal Procedure (Scotland) Act 1995 there is inserted the following section—

234A Non-harassment orders]

(1) This section applies where a person is—

(a) convicted of an offence involving misconduct towards another person ("the victim"),

(b) acquitted of such an offence by reason of the special defence set out in section 51A, or

(c) found by a court to be unfit for trial under section 53F in respect of such an offence and the court determines that the person has done the act or made the omission constituting the offence.

(1A) The prosecutor may apply to the court to make (instead of or in addition to dealing with the person in any other way) a non-harassment order against the person.

(1B) A non-harassment order is an order requiring the person to refrain, for such period (including an indeterminate period) as may be specified in the order, from such conduct in relation to the victim as may be specified in the order.

(2) On an application under subsection [(1A)] above the court may, if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from [harassment (or further harassment)], make a nonharassment order.

(2A) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor—

(a) about any other offence involving misconduct towards the victim—

(i) of which the person against whom the order is sought has been convicted, or

(ii) as regards which the person against whom the order is sought has accepted (or has been deemed to have accepted) a fixed penalty or compensation offer under section 302(1) or 302A (1) or as regards which a work order has been made under section 303ZA (6),

(b) in particular, by way of—

(i) an extract of the conviction along with a copy of the complaint or indictment containing the charge to which the conviction relates, or

(ii) a note of the terms of the charge to which the fixed penalty offer, compensation offer or work order relates.

(2B) But the court may do so only if the court may, under section 101 or 101A (in a solemn case) or section 166 or 166A (in a summary case), have regard to the conviction or the offer or order.

(2BA) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor about any other offence involving misconduct towards the victim—

(a) in respect of which the person against whom the order is sought was acquitted by reason of the special defence set out in section 51A, or

(b) in respect of which the person against whom the order is sought was found by a court to be unfit for trial under section 53F and the court determined that the person had done the act or made the omission constituting the offence.

(2C) The court must give the [person against whom the order is sought] an opportunity to make representations in response to the application.]

(3) A non-harassment order made by a criminal court may be appealed against—

(a) if the order was made in a case falling within subsection (1)(a) above, as if the order were a sentence,

(b) if the order was made in a case falling within subsection (1)(b) or

(c) above, as if the person had been convicted of the offence concerned and the order were a sentence passed on the person for the offence.

(3A) A variation or revocation of a non-harassment order made under subsection (6) below may be appealed against—

(a) if the order was made in a case falling within subsection (1)(a) above, as if the variation or revocation were a sentence,

(b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the variation or revocation were a sentence passed on the person for the offence.]

(4) Any person who is … in breach of a non-harassment order shall be guilty of an offence and liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both such imprisonment and such fine; and

(b) on summary conviction, to imprisonment for a period not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both such imprisonment and such fine.

(4A) …

(4B) …

(5) …

(6) The person against whom a non-harassment order is made, or the prosecutor at whose instance the order is made, may apply to the court which made the order for its revocation or variation and, in relation to any such application the court concerned may, if it is satisfied on a balance of probabilities that it is appropriate to do so, revoke the order or vary it in such manner as it thinks fit, but not so as to increase the period for which the order is to run.

(7) For the purposes of this section—

"harassment" and "conduct" are to be construed in accordance with section 8 of the Protection from Harassment Act 1997 (c 40), "misconduct" includes conduct that causes alarm or distress."

110. The Criminal Justice and Licensing (Scotland) Act 2010 provides at section 39:

“Stalking

Offence of stalking

(1) A person (“A”) commits an offence, to be known as the offence of stalking, where A stalks another person (“B”).

(2) For the purposes of subsection (1), A stalks B where—

(a) A engages in a course of conduct,

(b) subsection (3) or (4) applies, and

(c) A's course of conduct causes B to suffer fear or alarm.

(3) This subsection applies where A engages in the course of conduct with the intention of causing B to suffer fear or alarm.

(4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm.

(5) It is a defence for a person charged with an offence under this section to show that the course of conduct—

(a) was authorised by virtue of any enactment or rule of law,

(b) was engaged in for the purpose of preventing or detecting crime, or

(c) was, in the particular circumstances, reasonable.

(6) In this section—

“conduct” means—

(a) following B or any other person,

(b) contacting, or attempting to contact, B or any other person by any means,

(c) publishing any statement or other material—

(i) relating or purporting to relate to B or to any other person,

(ii) purporting to originate from B or from any other person,

(d) monitoring the use by B or by any other person of the internet, email or any other form of electronic communication,

(e) entering any premises,

(f) loitering in any place (whether public or private),

(g) interfering with any property in the possession of B or of any other person,

(h) giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person,

(i) watching or spying on B or any other person,

(j) acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm, and

"course of conduct" involves conduct on at least two occasions.

(7) A person convicted of the offence of stalking is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(8) Subsection (9) applies where, in the trial of a person ("the accused") charged with the offence of stalking, the jury or, in summary proceedings, the court—

(a) is not satisfied that the accused committed the offence, but

(b) is satisfied that the accused committed an offence under section 38(1).

(9) The jury or, as the case may be, the court may acquit the accused of the charge and, instead, find the accused guilty of an offence under section 38(1)."

111. In England & Wales, the PfH Act 1997 provides at section 2

"2. Offence of harassment

(1) A person who pursues a course of conduct in breach of section 1(1) or (1A) is guilty of an offence.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

(3) . . .

2A Offence of stalking

(1) A person is guilty of an offence if—

(a) the person pursues a course of conduct in breach of section 1(1), and

(b) the course of conduct amounts to stalking.

(2) For the purposes of subsection (1)(b) (and section 4A(1)(a)) a person's course of conduct amounts to stalking of another person if— (a) it amounts to harassment of that person,

(b) the acts or omissions involved are ones associated with stalking, and

(c) the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.

(3) The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking—

(a) following a person,

(b) contacting, or attempting to contact, a person by any means,

(c) publishing any statement or other material— (i) relating or purporting to relate to a person, or

(ii) purporting to originate from a person,

(d) monitoring the use by a person of the internet, email or any other form of electronic communication,

(e) loitering in any place (whether public or private), (f) interfering with any property in the possession of a person, (g) watching or spying on a person.

(4) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, or a fine not exceeding level 5 on the standard scale, or both.

(5) In relation to an offence committed before the commencement of section 281(5) of the Criminal Justice Act 2003, the reference in subsection (4) to 51 weeks is to be read as a reference to six months.

(6) This section is without prejudice to the generality of section 2." 112. Finally and although not a matter for this case the Public Interest Disclosure Act 1998 (PIDA 1988) s 5 and 7 provides employees a right not to be unfairly dismissed for making a qualified disclosure

as defined in ERA 1996 s 43B being a disclosure of information which in the reasonable belief of the disclosing worker is made in the public interest and tends to show one of six categories of wrongdoing including that a criminal offence has been committed, is being committed or is likely to be committed.

Gross Misconduct - Persistent Harassment

Discussion and Decision

113. The term persistent harassment does not appear at s234A of the Criminal Procedure (Scotland) Act 1995. That is not surprising, the offence in Scotland which may result in what may be broadly described as “non harassment orders” (being a specific direction from a Court not to carry out certain actions) is one of “stalking”. Some, but not all acts of harassment may indeed amount to a civil wrong and be actionable in terms of the PfHAct. Some, but not all acts of harassment may justifiably be classed as the offence, in Scotland, of Stalking. 114. Before the statutory use of the word harassment is adopted, or indeed the suggested statutory use of the phrase “persistent harassment” there is a straightforward non-legal meaning found by reference to any appropriate common usage dictionary namely repeated actions of aggressive pressure or intimidation. It is not necessary to say that the claimant is correct to describe the respondent’s communication in that way merely to state that there is an ordinary non-legal meaning. The non-legal (and non-accusatory of criminal offence) meaning is one which any reasonable employer would have readily accepted.

115. While the respondent seeks to rely, beyond his own professional experience, on the written opinion of counsel Mr Gebbie Advocate dated 19 January 2019, the respondent did not provide Mr Gebbie with the claimant’s letter of Friday 18 November 2017 and thus Mr Gebbie did not have the benefit of the context of the phrase. While Mr Gebbie makes reference to the Criminal Justice and Licensing (Scotland) Act 2010 and the PfH Act 1997 he does not identify any section, in Scotland, where a criminal offence of harassment (as opposed to

stalking) is set out. While Mr Gebbie makes reference to comments of Lord Matthews in the Court of Appeal in *Harvie v Murphy* 2015 SCCR 363 on s234 of the Criminal Procedure (Sc) Act 1995 he does not identify Lord Matthews to have suggested that harassment, rather than stalking, is the specific criminal offence rather Lord Matthew describes the orders which can be imposed by a court where a person is convicted of an offence. Indeed, I note that Mr Gebbie precedes this by stating *"*it is apparent that, depending on their content, the sending of letters... on at least two occasions can be the crime of stalking*"*. Thus, Mr Gebbie is stating that it is possible to commit the statutory crime of stalking by the sending of letters. That is not the issue here. I am satisfied that While Mr Gebbie concludes that "I am of the view that an allegation or accusation of "Persistent Harassment" by means of sending letters can be seen as an accusation of criminal conduct in Scots Law*",* Mr Gebbie's opinion of the absent the context of the phrase as it was used (or as he qualifies above the content of the letter) is not of assistance to this Tribunal in considering whether the respondent's asserted belief on reading the phrase in question in the context of the letter was reasonable. The approach however recommended by Lord President (Rodger) in *Bank of Scotland v Dunedin Property Investment Co* 1998 is one which lends itself to the reading of the letter.

116. Had the claimant substituted the word "stalking*"* for the phrase "persistent harassment" or indeed the word *"*harassment" that could potentially have given rise to a reasonable belief of an accusation of criminality.

117. Had the claimant reasonably believed that the respondent was committing a criminal act, such as stalking she would have been entitled to make a qualifying disclosure and the relevant protections against unfair dismissal would have applied. She did not believe that the respondent was committing a crime. She was simply asserting that in her view the respondent's correspondence was harassing. No employer could have formed a reasonable belief that the statement in the context of the letter and the preceding communications amounted to an allegation of criminality.

118. The claimant was clear in her evidence that she did not mean to suggest that the respondent was carrying out a criminal act. The respondent in contrast chose to read into a common phrase, used in the context of a straightforward letter, a particular meaning which no reasonable employer would have.

119. The correct of approach in order to form a genuine and reasonable belief would have been for the respondent's inquiry start and, in this specific instance finish, by considering what is the ordinary meaning of the phrase used in the context of the letter issued by the claimant.

120. If this tribunal was to accept the respondent's argument that the phrase did amount to an accusation of criminality made by the claimant against its employer that does not, of itself, resolve the matter in favour of respondent. This Tribunal, on the specific facts, does not accept that the respondent can reasonably take the view that a sanction of dismissal, which it is considered would have the effect of dissuading an employee from reporting alleged criminality on the part of an employer, falls within that band of reasonable responses.

121. While the respondent in his submission did not expressly identify what the potential consequences where a matter of criminality arises for a solicitor, it is understood that broadly the respondent is referring to the position in Scotland whereby the Law Society of Scotland has certain investigatory powers which may be deployed where a solicitor is convicted of a criminal offence and which may lead to a sanction before the Scottish Solicitors' Discipline Tribunal. Again, and although not expressed by the respondent such consequences following on from criminal conviction are understood to potentially exist for other regulated professions including those in health and social care. The existence of such consequences, following a conviction, do not, of themselves, mean that a decision to dismiss in these circumstances would meet the statutory test set out above.

122. This Tribunal forms no view on the position which is understood to be put forward by the respondent that, if the Tribunal did not accept, he fairly dismissed for misconduct, the Tribunal would require to conclude that there would no

circumstances where an employer could fairly dismiss in response to an employee asserting criminality against their employer could fall within that band of reasonable responses. While the terms of PIDA 1998 are noted against the possibility that such a sanction could create a difficulty in dissuading employees from reporting alleged criminality this Tribunal is concerned with the specific factual and legal matrix of the present case. On that basis, this Tribunal does not require to form a view on, for instance, the possibility of terms and conditions provided by regulated professionals, or others, to their employees asserting that an accusation of criminal wrongdoing would be treated as gross misconduct while noting that PIDA may provide protection in such circumstances indeed also noting the comments of Chadwick LJ in *Friend v Civil Aviation Authority* [2001] EWCA Civ 1204 that an employee "cannot continue in an employment under which he refuses to comply with his employer's instructions; nor can it be expected that he will comply with instructions which he believes are unlawful and will lead to unsafe results", whether such a term could be a lawful and reasonable instruction is not matter for this Tribunal. There was no such term issued to the claimant.

Relevant Law

(b) Unfair Dismissal – Procedure

123. The ACAS Code of Practice on Disciplinary and Grievance Procedures came into effect on 11 March 2015: Code of Practice (Disciplinary and Grievance Procedures) Order 2015, SI 2015/649 provides:

> "12 Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or

employee intends to call relevant witnesses they should give advance notice that they intend to do this.

…

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. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

24. Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.

25. Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available. Provide employees with an opportunity to appeal.

26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

28. Workers have a statutory right to be accompanied at appeal hearings."

124. Supplemental to the comments of Lord Bridge in the House of Lords in *Polkey*, the Court of Appeal in *Foley* and Lord Wilson in the Supreme Court in *Reilly* already set out above, and although not referred to by either party, I have reminded myself of the comments of Mr Justice Wood (then President of the

EAT) in *ILEA v Gravett* 1988 497 “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 questioning of the employee, is likely to increase”.

125. Again, and although not referred to by the parties, I have reminded myself of the Court of Appeal decision in *Slater v Leicestershire Health Authority* [1989] IRLR 16 that in a small employer situation, it may not always be straightforward to avoid a situation where the same person carries out the investigation, discipline and the appeal. However, and again though not referred to by the parties, I have reminded myself of the comments of the EAT in *St Nicholas School (Fleet) Educational Trust Ltd v Sleet* UKEAT/0118/17 that at such an appeal, the focus is on the impartiality (or otherwise) of the decision-taker who

“might have a particular conduct issue in mind as the reason for dismissal, but dismiss unfairly because they have a closed mind to the possibility that the employee might be innocent, or that the conduct in issue might not justify dismissal.”.

Discussion

Unfair Dismissal - Procedure

126. On a procedural basis the employer did not afford the claimant an opportunity to explain her meaning before he came to his decision to dismiss. The claimant was absent from work due to ill health at time of the respondent’s receipt of the letter of 18 November 2017. There was no compelling reason for the respondent to have acted in such haste the claimant was not scheduled to return to work until 19 December 2018. While it is not considered that there is a reasonable inference of an allegation of criminality the respondent, in any event, failed to carry out any investigation, including questioning of the claimant as to the meaning of the phrase.

127. The respondent had not provided guidance to the employee of what would or would not amount to misconduct. If respondent had issued terms and conditions to the claimant he could have, sought to, set out that any accusation of criminality against him would be regarded as an act of gross misconduct. However again it is observed that a natural reading of the letter does not suggest an allegation of criminality.

128. While the respondent did afford an appeal, the claimant initially requested an appeal in her letter of 28 November and 14 December 2018, the respondent did not confirm the offer of appeal until his letter of 10 January 2018. He took no steps in that letter to afford the claimant with information as to her entitlement to seek to be accompanied by a fellow worker or representative present.

129. The respondent presided over and acted as decision taker in the claimant's appeal against his own decision. The appeal hearing was on 7 February 2018. The respondent, who is an experienced court practitioner, used the appeal process to put statements to the claimant reflecting his view of his own decision seeking to elicit the respondent's agreement to those statements, in doing so he did not afford the claimant the opportunity to set out her position in a fair and reasonable manner. In so doing he did not act in an impartial manner in the appeal hearing. The respondent did not approach the appeal hearing in an impartial manner, he operated the appeal hearing to secure from the claimant what he considered was the claimant's agreement with his own earlier decision.

    The claimant did not, and does not agree with the propositions that the respondent put to her including his proposition, reflecting his earlier conclusion, that the claimant had made an accusation of criminal wrongdoing against the respondent. The respondent acted as decision maker in the appeal with a closed mind to the natural reading of the phrase in the letter and the claimant's position she sought to underline at the appeal despite the absence of a fellow employee and or trade union representative.

130. Notwithstanding what the terms of respondent's letter of Thursday 16 November 2017 calling the claimant to a discipline hearing and which preceded the

claimant letter of Friday 18 November 2017 (on which the respondent founds) there is no dispute in evidence that dismissal would not have followed. In short and but for the claimant's use of the phrase "persistent harassment" no dismissal would have followed.

(c) Reduction under Polkey principle.

131. The next issue is whether it is appropriate to make any deduction under the principle derived from *Polkey v A E Dayton Services Ltd* [1988] ICR 142, which requires an assessment of the possibility of their having been a fair dismissal

had the procedure adopted been a fair one. That requires an assessment of whether in all the circumstances a fair dismissal could have been decided upon by a reasonable employer.

132. In these circumstances no reasonable employer would have dismissed. The issue is one of gross misconduct. It is considered that no reasonable employer would have dismissed having afforded an opportunity to the claimant to explain the clear context of her letter. Had the respondent approached the appeal hearing with an open and impartial mind the decision to dismiss would not have been upheld. In the circumstances it is appropriate to speculate on what the position would have been had the respondent overturned his earlier decision. In such circumstances and taking the claimants letter including that of 14 November 2017 I am satisfied that at the time the claimant had intended to return to work. While the claimant makes a brief comment in her letter of 14

December regarding not entering the respondent's office again this was written in the context of the location of whereabouts of the appeal. In any event the claimant did not maintain that position. She attended the appeal which was held at the respondent's office. In the circumstances and had the respondent overturned his decision, I am satisfied that the claimant's position would have reverted to that set out in her letter of 14 November 2017 and she would have returned to work alongside her colleagues.

Relevant Law

(e) has the claimant contributed to the dismissal?

133. ERA 1996 s 122(2) provides in relation to basic awards that

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

134. ERA 1996 s 123 (6) provides in relation to compensatory awards that

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

In the Court of Appeal decision in *Nelson v BBC (No 2)* [1980] ICR 110 LJ Brandon stated that "an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy".

Discussion and decision

(e) has the claimant contributed to the dismissal?

135. In the circumstances of this case I do not consider that the claimant's conduct was culpable or blameworthy. The claimant's letter was not written as an articulation of an accusation of criminal wrong wrongdoing. No reasonable employer could have read it as such. Had she asserted criminal wrongdoing against the respondent, which she did not, it is not accepted on the factual matrix set out above this would have contributed to a decision to dismiss which meets the test set out above. The respondent had given no notice that the he would regard such an accusation as amounting to gross misconduct.

(f) what, if any, was the extent of the claimant's losses.

Relevant Law

Mitigation of Loss

136. Section 123(4) ERA 1996 provides that in ascertaining the loss "… the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."

137. While noting the terms of *Bessden Properties Ltd v Corness* 1974 IRLR 338 and indeed the observations of Sedley LJ in *Wilding v Brtitish Telecommunications plc* 2020 IRLR 524 referred to by the claimant, and although not referred by either party I have reminded myself that in *Cooper Constructing Ltd v Lindsey* [2016] ICR D3 the Honourable Mr Justice Langstaff (President) reviewed the existing authorities on the burden of proof in respect of mitigation of loss and the extent of the duty and sets out 9 broad principles:

(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.
(2) It is not some broad assessment on which the burden of proof is neutral. ... If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.
(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see Waterlow, Wilding and Mutton).

(4) There is a difference between acting reasonably and not acting unreasonably (see Wilding).
(5) What is reasonable or unreasonable is a matter of fact.
(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see Waterlow, Fyfe and Potter LJ's observations in Wilding).

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

138. Again, and although not referred to by either party I have reminded myself of the comments of the EAT in *Leonard v Strathclyde Buses Ltd* 1999 SC 57 to the effect that compensatory award does depends on proof of loss. Thus, and as set out by the Inner House in *Dignity Funerals v Wm Bruce* [2005] IRLR 189

to the effect application of the just and equitable test should be underpinned by findings in fact establishing that the loss was caused to a material extent by the dismissal.

139. Further and having regard to the terms of Section 123(4) ERA 1996 I also have reminded myself of the comments of Lord Kinloch in *Allan v Barclay* (1864) 2 M 873 at 874 "The grand rule on the subject of damages is, that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer" and commented by Lord Jamieson in *Steel v Glasgow Iron and Steel Co Ltd* 1944 SC at 267 to the effect that it has "stood the test of time" and Lord Migdale in *McKillen v Barclay Curle & Co Ltd* 1967 SLT 41 at 45 'The statement of the law has stood unchallenged for over a hundred years and is still sound' and as described by Lord President Clyde that: "The doctrine of reasonable foreseeability with all its subtle ramifications may be applied in determining questions of liability ... [and] has no relevance once liability is established and the measure of damage is being determined" and the wrongdoer "must take his victim as he finds him". While

the respondent argues that losses following the claimant's separation from her former partner have no bearing, continuing losses which are attributable to the dismissal are part of the measure of damage. As Lord President Clyde observed in the calculation of losses the respondent requires to take the claimant as he finds her.

Discussion

Mitigation of Loss

140. The respondent argues that the claimant took inadequate steps to minimise her loss. The respondent's letter to the claimant inviting the claimant to a disciplinary was expressly highly critical of her competences. It was the respondent's position that he would have provided a reference which was not critical of her capability but elected not to communicate this in any way to the claimant. The only information the claimant had, as to what any possible reference from the respondent, would contain was by reference to the respondent's letters of Thursday 10 November 2017 and Thursday 16 November 2017, together with the reasonable conclusion that it would had reflected her dismissal for gross misconduct. While it is not in dispute that no issues had raised with the claimant prior to the respondent's letters of 10 and 16 November 2017 the respondent is mistaken that he had never communicated any criticism of the claimant's ability to carry out her work. The respondent's letter of 7 February 2018 did not record any offer to provide a reference. The respondent did not communicate any willingness to provide any form of reference to the claimant. Against this background this Tribunal has no criticism of the claimants' initial delay following 19 December 2017 when she was no longer unfit for work in starting making multiple applications for jobs, the claimant applied for several posts in February 2018 and March 2018.

It is considered that the claimant placed reasonable geographical restrictions on her job search and while, in some instances, those posts would have fallen a short distance out with the geographical restriction the Tribunal is not critical of the claimant's efforts in this regard. The claimant applied for a variety of posts including full and part time, the Tribunal is not critical of the claimant

decision in this regard. In addition, and while the respondent was able to identify alternate online jobsites, the Tribunal is not critical of the claimant's decision to utilise the website she did nor of her decision to focus on that website rather than explore other job websites identified by the respondent.

141. There was a gap in the claimant applying for jobs in the period 9 May to 30 June 2018. The commencement of this gap coincided with the separation from her partner in April 2018. The claimant became a lone parent at this time. On balance the Tribunal accepts that the claimant's circumstances changed shortly prior to this period and notes that the claimant did make an application for a role in the month of June on 30 June 2018. The respondent did not adduce evidence of specific roles which were available during this period. The respondent was further critical of a further gap in the period of the claimant's application for jobs between 14 August 2018 and 6 September 2018. The respondent was able to identify, albeit through an alternate website that there were possible jobs which could have been suitable if applied for. The claimant did not offer any relevant explanation for this further gap. It is noted that the Tribunal hearing was notified to the parties on 4 August 2018 as scheduled to start on 3 October 2018. It is recognised that a successful application would

have resulted in a degree of delay, requiring an interview, before starting a job and thus applying a just and equitable approach, including the background that she was not interviewed until 12 September for a post she had applied for on14 August 2018, it is considered that the relevant period of loss attributable to the dismissal should be calculated to 30 September 2018.

Relevant Law

Benefits sought

142. The claimant received Income Support. s124 of the Social Security Contributions and Benefits Act 1992 (SCBA 1992) sets out the basis for qualification for income support:

“Income support

124.—(1) A person in Great Britain is entitled to income support if– he is of or over the age of 16; he has not attained the qualifying age for state pension credit;

…

(e) he falls within a prescribed category of person;

…

(1A) Regulations under paragraph (e) of subsection (1) must secure that a person who– (a) is not a member of a couple, and (b) is responsible for, and a member of the same household as, a child under the age of 7, falls within a category of person prescribed under that paragraph.

…

(4) Subject to subsection (5) below, where a person is entitled to income support, then–

(a) if he has no income, the amount shall be the applicable amount; and

(b) if he has income, the amount shall be the difference between his income and the applicable amount."

143. The Income Support (General) Regulations 1987 as amended identifies that individuals who can claim Income Support include a lone parent aged over 18 who has at least one child under 5:

"Schedule 1B
Prescribed categories of person I
Lone Parents

1.—(1) A lone parent who is responsible for, and a member of the same household as– (a) a single child aged under 5, or (b) more than one child where the youngest is aged under 5."

Discussion
Benefits sought

144. The respondent is critical that the claimant did not seek Job Seekers

Allowance. The respondent believes that the claimant's decision to claimant Income Support and not to seek Job Seekers Allowance can only be explained by the claimant not being entitled to Job Seekers Allowance due to either the claimant not actively seeking employment or ill health. This is not accepted. The respondent refers to published summaries of eligibility of Income Support extending to 3 pages and Job Seekers Allowance extending to 4 pages. However, the rather more extensive regulations themselves on eligibility for Income Support extend to the claimant on the basis that she is a lone parent responsible for 4 children one of who is under 5 years of age. Neither of the summaries to which the respondent specifically set out the position set out in the regulations regarding a lone parent with a child under 5. The claimant has been a lone parent since around the end of April 2018. He is aware of the age of the claimant's children both through his former employment of the claimant and indeed through his friendship with the claimant's parents. In any event, the tribunal is satisfied that the claimant relied, appropriately, on the information provided by the relevant agency who advised her that she was eligible for Income Support. The tribunal is satisfied that the claimant's receipt of Income Support and other benefits reflects an assessment of her financial requirements by the relevant bodies against the background that she is now a lone parent responsible for young children. While the respondent argued that the claimant's receipt of Income Support could be used to assess the credibility of the claimant, he did not provide any authority for this proposition. The claimant has honestly stated throughout the case that she is in receipt of Income Support.

Remedy

Relevant Law

Basic Award

145. Section 119 of ERA 1996 sets out the provision for a basic award.

Basic Award

Discussion and Decision

146. The claimant is entitled to a basic award equating to statutory redundancy payment of **£524**; being 2 full years' service x 1 having regard to the claimants age x £262 applying the relevant statutory cap for a week's wages.

Relevant Law

Compensatory award

147. Section 123(1) of ERA 1996 provides" ... the amount of the compensatory award shall be 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".

Relevant Law

Adjustment of award resulting from failure to comply with Code of Practice

148. Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that an unreasonable failure by the employer or employee to comply with a relevant Code of Practice may result in the adjustment of an employment tribunal award and S207(2)A provides

> "Effect of failure to comply with Code: adjustment of awards
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that
>
> > (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
> >
> > (b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

Discussion

Adjustment of award resulting from failure to comply with Code of Practice.

149. The respondent acted unreasonably in immediately dismissing the claimant upon receiving the claimant letter of 18 November 2017, there was no reason why the respondent could not have sought the claimant's comments on the meaning of the phrase she deployed before his decision to dismiss. The claimant was absent from work until 19 December 2017, the respondent could have used that period to invite the claimant's comments. While the respondent, in response to the claimant's letter of 14 December 2018, did offer an appeal, he did not advise the claimant of her right to be accompanied and did not approach the appeal impartially. The respondent used the appeal hearing to secure what he considered to be the claimant's agreement that his decision was correct. While the claimant had asserted in her letter of 14 December 2017 that she would not enter the respondent's office again I consider that the context of this comment is important and consider it to be a broadly heated statement made around the location of the appeal and responding to the manner and fact of dismissal. It was in any event a position which the claimant did not maintain. She did attend the respondent's office at the appeal hearing on 7 February. Had the respondent acted approached the appeal hearing in an impartial manner he would have overturned his decision to dismiss and in that circumstance, I am satisfied that the claimant would have returned to work. It is clear from the content of the claimant's letter of 14 November 2017 that the claimant anticipated at that stage that she would return to working alongside colleagues at the respondent's workplace. The claimant's letter of 18 November 2017 did not express any intention not to return, rather it set out the claimant's rebuttal of allegations made in the

respondent's letter of 16 November 2017 and continued to identify the respondent as her employer. Again, there is nothing in the claimant's brief letter of 28 November 2017 suggesting that she would not return after a successful appeal.

Relevant Law

Provision of terms and conditions

150. In terms of s1 ERA 1996 each employee is entitled to receive from his employer not later than two months after the beginning of the employee's employment a written statement of the major terms upon which he is employed. The Employment Act 2002 provides as s127 that where the matter is before the Tribunal, it is required to increase an award by at least 2 weeks' pay and may if it is just and equitable increase that award to 4 weeks' pay.

Discussion and Decision

Provision of terms and conditions

151. It is accepted that the claimant was not provided with a written statement of the terms of her employment. As such the claimant is entitled to 2 weeks' pay. In all the circumstances it is considered just and equitable to increase that to 4 weeks' pay.

Recoupment of benefits

Relevant law

152. Again, and while I was not referred to authority, I have reminded myself that the Employment Protection (Recoupment of Jobseekers Allowance and

Income Support Regulations 1996 (the Recoupment Regs 1996) have been considered by the EAT (Judge Pugsley presiding) in *Homan v Al Bacon Ltd* [1996] ICR 721 which stated "In our view the prescribed element deals with the element in the award which is attributable to loss of wages and the only period to which it can apply was the period for which compensation was awarded".

Compensatory Award

Discussion and Decision

153. In addition, the claimant is entitled to a Compensatory Award.

154. While the claimant was not fit for work until 19 December 2017 she was thereafter fit to work and would have returned to work but for respondent's decision to dismiss on 22 November 2017. But for the dismissal the claimant would have continued to be paid Statutory Sick Pay from 24 November until 18 December 2017, having already been paid to 23 November 2017. This would have equated to a payment of £331.87. The claimant would have thereafter continued to be paid £249 per week net until April 2018 when her net pay would have increased to £260.00 per week. On a just and equitable basis, the claimant's net loss until end of September 2018 would equate to [£337.87 + (15 x £249) £3,735 + (26 x 260) £4,420] **£10,832.87**. I consider that it is just and equitable that no losses be awarded from 30 September 2018 onwards.

155. The claimant is entitled to **£350** for loss of statutory rights.

156. The claimant is entitled to pension loss for the period of loss. The respondents made the required 1% employer pension contribution and by reference to the 4th edition (August 2017) of the Principles for Compensating Pension Loss the pension loss arising from the unfair dismissal is **(**£252 x 0.01 x 15) and (£262 x 0.02 x 26) being **£174.04**

157. The claimant is entitled to an increase to reflect the failure of the respondent to issue statement of particulars of employment (£262 x4) **£1,048.**

158. The ACAS Code sets out the standard of reasonableness and fairness for handling disciplinary issues and grievances. The Code suggests that in disciplinary matters, the employer should carry out an investigation, inform the employee, hold a meeting with the employee, at which the employee may be accompanied and at which the employee should have the opportunity to respond and then the employer should decide on appropriate action and give

the employee an opportunity to appeal. The Code applies to dismissal in this case. There was a significant failure on the part of the respondent in terms of

its obligations under the ACAS Code. While the claimant was made aware of the allegation, there was no investigation, no disciplinary hearing and while the claimant was afforded an opportunity to appeal the respondent was not impartial in the appeal. I am satisfied that the respondent's failure was unreasonable. In all the circumstances it is considered just and equitable that an uplift to the compensatory award of 25% be awarded.

159. The total Compensatory Award including the uplift is **£15,506.14.**

160. While the respondent failed to pay notice pay no additional sum falls due in respect of this remedy as the losses are fully covered in the compensatory award.

161. The claimant was in receipt of Income Support from 7 June 2018 to date. Income Support is a recoupable benefit in terms of Reg 8 of the Recoupment Regs 1996. The Recoupment Regs 1996 apply to the period for which the claimant is awarded compensation. The prescribed period is **22 November 2011 to 30 September 2018.** The Prescribed amount is **£10,832.87.** The total compensation award for unfair dismissal **(£524** plus **£15,506.14**) exceeds the prescribed element by **£5,197.27** and this sum is payable immediately.

Conclusion

162. There was an unfair dismissal of the claimant by the respondent and she is awarded the sums set out above.

Employment Judge **Rory McPherson**

18 February 2019 Date of Judgment

Entered in register 19 February 2019 and copied to parties

I confirm that this is my judgment or order in the case of McMahon v Finlayson 4103392.2018 and that I have signed the judgment by electronic signature.