EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101445/2019

Held in Dundee on 19, 23 and 26 September 2019

Employment Judge I McFatridge
Tribunal Member K Culloch
Tribunal Member S Cardownie

Mrs D Aitken	**Claimant** **In person**
Fife Council	**Respondent** **Represented by** **Mr Thomas,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

(One) the claim of unfair dismissal and automatic unfair dismissal in terms of section 103A of the Employment Rights Act 1996 succeeds;

(Two) the claim of disability discrimination succeeds;

(Three) the claim under section 47B of suffering detriment as a result of making protected disclosures does not succeed as the Tribunal does not have jurisdiction to hear it due to time bar; and

(Four) the remedy to which the claimant is entitled shall be decided at a future hearing.

The above judgement was issued on 17 October 2019 without reasons and I indicated that the reasons would be provided in due course. The reasons are now given below.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondent. She also claimed that she had been unlawfully discriminated against on grounds of disability. The claimant also sought to claim that she had suffered a detriment on the ground of having made a protected disclosure and that her dismissal was automatically unfair since the sole or principal reason for her dismissal was that she had made protected disclosures. The case was subject to a degree of case management and following a preliminary hearing on 17 May 2019 the claimant was permitted to provide further and better particulars of her claims in an e-mail dated 18 April 2019. The respondent submitted a response in which they denied the claims. They did not accept that the claimant was disabled in terms of the Act. A final hearing was fixed and took place over three days in September 2019. At the hearing evidence was led on behalf of the respondent from Lynne Porter an Education Manager with the respondent who had made the decision to dismiss the claimant and Kirsty McElroy an HR Business Partner with the respondent who gave evidence in relation to having overseen the HR Business Partner who supported the respondent's managers during the various processes which pre-dated the claimant's dismissal including a grievance process which took place in early 2017. The claimant gave evidence on her own behalf and led evidence from Mrs P MacLean a former Pupil Support Assistant with the respondent who gave evidence regarding various incidents which took place at the school at which the claimant worked during the period from January 2016 to July 2017. For reasons of availability Mrs MacLean's evidence was interposed between that of the two respondent's witnesses. It should also be noted that the claimant gave her evidence with the aid of a "summary" document which

she had produced in advance of the hearing and provided to the respondent. The respondent had no objection to her evidence being given with the assistance of this document. The parties lodged a joint bundle of productions. On the basis of the evidence and the productions the Tribunal found the following essential matters to be proved or agreed.

Findings in fact

2. The claimant commenced employment with the respondent in or about 2004. She was employed as an Early Years Officer. As such she worked directly with pre-school age children usually in a nursery or early years department attached to a primary school. Prior to commencing work the claimant had completed a two year course at college in order to train herself for the position of Early Years Officer. Initially the claimant worked at a nursery school attached to a primary school at Auchtermuchty. The claimant worked at Auchtermuchty for the first four years of her employment. An incident took place where the claimant believed that a teacher had behaved inappropriately and pushed a child. The following day the child's mother had come to school complaining that the child had been up all night complaining that they did not wish to attend nursery. The claimant's position is that the teacher involved said nothing to the mother about the incident which had taken place the day before and that shortly after this she suggested to the claimant and others that they also should not mention it. The teacher told her that as long as everyone was singing from the same hymn sheet there should be no problems. The claimant was concerned about this and reported the matter to Ralph Donaldson an Education Manager with the respondent. Discussions took place and the claimant was asked if it would suit her to move schools and move to Newburgh which was the village where she lived. The claimant considered that a move to Newburgh would suit her and agreed to this. The claimant started working at Newburgh in or about 2008. The claimant had no difficulties whatsoever in her employment at Newburgh from then until various events which took place in the early part of 2017.

3. In or about January 2015 the claimant was diagnosed with cancer. She required an operation which took place in March of 2015. The operation was successful and the cancer has not recurred. During this period the

claimant was able to minimise the time taken off work and returned to work as soon as she was able to after her operation. The only other time she had off was for follow up appointments.

4. The claimant felt she had made a good recovery but in or about November 2015 she began to experience symptoms relating to her mental wellbeing. She felt weepy and overemotional. She consulted her GP who diagnosed her with depression. Initially she sought to avoid taking medication but in December 2015 she agreed to be prescribed anti-depressants. She advised the head teacher of the school and the nursery teacher in charge of the nursery section about this diagnosis.

5. Despite the anti-depressants the claimant still felt emotionally fragile and found herself becoming upset on occasions when there was no reason for this.

6. A number of changes also took place in her working environment over this period. Previously the respondent had a nursery teacher based at the school who was in charge of the nursery. This was in addition to the head teacher based at the adjoining primary school. At around this time the respondent decided to dispense with having a dedicated nursery teacher at the school and instead appointed someone as a Peripatetic Nursery Teacher who would be in charge of a number of early years' units attached to a number of primary schools. As a result of this, the Early Years Officers and Support Workers did not have anyone in charge of them on a day to day basis and there was no day to day supervision. In addition other members of staff had joined the claimant at the nursery. In October 2015 FF who was a sister-in-law of CW the other early years worker joined the team. FF advised the claimant that she was a close friend of CW. In June 2016 a new Support Assistant joined the team. This was CD. She was employed to look after a particular pupil, who had cerebral palsy, on a one to one basis. The claimant was concerned that no interview process took place. It was her understanding that CD was a friend of the head teacher and that the head teacher had simply appointed her to the position without any competitive process. She was also concerned that looking after a child with cerebral palsy required manual handling skills. She was concerned that CD had not been sent on any manual handling training

since she was aware from her own training that this was something which could be important.

7. At some point in 2015 the claimant became concerned about the fact that there was no heating in the room which the children were expected to use for changing at the unit. It had been decided that the children were to use a disused toilet. The claimant was concerned that this room was too cold for the children to change in. The claimant raised the matter on various occasions with the head teacher and with the nursery teacher but nothing was done. The claimant then reported the issue to the Care Inspectorate who contacted the respondent. The respondent arranged for an electric heater to be placed in the changing rooms within a day or so of the Care Inspectorate contacting them about the matter. Following this the head teacher of the primary school (SM) told the claimant that if her (SM's) line manager found out that it was the claimant who had reported the matter to the Care Commission then the claimant would be in deep trouble. The claimant felt that this incident affected her relationship with the head teacher which up to then had been reasonably good. From this time on the claimant reported a number of matters to the head teacher where she felt that practice was not as it should be. The claimant felt that the head teacher came to view her as a nuisance. The claimant mentioned these various issues at review meetings but noted that they were never written down.

8. During the course of the academic year 2016/2017 the claimant decided that she would wish to start working part time. She discussed the matter with FF who she understood was looking for a full time position. At that time FF was working part time. Discussions took place and it was agreed between the claimant and her head teacher that the claimant would return to work on a part time basis working 50 per cent hours after the end of the summer holidays in 2017. Although this had been agreed no formal steps had been taken to implement it before events overcame the matter.

9. The claimant came to believe that the head teacher saw her as a troublemaker. The claimant raised safety issues. She spoke up about having all four areas of the nursery open all day, even on a Friday when

there were only two staff. She raised this particular issue with Ann McGrath in March 2017.

10. Prior to the summer of 2016 the claimant had generally got on very well with her colleagues. There had been a good atmosphere in the nursery. Following the change in management and the fact that there was no longer a nursery teacher in charge, friction started to develop between the staff. The claimant and Ms MacLean's view was that there was a clique involving four staff led by CW who saw herself as being in charge. The other three started to take instructions from CW. The claimant, who was the same status as CW, did not consider this to be reasonable. She complained to the head teacher on numerous occasions about this. Nothing happened. As a result of this, relationships between the six people working in the nursery began to break down. The claimant was singled out and not involved in discussion or meetings.

11. A particular source of tension arose over the child CD was employed to look after. The claimant was aware from her knowledge that it is important that a child with that particular illness carries out any exercises they are prescribed on a regular daily basis. She was aware that the child's physiotherapist had prescribed certain exercises. The claimant's understanding was that if these exercises were not done on a regular basis then the child's development and future ability to cope with his illness could be compromised. The claimant asked the physiotherapist how often the child should be doing exercises. When told that the child should be doing these exercises daily the claimant mentioned that CW was not in fact doing these exercises daily. The claimant sought to escalate matters with the head teacher. This led to a further breakdown in relationships. The claimant considered that her fellow workers would behave in petty ways such as by removing articles she was planning to work with.

12. In or about March 2017 an incident took place involving the child looked after by CD. The claimant was working at one end of the nursery and noticed the child playing unattended in another part of the nursery. The claimant's understanding was that the child was supposed to be attended at all times by CD. The child fell over and hurt himself. There was some

mild bruising to his head. As soon as the child fell over and started crying CD rushed in to the room and dealt with him.

13. The incident happened in the morning. The child was due to be picked up at lunchtime. The child's mother did not attend to pick him up but had arranged for one of her friends to do this. Whilst the friend was picking up the child the claimant spoke to the mother's friend. The claimant asked her if she knew that the child had "had a bump" that day. The mother's friend said that she was not aware of this. The claimant then volunteered to the child's mother's friend that if she wished she could get the accident book simply to see what was recorded. The claimant went to get the accident book and showed it to the mother's friend. Both found that there was no entry in the accident book. The child then left with the mother's friend. The claimant considered that there had been a serious failure to follow the proper process and that the child's health and safety could have been compromised by the failure to record the incident as well as by the fact that CD had not been in attendance with the child at the time the child fell.

14. Later that afternoon the child's mother came to the nursery to pick up her other children. The claimant discussed the incident with her.

15. The claimant sought to raise the matter with the head teacher but the incident had occurred on the Thursday and the head teacher was unavailable on both the Thursday and Friday. On the Monday morning the claimant asked if she could speak to the head teacher. This was immediately after the Monday morning staff meeting. She asked if she could have a word about the incident that happened with (child's name). The head teacher was extremely short and abrupt with the claimant. She told her that the incident was done and finished and that it had been dealt with.

16. Subsequently, the head teacher called the claimant over at break time. The head teacher said that she was extremely angry with the claimant for "telephoning mum", the claimant indicated she had not telephoned the child's mother. A week or so after this the claimant decided to report matters to the regulatory authorities. She first of all telephoned the SSSC. She gave them details of the incident. They told her that she should phone

the Care Inspectorate. She telephoned the Care Inspectorate and reported the matter to them. There was subsequently an investigation involving the SSSC. The respondent's position was that they looked into the matter but decided that nothing occurred that would present the Council with risk and the SSSC were happy with matters. Mrs Price of the respondent was involved in the SSSC investigation.

17. Following this incident the claimant felt relations with her colleagues reached a new low. There were a number of incidents where she felt the four were ostracising her. She decided that she would raise a formal grievance. The claimant first of all contacted the respondent's HR department by telephone. She advised them of her concerns. They advised her that she required to lodge her grievance in writing. The claimant was sent a grievance form for completion. Whilst the claimant was in the course of completing this form she was advised that a grievance had been raised against her by the four members of staff with whom she was having a difficulty. The claimant then lodged her grievance.

18. The respondent advised the other four members of staff of the claimant's grievance. On the day that they did this all four members of staff called in sick leaving the claimant and one other member of staff to deal with all the children in the nursery on their own. The claimant considered this was a deliberate act showing collusion amongst the four employees.

19. A copy of the claimant's grievance was not lodged. A copy of the grievance outcome was not lodged.

20. The respondent appointed someone to investigate the grievance. This person would not make the decision on the grievance. The investigator would attend the grievance hearing and speak to their investigation report.

21. A copy of the investigation report in relation to the grievance was not lodged. The only document which was lodged in relation to the grievance was a letter dated 9 April 2018 from Shelagh McLean the respondent's Head of Education and Children's Services to the claimant dated 9 April 2018 which indicates that Ms McLean was responding to the claimant in relation to an e-mail she had sent requesting a review of her grievance and the decision of the service not to progress to stage 2. This was lodged

by the claimant (C3/1-C3/7, p55-61). This sets out Ms McLean's understanding of the history of the grievance (p58). This states

"……

You attended at a meeting with your Headteacher, where she advised that a grievance had been raised against you by a number of colleagues within the nursery at Newburgh PS. This grievance was raised individually, by all of the group, on 8th March 2017.

All parts were advised by letter, dated 17th March, that this grievance would be investigated by EA and that EA would be in touch directly. This letter was issued within 10 working days of receipt of the grievance.

The investigating officer held initial meetings with the complainants and yourself to hear the issues identified in the grievance against you. These meetings were organised as soon as possible i.e. initial investigatory meetings were held with the complainants on 22/23 March and again within 10 working days of receipt of the grievance.

You submitted a grievance form, dated 16th March 2017, against a number of your colleagues, including the Headteacher. Once your grievance form was received, and it was evident that the two grievances were intrinsically linked, additional investigatory meetings were held, with each individual, to explore the issues you had raised also, in order that both Grievances could be responded to through the one investigation.

The Easter holiday period meant that the further meetings took place as soon as possible following the break, with meetings taking place on 27th April 2017. Whilst I appreciate the fact that this was not within 10 days of receipt of your grievance I believe that the timescale for carrying out the investigatory meetings was entirely reasonable given the complexity of the issues being considered.

The investigation report was then completed by 10th May and forwarded to the nominated officer, Jackie Funnell (JF). This was within 10 working days of completing the investigatory interviews.

Jackie then made arrangements for the Grievance Hearing to take place on 31st May.

All parties were invited to meetings on 7th June to be advised of the outcome of the hearing, with this outcome being confirmed in writing in a letter dated 12th June. The meetings and the confirmation in writing took place within 10 working days of the Grievance Hearing.

Your letter confirmed that the outcome would be reviewed within 3 months of the date of the hearing and this date was set for 6th September, however my understanding is that you have not returned to work and therefore this review has not been possible, to date."

22. From this the Tribunal was satisfied that the respondent had investigated the grievance by interviewing the head teacher together with the other four individuals against whom the claimant had submitted a grievance. The only people who appeared to have been interviewed were therefore the targets of the grievance. There was one other person who was employed at the nursery and was neither the claimant nor one of the group of four who had complained about the claimant or who the claimant had complained about. This was Ms Pauline MacLean who was employed as a PSA at the Newburgh Nursery. Ms MacLean gave evidence to the Tribunal. The claimant considered that Ms MacLean was a key witness since she was the only person who was to any extent an independent third party. The claimant became aware that the investigator had not spoken to Ms MacLean and in advance of the grievance hearing to which she was invited to attend on 31 May the claimant obtained a written statement from Ms MacLean. This statement was handed over to JF at the grievance hearing. This statement was lodged (C4/1-C4/2, p63-64). It is as well to set it out in full.

"29th May, 2017

I am writing this statement on behalf of Diane Aitken regarding the grievance against her from EYO's and one PSA who she works with in Newburgh Nursery.

In the 1½ years I have worked in Newburgh Nursery with Diane I have never seen her do anything untoward, against colleague, child or parent. I know Diane to be a very caring kind person who is professional and passionate about her work and safety of the children at all times.

I have witnessed Diane being ignored, the other staff at the nursery not coming up for their lunch to the staff room when I ask them why not, they made up excuses at this time it was unknown to Diane a grievance was on its way. When they had a meeting at lunch on a Monday Diane didn't attend and she advised them not to do it over lunch they went ahead. They did not relate to Diane any changes or discussion they had talked about until Diane questioned them about what's happening they just said that is what we decided and it went ahead anyway, this is not teamwork. They are full of their own importance I feel this is due to no continuity of a Nursery Teacher on a weekly basis too many Chiefs and not treating everyone as an equal as I have found out in the past.

I have witnessed change, moving items around and out of Nursery with no team discussion. What they have accused Diane of sitting and writing etc they are all guilty of doing and find I am appalled at their complaints it's laughable. As for Catherine having worked with Diane for many years and when I started in Nursery laughs and jokes were flying it was a great place to work they were like two old girls having a banter, having invites to Catherine's house we all met for lunch on an in-service day etc. So when I heard Catherine had a grievance I was utterly shocked and disgusted that she said was terrified of Diane it is uncomprehendable, fabrication.

I feel this grievance only came to light due to CD being questioned and reported about her conduct with the child she worked with on a one to one basis, amongst other things she had took upon herself to do without consulting others. Diane reported CD due to health and safety issues which should be abided by at all times especially when you are working as a PSA like myself on a one to one child who has special support needs.

I have witnessed 2 work colleagues arranging in front of me about a night out for everyone in nursery except Diane and myself. There is definitely favouritism in nursery since the grievance came to light members of staff higher up the chain coming in checking Rachel's ok any problems let me know etc, not once did I see them ask Diane if she was ok, for them to be professional teachers they have treated Diane badly in all aspects.

This grievance should never have got to the level it has they are all adults and should have been dealt with by the Head Teacher in the proper manner.

For these 4 colleagues to paint the picture of Diane as a poisoness terrifying person that children don't want to be around is disgusting beyond words. This pure fabrication I feel they have collaborated together on this due to CD being reported on, they all complained at the same time a bit strange in my book.

These four think they are victims no they have victimized Diane 4 against 1, how Diane came into work knowing what they all had done to her I was surprised. They have ganged up on Diane due to her passion for health and safety and loving her job working with Children. She cares 100% and will fight and support any needs or care these children need on a support level whatever the support may be.

Paperwork and faffing around looking important is not engaging with children they need you.

I have not lied in my statement I believe everything I have stated to be truthful. I don't fabricate and will not stand by and see victimization and injustice being done."

23. Despite the fact that this letter was handed to JF at the grievance hearing JF did not contact Ms MacLean after the hearing to investigate the matter further. At no point did the respondent contact Ms MacLean to make any further enquiries regarding her statement.

24. The respondent's grievance procedure was not lodged.

25. The letter from Ms McLean referred to above (C3) states on page 57

"Outcomes can include:

- Taking no action.
- Taking action to try and cease the unacceptable behaviour.
- Obtaining an apology from the individual/s subject to the grievance being raised.
- Training and development for certain employees.
- Counselling for one or both parties.
- Preparing a plan of action for change, with review periods.

- Referring the matter for consideration under the disciplinary procedure.
- Moving an employee or employees to another workplace, post or Service."

Ms Mclean's letter goes on to state

> "The outcome, as determined by the nominated officer, was a decision to move you to another workplace, post or Service. While mediation, and preparing an action plan for change, may have been an option if all parties agreed, a number of parties were not in a position to progress with this option and therefore the outcome of mediation could indeed have been the same as the direct decision taken by the nominated officer.
>
> It is clear, from the paperwork, that the evidence presented supported the fact that the behaviour you asserted in your grievance was not corroborated. Therefore, to support you and our other employees involved in this case the most reasonable solution, which was operationally viable, was to move you to another post, to allow you to work with another team."

26. The claimant was extremely upset when told that she would have to move. She returned to work one day. All of the other four members of staff were huddled in a room with the nursery teacher. The claimant felt intimidated. The claimant was extremely distressed and spoke to her GP who advised that she needed time away from work in order to allow her health to settle. The claimant then went off sick.

27. The claimant required to up her dose of anti-depressants from 50mg of Sertraline to 150mg. She found that she had serious trouble sleeping. She found it difficult to concentrate. She had difficulty trusting people. She stopped going out of her house. She had difficulty in speaking to her family about the issues. She found it hard to say that she was being compulsorily moved. She required to attend her GP and felt her GP was supportive. She was prescribed Diazepam to get through difficult meetings. She found herself feeling suicidal and discussed this with her GP. Generally she ceased to interact or take any part in social activities.

28. The claimant decided to put in a grievance about AC and JW. She put in a further grievance against them. She was then called in to another meeting with JF on 22 June. The claimant attended this meeting with her union representative. She was told that if she proceeded with the grievance then she would face disciplinary action. The claimant felt victimised by this. The claimant was told that any issues she had with CW and AC could be dealt with at her stage 2 appeal.

29. The claimant lodged a stage 2 appeal against the outcome of the grievance. This was acknowledged to the claimant in a letter dated 15 August 2017 (C1). The letter stated

> "I can confirm that I have reviewed your grievance and your concerns detailed on the Stage 1 form.
> However, as you have already raised a grievance against Catherine, along with four colleagues, we are going to incorporate this new grievance with your request to process to stage 2. We have passed this grievance onto Jacqueline Price, head of Service to review along with your stage 2 form. …."

30. In the meantime however, on 14 August 2017 Ms Price had written to the claimant in relation to her stage 2. The letter was lodged (C2, p53). This stated

> "Following the outcome of the Stage 1 Grievance Hearing, you have requested that your grievance be considered at the next stage. This has been forwarded to me by Derek Brown, to review in line with the Grievance Procedure.
> As you will be aware, for your grievance to progress to stage 2 at least one of the following criteria must be met and be relevant:
>
> - Information provided by the employee was not taken into consideration or
> - The findings of the hearing were not consistent or supported by the information provided.
>
> The purpose of the review is to assess whether or not the grievance can be considered competent or not.

> On your form you have indicated that you feel the outcome of stage 1 was based on intentionally misleading statements provided by those interviewed. You have suggested that you have evidence that the statements provided were 'lies'.
>
> You haven't supplied any details to justify your view with the grievance. In order for me to be able consider the competency you need to provide more details. For example, what statements do you believe were lies and what evidence can you provide to substantiate your opinion, including where necessary times, dates, comments and actions.
>
> In addition to this, I have been given a grievance that you have raised against CW and I have been asked to incorporate this with your stage 2 request as your concerns are similar in nature to those raised during stage 1. Again, I would kindly ask you to provide more details about these concerns and provide evidence to substantiate your opinion. …."

The claimant was advised to provide this information by 28 August. The claimant duly did so. Neither the claimant's original letter of appeal nor the additional documents which she provided were lodged with the Tribunal. As noted above a letter was lodged from Ms Shelagh McLean the respondent's Head of Education and Children's Services setting out the respondent's position which was sent to the claimant on 9 April 2018. In relation to stage 2 stating

> "The Stage Two Form should be submitted to a more senior manager who will then pass it to another manager at the same or more senior level for review (this manager will normally be out with the Section/Service involved in the grievance). A decision will be made by the more senior manager within 5 working days. If this manager decides that Stage Two should proceed, the Form will be handed back to the manager hearing Stage Two.
>
> Your stage two form is dated 14th June and was forwarded to Derek Brown, the appropriate more senior manager.
>
> You were provided with an initial response on 27th June, indicating that a decision would be provided following the summer break and this decision was subsequently confirmed to you by letter, dated

> 25 August. The form had been reviewed by Jacqueline Price whose conclusion was that the grievance should not move forward to a Stage Two hearing as neither of the required criteria were met. You communicated with Jacqueline Price, by email, dated 29th August, asking for further information and this email was responded to on 31 August.
>
> Again, I am satisfied, having reviewed all of the information, that the principles of the grievance procedure have been met."

31. The respondent did not ever return to work. During her absence the claimant was provided with a list of potential alternative schools where she could work. The final list she was offered was lodged by the claimant (AC4 - claimant's additional list no. 4). This list includes locations which were offered at various times over the course of the claimant's absence. There were positions available at Crail, Kennoway, Kirkcaldy West, Lawhead, Lynburn, Markinch, McLean, Mountfleurie, Pitreavie and Torryburn. The closest of these involved the claimant in a 28-mile journey there and back. The furthest away involved a journey of around 70 miles. The claimant does not drive. None of these locations were served by public transport which the claimant could use to attend work.

32. Although the claimant had been working full time hours at Newburgh and although nothing had been done formally in relation to her request that she start working part time hours after the holidays, her sick pay was immediately cut so that it would be based on her working part time hours. The claimant challenged this decision. Her pay was eventually restored before the claimant went on to nil pay in or about February.

33. The respondent has an Attendance Management Policy which was lodged (p89-102).

34. The claimant was required to attend various meetings. She broke down on each occasion she required to attend. The claimant began to develop an anxiety for whenever the postman came. She felt that she was broken. Prior to this period of ill health the claimant had almost 100% attendance. She was crying on a daily basis and extremely weepy. She suffered from low mood. The claimant did not have any hobbies prior to becoming ill but did socialise. She stopped socialising entirely after she went on sickness

absence. She found herself unable to watch television because she couldn't focus on the programmes. The claimant wished to be alone all the time. The claimant felt aggrieved that she had not been shown the statements of the people who had put in a grievance against her. There had been some reference at the grievance to a complaint from a third party. The claimant was unaware as to who this third party was. She tried to obtain this information from the Council but the Council refused to give it to her. This caused the claimant a great deal of anxiety

35. The claimant had an absence management meeting with Jane Mason in or about October 2017. She raised again the fact that the grievance process has not been dealt with properly. Ms Mason suggested a meeting with Derek Brown another Head of Service. The claimant was told Ms Mason was spending some time trying to set up this meeting with Mr Brown. The claimant was then advised that the meeting would not happen.

36. The claimant was called for an attendance review meeting on 23 November 2017. A note of this meeting was produced (p103). The claimant's position which the Tribunal accepted was that these minutes did not accurately show what was discussed at this meeting. The claimant's position is that many more things were discussed than are set out in the minutes. In any event the minutes confirm that at that stage the claimant remained on the same medication, had been reviewed, and that the GP felt she was doing well. She was looking for a phased return to work, that an OH referral could be progressed and if occupational health recommended CBT (cognitive behavioural therapy) then this could be progressed. It is noted that the claimant felt that she had not been supported by this service during her absence. The minute then goes on to state

"
- Advised post at Newburgh is unavailable as outcome from grievance was that Diane would be moved from Newburgh.
- Wants to RTW on a full time basis
- Was given the choice of: Pitteuchar East or Leuchars as these were the only full time positions available – Rimbleton was also offered but 20 hours

- If no RTW indicated by Diane or via OH, service will progress with capability"

Pitteuchar is some 15 miles from Newburgh and Leuchars is 18 miles from Newburgh. There is no regular bus service which the claimant could use to either location.

37. Despite the fact that the letter which was sent to the claimant had indicated that the decision to move her from Newburgh would be reviewed in September there was no attempt at this meeting to review the decision or indeed any suggestion that the decision could be reviewed. By this stage, two of the four individuals who had raised grievances against the claimant at Newburgh had left.

38. In 2017 the respondent operated an e-matching service for employees doing jobs such as the claimant's. This was an electronic system, whereby existing employees could enter their details on a database indicating if they were looking for other jobs and what criteria would suit them. The idea was that the respondent continually had vacancies appearing in jobs in areas like Early Years. It was felt that this would be a more cost effective way of matching existing employees to vacancies rather than requiring to go through an internal advertising process and each employee having to resubmit their details each time. The e-matching process was not a particular success and was discontinued after 2017. Whilst the process was ongoing however the remaining two members of staff at Newburgh had completed e-matching indicating that they would be happy to move to jobs at other schools. Accordingly, by November 2017 the situation was that the respondent had made a decision in response to the claimant's grievance that the claimant would not be permitted to return to Newburgh. Of the four individuals who had submitted a grievance about the claimant, two had left and two had indicated that they would be happy to be moved to other roles by completing the e-matching process.

39. The claimant attended a further occupational health consultation on 21 December 2017. The report was lodged (p105-106). At 'current issues' it stated

"Mrs. Aitken is currently absent from work in relation to perceived work stress.

She was diagnosed with skin cancer in 2015 and following surgery has been well with 3 monthly monitoring by her Specialist. In relation to her diagnosis Mrs. Aitken's mental health was affected resulting in increased levels of anxiety and depression. She has been receiving medication since this time and again managing well.

Mrs. Aitken informs me of an incident at work resulting in grievances and a conclusion that she would be moved schools. Mrs. Aitken strongly disagrees with this decision and is keen to resolve the situation at work enabling her to return.

She has, as a result continued to experience increased levels of anxiety, low mood, sleep disturbance, emotional upset, concentration difficulties and fatigue for which she has received some on line psychological support.

We have discussed additional therapy and a referral to the works counselling is now advised as well as additional support from her GP which she plans to pursue.

We did discuss the decision of moving to another school however Mrs. Aitken feels that this is not a decision she wants to consider.

OH Opinion.

Based on the history and information provided to me during the consultation and the information you provided in the referral, I can now give my opinion in response to the questions asked in the referral.

What is the employees current fitness for work? Based on my assessment of this lady today and with the medical evidence available to me it is my opinion that she is currently unfit for work in relation to heightened levels of anxiety and depression exacerbated by work issues.

Likely date of return to work? Once a resolve/compromise can be found to Mrs. Aitken's perceived work stress then a return to work with support is likely.

What effect will this condition have on the employee's ability to carry out her duties? Mrs. Aitken is currently physically fit for work. With a resolve to her perceived work stress and additional psychological

support it is the medical expectation that she will be fit to undertake her current role.

Are there any modifications/adjustments which would alleviate the condition or aid rehabilitation? In view of the nature of her symptoms I would suggest that management consider a 4 week phased return plan ideally working 50% of her working hours for 2 weeks followed by 75% of her hours in weeks 3 and 4 returning to full hours by week 5. Regular communication with her manager is also advised for the first several weeks in order to monitor her progress in rebuilding her confidence and stamina whilst at work.

Are there any particular duties the employee cannot do? Mrs. Aitken is expected to be fit for full duties on her return to work.

Is the condition likely to re-occur in the future? Although Mrs. Aitken does have an underlying condition of depression and anxiety treated with medication since her cancer diagnosis she has in the past managed this very well. With a resolve to her perceived work stress and additional psychological support she is again expected to regain good health.

Equality Act 2010

A Disability Checklist has been completed today which indicates it is likely this individual would be considered to have a disability in relation to her mental health for the purposes of UK disability discrimination legislation. This is however a legal decision and best practice would require a discussion of reasonable adjustments prior to making deployment or employment decisions.

Please note this individual is considered to have an 'automatic' disability for the purposes of UK disability discrimination legislation in relation to her cancer diagnosis.

Management Advice

In view of the nature of her symptoms I would suggest that management consider a 4 week phased return plan ideally working 50% of her working hours for 2 weeks followed by 75% of her hours in weeks 3 and 4 returning to full hours by week 5. Regular communication with her manager is also advised for the first several weeks in order to monitor her progress in rebuilding her confidence

> and stamina whilst at work. With regards to transferring to another work area, this is for management to discuss further. Mrs. Aitken will be medically fit to return to her role. I would also suggest that a referral is made for counselling as soon as possible.
>
> I am unable to identify any additional support or adjustments at this time which would assist in the management of this condition. ….."

No further occupational health review was scheduled.

40. At some point around this time it was decided that the claimant would be managed by Graham Clark rather than Ms Mason. Mr Clark met with the claimant on 24 January. An attendance management record of this meeting was lodged (p107). Once again the Tribunal accepted the claimant's position that considerably more was discussed at this meeting than is minuted. In any event it was noted that the respondent would progress a referral to counselling. This never in fact happened. The action agreed was that the claimant was to renew her options for work based return and inform the respondent of her decision by 26 January.

41. A further meeting took place on 23 February 2018. A minute of this meeting was lodged (p109-110). Once again the Tribunal accepted the claimant's position that much more was discussed at this meeting than is mentioned there. The claimant was told that a letter was going to her providing various options. The options which were provided to the claimant were those set out in the list provided (AC4) which has already been referred to. It was suggested that the claimant would be referred for another occupational health appointment. It is noted that CBT sessions were ongoing.

42. The claimant attended a further occupational health consultation on 18 April 2018. The report from this was lodged (p111-112). Under current issues it states

> "As you are aware from previous occupational health correspondence Mrs. Aitken remains absent from work in relation to ongoing perceived work stress.
>
> Mrs. Aitken continues with medication and cognitive behaviour therapy from a Psychologist which is helping however still remains

> very emotional at times with high levels of anxiety when thinking about her work situation. Mrs. Aitken states that her appeal is not concluded adding to her stress.
> I understand that Mrs. Aitken has been offered different work locations however has not been able to accept these.
> She is now of the opinion that as a result of previous work issues, she will be unfit to return to work within a nursery environment without further exacerbating her health and now wishes to be considered for redeployment."

Under 'OH opinion' it is noted the claimant remained unfit for work. The report goes on to state

> "Mrs. Aitken is now of the opinion that she cannot return to nursery work due to past work events resulting in heightened levels of stress and anxiety."

The report went on to state

> "It is my opinion that it is now unlikely that Mrs. Aitken will be fit to return to her original role working with children in a nursery environment."

The report goes on to confirm as before that it is likely that the claimant would be considered to be disabled under UK legislation. Under 'Management Advice' it states

> "In view of the nature of her symptoms I would suggest that management now consider the option of medical redeployment which we have discussed in detail. A meeting with management is advised in order to discuss this further. I am unable to identify any additional support or adjustments at this time which would assist in the management of this condition other than regular communication to continue with her manger over the next few months enabling her symptoms to fully settle."

43. As noted in the occupational health report the claimant's view by this time was that she was bashing her head against a brick wall. Following pressure from her Mrs Shelagh McLean the Head of Education and

Children's Services had produced a review of the grievance and written to the claimant the letter dated 9 April 2018 which has been referred to previously in this judgment. The claimant felt that there was no real possibility of the respondent changing their treatment of her. She was concerned that in her view she had been doing her job and pointing out poor practice. She considered that as a professional Early Years Officer she would be obliged to continue to do this if she worked in any other post in early years. She believed that if she did this she would continue to suffer poor treatment. She felt that in those circumstances she would rather be redeployed to a different post rather than return to a post as Early Years Officer where she felt she would have to compromise her principles.

44. The claimant attended an absence review meeting on 4 May 2018. A minute of this meeting was lodged (p113). Once again the Tribunal accepted the claimant's position that more was discussed at this meeting than is recorded in the minute. In any event the outcome of this meeting was that the claimant commenced a 12 week period during which she entered the claimant's Medical Redeployment Policy. The claimant e-mailed the respondent on 8 May 2018 to formally confirm that she would comply with redeployment. The medical redeployment policy was not lodged. The procedure involves employees going online and seeking information regarding any vacancies which might be suitable for them. Precise details of how the policy operates in practice are unclear. The Tribunal accepted the claimant's evidence that she was not offered any posts during this redeployment period nor was she advised of any options which might be suitable for her. In any event, by the end of the period the claimant had changed her position and was willing to return to a job as an Early Years Officer provided she could return to Newburgh. This remained her position up to and after her dismissal.

45. By this stage the claimant felt absolutely devastated. She considered that Fife Council had dug their heels in about letting her back. She kept hoping that someone within the Council would recognise that what they were doing was wrong. She found that her mental health continued to be seriously affected. She continued to be weepy. She continued to avoid

social occasions. She would re-live the whole situation every night when she went to bed.

46. The claimant avoided talking about matters with her family. The claimant had a part time job with Tesco as a Checkout Assistant working weekends. She had this job whilst she was working at Newburgh and had worked there many years. She continued to attend at weekends. She found this therapeutic as she told no-one there about her situation and because the store was in a different location (Perth) she did not have to talk about matters with anyone. The claimant considered asking Tesco if they could provide her with more hours but was unhappy about doing this. She believed that if she asked for more hours then Tesco management would ask her why she was no longer continuing as an Early Years Officer. She felt that it would be very difficult to explain this and that doing so would have a negative effect on her mental health.

47. Following the end of the redeployment process without the claimant having been redeployed the respondent asked for a further occupational health report. The claimant attended an appointment on 11 September 2018 and following this the occupational health provider produced a report. This was lodged (p117-118). The report stated

> "Current issues
>
> This consultation followed on your concerns regarding Ms Diane Aitken's fitness for work.
>
> From my discussion with Ms Diane Aitken, I understand that she has been on a sick leave since 14/08/2017 due to stress reaction to protracted complex work related issues. Her stress reaction has been manifested as emotional frailty, excessive worry, anxiety, low confidence and poor sleep pattern.
>
> She has been supported by her GP and family members. It appears that, to date, the work related issues have not been resolved and continue to have adverse impact on Ms Aitken's emotional and psychological wellbeing. I noted from your referral that she has been put on a redeployment register and, to date, no alternative employment has been identified.
>
> OH opinion

> Based on my discussion and assessment of Ms Diane Aitken, it was evident today that she has been adversely affected by the on going work related issues.
>
> In my opinion, the most effective measure that could facilitate Ms Aitken's return to work would be that she meets with the management in an attempt to address in detail and resolve the work related issues to mutual satisfaction. This would mitigate her stress reaction and result in her returning to her duties. Should these issues remain unresolved, I am concerned that it may adversely affect Ms Aitken's mental and physical health.
>
> In my opinion, the above issues are out with occupational health scope."

48. A further absence review meeting took place on 21 September 2018. A minute of this meeting was lodged (p119-120). Once again the Tribunal accepted the claimant's position that more was said at this meeting than is included in the minutes. It is probably as well however to set out the minute in full.

> "Clark welcomed everyone and apologised for not having the meeting any earlier and enquired how Dianne was keeping. Dianne said she was just the same.
>
> Clark asked her what her opinion of the Occupational Health report was. Dianne said she agreed with it, but felt that the real reason for her health problem had not been addressed through her grievances complaint. Clark pointed out that this meeting was about Dianne's attendance and the grievance process has been concluded.
>
> Lee-Anne also added that Shelagh McLean, Head of Service, had conducted a thorough review of the grievance documentation and had responded directly to Dianne about this. Dianne stated that she feels that nobody is listening to her and Fife Council just want to ignore this matter.
>
> It was noted that the time for redeployment was up in August 2018, and no alternative employment had been found. Dianne indicated that nothing was suitable and asked what happens next.

It was explained that the next step would be a Capability Hearing and Dianne asked what would be the outcome of that. Lee-Anne explained that there would be four possible outcomes:

1. Further time – Dianne asked what that would entail and Lee-Anne explained that the Service could allow a further period of time, if for example if recovery is underway and an employee is close to being fit to return to work
2. Redeployment
3. Referral to Occupational Health – if we need further medical information
4. Dismissal from your post due to ill health

Dianne asked if she would be able to bring Morghan [her niece] to the Capability hearing. Lee-Anne explained it was usually either a union representative or a colleague but she should ask the Chair if she could bring Morghan for support instead. She asked how long it would take until the meeting and was told she would get at least five working day notice before the meeting."

49. In the event a capability hearing took place on 30 October 2018. The capability hearing was conducted by Lynn Porter an Education Manager with the respondent. She had not been involved in the claimant's case before. She is an experienced manager and does around three capability hearings per annum. She was familiar with the respondent's absence management processes. The claimant attended and was accompanied by her niece. Lee-Anne French an HR Advisor with the respondent also attended as did Clark Graham an Early Learning Officer who was the person who had been dealing with the claimant's absence management. Lorraine Rennie of the respondent took minutes. These minutes were lodged (p123-130). In advance of the hearing Mr Graham had produced a management report which was also lodged (p121-122). The report sets out the history of the matter and refers to the occupational health report.

50. Mr Graham presented his report at the outset of the meeting. The minutes then report that Ms Aitken asked a number of questions. This states

"DA referred to Appendix 8 of the report the OH report from 11 September which advised that 'DA should meet with the

management in an attempt to address in detail the work related issues to mutual satisfaction, should these issues remain unresolved there would be concern that it may adversely affect DA's mental and physical health'. DA confirmed this meeting had never happened."

Ms Porter advised the claimant that it was her understanding that the grievance procedure had been exhausted and a full review had been completed by a Head of Service.

"DA said that she believes the grievance was not carried out properly and she could not move on until whoever needs to know about the grievance issues knows.
CG clarified that it was outwith his scope to review the detail of the grievance, his role was to manage DA's attendance.
DA replied that CG should have transferred her to someone who could help.
LP stated that we can't go back and review the outcome of a grievance. LP advised that formal processes and procedures were in place and the service cannot look at the grievance and review again. Process has to be followed.
LP asked DA if she was interviewed as part of the process.
DA confirmed she had but wished to address certain points.
DA stated that at a meeting with Jane Mason where she expressed that she felt she had been bullied LAF had told her you've not been bullied, and DA stated she was surprised to see LAF in attendance at the hearing. LAF stated that she had not said that to DA.
LP advised that Shelagh McLean, Head of Service, had conducted a review of the entire grievance process. DA stated yes however nobody had spoken to her about this and said how can you review a process without speaking to the people involved. DA stated that she was not given the right of appeal following the outcome of her grievance. LAF confirmed that she did have the right of appeal and DA did submit a stage 2 grievance. However in line with procedure this was reviewed by a Head of Service and did not meet the criteria to proceed to a stage 2 grievance.
LP asked if there were any other questions for CG. DA stated no."

51. The claimant then presented her case which she did using presentation notes. These notes are replicated in Appendix 1 to the minute (p127-130). Following the claimant making her presentation Lee-Anne French had asked her if she had any questions and stated she had not. Ms Porter then asked the claimant if she had anything to add and the claimant spoke again referring to the fact she felt she had been bullied. Ms Porter then adjourned the hearing to consider the outcome. During the adjournment she consulted with Lee-Anne French. The claimant's position was that if she were allowed to resume her role at Newburgh Primary School then she would be able to return to work. To this end the claimant wanted to have the meeting with senior management suggested by the respondent's occupational health advisers. The claimant's position was that if she was able to speak to someone who could understand where she was coming from and the source of the upset then she would be able to return to work.

52. Ms Porter's understanding of the position was that the decision not to allow the claimant back to Newburgh had been made as a result of the grievance process. It had been made by management which was senior to her. At the Tribunal hearing she indicated she was unsure as to precisely who had made the decision but presumed it was probably JF. Her understanding was that management had decided that there was no possibility of this decision being changed. Ms Porter felt that despite what the claimant was saying about the importance of having a meeting with senior management that despite the fact that this had been suggested by the respondent's own occupational health providers this was not something which ought to be allowed. Her view was that the claimant clearly saw this meeting as a path to being allowed to go back to Newburgh. Ms Porter felt that the claimant understood that the purpose of the meeting with management would be to review the decision taken after the grievance that she not be permitted to go back to Newburgh. Ms Porter considered that given that there was no possibility of this outcome then it would simply cause the claimant more upset to arrange a meeting where at the end of the day the outcome which the claimant was seeking was not a possibility.

53. Ms Porter therefore decided to make her decision based on her understanding that if the claimant was not permitted to return to Newburgh

then there appeared to be no possibility of her returning to work within a reasonable timespan. Ms Porter therefore decided that the appropriate way to deal with the matter was to dismiss the claimant.

54. Before making this decision Ms Porter did not consult with senior management. She did not explore whether or not there would be any possibility of reviewing the grievance outcome. She did not consider that the letter advising the claimant of the grievance outcome had specifically stated that this outcome would be reviewed. After the adjournment the claimant was advised that she was being dismissed. It stated

> "LP had explained the four possible outcomes of today's capability hearing but DA had indicated today that she would only consider returning to Newburgh Primary School or receiving a settlement package, and neither of these were within LP's power to grant. It was also clear that further time would not result in a return to work or a further referral to OH would not provide any new information and as redeployment had already been fully explored this had not resulted in an alternative post being found. The service could no longer sustain the length of absence therefore the decision was to dismiss DA on the grounds of ill-health with effect from today's meeting of 30 October 2018."

55. Ms Porter wrote to the claimant in a letter dated 2 November 2018 confirming the decision (p131). The respondent has a system where employees who are dismissed have a right of appeal to the elected members. The claimant duly appealed. The appeal was considered by the elected members. It is not the respondent's policy to minute these meetings or for any notes to be taken. The outcome of the appeal to the elected members was that the claimant's dismissal was confirmed.

56. Following her dismissal the claimant has not started alternative employment. She has applied and on two occasions was offered interviews. On each occasion she found the idea of attending for interview and potentially having to explain to a new employer what had happened to her at Fife Council to be more than she could deal with. On one occasion she got to the car park but was unable to go into the building where the interview was to be held. The first of these jobs was with a

company called Time to Explore which is in the private care sector. The second interview was as a Customer Adviser with SSE. She was unable to attend either interview because of her health.

57. The claimant continues to work at her weekend job at Tesco where she has worked for 24 years.

58. In May 2018 the claimant started working as a volunteer at CAB. She felt able to do this since she did not have to attend any interview or go through any process prior to starting. She felt that if there had been any such process which involved her going over what happened at Fife Council then she would not have been in a position to do this. It was agreed at the hearing that if the claimant were successful the issue of remedy would be considered at a later remedy hearing.

Matters arising from the evidence

59. The major difficulty in this case was that much of the evidence which the Tribunal would have found of assistance in determining matters was not actually lodged. The Tribunal did not have copies of the claimant's grievances nor the grievance outcome. The Tribunal did not have copies of the respondent's grievance procedures. The Tribunal did not hear any first hand evidence from anyone from the respondent who was involved in the grievance process or the management of the claimant up until Ms Porter who essentially met her for the first time at the meeting where she decided to dismiss her. The respondent's other witness Ms McElroy had practically no first hand evidence to give at all as to what had happened in this case. She was the manager to whom Lee-Anne French the HR Adviser who had supported management at various meetings reported. Ms McElroy could give evidence relating to the respondent's procedures and what she understood to have happened given her recollection of conversations with Ms French. Whilst I accepted that both witnesses were trying to be truthful in their evidence there were substantial gaps. There were many areas where they indicated they simply did not know the answer to questions which had been asked. Where they did give answers it was sometimes unclear as to what these answers were based upon and the Tribunal in general preferred the evidence of the claimant on these points.

60. The shortcomings in the evidence were particularly noticeable during the evidence of Ms Porter which occurred on the first day of the hearing. Ms Porter's evidence was quite clear that she herself had worked on the basis that senior management of the respondent had decided that the claimant was not going back to Newburgh and that was that as far as she was concerned. She made it clear that she herself had not carried out any review whether or not it would be possible to send the claimant back to Newburgh. Her evidence was that, as stated in her findings in fact, her view was that there was no possibility of the claimant going back to Newburgh because senior management had decided that and that in her view there was no point in arranging a meeting with senior management as suggested by HR as this would simply be exposing the claimant to disappointment. It was clear at least to the Tribunal that this caused the respondent some difficulty given that part of their case was that as stated in their ET3

> "… a capability hearing was held. At that meeting it was clear that the claimant was still not prepared to accept the outcome of her grievances and that she sought to challenge that outcome. She confirmed that the only outcome which she would find acceptable was to be returned to her role as an Early Years Officer at Newburgh or to be offered a settlement package. The Respondents considered the position carefully. They considered that it was neither appropriate nor safe to accede to the Claimant's request that she be returned to Newburgh."

It was absolutely clear at the end of Ms Porter's evidence that if anyone at the respondents had "considered the position carefully" or made a decision based on appropriateness or safety it was certainly not Ms Porter. The Employment Judge asked the respondent's solicitor if he was intending to lead another witness given Ms Porter's testimony. He indicated that he was considering the matter and would let the Tribunal know when the Tribunal was next due to sit which was the following Monday. In the event the respondent chose not to call another witness.

61. Ms McElroy was able to give some limited evidence in relation to what she understood of the grievance process and in particular advised that where

Ms McLean in her letter set out what she understood the process to be that she was accurately quoting from the respondent's processes. The Tribunal were prepared to accept on this basis that the respondent's processes were indeed as set out by Ms McLean albeit that there may be other parts of the process which were not quoted by Ms McLean of which the Tribunal is completely unaware. Ms McElroy also gave evidence to the effect that she understood that the SSSC had been in contact with the respondent in relation to the incident reported by the claimant and that the respondent had spent some considerable time with the SSSC but that they had finally indicated that they were satisfied with the position and took no further action. Ms McElroy also indicated that it was her understanding that the decision to redeploy the claimant was taken by Ms JF. She was able to give general information relating to the respondent's redeployment process and confirmed that the respondent's grievance process does indeed require a grievance appeal to pass a sift by senior management before it is considered further. Ms McElroy gave evidence that she understood that the statement by Mrs P MacLean the claimant's colleague lodged at page 63 had been before Ms JF at the grievance meeting with the claimant. She was frank in giving evidence to the effect that had she been faced with such a statement then she would have expected some further investigation to take place. She could not give any explanation as to why Ms JF had not either instructed the investigator to speak to Pauline MacLean or sought to obtain further information herself. Ms McElroy volunteered the opinion that if she had been dealing with the grievance she would certainly have made further enquiries based on Pauline MacLean's statement.

62. The Tribunal found Pauline MacLean to be a reliable and credible witness. It was clear to us that she felt troubled by the way that the claimant had been dealt with by the respondent. Despite this she gave her evidence in a measured way and was careful not to give evidence which was outwith her direct knowledge. The Tribunal also found the claimant to be a credible witness. She is not a trained lawyer and given that she was representing herself some of her evidence was not delivered in a particularly coherent or logical sequence. At the end of the day however the Tribunal were satisfied that her evidence was both credible and

reliable. We accepted her evidence regarding the effects of her illness on her ability to carry out day to day activities and her evidence in relation to the medication prescribed to her. We accepted her factual evidence although at times we felt that her take on things was somewhat emotional and she was seeking to impute a sinister purpose to events which may well have been unintended or accidental. The claimant raised issues relating to the fact that it took the respondent some time to sort out her sick pay and also the fact that the respondent appeared to have advertised her job in June 2017. The Tribunal did not feel it appropriate to make detailed findings regarding these matters. We should also record that the evidence given in relation to what had happened at Auchtermuchty was not raised by the claimant as part of her claim but was elicited by the respondent in cross examination.

Issues

63. The claimant claimed ordinary unfair dismissal in terms of section 98. It was also her position that she had been automatically unfairly dismissed in terms of section 103A of the Employment Rights Act 1996. It was her position that the sole or principal reason for her dismissal was that she had made protected disclosures. The respondent's position was that the reason for the claimant's dismissal was capability however they had an Esto position which was that given the breakdown in the relationship between the claimant and her colleagues it was not possible for the respondent to return the claimant to her job at Newburgh and such a circumstance would amount to some other substantial reason under section 98(1)(b). The Tribunal would require to determine which of the competing reasons was correct and in the event that we did not find the dismissal to be automatically unfair we would require to determine whether the dismissal was fair in terms of section 98(4) of the Employment Rights Act 1996. The claimant claimed disability discrimination. The respondent did not accept disability and the Tribunal would require to establish whether or not the claimant was disabled and in the event that we did (which we did) whether or not she had suffered unlawful discrimination. The claimant's claim as set out in her particulars did not refer to particular sections of the Equality Act however we understood the claimant to be making claims in respect of section 15 (discrimination arising from

disability) and section 20/21 of the Act (failure to make reasonable adjustments).

64. We also understood the claimant to be making a claim of detriment for making public interest disclosures in terms of section 47B of the Act. We understood this related to the respondent's decision in 2017. It was the respondent's position that the claimant had not made protected disclosures nor had she suffered a detriment as a result thereof. In any event, their position was that even if the claimant had suffered a detriment in 2017 any claim ought to have been raised at that time and given that it was not any such claim was now time barred. On the issue of time bar the claimant did not seek to argue that it had not been reasonably practicable for her to raise her complaint within the statutory period of three months following the date of the act complaint of. During the course of the Tribunal the parties agreed that the present hearing would deal solely with the issue of liability. Any calculation of the claimant's losses will involve a calculation relating to loss of pension and generally speaking it is of assistance to Tribunals to obtain specialist input before making such a calculation. It was therefore agreed that in the event that the claimant was successful there would be a separate remedies hearing.

Discussion and decision

65. Both parties made full submissions. The claimant's was necessarily less focused than that of the respondent's since the claimant does not have legal training. Rather than set out the submissions at length they have been referred to where appropriate in the discussion below.

Discussion and decision

66. Given that the claim involved the assertion that the claimant had made protected disclosures and the assertion that the claimant was disabled, the Tribunal considered it appropriate to set out our decision in relation to these matters in advance of consideration of the individual claims.

Did the claimant make protected disclosures?

67. Section 43B of the Employment Rights Act 1996 states

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

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

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

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

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

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

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

68. Section 43C-43J goes on to list various legal persons to whom, if a qualifying disclosure is made then the qualifying disclosure qualifies for protection. The section of particular relevance in this case is section 43F which states

"(1) A qualifying disclosure is made in accordance with this section if the worker –

(a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes –

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true."

69. The Public Interest Disclosure (Prescribed Persons) Order 2014 (SI2014/2418) as Amended lists the current persons prescribed in terms of section 43F. Amongst the persons prescribed are the Scottish Social

Services Council (SSSC) which is prescribed in respect of "matters relating to the registration of the Social Services Workforce by the Scottish Social Services Council under the regulation of Care (Scotland) Act 2001" and the Care Inspectorate who are registered in relation to "matters relating to the provision of Care Services as defined in the Public Services Reform (Scotland) Act 2010." Also of potential relevance is section 43D which states

> "(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure
>
> (a) To his employer, or
>
> (b) where the worker reasonably believes that the relevant failure relates solely or mainly to
>
> (i) the conduct of a person other than his employer or
>
> (ii) any other matter for which a person other than his employer has legal responsibility to that person."

70. In this case the claimant's position was that she had made a substantial number of qualifying disclosures to her employers over the years. It was her position that, as she put it, she would point out poor practice where she saw it. She only gave detailed evidence however in respect of four specific matters. One of these was in relation to the incident in Auchtermuchty which the Tribunal did not understand to be relevant to the current proceedings. The claimant's position was that after she made that disclosure she agreed to a move to Newburgh because that suited her. In any event this move happened many years ago and would not be relevant to these proceedings. The claimant also referred to two specific disclosures in detail. One of these was in relation to her disclosure to the Care Inspectorate that children were, in her view, having to get changed in an area which was not properly heated. The Tribunal accepted on the evidence that the claimant disclosed this information to the Care Inspectorate. We considered that this disclosure was in the public interest as the lack of heating affected children of members of the public who were attending the school. It is in the public interest that the health and safety of children is protected. The Tribunal considered that this information tended to show that the health and safety of an individual has been, is being or is likely to be endangered and that accordingly this was a

protected disclosure. It would appear however that this disclosure was made in 2015 which was some time prior to the alleged detriment occurring.

71. The most significant disclosure which the claimant alleged she made was in March 2017 which the tribunal considered a more significant disclosure.

72. On the basis of the evidence, on this occasion the claimant disclosed information to (1) the friend of the mother of the child who came to pick up the child, (2) the child's mother, (3) the Head Teacher of the school, (4) the Care Inspectorate, (5) the SSSC. The information provided was that the child had suffered an injury as a result of the person designated to provide that child with one to one care having left the child unattended and second that the injury had not been recorded in the accident book. The Tribunal accepted that this was information which tended to show that the health and safety of an individual had been, is being or was likely to be endangered. The Tribunal did not accept that the friend of the child's mother who picked the child up was a person within any of the categories listed in sections 43C-43J of the Employment Rights Act. We did consider that disclosure to the Head Teacher was tantamount to disclosure to the employer. The Tribunal felt the issue of whether a disclosure had in fact been made was a matter which we required to consider very carefully before coming to a conclusion as the difficulty for the claimant was that her evidence in relation to what she actually said to the Head Teacher was fairly slight. Her evidence was that she had tried to see the Head Teacher on the Thursday afternoon and Friday to report matters to her but the Head Teacher was away from school. The claimant had attended the usual Monday morning meeting at which the Head Teacher was present and tried to speak to her after that. It was unclear what was said. What the claimant said was that the Head Teacher by this time already been approached by the child's mother and told the claimant that matters were being dealt with. The claimant met the Head Teacher again that morning but all she could say was that there had been a discussion of the issue at which thee head teacher had made it clear she was not happy that the claimant had told the mother about the incident. The claimant could not repeat what precisely was said. On balance however and bearing in mind that the claimant's position was that she had witnessed two examples of

unacceptable behaviour and given that we accepted her evidence that this was the kind of thing she was always pointing out the Tribunal considered that a disclosure of information had been made to the Head Teacher on the Monday morning.

73. With regard to the disclosure to the mother we accept that this was a disclosure of information. The claimant's evidence was that she told the mother what had happened. It appears to the Tribunal that this is a disclosure falling within section 43C(1)(b). Failure related solely or mainly to the conduct of her fellow worker who the claimant considered had not been properly looking after the child on a one to one basis and had failed to put the accident in the accident book. The matter related to the child for whom the child's mother had legal responsibility.

74. The Tribunal also accepted the claimant's evidence that she had brought this matter to the attention of the Care Inspectorate and the SSSC. The claimant's position in evidence was that she had telephoned the SSSC a week or so after the incident and reported the matter to them. They had told her to telephone the Care Inspectorate and she had telephoned them and given them the information. Ms McElroy indicated that the subsequent investigation had been carried out by the SSSC. The Tribunal found it slightly confusing that the SSSC having apparently told the claimant in the first instance to contact the Care Inspectorate had then gone on to investigate the matter themselves. That having been said the Tribunal were in no doubt, based on the evidence, that the claimant had contacted both the SSSC and the Care Inspectorate. The Tribunal were also satisfied that the claimant had disclosed information to them namely what had happened in relation to the child and that this was information falling within section 43B(d). We also note the evidence of Ms Pauline MacLean who, as someone employed to look after a child, confirmed that in her view this was a health and safety issue. She did this both in the letter she sent to the respondent at the time and in her evidence to the tribunal.

75. The Tribunal considered that the disclosure was in the public interest. It is in the public interest that those charged with looking after children at

school or nursery school carry out their duties properly and care for the health and safety of those placed in their charge.

76. The fourth disclosure was in relation to the claimant contacting the Physiotherapist and Head Teacher about her concern that the child in the care of her colleague was not getting the daily exercises which she required. The Tribunal considered that this was a disclosure of information and that it was made to the employer on the basis that it was made to the Head Teacher. The Tribunal considered that it was information which tended to show that the health and safety of the child was being or likely to be endangered made in the public interest because again it is in the public interest that children who attend school and who have been designated a worker to carry out a specific are plan on a one to one basis have that care plan carried out.

77. Overall, the Tribunal accepted that the claimant had made these protected disclosures in the period during and leading up to March 2017.

Disability

Was the claimant disabled?

78. The definition of disability is contained in section 6 of the Equality Act 2010. It states

> "(1) A person P has a disability if-
>
> (a) P has a physical or mental impairment, and
>
> (b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

79. Further guidance is given on matters to be taken into account in determining questions relating to the definition of disability. Schedule 1 of the Equality Act and in further guidance provided by the Secretary of State in terms of section 6(5) of the Act. The current guidance is set out in 2011.

80. The claimant's position was that she suffers from two impairments. One of these was the cancer with which she was diagnosed in 2015. The Tribunal noted that the respondent's occupational health providers considered that the claimant was deemed to be disabled as a result of this

condition within the terms of paragraph 6 of Schedule 1 to the Equality Act 2010. The Tribunal agreed with this and considered the claimant to be disabled on the basis of her suffering from cancer. Cancer is one of the conditions where a sufferer is deemed to be disabled in terms of paragraph 7 of schedule 1 of the Equality Act 2010.

81. The thrust of the claimant's claim however was that she was also disabled as a result of suffering from depression and anxiety. The Tribunal accepted the claimant's evidence in relation to her diagnosis and also in relation to the effects of this on her ability to carry out day-to-day activities. The claimant's evidence in relation to this was given at various points in her oral testimony. The claimant accepted that she had first been diagnosed with depression in 2015. She understood that it was not uncommon for individuals who had survived cancer to be in denial for a few months before the implications hit them and that this could then lead to a depressive illness. We accepted that the claimant had been prescribed Sertraline and that the dosage had been increased over the years. We also accepted that the claimant had been prescribed Diazepam which was to be used to assist her to attend meetings. The Tribunal considered that, albeit there was no GP report or other evidence from the claimant's medical records, that the claimant was suffering from an impairment namely depression and anxiety from late 2015 to date.

82. We considered this impairment to be long term as it had lasted more than twelve months.

83. With regard to the effect of the impairment on the claimant's ability to carry out day-to-day activities the claimant's evidence was that she was often tearful. This was confirmed by the evidence of Ms Porter in relation to the claimant's presentation at the meeting she attended. It was also confirmed by Pauline MacLean that the claimant would become tearful and upset. It is clear that the claimant continued to attend work until June 2017. We accepted the claimant's evidence that at that point matters reached the stage where she was deeply distressed and that she had spoken to her GP who advised that she needed time away from work in order to allow her health to settle. We accepted the claimant's evidence that over the period both before and after her absence she had ceased to

attend social activities. We accepted her evidence that by and large she would only leave the house when she absolutely had to. We accepted that the claimant did continue to attend her work at Tesco however we accepted her explanation regarding this. It also appeared to the Tribunal that given that the claimant's dosage of Sertraline was increased over the period that we required to take into account that without this the symptoms of her impairment would have been even worse.

84. Taking all matters into consideration we note that we required to consider whether the effect on the claimant's ability to carry out day-to-day activities was significant rather than trivial. We accept that this is not a case where the claimant was unable to leave the house at all. We note that she did continue to carry out some day-to-day activities. That having been said it appeared to us that looking at matters in the round there was really no question but that the effects of her impairment on her ability to carry out day-to-day activities was substantial. Even for a person with disabilities life must go on and a person such as the claimant may continue to carry out some day-to-day activities whilst having serious difficulty in carrying out others. We considered that this was one of those cases. We also accepted the effect of her impairment would have been worse without the medication. It was our view that the claimant met the definition of disability contained in the Equality Act and was therefore entitled to its protection.

Claim: unfair dismissal

85. The first point which the Tribunal required to determine was what was the reason for dismissal. The case of ***Abernethy v Mott, Hay and Anderson [1974] IRLR 213 CA*** defines a reason for dismissal as a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee. In this case there were three different suggested reasons put forward by the parties. The respondent's position was that the reason for dismissal was capability in that the claimant was unfit to return to her role. Their secondary position was that the claimant was dismissed because it was not possible to return her to her role at Newburgh Primary School and that this amounted to "some other substantial reason" in terms of section 98 of the Employment Rights Act 1996. The claimant's position was that

the sole or principal reason for her dismissal was that she had made protected disclosures.

86. So far as the burden of proof is concerned the burden of proof is on the respondent to show that they have established a potentially fair reason for dismissal so the burden of proof was on the respondent in respect of the first two reasons. On the other hand the burden of proof is on the claimant in respect of establishing the reason suggested by her although to be more accurate the employee acquires an evidential burden to show that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason advanced. Once the employee satisfies the Tribunal that there is such an issue the burden reverts to the employer who must prove on the balance of probabilities which of the competing reasons was a principal reason for dismissal. This approach was set out in the case of ***Maund v Penwith District Council [1984] ICR 143 CA.*** It was also applied in the case of ***Kuzel v Roche Products Ltd [2008] ICR 799 CA***. This was the approach which the Tribunal adopted in the current case.

87. With regard to the respondent's primary case that the reason for dismissal was incapacity the Tribunal felt this was not established on the facts. The fact of the matter was that the claimant indicated that she would be able to return to work if she were restored to her previous role at Newburgh Primary School. This was the claimant's clear evidence at the hearing. Ms Porter's position when asked was that the claimant was extremely distressed at the meeting, that she was unsure if on this basis it would have been appropriate to simply send the claimant back to Newburgh Primary School. Ms Porter was however clear that her decision to dismiss was not based on any analysis along those lines. Her decision to dismiss was that the respondent's management senior to her had already decided that the claimant was not going back to Newburgh Primary School and there was therefore absolutely no possibility of this happening. This was not a decision which was open to her to revisit. It was clear that the respondent decided to ignore the advice of their own occupational health adviser which was that a meeting should be set up with management in order to discuss a way forward. Ms Porter's position was that she was not prepared to follow this advice since there was no possibility of the decision

to allow the claimant to return to Newburgh Primary School being reversed. It was clear to the Tribunal that the reason for dismissal was not to do with the claimant's capability. The reason was the decision that the claimant was not to be permitted to return to Newburgh Primary School.

88. The Tribunal then considered the respondent's Esto position which was that this amounted to some other substantial reason. It was noted that the only first hand evidence we received regarding the grievance process was from the claimant. It was clear that neither of the respondent's witnesses were in any position to give any relevant first hand evidence that the decision to refuse to allow the claimant to return to Newburgh Primary School amounted to some other substantial reason. The only evidence from the respondent with any information bearing on the issue of why it was decided to take this action was in the letter from Sheila MacLean to the claimant of 9th April 2018. The respondent's representative in cross examination suggested to the claimant that her four colleagues had said they would not work with her. It was not something which was put in evidence. The suggestion was also made in submissions that given the breakdown in relations it was easier to require the claimant to move than to try to move her four colleagues. It was also suggested that the fact that the contract contained a mobility clause meant that it could not be challenged. The Tribunal's view was that the respondent had entirely failed to establish that the decision not to permit the claimant to return to Newburgh Primary School in the particular circumstances of this case amounted to some other substantial reason justifying dismissal. This is particularly the case where, as here, the claimant was disabled and where the claimant, an employee of standing with a good sickness record had indicated that the only way she returned to work was if she returned to Newburgh Primary School and where the respondent's own occupational health service had recommended a meeting to discuss this.

89. Given that the respondent failed to establish a potentially fair reason for dismissal, the dismissal would be unfair under section 98 in any event. However, the Tribunal went on to consider whether the dismissal was automatically unfair in terms of section 103A.

90. As noted above we considered it established that the claimant had made protected disclosures. The principal protected disclosure was the disclosure made to SSSC and the Care Inspectorate and to a lesser extent to the child's mother, in relation to the treatment of child X. Following this the claimant was involved in submitting a grievance and was the target of a grievance submitted by others.

91. Although the point was not specifically made in the evidence it is clear that the grievance process would be going on around the same time as the SSSC investigation into the disclosure made by the claimant. Ms McElroy's evidence was that the respondent had spent some considerable time on the matter.

92. We also have the claimant's evidence, which we accepted, which illustrated the respondent's general attitude to previous protected disclosures made by her. We note that she was specifically warned on one occasion that if the Head Teacher's managers discovered who had been responsible for reporting the heating issue to the SSSC then she would be in trouble. We also have the claimant's evidence regarding what she was told in relation to raising a further grievance and that this could result in disciplinary action. Ms McElroy confirmed in cross examination that the respondent's procedures do allow for disciplinary action to be taken in relation to a grievance which is considered to be malicious. There has not at any point been any suggestion from the respondent that the claimant was acting maliciously.

93. It was clear to us on the basis of the evidence which we heard that the claimant's grievance was inextricably linked with the protected disclosure which she made regarding child X. It appeared to us that the outcome of the process that she be compulsorily moved from Newburgh was also inextricably linked to the protected disclosure which she made.

94. The respondent made much in their submissions of the fact that their grievance procedure specifically indicates that one of the outcomes can be that an individual is compulsorily moved. The Tribunal indicated at the time that this was not a matter which we were used to seeing in grievance procedures. In case there can be any doubt in the matter, the reason for this is that typically procedures are used as a way of providing managers

who may not be employment experts with guidance so as to ensure that they are acting within the law. Typically, grievances lodged by employees may involve complaints of discrimination or, as in this case, relate to disclosures of information which are protected disclosures. Most employees would see being compulsorily moved as being a detriment. This is the case whether or not there is a mobility clause in the contract. To have as an outcome of the grievance process something which can clearly amount to a detriment is simply inviting a manager to consider an outcome which in the case of an allegation of discrimination would amount to unlawful victimisation contrary to section 26 of the Equality Act or in the case of protected disclosure an unlawful detriment in terms of section 47B of the Employment Rights Act. Clearly, in the case of the respondent, managers appear to have HR advice however the Tribunal was not reassured by Ms McElroy's answers to questions which indicated that if an employee wished to take advantage of their protection relating to whistleblowing they would require to invoke the respondent's whistleblowing policy. In any event, going back to the facts of this case it appeared to be absolutely clear to the Tribunal that the decision to refuse to allow the claimant to return to her role at Newburgh Primary School was due to the fact that she made a protected disclosure. As noted above, Ms Porter felt that it was not within her powers to review this decision. Not just that but she felt that the management position on the matter was so clear and entrenched that there was no point in even arranging a meeting between the claimant and management to discuss the matters. It therefore appears to the Tribunal that following matters logically the principal reason for the claimant's dismissal was the fact that she had made protected disclosures. The dismissal is therefore automatically unfair in terms of section 103A.

Disability discrimination

95. The claimant made claims in relation to her treatment over the period. The respondent's position was that whilst they did not accept that the claimant was disabled that they had treated her throughout the process as if she had been. The tribunal noted that the occupational health reports throughout indicated that the claimant could be regarded as disabled for

the purposes of the legislation and the tribunal considered that the respondent knew or ought to have known that the claimant was disabled.

96. The claimant made various claims about her treatment generally along the lines of the fact that the respondent refused to engage with her and that this amounted to unfavourable treatment arising from her disability. The claimant was frequently tearful at meetings. She tried to make points which were ignored by the respondent. At the end of the day while we had considerable sympathy for the claimant's position regarding this we did not feel that the evidence was sufficiently specific for us to make any finding in relation to this.

97. Where the Tribunal did consider the respondent was guilty of disability discrimination was in respect of two matters. The first of these was in relation to the fact that there was no review of the decision not to allow the claimant to return to Newburgh Primary School. As noted above the Tribunal did not have before it a copy of the letter sent to the claimant in which this sanction was imposed. Shelagh McLean however specifically states in her letter that there was due to be a review in September 2018. No review took place. The only evidence we have as to the reason for this is Shelagh McLean's own statement that this is because the claimant was off ill. The claimant was off on disability related illness. It appears to us that it was undoubtedly unfavourable treatment of the claimant to refuse to review the decision that she could not return to Newburgh Primary School. At the end of the day this was the main thing the claimant wanted. The evidence was that circumstances on the ground at the school had changed with at least two of the employees with whom she had previously had problems no longer being there. It was also in our view the failure to review this decision and failure to even countenance a review which led to the claimant being dismissed. Ms McLean's own statement is that the review did not take place because the claimant was on disability related leave. This is clearly something arising from her disability and the respondent have therefore unlawfully discriminated against the claimant in this respect.

98. The second point is that the final occupational health report had as its recommendation that a meeting be set up between the claimant and senior management in order to discuss her work related issues.

99. The claimant's disability, which arose at least in part from her work related issues, was causing her to be absent from work and eventually led to her being dismissed. The claimant was frustrated that the respondent was not prepared to engage with her on the matter. The refusal to engage was a provision, criteria or practice applied by the respondent. It clearly placed the claimant at a disadvantage for the reasons already stated. The occupational health advice was that this would assist the claimant and perhaps allow her to return to work. In the view of the Tribunal it would have amounted to a reasonable adjustment. The respondent refused to contemplate it. It is noted Ms Porter's evidence was simply to the effect that she understood the decision had been made elsewhere. She was not particularly clear as to who had made the original decision. The Tribunal's view was that it was unreasonable for the respondent not to make this adjustment. The respondent therefore also unlawfully discriminated against the claimant on grounds of her disability in this respect also.

Detriment – section 47B

100. The respondent's position was that this claim was time barred. The detriment occurred when the claimant was advised of the decision of the grievance in June 2018 and she ought to have raised the claim within three months of that date. She did not. Although it is clear that the claimant has been ill for the whole of this period, it was clear to the Tribunal that despite this she had been in a position to carry on correspondence with the respondent and attend meetings. The claimant could have obtained legal advice but did not. The claimant did not give any evidence in relation to any claim that it had not been reasonably practicable for her either to take legal advice within the prescriptive period or indeed to lodge her claim during this period. On this basis the Tribunal required to conclude that this claim was time barred and the Tribunal had no jurisdiction to hear it.

101. The parties were in agreement that should we find in favour of the claimant, which we have done, then the matter of remedy should be considered at a subsequent Tribunal. A remedy hearing should be listed.

102. In order to assist the parties in discussing the issue of compensation with a view to perhaps avoiding a future hearing the Tribunal feels it appropriate to state that our provisional view at least is that, given the claimant's evidence regarding breaking down on going to interviews and given her evidence as to why she has not applied for extra shifts at Tesco, the Tribunal's provisional view is that we would not be minded to make a finding that the claimant has failed to minimise her losses. We should also say that so far as future losses are concerned our preliminary view would be that, given the claimant's stated intention that she would have gone part time after the summer of 2018 then any future loss should be based on these part time hours rather than her full time hours and the fact that the contract had not yet been altered would not, at least on our present understanding of matters, change this. We should stress that these are preliminary views given with a view to aiding the parties and that at any subsequent remedy hearing the parties will be free to argue that we should alter our position in respect of these.

Employment Judge: **Ian McFatridge**
Date of Judgment: **13 November 2019**
Date sent to parties: **13 November 2019**