



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000193/2023

5 Final Hearing in person held in Glasgow on 6, 7, 8, 11 and 29 September 2023; further written representations from both parties on 23 and 25 January 2024 ; and Members' Meeting held in chambers on 15 February 2024

10 Employment Judge Ian McPherson
Tribunal Member Ijaz Ashraf
Tribunal Member Donald Frew

15 Mr Paul McMenamin

Claimant
In Person

20 Renfrewshire Council

Respondents
Represented by:
Ms Gemma Thomson -
Senior Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The unanimous reserved Judgment of the Employment Tribunal is that: -

- (1) the respondents did not fail to make reasonable adjustments for the claimant's disability, contrary to **Sections 20 and 21 of the Equality Act 2010**;
 - (2) the respondents did not unlawfully discriminate against the claimant for a reason related to his disability, by treating him unfavourably for a reason arising in consequence of his disability, contrary to **Section 15 of the Equality Act 2010**;
 - (3) the claimant resigned from his employment with the respondents in circumstances where there was no fundamental breach of the employment contract by the respondents;
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- (4) accordingly, there was no unfair constructive dismissal of the claimant by the respondents, contrary to **Section 98 of the Employment Rights Act 1996**; and
- (5) in all the circumstances, the claimant's complaints against the respondents are not well founded, and his claim against the respondents is therefore dismissed in its entirety by the Tribunal.

REASONS

Introduction

1. This case called before us as a full Tribunal on the morning of Wednesday, 6 September 2023, for a 3-day Final Hearing in person, previously intimated to both parties by the Tribunal, by Notice of Final Hearing dated 7 July 2023. The Final Hearing was listed for full disposal, including remedy, if appropriate.
2. The ET1 claim form was first presented by the claimant, Mr McMenamin, acting on his own behalf, on 28 April 2023, following ACAS early conciliation between 24 February and 28 March 2023.
3. The Tribunal claim followed termination of the claimant's employment with the respondents as a primary teacher, which he stated had ended on 14 April 2023. In his claim form, the claimant complained of unfair constructive dismissal, discrimination on grounds of disability, and failure to make reasonable adjustments. In the event of success with his claim, he sought an award of compensation only from the Tribunal, given that he had secured new employment as from 17 April 2023.
4. The claimant set out the background and details of his claim, at section 8.2 of his ET1 claim form presented to the Tribunal, as follows:

"I was employed by Renfrewshire Council as a teacher. My employers were aware that I have a condition called Retinitis Pigmentosa, which is a degenerative eye condition.

I approached my line manager in September 2021 to discuss that I was beginning to find the classroom environment difficult to manage due to my

condition and this was beginning to cause anxiety. I was able to manage **[sic]** my 1-1 and group learning environments far more comfortably. Despite various meetings with various HR officers about assisting tech and adapting my responsibilities to meet my needs, I was placed in a classroom full time
5 from August 2022. Assistive hardware and software were ordered but not set up or installed for my return to work after holidays. This caused such stress and anxiety that I felt unable to continue in work and was absent with WRS (work-related stress).

I met with HR in October 2022 and asked to consider redeployment within the
10 council to an office based job which would better suit my needs in the long term, as suggested in 2 separate Occupational health reports. I was told this was impossible. My job was as a teacher.

In December 2022 I was told that HR would look into vacancies but I would
15 need to apply and resign. However, this never materialised and I felt I had no option but to accept a job offer in mid March 2023, as I had been moved to half pay.

I believe my employers failed to make reasonable adjustments. Firstly, in
20 August 2022 by placing me full time in a classroom when I had approached them months before to disclose that this was becoming more difficult and stressful. Secondly, by failing to take meaningful action towards redeployment within the wider organisation.

I believe that this was an unfair constructive dismissal under the Employment
25 Rights Act 1996. I was left with no option but to accept a new job with a greatly reduced salary. I was on half pay, due to move to SSP in June 2023, with no tangible signs of progress regarding redeployment.

I believe the (constructive) dismissal was discriminatory under the Equality
Act 2010. I had no previous issues during my employment and believe that my needs based around my disability **[sic]** were not met, available discretion was not applied around pay, forcing me to leave the organisation.

All of the above resulted in acute anxiety and stress, and insomnia which required medication. I lost all faith in my employer's willingness to support me within the organisation.”

5. On 31 May 2023, an ET3 response was lodged for the respondents, by their in-house lawyer, Ms Gemma Thomson, resisting the claim and setting forth detailed grounds of resistance in a separate paper apart. She pled that the claimant's employment had ended on 13 April 2023 following his resignation; and her detailed paper apart addressed the claimant's complaints, as outlined in his ET1 claim form.
6. At Initial Consideration by Employment Judge Kearns, on 2 June 2023, she ordered that the case proceed to the previously listed Case Management Preliminary Hearing by telephone conference call on 28 June 2023. On 28 June 2023, the case called before Employment Judge Macleod for that Case Management Preliminary Hearing. The claimant appeared on his own behalf, and the respondents were represented by Ms Thomson.
7. Judge Macleod ordered that the case be listed for a 3-day Final Hearing before a full Tribunal in Glasgow, and he made various case management orders and directions, including for a Joint Bundle of Documents, and a Joint List of Issues. His written PH Note and Orders was sent to both parties on 30 June 2023.
8. In advance of the start of this Final Hearing, Employment Judge Ian McPherson issued various case management orders and directions, all as set forth in a letter sent to both parties by email from the Tribunal on 30 August 2023.

Final Hearing before this Tribunal

9. At this Final Hearing, the claimant appeared as an unrepresented party litigant, along with his aunt (Ms Christine McMenamain) as a witness. Although Ms McMenamain is a qualified solicitor, working in-house with another local authority, she did not appear as the claimant's legal representative in these Tribunal proceedings, but only as a witness on his behalf.

10. The respondents were legally represented by their in-house solicitor, Ms Thomson, and she had two witnesses to lead on behalf of the respondents: a Ms Lorna Murray (Head Teacher, St John Ogilvie Primary School), and a Ms Lynette Stewart (Senior Human Resources and Organisational Development (HR&OD) adviser).
11. The Tribunal had received a Joint Bundle of Documents comprising 47 documents, extending 212 pages and, in the course of the Final Hearing, we allowed certain additional pages to be added in to that Joint Bundle, as documents 48, 49 and 50.
12. Included within that Joint Bundle, at pages 154 to 168, was an undated document 37, described as “**Attendance Contact Summary Table.**” It recorded attendance contacts with the claimant from 28 October 2021 to 27 April 2023. Other evidence heard, and other documents lodged with the Tribunal, showed that this particular document was not a comprehensive list. For example, it did not mention Tracy McGillivray’s reply of 28 March 2023 to the claimant’s resignation letter, but it did include the text of some messages / emails that were not otherwise provided in the Bundle. In his oral evidence in chief to the Tribunal, the claimant stated that, as far as he could remember, the chronology of events set forth in this document was fairly accurate.
13. On 5 September 2023, Ms Thomson provided the Tribunal with a jointly agreed statement of facts, running to 33 paragraphs. Paragraph 32, reading: “**The Claimant resigned on 13 April 2023**” was reworded at the start of the Final Hearing, on 6 September 2023, to reflect the fact that the claimant had resigned with effect from 13 April 2023, by letter of resignation submitted on 17 March 2023. Subsequently the agreed document was further revised, to include a new paragraph 34, about the claimant’s fit notes, and in its final form, its finally agreed terms are reproduced later, in our findings in fact.
14. On the first day of the Final Hearing, on 6 September 2023, there was discussion with both parties about revisal to the intimated Joint List of Issues. The claimant’s Schedule of Loss, and the respondents’ Counter Schedule,

were both updated and revised during the course of the Final Hearing. In their final versions, they are reproduced later, in our findings in fact.

15. In writing up this Judgment, the Tribunal wishes to place on record that it is most grateful to both parties for the reasonable, courteous and pragmatic manner in which they both conducted proceedings before us, and they both sought to assist the Tribunal in furthering the overriding objective to deal with the case fairly and justly.
16. Reasonable adjustments were put in place by the Tribunal to take account of the claimant's disability, and in particular he was allowed to access documents provided electronically on his own laptop due to his visual impairment. It had assistive technology to allow him to read documents, on screen, rather than, as others at the Hearing were doing, using, and navigating through a paper, hard copy Bundle. When the respondents emailed in additional documents, there being no objection by Ms Thomson, the Tribunal agreed to the claimant accessing these on his mobile phone, which had assistive technology, to allow him to obtain easy access.
17. As he had an e-Bundle of the original Joint Bundle, but only separate emails for subsequent documents from Ms Thomson, the Tribunal arranged, via a Legal Officer, to prepare a consolidated PDF Bundle, which was sent to and used by the claimant. In accordance with the Judicial College's **Equal Treatment Bench Book**, the claimant having a visual impairment disability, and being an unrepresented party litigant, the Tribunal sought to provide him with guidance, support and assistance in how to present his claim, and conduct the Hearing. Despite the presiding Judge's reference to the Bench Book, and that it would be appropriate for the claimant to take notes during his own cross examination, for the purposes of any re-examination, the claimant took no such notes.

Joint List of Issues

18. On 6 September 2023, following the presiding Judge's review of the intimated Joint List of Issues, and after discussion with both parties, at the start of this Final Hearing, and an adjournment for them both to consider any necessary

revisals, we jointly agreed with them a finalised Joint List of Issues in the following terms, as added to the Joint Bundle as document 48:

1. Reasonable Adjustments

5 *With regard to the claimant's claim that there was a failure to make reasonable adjustments, this claim is comprised of the following points:*

(a) *That the provision, criterion or practice applied by the respondent to him was that he required to teach a full class of pupils;*

10 (b) *That this caused him a substantial disadvantage on the basis that he suffered, and suffers, from Retinitis Pigmentosa, a disability within the meaning of section 6 of the 2010 Act;*

(c) *That the respondent should have made the following adjustments:*

(i) *The respondent should have allocated him to 1:1 and group learning environments;*

15 (ii) *The respondent should have provided the assisting hardware and software to allow him to adapt to his circumstances at work in August 2022 following the end of the summer holiday, and should have ensured that it was properly installed and efficiently prepared for him on his return;*

20 (iii) *That the respondent should have considered and granted the claimant redeployment into a non-teaching role from October 2022 onwards.*

a. What is the provision, criteria or practice applied by the Respondent which is discriminatory in relation to a relevant protected characteristic of the Claimant?

25 **b. What is the particular disadvantage that the provision, criteria or practices or would put those that the Claimant shares a protected characteristic with?**

c. In what way was the Claimant put at that disadvantage?

- d. ***If so, and the duty to make reasonable adjustments arose, did the Respondent fail to take such steps as were reasonable to take to avoid the disadvantage?***

2. Constructive Dismissal

5 *The claimant complains that he was unfairly constructively dismissed by the respondent. He maintains that the respondent's failure to consider his requests for reasonable adjustments, and to make those adjustments, amounted to conduct in fundamental breach of the implied term of trust and confidence inherent in the employment contract between employer and employee. He also*
10 *complains that that act of constructive dismissal amounted to a discriminatory dismissal, on the grounds of his disability.*

- a. ***Was there a dismissal for the purposes of section 95(1)(c) of the Employment Rights Act 1996? Did the Respondent breach the implied term of trust and confidence ?***

15 ***The Tribunal will need to decide: (1) whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and (2) whether it had reasonable and proper cause for doing so.***

- b. ***If there was a breach of contract, was it fundamental, i.e. so serious that the Claimant was entitled to resign in response?***
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- c. ***Did the Claimant resign in response to a fundamental breach of contract or for some other reason?***

- d. ***Were the Respondent's actions in this regard discriminatory, on the grounds of the claimant's disability?***

- 25 e. ***If there was a constructive dismissal, what was the reason for the breach of contract, and was it a potentially fair reason for dismissal?***

3. Discrimination claim

The claimant complains that he was discriminated against on the grounds of disability. The disability he relies upon is a degenerative eye condition known as Retinitis Pigmentosa.

5 *The respondent accepts that the claimant is a disabled person as defined in section 6 of the Equality Act 2010, that he was disabled at the material time of the events complained about in this claim, and that they were aware of his degenerative eye condition prior to his employment commencing.*

Under that general heading, he makes the following complaints:

- 10 (i) *That the act of constructive dismissal amounted to a discriminatory dismissal, on the grounds of his disability;*
- (ii) *That the respondent failed to make reasonable adjustments under section 20 of the Equality Act 2010; and*
- 15 (iii) *That the respondent discriminated against him for a reason related to his disability under section 15 of the Equality Act 2010.*

This is separate and distinct from the S20 claim which relates to specific adjustments as opposed to the discriminatory behaviour/unfavourable treatment of him by the respondent. He complains that he was also unfairly treated as a consequence of his disability by the decision to move him to half pay despite the availability of discretion and the advice that it should be exercised in cases involving disability.

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- a. Did the Respondent treat the Claimant unfavourably for a reason arising in consequence of his disability by not providing him with a safe working environment as a disabled person?**
- 25 **b. Did the Respondent treat the Claimant unfavourably for a reason arising in consequence of his disability by informing him that alternative roles were not suitable for him without consulting with him about any alternative roles?**

- c. Did the Respondent treat the Claimant unfavourably for a reason arising in consequence of his disability as a proportionate means of achieving a legitimate aim?**

The respondent says that its aims were:

- 5 a. *In relation to 3(a), to successfully run a primary school within core staffing allocations and to maximise attainment of pupils, particularly to reduce the poverty related attainment gap.*
- b. *In relation (d) below, to manage allocated budget and to apply sick pay discretion in only exceptional circumstances; to prevent floodgate effect.*

10 *The Tribunal will decide in particular:*

- (1) *was the treatment an appropriate and reasonably necessary way to achieve those aims;*
- (2) *could something less discriminatory have been done instead;*
- (3) *how should the needs of the claimant and the respondent be*
15 *balanced?*

- d. Did the Respondent act unreasonably and in a discriminatory manner in refusing to exercise its discretion to extend the full sick pay period?**

4. Remedy

20 ***The claimant is in new employment with another employer. He does not seek to be re-instated or re-engaged by the respondent. He seeks compensation as per his Schedule of Loss.***

If the Claimant's claims are well-founded, what remedy should be awarded?

- 1.1 *What basic award is payable to the claimant, if any?*
- 1.2 *If there is a compensatory award, how much should it be? The Tribunal*
25 *will decide:*

- 1.2.1 *What financial losses has the dismissal caused the claimant?*
- 1.2.2 *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
- 5 1.2.3 *If not, for what period of loss should the claimant be compensated?*
- 1.2.4 *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*
- 1.2.5 *If so, should the claimant's compensation be reduced? By how much?*
- 10 1.2.6 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
- 1.2.7 *Did either party unreasonably fail to comply with it?*
- 15 (a) *Did the claimant fail to follow the ACAS Code of Practice on disciplinary and grievance procedures at section 32. "If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance."?*
- 20 (b) *The claimant states: I consider that a uplift of 25% should be made to the compensatory award for the Respondent's failure to follow the ACAS Code. The Respondent failed to deal with issues promptly, delayed communicating or failed to communicate with me the outcome of actions agreed at meetings and refused me a right of appeal against the decision to place me on half pay.*
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- 1.2.8 *If so is it just and equitable to increase or decrease any award payable to the claimant?*
- 1.2.9 *If so, by what proportion, up to 25%?*
- 5 1.2.10 *If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?*
- 1.2.11 *If so, would it be just and equitable to reduce the claimant's compensatory award?*
- 1.2.12 *If so, by what proportion?*
- 1.2.13 *Does the statutory cap of fifty-two weeks' pay apply?*
- 10 1.3 *What financial losses (if any) has any failure to make reasonable adjustments and / or any discrimination by the respondent caused the claimant and how much compensation should be awarded to him for that?*
- 15 1.4 *What injury to feelings has any failure to make reasonable adjustments and / or any discrimination by the respondent caused the claimant and how much compensation should be awarded to him for that?*

Findings in Fact

19. We have not sought to set out every detail of evidence which we heard nor to
20 resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out below, in a way that it is proportionate to the complexity and importance of the relevant issues before the Tribunal.
- 25 20. Certain limited facts were agreed between the parties, as per the Statement of Agreed Facts to which we referred earlier in these Reasons, at paragraph 13 above. We have had regard to them, but, given the extent of the evidence led by both parties, and the disputed facts in this case, we do not consider

ourselves restricted by only the agreed facts in that document, and our own findings in fact are accordingly more extensive in scope and extent, and often more detailed, than in parties' jointly agreed Statement. We have incorporated the terms of the Statement of Agreed Facts, and, for ease of reference, shown them with the label **[ASF]** followed by the paragraph number used there.

21. On the basis of the sworn evidence heard from both parties before us over the course of this Final Hearing, and the various documents in the Joint Bundle of Documents and additional documents provided to us, the Tribunal has found the following essential facts established:

Claimant's eye condition

- (1) The claimant, aged 32 at the date of the Final Hearing, is a registered blind person.
- (2) The Claimant has a condition called Retinitis Pigmentosa. **[ASF 5]**
- (3) It is a degenerative eye condition. **[ASF 6]**
- (4) Common symptoms include difficulty with night vision and loss of peripheral vision. The claimant experienced night blindness, tunnel vision, and blurry / hazy central vision, with lack of depth perception, extreme glare, and glow variations. He rarely read from paper and preferred everything to be electronic.
- (5) The Respondents were aware of the Claimant's condition prior to his employment commencing on 12 August 2019. **[ASF 7]**
- (6) The Claimant's eye condition worsened throughout his employment with the Respondent, causing deterioration in his sight. **[ASF 8]** The period from September 2021 to August 2022 was "**vastly more difficult**", where he had to take pictures on his phone to magnify them, as he had no assistive technology from the Council during that whole time.

- (7) The Claimant contacted the Royal National Institute of Blind People (RNIB) regarding any suggested adjustments that could be made to his workplace. **[ASF 18]**

5 **Claimant's employment by the Respondents, and his Conditions of Service**

- (8) The Respondent is a local authority established under the Local Government (Scotland) Act 1994, having its headquarters in Paisley. It employs around 8,000 employees in its various Directorates. It has a statutory responsibility for education of children within the Council area.

- 10 (9) The Claimant has been employed by the Respondent since 13 August 2019. **[ASF 1]**

- (10) The Claimant was employed as a trainee teacher from 13 August 2019 until 11 August 2020. **[ASF 2]** As such, he was a first-year probationary teacher, at St Mary's Primary School in Paisley. At that time, Lorna Murray worked at St Mary's, as acting Head, before being appointed Head Teacher at St. John Ogilvie's.

- 15 (11) The Claimant was employed by the Respondent as a teacher from 12 August 2020. **[ASF 3]** He was a fully registered teacher in Scotland, on the GTC (**General Teaching Council for Scotland**) register.

- 20 (12) A copy of the claimant's employment contract documentation with the respondent dated 4 September 2020, was produced to the Tribunal, as document 7, at pages 37 to 52 of the Joint Bundle, including his written statement of employment particulars as a permanent primary supply teacher, with his salary and conditions of service to be in accordance with the provisions contained in the SNCT (**Scottish Negotiating Committee for Teachers**) handbook of conditions of service.
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- 5 (13) Renfrewshire Council has a **Supporting Attendance at Work Policy** for all local government employees but excluding teachers. A copy of this policy, issued in 2013, and in force during the claimant's period of employment, was produced to the Tribunal, as document 36, at pages 142 to 147 of the Joint Bundle. Although not applicable to teachers, many meetings with the claimant in 2021 and 2022 were described by the respondents as "**supporting attendance meetings**", albeit described in correspondence from the Head Teacher as "*arranged in line with the Absence Management Policy for Teachers*".
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- 15 (14) There was also produced to the Tribunal, as document 39, at pages 174 to 185 of the Joint Bundle, a copy of the respondents' **Absence Management Policy for Teaching Staff**, adopted in September 2001, and applicable during the claimant's period of employment. That policy document set forth guidance on managing various absence categories for teaching staff, including long term absence. It defines "**long term absence**" as any single period of absence amounting to 20 or more working days.
- 20 (15) For long term absence, the Absence Management Policy for Teaching Staff provided that the Head Teacher should seek to maintain contact with the employee on a quarterly basis as a minimum, offering advice and assistance as appropriate. In normal circumstances, medical advice should be sought from the Occupational Health Adviser as to the nature of the problem and the
- 25 likely duration of the absence.
- 30 (16) Throughout the duration of the absence, the policy states that it is essential to consult regularly on a personal basis with the employee and consider the employee's opinion on their condition. Where the prognosis is such that a prolonged absence is likely, then the case should be treated as one of capability.

- 5 (17) In circumstances where the employee is unlikely to return to work, further action will generally be initiated by the Director of Education, but as a first step the medical facts must be confirmed by to the Council's "**examining medical officer**". The respondents use the services of an external service provider, **PAM OH Solutions**, to provide them with occupational health advice related to the effects of health on work and work on health.
- 10 (18) When reviewing the case, the policy states that certain factors should be taken into consideration, namely age and length of service; entitlements to pension and other financial benefits; any continuing entitlement to sickness allowance; the attitude of the employee to any major change in lifestyle; and the effect of the continuing absence on the delivery of the service and other employees.
- 15 (19) Whilst recognising that circumstances may vary from case to case, the policy document identifies that there are certain possibilities which will be considered, including part time work / phased return to work ; ill health retirement; or consideration of dismissal on grounds of incapability through ill health.
- 20 (20) As regards ill health retirement, the policy provides that where a teacher is unable to return to work, it is open to them to apply to the Scottish Public Pensions Agency ("SPPA") to be granted ill health retiral, but for such a retiral to be granted, the teacher has to be assessed as permanently unfit to teach, this assessment being
25 determined by the SPPA based on medical reports.
- 30 (21) The claimant's starting salary was £32,994 per annum, he was a member of the Scottish Teachers' Superannuation Scheme, and his contractual pay entitlement during sickness absence was in accordance with section 6, Part 2 of the SNCT handbook of conditions of service.

- 5 (22) A copy of section 6, Part 2 of the SNCT handbook of conditions of service, was produced to the Tribunal, as document 36A, at pages 148 to 153 of the Joint Bundle. As a teacher with more than three years' service at the commencement of absence from duty, but less than five years' service, the claimant's entitlement to sickness allowance was for a period of 152 days at full salary, and a further 152 days at half salary.
- 10 (23) In terms of paragraph 6.8, the Council has the discretion to extend periods of sickness allowance, where appropriate. Paragraph 6.11 provides that if an employee is still unfit to work at the expiry of the half salary, the Director of Education, or equivalent, can place a teacher on the reserve list; decide whether payment of sickness allowance shall be extended for a period; or take such other action as may be deemed appropriate. The Director of Education, or
- 15 equivalent, will consider all relevant factors, including medical reports, in reaching a decision.
- 20 (24) Further, paragraph 6.36 deals with "**long term medical conditions**", and provides that: "*Where an employee is suffering through a long term medical condition, the council should give careful consideration to extending the period of sickness allowance, particularly when the prognosis is that he / she will be able to return to work or where the illness will bring the employee under the terms of the Equality Act 2010. The medical officer acting on behalf of the council should obtain evidence from the employee's medical adviser to help the council reach a decision.*"
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Claimant's deployment at St John Ogilvie Primary School

- (25) The Claimant was employed on a full-time basis as a permanent supply teacher at St John Ogilvie Primary School. **[ASF 4]**
- 30 (26) The Claimant was allocated a full-time Primary 3 and Primary 4 composite class for the 2022/2023 School Year. **[ASF 10]**

- (27) Composite classes are nationally capped at 25 pupils per class.
[ASF 11]
- 5 (28) The claimant was transferred to St John Ogilvie Primary School as an additional teacher because further teachers were required to accommodate children attending school in “bubbles” following the first Covid 19 lockdown.
- 10 (29) The Pupil Equity Funding (“**PEF**”) funded the claimant’s post for 50% of a working week. The other 50% of the working week he was covering non-class contact time for other teachers at St John Ogilvie Primary School.
- (30) Pupil Equity Funding is allocated directly to schools and targeted at closing the poverty related attainment gap. **[ASF 9]**
- 15 (31) There was produced to the Tribunal, as document 33, at pages 111 to 138 of the Joint Bundle, a copy of the Scottish Government’s Pupil Equity Funding national operational guidance (June 2023).
- (32) While that document post-dated termination of the claimant’s employment with the respondents, both parties were agreed at this Final Hearing that similar PEF national guidance was in place in earlier years while the claimant was employed by the respondents.
- 20 (33) PEF is money that is given to each school in Scotland to reduce the poverty related attainment gap. It is allocated to schools based on the numbers of free school meal entitlement of pupils.
- (34) Attainment statistics must be submitted to the Scottish Government for years 1, 4 and 7 and interventions must be justified with reference to the attainment statistics. These are published on the Scottish Government Website.
- 25 (35) Pupil attainment statistics would be presented to the school’s Parent Council for review annually. PEF is allocated to schools on an annual

basis, the figure will be reviewed by the Scottish Government every three years.

5 (36) A PEF plan is produced on an annual basis and funding allocated from that accordingly. The impact of the PEF interventions are constantly under review.

(37) St John Ogilvie Primary School would receive approximately £30,000 to £35,000 per year. To hire a full-time member of teaching staff using PEF monies would cost around £50,000.

10 (38) PEF roles could not be split across multiple schools as each school's Head Teacher has discretion to use the funding for a specific purpose and to use the staff member most appropriate.

15 (39) Some Head Teachers may use PEF monies to hire additional teaching staff for small group learning. However, this is constantly subject to change and the post must be allocated to the staff member most likely to enact the change required.

(40) There are no specific permanent full-time small group learning roles within Renfrewshire. Small group learning roles may exist as part-time or peripatetic roles across Renfrewshire and would tend to involve small group learning as part of a wider role.

20 (41) Renfrewshire has two Flexible Learning Resources bases for children with additional support needs ("ASN"). Classes of children with ASN are inherently smaller. There can be small group work included in this type of role. However, children who attend ASN schools, from the Head Teacher's experience, tend to have "high tariff" behaviour and are generally greater flight risks.

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(42) At this Hearing, the claimant's Head Teacher, Lorna Murray, referenced an early years inclusion facility that she knew of from a previous school that she had worked at. She recalled that there may have been small group work there. However, the children were below school age.

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- 5 (43) Neither the claimant nor any of the witnesses at this Hearing could point to any roles within Renfrewshire that arose from March 2022, when small group learning was discussed with the claimant, until 17 March 2023, when the claimant intimated his resignation, that would have allowed for small group learning.
- 10 (44) In terms of the staffing allocations for St John Ogilvie Primary School, the school has nine classrooms. There were 10 classes with two classes sharing one classroom. In the school year commencing August 2023, the school had 245 pupils, and it was estimated that this figure was approximately 220 for the year commencing August 2022.
- 15 (45) The school is allocated by a Renfrewshire Council education manager a number of teachers on an annual basis based on the capacity of the school and the number of pupils attending that year. The process is completed across Renfrewshire Council primary schools.
- 20 (46) In the school year commencing August 2022, the school was allocated 12 FTE (fulltime equivalent) teaching staff and four or five non-teaching staff. Within the 12 FTE would include management staff and full-time or part-time teachers assigned to the nine classes.
- 25 (47) Within the FTE assigned to the school, 0.2 FTE is allocated to “network”, described as pupil support work and paperwork. Staffing allocations are also provided to allow each classroom teacher 2.5 hours of non-class contact time each week. Ordinarily, this was assigned to the deputy headteacher and was assigned to the deputy headteacher during the year commencing August 2022.
- 30 (48) There are no small group learning roles included within core staffing allocations. Class sizes are capped at: 25 pupils for primary 1, 30 pupils for primaries 2 and 3 and 33 pupils for primaries 4-7. Composite classes are capped at 25 pupils.

- (49) In the school year commencing August 2022, each of the nine classrooms was being used as a classroom with either a full time or part time teachers teaching the pupils.
- (50) Schools could have “additionality” of staff for short periods of time if staff cover is put in place in advance of a staff member going on maternity leave for example.
- (51) Within core staffing funding, it would not be possible for the claimant to have been allocated a small group learning role at St John Ogilvie Primary School.
- (52) Other schools within Renfrewshire would be allocated staff in the same way and therefore small group learning roles did not exist at other schools within the authority area.

Claimant’s Meetings with Head Teacher & HR, and Occupational Health reports – session 2021/2022

- (53) The Claimant spoke to Lorna Murray in September 2021 about his worsening sight. **[ASF 12]**. She is the Head Teacher at St John Ogilvie Primary School. The meeting took place in her office at the school. It was initiated by the claimant, and he informed her that his eyesight was getting worse, with his central vision affected, and certain aspects of his job were becoming more difficult with reading, and supervision of children.
- (54) The Claimant spoke to Lorna Murray on 29 October 2021 about his worsening sight. **[ASF 13]** It was a further, informal meeting with her. He was finding the role of class teacher challenging, given his eyesight deteriorating, and he was looking for support and options moving forward.
- (55) There was a meeting between the Claimant, Elspeth Chisholm and Lorna Murray on 2nd November 2021. **[ASF 14]** Ms Chisholm is a Human Resources & Organisational Development (“HR&OD”) Adviser. The meeting was held remotely on Teams.

(56) In February 2022, the claimant applied for an **Inclusion post with East Renfrewshire Council**, but he was unsuccessful in that application, which fact he informed Lorna Murray of at the time.

5 (57) There was produced to the Tribunal, as document 8, at pages 53 and 54 of the Joint Bundle, copy of an **Occupational Health Report** on the claimant, dated 7 March 2022, by a Dr C Liew, from PAM OH Solutions, to the respondents' Linda Mullin (HR), following upon a telephone assessment of the claimant regarding his fitness for work and additional supports required due to his underlying retinitis pigmentosa.

10

(58) At that time, the claimant was working 0.5 non-class contact time with class sizes of up to 31 pupils, and 0.5 PEF support working with smaller groups.

15 (59) The OH opinion from Dr Liew was that the claimant was fit for work, with restrictions, and risk assessments at work should be updated three to six monthly as his condition may deteriorate over time and his needs could change. OH confirmed that health and safety monitoring was essential in the claimant's case as visual impairment could affect safety at work. In relation to duties that the claimant was

20 unable to do, OH advised that a classroom teacher role may be difficult for the claimant if working with large numbers of pupils, and so recommended that the claimant might manage smaller groups of 10 pupils or less.

25 (60) A medical report from his ophthalmologist was also requested for more information. It was also agreed that input from Access to Work would be helpful, noting that the claimant had been in contact with Access to Work and RNIB to get a workplace assessment to ensure the claimant could work safely in a school environment.

30 (61) There was a meeting between the Claimant, Lorna Murray, Christine McMenemy and Morna Armstrong on 29 March 2022. **[ASF 15]** Ms McMenemy is the claimant's aunt, and Ms Armstrong is Principal

HR & OD Adviser. It was a formal meeting, held remotely, using Teams. The claimant's aunt was there, supporting him, and she took some notes at meetings she attended with the claimant.

5 (62) They discussed the OH report of 7 March 2022, and the claimant confirmed that while work could be stressful, he was managing, but he was considering what other employment options might be available with the council should his sight continue to deteriorate. A further meeting was arranged for 28 April 2022.

10 (63) A copy of Christine McMenemy's handwritten notes of that meeting held on 29 March 2022 were produced to the Tribunal, as document 9, at pages 55 to 61 of the Joint Bundle. No notes of that meeting from the respondents' attendees were produced to the Tribunal.

15 (64) A copy of the RNIB email to the claimant on 1 April 2022, from Heather Barbara, RNIB Employment Adviser, copied to Morna Armstrong for the respondents, was produced to the Tribunal as document 42, at pages 189 to 195 of the Joint Bundle.

20 (65) The **RNIB report** detailed the claimant's sight loss, noting that retinitis pigmentosa had affected his visual acuity and caused some loss of peripheral vision, with some light sensitivity issues, and night blindness. The claimant's eye condition affected his ability to read standard sized print and handwritten material, and much of the content on a computer screen could also appear too small or detailed for him to discern it properly. He preferred all written material being provided in an electronic format, as that gave him the facility to resize material to his preferred format, or output as speech, or printed written material being provided in large print format.

25

30 (66) The RNIB email detailed the points discussed between the claimant and Ms Barbara, at a meeting held that day, including her recommendations for equipment and other adjustments which the claimant might discuss with the respondents as his employer. Working with smaller groups was discussed as an alternative

approach, to be discussed locally, as the needs of the respondents' business would have to be considered.

- (67) There was produced to the Tribunal, as document 10, at pages 62 and 63 of the Joint Bundle, and duplicated as document 40, at pages 186 and 187, a “**Supporting Attendance – Outcome of Meeting**” letter dated 27 April 2022 from Lorna Murray, Head Teacher, to the claimant, in the following terms:

“Dear Paul,

Supporting Attendance – Outcome of Meeting

Thank you for attending the supporting attendance meeting with me on 29 March 2022, arranged in line with the Absence Management Policy for Teachers. The meeting took place by video call. Also in attendance at the meeting were Christine McMenamin, your Aunt who accompanied you, and Morna Armstrong, Principal HR & OD Adviser.

The purpose of the meeting was to discuss the Occupational Health Service (OHS) report of 7 March 2022, with the purpose of ensuring that there is appropriate assistance in place to support your health, wellbeing and attendance at work.

I shared that you have Retinitis Pigmentosa, and you have expressed concern that as your eyesight deteriorates, you will have difficulty performing everyday tasks.

A discussion took place around the OHS report from 7 March 2022, which advised that a workplace assessment be undertaken by Access to Work or RNIB to assess your needs in more detail. A workplace assessment is also recommended by the OHS to ensure you are able to work safely in a school environment.

You advised that you had requested a workplace risk assessment from Access to Work. There is already a referral in place with Access

5 to Work and you had initially been informed that you would not require a new referral. However, you have since been advised that this was not the case and a new referral would need to be made. You made the new referral in December 2021, and were informed that the referral can take up to 6 months to be actioned. In the meantime, you advised that a workplace risk assessment can be carried out by RNIB. There may be a charge for this.

10 You shared that you had some equipment on a short trial at home from RNIB. The equipment gave you the option to enlarge and change the background colour of text. This equipment would need to be purchased and is not available on loan. Light within the classroom can also cause a glare, and you confirmed that you can lower blinds within all the rooms to help with this.

15 A discussion took place around working arrangements. You advised that this can be stressful however you have managed this year. The OHS report stated that it may be more realistic that you work with smaller groups of children, and possibly older children as they have greater independence. However, it was agreed that this is not always the case. Currently, you are working with a variety of classes/groups. I outlined that you work 0.5 NCCT working with large class sizes of up to 31 pupils, and 0.5 PEF support working with smaller groups. It was noted that sometimes sickness absence cover requirements can impact on this arrangement.

25 You explained that you are looking to find out what options from Renfrewshire Council are available going forward should your eyesight deteriorate. In addition, you confirmed that you have applied for jobs within and outwith the authority, mainly Inclusion Support roles. You shared that you have a background in ASN.

We agreed the following actions as an outcome of the meeting:

30 1. Paul to organise Workplace Risk Assessment through RNIB.

2. *Morna to link with RNIB to establish if the report available without charge is acceptable*
3. *Morna to link with Education Manager in relation to roles.*
4. *School Risk Assessment to updated in April 2022 with Paul, Lorna and Joanne Duffy, Service Delivery Officer.*
5. *Lorna to link with the sensory team if appropriate (Morna will confirm team).*
6. *Morna will check with OHS what is meant by 'PSA' as it features in the OHS report of 7 March 2022.*
7. *Paul will arrange a visit to the optician.*
8. *A medical report was requested from the Ophthalmologist by the OHS.*

As a further action point from the meeting, we arranged another supporting attendance meeting to review progress with the agreed actions on Thursday 28 April 2022 at 9.15a.m. In attendance will be myself and Morna Armstrong, Principal HR & OD Adviser.

Please advise me as soon as possible if the date, time or location is unsuitable in order that alternative arrangements can be made.

If you wish, you may be accompanied by your trade union representative or other person of your choice. It is your responsibility to make the necessary arrangements if you wish to be accompanied."

- (68) There was a meeting between the Claimant, Christine McMenamin, Lorna Murray and Morna Armstrong on 28 April 2022. **[ASF 16]** It was a formal meeting, held remotely, using Teams. It discussed the report from RNIB. The claimant was informed and accepted that it would not be possible to create a specific role for him in the school, and that further consideration would be given to the possibility of a

personal support assistant. The claimant expressed anxiety about the year ahead without any adjustments to his work.

5 (69) A copy of Christine McMenamín's handwritten notes of that meeting held on 28 April 2022 were produced to the Tribunal, as document 11, at pages 64 to 67 of the Joint Bundle. No notes of that meeting from the respondents' attendees were produced to the Tribunal.

10 (70) Further to that meeting held on 28 April 2022, there was produced to the Tribunal, as document 43, at pages 196 and 197 of the Joint Bundle, a "**Supporting Attendance – Outcome of Meeting**" letter (wrongly) dated 27 April 2022 from Lorna Murray, Head Teacher, to the claimant, in the following terms:

Dear Paul,

Supporting Attendance – Outcome of Meeting

15 *Thank you for attending the supporting attendance meeting with me on 28th April 2022, arranged in line with the Absence Management Policy for Teachers. The meeting took place by video call. Also in attendance at the meeting were Christine McMenamín, your Aunt who accompanied you, and Morna Armstrong, Principal HR & OD Adviser.*

20 *The purpose of the meeting was to discuss RNIB report of 1st April 2022 with the purpose of ensuring that there is appropriate assistance in place to support your health, wellbeing and attendance at work.*

25 *You advised that you had an appointment at the optician and that you are now awaiting an appointment with the specialist. You also confirmed that you have completed the consent form for Occupational Health (OH) to contact the specialist. As of 7th June 2022, OH were not in receipt of your completed consent form. A new consent form will be sent to your home address for you to complete*

and return as soon as possible. Please advise me if you do not receive this form over the next week.

5 *I asked at the meeting if there was any update on the referral you made to Access to Work (ATW) and you advised that you had been in touch with them however there was no way to speed up the referral in order to purchase the supports detailed in the RNIB report. I outlined that I was awaiting a reply from Sandra Metcalfe, Team Manager of Renfrewshire Council's Sensory Impairment Team, who would potentially be able to offer some advice / support with regards*

10 *supporting you on your return to the classroom next session.*

I advised that the staffing allocation for the school has not been confirmed and I was unable to say whether you would be remaining in St John Ogilvie. I asked Morna if there was any update with regards roles within Children's Services. Morna informed us that a

15 *role of potentially working with small groups of pupils could not be created. The advice received from Children's Services was for you to consider the proposal of a Support Assistant being provided through ATW, to allow you to continue to undertake your current class teacher role.*

20 *Christine explained that you were not looking for a role to be created but that you would be considered for existing roles that would be suitable. I shared that within Renfrewshire Council the role, for example of pupil support teachers, does not exist as core staffing. The role of working with small groups for 0.5 FTE of the week has*

25 *been available in St John Ogilvie this session due to the way the Pupil Equity Funding had been used. I shared that I was not in a position to know what other schools would be doing with their PEF funding as it involved consultation with school communities.*

30 *I discussed each part of the RNIB report in terms of software and supports that could be purchased / made available once the ATW referral has been actioned. It was also agreed that advice would*

5 *need to be taken from ATW about the benefits and practicalities of considering Pupil Support Assistant / Support Worker assistance. This was referred to in the OH report of 7th March 2022 and RNIB report of 1st April 2022. You explained that you do not feel this type of support may be needed just now, and you would rather work to your strengths.*

We agreed the following actions as an outcome of the meeting:

10 *Morna stated that she would speak to Renfrewshire Council ICT Department with regards licences for Dragon / Access Technology Software. ICT have since replied to Morna and stated that they do not have spare licences and they are purchased and rolled out on an individual basis.*

15 *I stated that I would speak to Sandra Metcalfe to ask if and what support could be made available to support you in the classroom until the ATW referral is actioned. Since then I have passed on your email address to Sandra Metcalfe who will be in touch with you, and planned to pass your details on to one of her team who can offer support for the classroom.*

20 *I will advise on staffing once the information is made available, and you will continue to look out for job opportunities within Renfrewshire Council that may be more suitable for the longer term. I will continue to link with you in terms of updating the Risk Assessment as and when appropriate.*

25 *You stated that you will keep me informed with regards the progress of the ATW referral, which you have done.”*

(71) There was produced to the Tribunal, as document 12, at page 68 and 69 of the Joint Bundle, an undated letter from the claimant to the respondents’ Morna (Armstong), sent sometime in May 2022, expressing his concerns about what he perceived to be a lack of progress on the part of the Council, in the following terms:

30

“Following on from our meetings on 29 March and 28 April I've had an opportunity to reflect on those discussions, in particular the meeting of 28 April.

I think this would be a good time to set out matters as I see them.

5 *The Authority has known since my employment that I have a disability and have been registered as blind for a number of years. I have been open about the fact that this is a degenerative condition and affects, in particular, my peripheral vision.*

10 *In September last year I spoke with my Head Teacher, Lorna Murray, and told her that I was aware that my vision had deteriorated and consider it time to explore formal support.*

15 *Lorna arranged a meeting with Elspeth from HR and the position was fully explained. I understood that investigations were to be made by HR around support measures and options in other settings but I heard nothing further. Having pressed for an update, the meeting of 29 March was arranged.*

20 *It was clear to me at that meeting that none of the matters discussed in September had been progressed. I was, however, encouraged by the scope of the discussion. In summary, we spoke about exploring technology which might assist, prospects of redeployment, alteration of my duties to work with smaller or older groups and the possible remit of a Personal Support Assistant. I explained that my eyesight had deteriorated further and that I was keen to explore all options as I am looking for longevity in my career.*

25 *I am sure that you will also have detailed notes of that meeting but I think it would be useful to set out of the discussion around redeployment and adjustment.*

30 *My strong preference is to retain autonomy in my post as far as possible and I explained that this can be facilitated by working with smaller groups or older children. Currently I spend 50% of my time*

5 *working with smaller groups although Lorna explained but Wayne this was not possible due to staff absence I have always been flexible. I stated that I have also applied four positions working with older children but have not, as yet, been successful. An action from the meeting was for this to be raised with Amilia Hall In the context of adapting my role to accommodate my disability. We discussed that there were others working in "split" roles which could possibly be reconfigured to allow this. I accepted that this was unlikely to be in my current school. Amelia was also to be consulted in relation to*

10 *inclusive support rules in secondary schools. HR were to look at any other rules within the authority although I stressed that's my preferred option is to remain in teaching.*

15 *I was hopeful that, at the meeting of 28 April, there would have been some progress what was told the feedback from Amelia had been that there was no capacity to create a role and that it was the PSA option which should be further explored. I had not asked but a role was created what that my current role was adjusted to allow me to carry this out in the context of my disability. Later in the meeting it was stated but Amelia had been given all of the information around*

20 *my experience but the team were in the middle of organising staff just now. So, I am not clear, is the request to adjust my role still under consideration or has it been discounted? If so, on what basis?*

25 *In relation to a personal support assistant there is currently no clarity around that person's role in practical terms and therefore no sense of whether this is a viable option. I was asked at the last meeting to contact Access to Work to explore what a PSA might do. I was told that there would be funding and recruitment considerations following that. As with any actions assigned to me, I immediately contacted Access to Work. I am told but there is a waiting list of 6-8 weeks from*

30 *my enquiry to be assigned to a case manager and I cannot access information on the PSA until then.*

Lorna expressed at the last meeting a worry that time might simply run out and I am very concerned that this will indeed be the case. Almost a full school year has passed since I raised these issues and there appears to have been no progress.

5 *You expressed the hope that a job comes up which is a “better fit” and that might happen. In the meantime, however I do not consider it reasonable, despite my best efforts, to be facing the summer break with no certainty as to what will be expected of me next year and whether that will be something with which I can cope. I have not*
 10 *made an issue of the toll this uncertainty is taking on me but that is certainly the case and increasingly so.*

My aim, with the Authority's support, is to continue in teaching and to work with autonomy as far as possible

15 *There is currently no date for a future meeting as this was to be arranged around the response from Access to Work. I am, however, keen to look at what progress can be made prior to the summer break. I'd be grateful if you could consider and then arrange a time for a further discussion.”*

20 (72) On 17 June 2022, an Access to Work grant was awarded by the Department of Work and Pensions to partially fund assistive equipment and technology for the Claimant. **[ASF 19]**

25 (73) The assistive equipment ordered is detailed at document 30 of the Joint Bundle. **[ASF 20]. [Note by Tribunal:** this agreed fact is in error: the document 30, produced at page 104 of the Joint Bundle, is actually the receipt signed by the claimant’s father on 27 April 2023. The DWP quotation for the equipment ordered for the claimant was actually produced as document 31, at pages 105 to 108 of the Joint Bundle.]

30 (74) The equipment was delivered prior to the new school term commencing after the Summer 2022 holidays. **[ASF 21]**

(75) There was a meeting between the Claimant, Lorna Murray, Christine McMenemy and Morna Armstrong on 21 June 2022. [ASF 17]. It was a formal meeting, held remotely, using Teams. With the school holidays coming up, the claimant was told that there were no alternative roles available for him in other educational establishments, and no specific role could be created just for him.

(76) A copy of Christine McMenemy's handwritten notes of that meeting held on 21 June 2022 were produced to the Tribunal, as document 13, at pages 70 to 74 of the Joint Bundle. No notes of that meeting from the respondents' attendees were produced to the Tribunal.

(77) No "**Supporting Attendance – Outcome of Meeting**" letter was sent to the claimant by the Head Teacher, Lorna Murray, or by Ms Stewart, or anybody else within HR&OD, noting what had been discussed, or agreed, at that meeting held on 21 June 2022.

Claimant's absence from work, and Meetings with Head Teacher & HR, and Occupational Health reports – session 2022/2023

(78) There were two in-service days on 14th and 15th August 2022, before pupils returned to school. [ASF 22] [Note by Tribunal]: this agreed fact is in error as the 2 days were actually Monday 15 and Tuesday 16 August 2022].

(79) The Claimant did not attend the first in service day as he was attending a wedding. [ASF 23]. The Head Teacher had granted him this day off as it was a re-arranged wedding, where the claimant was the best man, and the wedding which had been planned for the weekend had been moved due to a fire which broke out at the wedding venue.

(80) The claimant did attend on the second day, Tuesday, 16 August 2022. Pupils returned to school on Wednesday, 17 August 2022, when the claimant attended for work at the school.

- (81) The assistive software and hardware was not installed on his return to school after the holidays. [ASF 24]
- (82) When the claimant attended at the school, on 16 August 2022, for the in-service day, he saw something had been delivered to the school, as there were a “*pile of boxes*” on his desk, but nothing had been set up. A new laptop with assistive technology was not there. It had been ordered and was due to arrive shortly after the start of the school year when the software would be installed.
- (83) There were boxes for each other of the assistive technology items. He recalled the boxes included a computer monitor, headphones, portable video magnifier, pocket video magnifier, and task lamp, but he never received the Dragon speech recognition software or training, nor the access technology software.
- (84) On 16 August 2022, the claimant set up his classroom. He believed that he was to set up what equipment was there, as the Council had not sent him any correspondence to say he would get assistance to set up his work station with the new equipment, albeit he had told the Head Teacher and HR that he could be contacted during the school holidays, and that he would go in to get things organised. He was not contacted and asked to do so during the school holidays.
- (85) Some of the assistive equipment was delivered to the school in advance of the new school year commencing on 15 August 2022, but not a new laptop that the respondents’ IT department were intending to allocate to the claimant. The claimant was advised by the Head Teacher, on his first day back in school, on 16 August 2022, that a full-time member of staff (Lorna Innes) had been arranged to assist him in the classroom for the new school term.
- (86) For session 2022-23, the claimant was given responsibility for teaching a composite primary 3 / primary 4 class of 24 pupils. It was planned that the assisting staff member would be a teacher for the first 10 weeks of school term. This was to provide the claimant with

support with building relationships with the new pupils, adjusting to the new equipment and any other support that was required. Thereafter, a classroom assistant would be specifically trained and allocated to the claimant's class on a longer-term basis.

5 (87) On the afternoon of the second day, a Cluster Mass was organised at St Andrews, to which all teaching staff were expected to attend. The Head Teacher gave the claimant the option to remain at the school to give him more time to set up his assistive equipment, so he did stay in school that afternoon.

10 (88) The ordinary course of action if any teacher experienced technical difficulties with equipment would be to contact the Head Teacher in the first instance. Thereafter the respondents' IT department could be contacted if further technical support was required. The claimant did not make the Head Teacher aware that he was experiencing
15 difficulties setting up his classroom.

(89) The claimant had his first day back with pupils on 17 August 2022, and he "***struggled through that day***". He felt overwhelmed, his mental health was not doing very well, and when he spoke with the Head Teacher, after school that day, he did not ask for any
20 assistance with installation of equipment, but he did ask for her advice on what he could use the second adult in the classroom for, and she stated that the additional member of staff could be used for any form of support for the claimant.

(90) The Claimant was absent from work on 18 August 2022. **[ASF 25]**
25 On his way into work, by taxi, he burst into tears, and went straight to his parents' house, rather than the school, before phoning the Head Teacher, Lorna Murray, straight away.

(91) Discussion took place around him contacting his doctor for support. The Head Teacher emailed him a leaflet about "***Time for Talking***",
30 a 24/7 phone helpline for Council staff offering a free confidential counselling and support service. A copy of this leaflet was produced

to the Tribunal, as document 32, at pages 109 and 110 of the Joint Bundle.

5 (92) The claimant went to consult his GP, and he was diagnosed with work related stress. His father took GP fit notes into the school in accordance with their absence reporting procedures. The claimant's sick notes did not reference his retinitis pigmentosa, his visual impairment, as the reason for him being certified unfit to work by his GP.

10 (93) The Claimant did not return to work from 18 August until he resigned on 13 April 2023. **[ASF 26]** Apart from attendance at 2 subsequent supporting attendance meetings in the school, he was never back in the school in a working capacity.

15 (94) A meeting took place between the Claimant, Christine McMenamin, Lorna Murray and Lynette Stewart on 31 August 2022. **[ASF 27]** Ms Stewart is an HR & OD Adviser. This formal, in-person meeting was held within the school, chaired by Ms Murray.

20 (95) The claimant stated that the specific area causing him stress within the role of class teacher was the feeling of not seeing everything that was going on within the classroom. He did not mention that the assistive equipment not having been installed was a barrier to his return to work. It was agreed that an Occupational Health referral should be made, and Lynette Stewart explained that the teacher terms and conditions of employment could not transfer to other areas of the Council.

25 (96) A copy of Lynette Stewart's handwritten one-page note of that meeting held on 31 August 2022 was produced to the Tribunal, as document 44, at page 198 of the Joint Bundle.

30 (97) A copy of Christine McMenamin's handwritten notes of that meeting (described in the Bundle index as September 2022) were produced to the Tribunal, as document 16, at pages 82 to 84 of the Joint

Bundle. No notes of that meeting from the respondents' other attendee, Ms Murray, were produced to the Tribunal.

5 (98) No "**Supporting Attendance – Outcome of Meeting**" letter was sent to the claimant by the Head Teacher, Lorna Murray, or by Ms Stewart, or anybody else within HR&OD, noting what had been discussed, or agreed, at that meeting held on 31 August 2022.

10 (99) Although not referred to in the agreed statement of facts, there was produced to the Tribunal, as document 14, at pages 75 to 78 of the Joint Bundle, an **Occupational Health referral** dated 9 September 2022, made by Lorna Murray, the claimant's Head Teacher.

(100) In that referral, Lorna Murray gave as the reason for referral the claimant's long term sickness absence, which had begun on 18 August 2022, and where the reason for absence was recorded as "**work related stress**".

15 (101) In the background information provided to OH by Lorna Murray, as the claimant' line manager, she stated as follows:

20 *"Paul has a condition cold retinitis pigmentosa. Over time the condition will cause Paul's eyesight to deteriorate. Paul has been absent from work since 18th August 2022 with work related stress stated as the reason for absence. For session 2022-23 Paul had been allocated the responsibility of being the class teacher of primary 3 / 4 with 24 pupils. On returning from the summer holiday period some adjustments and additional support had been put in place to support Paul in his teaching. A desk lamp, magnifier, laptop with speech software had been ordered with some equipment being*

25 *in place. An additional teacher was allocated to the class to support Paul in the first few months of the new term. Paul would have overall responsibility for the class and the additional teacher would be a support for Paul to ensure that he was able to build. A meeting with*

30 *HR, Paul and the Head Teacher took place on 31st August to*

discuss ongoing support for Paul. One of the recommendations from the meeting was for a referral to be made OH.”

5 (102) There was also produced to the Tribunal, as document 15, at pages 79 to 81 of the Joint Bundle, an **Occupational Health report** on the claimant dated 27 September 2022 from Dr C Liew from PAM OH Solutions to the respondents’ Lynnette Stewart (HR), following upon a telephone assessment of the claimant regarding his fitness for work and additional supports required due to his underlying retinitis pigmentosa.

10 (103) In particular, Dr Liew, in discussing “current issues”, stated that:

15 *“Retinitis pigmentosa (RP) is a group of rare, genetic disorders that involve a breakdown and loss of cells in the retina. Common symptoms include difficulty seeing at night and a loss of side (peripheral) vision. Mr McMenamin may have difficulty performing essential tasks of daily living such as reading should his condition deteriorate walking without assistance or recognising faces and objects. He felt able to carry out his role following my assessment in March 2022; however he has found it more difficult towards the end of the school term and reports that since the summer break, he has*

20 *definitely had further deterioration reported in his central vision.*

25 *As management are aware, he has been in contact with Access to Work and RNIB. I had recommended that he gets a workplace assessment undertaken by either of these organisations to assess his needs in more detail at my last assessment. Mr McMenamin had a phone assessment with RNIB and some funding via Access to Work for some work adaptations to be put in place. However, he still found working in a classroom with large number of pupils difficult despite the support and having an additional member of staff to help.*

30 *I had also suggested that he is considered to work with smaller numbers of pupils in a class (i.e.. less than 6) as this may more achievable and realistic given the nature of his visual impairment and*

progressive nature of the condition. Working with older pupils may also be safer as they would be expected to be more independent in a classroom setting. Having a support from a PSA will certainly help as well, where possible.”

5 (104) A medical report from his ophthalmologist was still pending, as it was only requested on 15 August 2022 as there were some delays of obtaining consent after Dr Liew’s initial assessment in March 2022.

(105) The OH opinion from Dr Liew was further to her previous report and recommendations made on 7 March 2022. In this further report, Dr
10 Liew stated that the claimant was fit for work, with restrictions, as previously advised, and she further stated that:

*“This may be a short-term adjustment and provided Mr
McMenamin’s vision does not further deteriorate. However, in the
longer term we discussed the benefit of exploring redeployment to a
non-pupil contact role we are Mr McMenamin may benefit from
15 training while he still has some preserved vision that would allow him
to undertake and learn new things (i.e. using voice recognition
software, finding alternative ways of undertaking a desk based job
etc) prior to his vision deteriorating further.... In the interim, please
20 consider my recommendations above and discuss with the
employee as he is still very keen to work if possible.”*

(106) Dr Liew also stated that that risk assessments at work should be updated three to six monthly as his condition was very likely to further deteriorate over time. While she had not routinely arranged further
25 review, she suggested that a further assessment be held once further information was available from the claimant's specialist ophthalmologist.

(107) There was produced to the Tribunal, as document 17, at pages 85 to 87 of the Joint Bundle, a **further Occupational Health report** on the claimant dated 25 October 2022 from Dr C Liew from PAM OH
30 Solutions to the respondents’ Lynnette Stewart, following upon a

further telephone assessment of the claimant regarding his fitness for work and additional supports required due to his underlying retinitis pigmentosa.

5 (108) Dr Liew's further report of 25 October 2022 noted that the claimant was still signed off work citing work related stress, and that the ophthalmologist's report was received on 10 October 2022, and that it was read out and discussed with the claimant, who had consented for her to provide the council with an update.

10 (109) No copy of the specialist ophthalmologist's report was provided to the Tribunal by either party as part of the Joint Bundle. From the terms of Dr Liew's report, it was recorded that:

15 *"The specialist report essentially confirms that Mr McMenemy's retinitis pigmentosa (RP) is progressive in nature and the condition will eventually lead to extreme tunnel vision and loss of acuity (vision). Rate of deterioration in cases are variable but in Mr McMenemy's case, a significant deterioration was noted between April 2021 and October 2021. There is no treatment to be offered; hence he has also been discharged from the specialist clinic. The specialist confirms that Mr McMenemy's visual impairment and being "registered blind" would certainly restrict his ability to work as a teacher in comparison to a normal sighted colleague. The specialist also supported the work adjustments recommended by OH in relation to working with smaller groups and older pupils as he felt that sensible measures should certainly be considered to support Mr McMenemy, where possible".*

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25

(110) In her OH opinion, Dr Liew stated:

30 *"In my opinion, Mr McMenemy is fit for a trial of work with restrictions-as detailed in my report from 27th September 2022. In the short-term, adjustments within his teaching role could certainly be trialled with permanent adjustments considered, where operationally feasible. However, in the longer term, it is my medical*

opinion that redeployment to a non-pupil contact role would be better as this allows Mr McMEnamin more time and opportunity for training while he still has some preserved vision. Please discuss the work recommendations from previous reports with the employee as he does remain keen to remain at work in some capacity and the lack of clarity relating to the future of his employment is certainly an on-going concern at present.”

5

(111) A meeting took place between the Claimant, Christine McMEnamin, Lorna Murray and Lynette Stewart on 1 December 2022. **[ASF 28]** This formal, in-person meeting was held within the school. The claimant was asked whether there was anything the council could do to help him return to classroom teaching, and his position was that he could not return to classroom teaching, and saw the possibility of finding him an alternative non-teaching role was discussed.

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(112) A copy of Lynette Stewart’s handwritten one-page note of that meeting held on 1 December 2022 was produced to the Tribunal, as document 44, at page 199 of the Joint Bundle.

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(113) A copy of Christine McMEnamin’s handwritten notes of that meeting held on 1 December 2022 were produced to the Tribunal, as document 19, at pages 89 to 91 of the Joint Bundle. No notes of that meeting from the respondents’ other attendee, Ms Murray, were produced to the Tribunal.

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(114) No “**Supporting Attendance – Outcome of Meeting**” letter was sent to the claimant by the Head Teacher, Lorna Murray, or by Ms Stewart, or anybody else within HR&OD, noting what had been discussed, or agreed, at that meeting held on 1 December 2022.

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(115) The claimant applied for a new job with DWP, on 6 December 2022.

(116) By an undated letter from the claimant to the respondents’ Head of Education, Tracy McGillivray, received by her on 6 December 2022,

the claimant wrote to her in relation to his then current absence from work.

- (117) A copy of the claimant's undated letter was produced to the Tribunal as document 18, at page 88 of the Joint Bundle, and it was written in the following terms:

"Dear Ms McGillivray,

I am currently absent from my post as a class teacher at St John Ogilvie Primary School due to ill-health. Supporting attendance discussions are ongoing with Lorna Murray and Lynette Stewart. My salary is, however, due to reduce on 15th January 2023.

You will be aware that part 2 section 6 of the SNCT Handbook provides for discretion around sickness pay. Section 6.8 refers to the general discretion and, in particular, section 6.36 refers to careful consideration being given to the extension of sick pay where the person will be able to return to work or there is an Equalities issue.

I am told by Lynette that the decision to exercise discretion lies with you and I request that you do so.

If you have a policy or criteria which sits underneath the handbook provisions, please let me know and I will make my request with reference to those requirements.

If you wish any further information generally before considering my request I will be happy to provide this."

- (118) On 14 December 2022, Tracy McGillivray, the respondents' Head of Education, wrote back to the claimant in response to his letter received on 6 December 2022. A copy of her reply was produced to the Tribunal as document 20 at page 92 of the Joint Bundle. In her letter of reply, Ms McGillivray stated as follows:

"Thank you for your letter received on 6 December 2022 in relation to your current absence from work.

Apologies for the delay in my response. I have linked with Lynette and Lorna on this one as you noted in your letter they are supporting you at this time with your absence from work.

5 *I understand that discussions took place with you at your last meeting requesting that you go back and discuss your reason for absence on your fit note as it currently states “work related stress” with no mention of your long term health condition, retinitis pigmentosa and your deteriorating vision, which are the main barriers to you returning to work. Lynette and Lorna have advised*
10 *that the last Occupational Health report did not focus on your long term health issues, but focused on the reason for absence, as noted on your fit note, as work related stress.*

15 *Having reviewed your full absence case, I would advise that whilst the provisions in the SNCT handbook do allow for an extension at the discretion of the employer, the circumstances here do not, in my view, merit such consideration.”*

(119) The claimant replied to Ms McGillivray’s letter of 14 December 2022 by an undated letter from him to her, a copy of which was produced to the Tribunal as document 21, at page 93 of the Joint Bundle,
20 reading as follows:

“Dear Ms McGillivray,

Thank you for your letter. You’ll appreciate that the decision is disappointing.

25 *In my e-mail of 06/12/2022 I asked to be informed of any policy or criteria which sits underneath the handbook provisions in order that I could make the request in that context. From your response, I assume there is no such policy and the issue is purely one of discretion but please confirm.*

30 *I also asked that you let me know if I could provide any other information before you considered my request. In my view this would*

be particularly important in the absence of a policy or criteria in order to ensure that any decision was reached in a balanced and transparent manner.

5 *On the face of it my request meets the conditions set out in the handbook. I understand from your response that you have considered two matters - the content of the occupational health report and the reason for absence given by my doctor.*

I am not clear how either of these formed part of your decision to refuse my request and would be grateful if you could clarify.

10 *Further, I do not agree with the interpretation of the occupational health report and am concerned that the reason for my absence as assessed by my doctor has been referenced. It was clear at the last meeting a view was held but the reason given by my doctor was incorrect. Lynette did however clarify that, despite the comments*
15 *made, this was not a matter for HR or Education to assess. I agreed to discuss with my doctor and will do so. The reason for my absence currently remains as stated and I do not know if / when this will change.*

20 *I look forward to hearing from you in response to the issues I have raised. Please also confirm whether you are prepared to revisit your decision and, if not, please advise me of the relevant appeal process and any time scale.”*

(120) On 19 December 2022, the claimant had an interview with DWP for a new job, that he had applied for on 6 December 2022.

25 (121) On 23 December 2022, Tracy McGillivray, the respondents' Head of Education, wrote back to the claimant in response to his undated letter. A copy of her reply was produced to the Tribunal as document 22 at page 94 of the Joint Bundle. In her letter of reply, Ms McGillivray stated as follows:

“Please first of all forgive me for sending this letter to your glow e-mail address I do not have your personal e-mail and I appreciate that you may not be checking this account during the school holidays.

5 *I appreciate that my response in relation to your request to extend sickness absence was disappointing to you, and would ask you to note that there is no right of appeal within the SNCT handbook provisions.*

10 *I reviewed clause 6.36 of the SNCT handbook together with the information outlined in my letter dated 14 December 2022 when coming to my decision. I would also ask you to note that the provisions within 6.36 state “... The council should give careful consideration to extending the period of sickness allowance,,,”. The sickness allowance and entitlements within the SNCT handbook have not as yet been fully exhausted with you commencing half pay from 16 January 2023, then no pay from 18 June 2023 should you*
15 *continue to remain absent from work.*

20 *In relation to ongoing dialogues between occupational health and your medical adviser, these are discussion which should take place with your head teacher and HR who are supporting your absence from work at this time. I am not involved in those detailed discussions.”*

(122) The claimant responded to Ms McGillivray by an undated letter, emailed to her on 11 January 2023, copy produced to the Tribunal as document 23 at page 95 of the Joint Bundle, reading as follows:

25 *“Thank you for your letter sent by e-mail on 23 December. You will appreciate that I had insufficient time to consider and respond before the end of term.*

30 *The SNCT handbook does not set out any form of process. It is for that reason Lynette was asked to confirm to whom the initial request should be made in terms of Renfrew’s procedures. It would be clearly*

unfair for there to be no right of appeal from an initial decision. If it remains the case that you are not prepared to review your position then perhaps Lynette could confirm the escalation process. Will you ask her to do so or will I contact her direct?"

5 (123) On 11 January 2023, the Claimant emailed Lynette Stewart expressing an interest in various areas of work undertaken by the Respondent. **[ASF 29]**

10 (124) A copy of the claimant's e-mail of 11 January 2023 to Ms Stewart was produced to the Tribunal, as document 24, at page 96 of the Joint Bundle, where he informed her that:

15 *"I have spent sometime trying to research different sectors within the council to identify possible opportunities. In terms of interest, I have always had an interest in social work / child protection type of work. In a previous role, I worked as a support worker for SEBN children and gained experience and knowledge of working in the sector. I also had responsibility for the pastoral care of students and have always enjoyed this type of work. In terms of strengths I would say any role that involves working with people. I have strong communications skills and can explain and pass on information clearly. I have*

20 *experience in conflict resolution from previous CAMHS training. I hope this is helpful I know you had asked about any specific jobs I would be interested in but without specific knowledge of day-to-day tasks, it is difficult for me to provide more specific examples."*

25 (125) In reply to the claimant's e-mail, Lynette Stewart e-mailed him back on 13 January 2023, copy produced at page 96 of the Joint Bundle, saying that she would check the vacancies as they came through and if there was anything she thought would be relevant for the claimant to apply for based on what he had detailed in his e-mail she would let him know. If there was anything he was applying for, she

30 asked him to let her know and she would have a chat with the recruiting manager.

- 5 (126) Lynette Stewart regularly consulted internal vacancies for any suitable posts for the claimant. The claimant did not apply for any internal vacancies independently or with the support of the respondents. No suitable vacancies were identified in the period between 11 January 2023 and the claimant's resignation, and he did not make any further contact with her prior to sending in his resignation letter to his Head Teacher on 17 March 2023.
- 10 (127) There was produced to the Tribunal, as document 38 at pages 169 to 173 of the Joint Bundle, an excel spreadsheet with a summary table of advertised posts that became available within the Council from 13 January 2023 until 17 March 2023.
- 15 (128) In his oral evidence to the Tribunal, the claimant stated that the first time he saw this document was when the Joint Bundle was intimated to him by the respondents' solicitor. He felt that Lynette Stewart had acted unreasonably in not discussing roles with him, and failing to keep in touch, and had she done so, and followed ACAS guidance, before discounting him for roles, redeployment within the Council would likely have been possible.
- 20 (129) Prepared by Lynette Stewart, this spreadsheet recorded job number; job title; grade, working hours and contract type (for example, temporary or permanent), job posting start and end dates, suitability for redeployment; and further detail.
- 25 (130) Ordinarily, redeployment into new roles in the Council would take an average of three to six months and sometimes longer, depending on the specific requirements of the role and needs of the employee.
- (131) In Lynette Stewart's experience, she did not consider seven weeks to be a particularly lengthy period of time to not have found an alternative suitable role for an employee.
- 30 (132) She intended to speak to recruiting managers in advance to assist the applicant. She suspected that in most cases, there would

necessarily be the requirement for formal interview. She has worked in all services of the Council and has a broad understanding of what different job roles involve.

5 (133) Using her knowledge of the roles and the information that she had regarding the claimant's skills, experience and preferences, Lynette Stewart explained to the Tribunal the process that she underwent to assess the claimant's suitability for the posts that were circulated to her in a weekly email before they reached the Council's Vacancy Management Panel.

10 (134) There were less roles at that time of year than normal due to the proximity to the Council's financial year end. The claimant was being paid as a teacher which was comparable to Grade 11 of local authority pay grade.

15 (135) Lynette Stewart did not contact the claimant as she did not have any substantive update for him. She did not believe that he would wish to hear from her regularly with updates merely confirming that she had not found him a suitable role.

20 (136) She noted that the claimant was off sick with work related stress and as a person related to his workplace, she did not want to constantly contact him which she felt may add to his stress.

(137) The claimant had not contacted the respondents regarding any roles that he was interested in, and nor had he contacted the respondents regarding a request for regular updates.

25 (138) The respondents had implemented adjustments to the classroom and teaching environment to facilitate the claimant continuing in a teaching role. The additional member of staff and supportive hardware and software were never trialled by the claimant.

(139) The respondents continued to attempt to facilitate the claimant's return to work throughout his absence, but he never returned to

work, after 18 August 2022, and he resigned, with effect from 13 April 2023, after he had accepted a new job with a new employer.

Claimant's entitlement to sickness allowance, and going on to half-pay

(140) The Claimant was paid half pay from 16 January 2023. [ASF 30]

5 (141) In accordance with the respondents Sick Pay Policy, the claimant was paid half pay from that date. The claimant requested that he remain on full pay whilst on sick leave, as per his correspondence with Tracy McGillivray, Head of Education. His medical fit note was always provided for work related stress. It was discussed with the claimant by the respondents' HR that if his medical fit note were to be amended by his doctor to relate to his disability, discretion could be potentially exercised in relation to his pay. The medical fit notes were not amended. Based on medical fit notes for work related stress, the respondents reduced the claimant's pay by half, per the respondents' Sick Pay Policy.

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(142) The claimant continued to be in receipt of half pay from 16 January 2023 until termination of his employment with the respondent on 13 April 2022. He remained absent from work, and the reason given for his absence was "**work related stress**".

20 (143) Further, and, as per the letter of 23 December 2022 to the claimant from Tracy McGillivray, the respondents' Head of Education, copy produced to the Tribunal as document 22, at page 94 of the Joint Bundle, the claimant's entitlements to sickness allowance within the SNCT handbook were not fully exhausted, and had he remained in service and continued to remain absent from work then he would have been in a no pay situation from 18 June 2023.

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(144) In reply to the claimant's e-mail to her on 11 January 2023, Tracy McGillivray, the respondents' Head of Education, wrote again to the claimant by letter dated 17 January 2023, a copy of which was

produced to the Tribunal as document 25, at page 98 of the Joint Bundle, in the following terms:

“Thank you for your e-mail dated 11 January 2023.

5 *The provisions within the SNCT handbook, which are nationally agreed terms and conditions, are applied by each council, there is no separate policy or process out with the provisions outlined in section 6 of the handbook.*

10 *I can therefore reaffirm the position that there is no right of appeal in relation to my decision under paragraph 6.36 off the national handbook.*

I trust this clarifies the position for you.”

(145) The Claimant’s medical fit note was always for work related stress.
[ASF 31]

15 (146) There was produced to the Tribunal, as document 26, at page 99 of the Joint Bundle, a copy of a letter **“to whom it may concern”** from the claimant’s GP, Dr George Gibson, dated 7 March 2023 in the following terms:

20 *“I first saw Mr McMenamin in surgery on the 18th August. Mr McMenamin has a history of degenerative vision and was finding it increasingly difficult to manage at work. Mr McMenamin presented with acute stress, insomnia and anxiety.*

25 *Over the last few months, we have reviewed Mr McMenamin regularly at the practice. He has required Propranolol for anxiety attacks and sleeping tablets for insomnia. Mr McMenamin has also been reviewed by our Community Well-being Nurse. Following review, he was referred for Cognitive Behavioural Therapy to help manage his symptoms.*

Mr McMenamín's presentation is secondary to difficulties he is experiencing at work. I suspect Mr McMenamín will continue to suffer from acute stress and anxiety until the issues at work are resolved."

5 (147) The GP's letter of 7 March 2023 was not provided by the claimant to his Head Teacher, or any member of the respondents' HR & OD function, while he was employed by the respondents, and it was first seen by the respondents when it was included in the Joint Bundle for this Final Hearing.

10 (148) The claimant accepted his current job with the DWP on 9 March 2023, having accepted their offer dated 7 March 2023 of a permanent appointment as an Executive Officer.

Claimant's resignation letter

15 (149) The Claimant sent a letter of resignation to the Respondent dated 17 March 2023 with an effective date of 13 April 2023. **[ASF 32]**. He wrote it on his own, and he emailed it to his Head Teacher.

20 (150) By 17 March 2023, when he tendered his resignation to the respondents, the claimant had already applied for alternative jobs outside the Renfrewshire Council, and he resigned from their employment when he was offered and accepted one of those other roles, namely his current employment with the Department for Work and Pensions.

(151) The claimant did not invoke any formal grievance procedure within Renfrewshire Council before he sent in his letter of resignation on 17 March 2023.

25 (152) A copy of that resignation letter, addressed to Lorna Murray, was produced to the Tribunal, as document 27, at page 100 of the Joint Bundle, and it stated as follows:

"Dear Lorna,

Please accept this letter as official notice of my resignation as a primary school teacher for Renfrewshire Council. My last day of employment will be 13/04/2023.

5 *I feel that I have no choice but to accept the job on offer due to the lack of meaningful action from the Council since our communications began in September 2021. Furthermore, there has been a complete lack of engagement from the Council since 01/12/2022.*

I wish you and all of my colleagues [sic] the best in the future.

Sincerely,

10 *Paul McMEnamin”*

(153) On 21 March 2023, the claimant emailed Lorna Murray, the Head Teacher, and asked her to confirm that she had received his emailed resignation letter the previous week. She emailed him, on 22 March 2023, acknowledged its receipt, and advised him that she had 15 passed it to Tracy McGillivray, the respondents’ Head of Education, who would be in touch shortly. She thanked him for his commitment and kindness shown to both staff and pupils during his time at St John Ogilvie, and wished him every success for the future.

(154) In response to the claimant’s letter of resignation, a letter dated 28 20 March 2023 was sent to him by Tracy McGillivray, the respondents’ Head of Education. A copy of that letter was produced to the Tribunal, as document 28, at pages 101 and 102 of the Joint Bundle.

(155) Ms McGillivray’s letter to the claimant acknowledged his letter of resignation, and stated that she was disappointed to note that he had 25 stated that he was resigning to accept another post because he felt he had had no meaningful support from Renfrewshire Council since 2021.

(156) While she accepted his resignation, Ms McGillivray stated that she had to be clear that she refuted the claimant’s comment that he had

5 received little meaningful support, when he had been supported through the supporting attendance procedures; he was re-engaging with Access to Work to see if there was anything additional that could be done to support him in the classroom; and he had asked to be considered for redeployment, but it had been explained that redeployment on his current teacher terms and conditions would not be possible as there were no teacher roles that could be adapted to his needs.

10 (157) Ms McGillivray stated that she was sorry that the claimant felt he had no other option but to accept this new post, and she wished him well with it. In relation to the claimant's request that the equipment purchased on his behalf could be given to him for his use in his new role, with his new employer, she agreed to be in touch with him again.

15 (158) The claimant did not reply to Ms McGillivray's letter of 28 March 2023, as he did not know if it would be appropriate to do so. He recalled getting a P45 document from the respondents, giving 13 April 2023, as his leaving date. No copy of his P45 was provided to the Tribunal by either party in the Joint Bundle.

20 (159) By subsequent letter from her, dated 4 April 2023, a copy of which was produced to the Tribunal, as document 29, at page 103 of the Joint Bundle, Ms McGillivray advised the claimant to liaise with Lorna Murray from 17 April 2023, the school then being closed for the Easter holidays, to take possession of the equipment, pick up any
25 personal belongings, and return any devices which belonged to the school or the Council.

(160) On 26th April 2023, the Claimant's father collected the assistive equipment from St John Ogilvie's Primary School. **[ASF 33]**

30 (161) A receipt for that equipment, signed by the claimant's father and Lorna Murray, on 27 April 2023, was produced to the Tribunal, as document 30, at page 104 of the Joint Bundle. It listed a LED desk

lamp; Zoom Text Magnifier with Speech v.22 (with training session)
; 24" matt screen anti-glare monitor ; VT Arm 3 monitor arm; Dragon
Pro Access Individual v15 with headset; Dragon refresher training;
Prodigi Connect12 (with training); and Explore 5 handheld electronic
magnifier.

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(162) The fit notes found at item 50 of the Joint Bundle were submitted by
the claimant to the respondent and cover the time period from when
he went off sick on 18th August 2022 until 17th April 2023. **[ASF 34]**

(163) These fit notes, issued to the claimant by his GP, and all assessing
him as unfit to work because of "**work related stress**", were
produced to the Tribunal as additional document 50, emailed to the
Tribunal by the respondents' solicitor on 7 September 2023, with GP
statements dated from 18 August 2022 to 27 February 2023, and
further email of 12 September 2023, enclosing the final fit note dated
27 February 2023 covering the period to 17 April 2023.

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Claimant's circumstances post-termination of employment with the Respondents

(164) Post-termination of employment with the respondents, the claimant
started new employment with a permanent appointment in the Civil
Service as an Executive Officer in the Department for Work and
Pensions at Castlemilk Job Centre, Glasgow, which commenced on
17 April 2023, subject to a 6 months' probationary period. Not long
after starting that new job, the claimant felt that he had a purpose
again.

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(165) A copy of the DWP letter of 7 March 2023, with his offer of
appointment, and terms and conditions of employment, was
produced to the Tribunal as document 45, at pages 200 to 208 of the
Joint Bundle.

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(166) From the claimant's further and better particulars provided to the
Tribunal, on 25 July 2023, copy produced to the Tribunal as

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document 4, at page 27 of the Joint Bundle, he applied for that new job at DWP on 6 December 2022, he was interviewed on 19 December 2022, and he accepted the offer on 9 March 2023.

5 (167) The claimant was engaged in ACAS early conciliation between 24 February and 28 March 2023, and he presented his ET1 claim form to the Employment Tribunal on 28 April 2023. A copy of that ET1 claim form was produced to the Tribunal, as document 1, at pages 1 to 14 of the Joint Bundle.

10 (168) He did not seek re-instatement to his old job with the respondents, nor re-engagement to get another job with the respondents, but instead sought an award of compensation only in the event of success with his Tribunal claim against the respondents.

15 (169) The respondents defended the claim by an ET3 response form, and paper apart, presented to the Tribunal on 31 May 2023, a copy of which was produced to the Tribunal, as documents 2 and 3, at pages 15 to 26 of the Joint Bundle.

(170) Copy payslips from the claimant's new employment with DWP covering June to August 2023 were produced to the Tribunal as document 47, at pages 210 to 212 of the Joint Bundle.

20 (171) From annual gross salary of £28,117, the claimant was in receipt of monthly gross pay from DWP of £2,343.08, producing net pay of £1,846.66.

25 (172) With the Respondent, the claimant was earning monthly net normal take home pay of £2,200, according to section 6.2 of his ET1 claim form, and £3,531 gross pay before tax, according to section 5.2 of the respondents' ET3 response.

(173) The claimant has been employed by the DWP since 17 April 2023, and his net pay is around £607 per month less than when he was employed by the respondents.

(174) There was also produced to the Tribunal as additional document 49, emailed to the Tribunal by the claimant, on 6 September 2023, cropped screenshots of the claimant's bank statements showing his wage payments from DWP for April, May and June 2023.

5 **Claimant's Schedule of Loss, and Respondents' Counter-Schedule**

(175) The claimant provided a Schedule of Loss to the Tribunal on 2 August 2023, copy produced to the Tribunal as document 5 at pages 28 to 30 of the Joint Bundle, seeking a total award of **£109,797**, including 6 years' future loss of earnings, quantified at **£43,704**, and including a claim for an ACAS uplift of 25% on his compensatory award for the respondents' failure to follow the ACAS Code, and a separate claim for **£45,000** for injury to feelings.

10 (176) No claim was made by the claimant, at any stage, for loss of pension rights, and having been asked about that by the Judge, on day 1 of this Hearing, the claimant thought about it overnight, and, on day 2, he informed the Tribunal that he was making no claim for pension loss, but otherwise proceeding to seek compensation as laid out in his Schedule of Loss.

15 (177) The respondents provided a Counter Schedule on 23 August 2023, copy produced to the Tribunal as document 6B at pages 36(2)-36(3) of the Joint Bundle, suggesting a total award of **£5,158.28**, in the event of success for the claimant.

20 (178) In answer to the Tribunal's order of 30 August 2023, requesting details of his financial loss, the claimant replied to the Tribunal, on 4 September 2023, in the following terms, as per the copy particulars produced to the Tribunal as document 6A at page 36-1 of the Joint Bundle, stating:

25 *"4a, What I seek in terms of remedy is detailed in the attached Schedule of losses. The six year progression to return to my previous level of salary is based on a discussion had with my new*

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line manger [sic]. It would require 2 promotions and working my way to the top of the scale.

5 *4b, I am a member of the SPPA pension scheme and I believe this is a defined benefit scheme. I no longer have access to my Renfrewshire payslips but I have attached a screenshot of my SPPA account.*

4c, Refer to Schedule of losses which is attached.

4e, Jobs applied for-

Disabilty Advisor, applied on 05/01/2022, unsuccessful.

10 *Teacher of support, East Renfrewshire Council, applied on 23/01/2022, Unsuccessful.*

Teacher of Support (Inclusion), East Renfrewshire Council, Applied 20/02/2022, Unsuccessful.

15 *Three Civil Service jobs applied for in December 2022, including my current job.*

20 *4f, In terms of efforts made to minimise lose, I applied for a number of jobs while still working as a teacher that I believed would be better suited to my needs. Due to the lack of progress in relation to redeployment within Renfrewshire Council, I made applications for the Civil Service. Within my new role, I have had conversations regarding career progression. After my probation period ends in October my line manager has asked if I would like to be involved in some of the managerial duties to aid my development within the department.”*

25 (179) That original Schedule of Loss was superseded by a later version in the course of this Final Hearing, an updated version being provided by email on 4 September 2023, copy produced to the Tribunal as document 6C at pages 36(4) – 36(6) of the Joint Bundle, seeking a

reduced total award, with injury to feelings now sought at **£30,000**, as opposed to **£45,000** sought previously.

5 (180) The respondents provided a further Counter Schedule on 5 September 2023, copy produced to the Tribunal as document 6D at pages 36(7)-36(8) of the Joint Bundle, still suggesting a total award of **£5,158.28**, in the event of success for the claimant, but with an updated narrative of the respondents' position in reply to the claimant's Schedule of Loss.

10 (181) In his final, revised Schedule of Loss, as at 6 September 2023, provided by email along with his closing submissions on 25 September 2023, the claimant quantified his total losses in a figure of **£122,650**, including an increase in the sum sought for injury to feelings, reinstated to **£45,000**, as follows:

1. CLAIMANT'S DETAILS

15 *Date of Birth 15/04/1991*

Date employment commenced 13/08/2019

Effective Date of Termination (EDT) 14/04/2023

Age at EDT 31

Gross annual salary £42,372

20 *Net annual salary £29,607 ex pension £32,424 Inc pension*

2. Unfair Dismissal

2.1 Basic Award

3 x applicable weekly gross pay figure (statutory cap of £643) = £1,929

Total basic award = £1,929

2.2 Compensatory Award

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2.2.1 Past Losses

Net pay per week £616.75

Loss of earnings from EDT to 6th September 2023 £12,302

Less income from new job £9,230

5 *Plus Legal fees £ 1,875*

Half pay from January – April 2023 £1,950 approx

Total = £6,897

2.2.2 Future losses

10 *I have an ongoing net loss of earnings of (£607) per month. It is likely to take around (6) years for me to reach a grade in my new role with salary equivalent to my previous one.*

Total Future Loss (72) months x £ 607 = £43,704

Future Loss

2.2.3 Loss of Statutory Rights

15 *I will have to work two years to regain protection from unfair dismissal and I consider that £500 would be an appropriate award to reflect that loss.*

Total Compensatory Award = £53,120

2.2.4 Uplift for Failure to Follow the ACAS Code

20 *I consider that a uplift of 25% should be made to the compensatory award for the Respondent's failure to follow the ACAS Code. The Respondent failed to deal with issues promptly, delayed communicating or failed to communicate with me the outcome of actions agreed at meetings and refused me a right of appeal against*
25 *the decision to place me on half pay.*

Uplift £13,280

2.3 Tax Liability

To the extent that the award is greater than £30,000 it will be subject to taxation. I would therefore seek to gross up the award to allow for tax to be paid on the sums awarded.

3. Discrimination

I believe that I am entitled to damages for injury to feelings in relation to the discriminatory treatment suffered by me as set out in my claim and as will be addressed in my evidence. This has caused a serious impact on my mental health and wellbeing and directly resulted in the loss of a career and career path which I had considered a vocation through years of study, training and subsequent teaching practice. I believe I am entitled to compensation in the middle range of the highest Vento Band at £45,000. (With 25% uplift = £56,250)

Total (Basic + Compensatory+ Future Loss +Discrimination) = £122,650

Includes 25% uplift for basic, Compensatory, Future Loss and Discriminatory elements.

(182) In support of his claim for legal fees of **£1,875**, there was produced to the Tribunal, as document 46, at page 209 of the Joint Bundle, copy letter of 16 May 2023 from McGrade & Co, solicitors, with fee note for all employment advice work carried out on the claimant's behalf from 23 March to 5 May 2023.

(183) On 29 September 2023, the respondents' solicitor lodged a revised Counter-Schedule, which sought a **25% downlift** on any award of compensation to the claimant, for his alleged failure to follow the ACAS Code of Practice, in the following terms:

RESPONDENT'S COUNTER SCHEDULE OF LOSS (AS AT 29/09/2023)

5 b. *It is disputed that the respondent failed to follow the ACAS Code of Practice in the terms described by the claimant. The respondent responded to the claimant regarding any queries that he raised timeously. Between January 2023 and March 2023, when the claimant handed in his notice, the respondent did not find any suitable role for the claimant within the organisation. The claimant did not make efforts to look at available roles or provide further specification to the respondent as to roles he was interested in.*

10 c. *It is likely that any redeployed role that the Council could have provided the claimant would have been for a salary similar to or perhaps even less than what the claimant earns in his new role with the DWP. This is on the basis that the claimant did not wish to go back into a teaching role. Therefore, it is likely that the claimant would not have been able to continue to earn a teacher's salary regardless of the actions of the respondent. The claimant's future losses claim should not be awarded.*

20 3. **Discrimination**

25 a. *It is disputed that the respondent's conduct directly resulted in the loss of a career and career path for the claimant. The respondent made adjustments to help facilitate the claimant remaining in a teaching role. It was the respondent [sic] that requested redeployment.*
[Note by Tribunal: this typographical error, noted by the Judge on 5 September 2023, in the original version, and amended and marked up in hard copy on the Tribunal's papers, substituting the word "**claimant**" for "**respondent**", was not updated by the respondents' solicitor in this revised version.]

30

b. *The claimant asked for redeployment into different role in the Respondent's organisation. At the meeting of 1/12/2022, the claimant stated that he would consider roles with local government terms and conditions and pay scales. Roles in the local government that would pay the claimant a salary commensurate to his teaching salary all had technical, experience or qualification requirements that the claimant did not have, i.e. legal, finance, social work, IT, HR, management roles etc.*

Mitigation

1. *The claimant did **[not]** raise a grievance or utilise any internal procedures before he handed in his resignation. **[Note by Tribunal:** this typographical error, noted by the Judge on 5 September 2023, in the original version, and amended and marked up in hard copy on the Tribunal's papers, inserting the word "**not**", was not updated by the respondents' solicitor in this revised version.]*
2. *The claimant did not inform the respondent's HR Advisor and headteacher that he wished for more regular contact regarding roles, notwithstanding if no substantive update could be offered.*
3. *The claimant is qualified for teaching roles which would have paid an equivalent salary to that of his previous job. The claimant asserted that he would be able to continue to work as a teacher had the respondent made further adjustments to his workplace. The claimant did not apply for a reasonable number of other teaching roles in other local authority areas which would have paid him more than his current role.*

Tribunal's Assessment of the Evidence led at the Final Hearing

22. In considering the case before the Tribunal, we have had to carefully assess the whole evidence heard from the various witnesses led before the Tribunal,

and to consider the many documents produced to the Tribunal in the Joint Bundle, which evidence and our assessment we now set out in the following paragraphs.

23. The first witness from whom the Tribunal heard was the claimant, **Paul McMEnamin**. We heard his evidence on days 1 and 2, Wednesday 6 (afternoon) and Thursday 7, September 2023 (all day). As he was an unrepresented, party litigant, by joint agreement with both parties, his oral evidence in chief was elicited by a series of structured and focussed questions asked of him by the presiding Judge.
24. The claimant was cross-examined by the respondents' solicitor, Ms Thomson, and asked a question of clarification by Mr Ashraf, non-legal member of the panel. While the claimant was offered the opportunity for re-examination, he stated that nothing further stuck out as needing any clarification, so he was content to rely upon his evidence in chief, and his answers in cross-examination.
25. We found the claimant to be a credible and reliable witness, who was a good historian of events, and we were satisfied that he gave his evidence to this Tribunal in a straight-forward manner, answering questions asked of him as best he could recall, and that without any evasiveness, or exaggeration, on his part. In cross-examination, the claimant did not recall the terms of the discussion with the Head Teacher, after school, on Wednesday, 17 August 2022, as narrated at page 157 of the Joint Bundle, about support from the additional teacher in the classroom, and his recollection was that he had struggled through that day. He spoke of having a relatively good working relationship with Lorna Murray, which had built up and grown over time working together.
26. Next, we heard from Miss **Christine McMEnamin**, the claimant's aunt, on the morning of day 3, Friday, 8 September 2023. She explained that she was not the claimant's legal representative, although she is a solicitor. Her evidence in chief was elicited by the claimant asking her questions, and she was then cross-examined by the respondents' solicitor, Ms Thomson, and asked

questions of clarification by Mr Ashraf, non-legal member of the panel. While the claimant was offered the opportunity for re-examination of the witness, he stated that that was not required, as he was content to rely upon his aunt's evidence in chief, and her answers in cross-examination.

5 27. We found Miss McMenamain to be a credible and reliable witness, who was a good historian of events, relating to meetings she had attended with the claimant, and her recollection of what the claimant had relayed to her as regards his employment with the Council. We were satisfied that she gave her evidence to this Tribunal in a straight-forward manner, answering questions
10 asked of her as best she could recall, and that without any evasiveness, or exaggeration, on her part.

28. While Miss McMenamain had attended some meetings along with the claimant and officers from the Council, and she had taken some handwritten notes at the time, she informed us that she is not a minute-taker, and those notes were
15 not shared with the respondents at the time, and her notes were only disclosed to the respondents when the Joint Bundle was being created.

29. She was crystal clear that she was at meetings to support her nephew, not to represent him, and that, as a young teacher, he was looking for longevity in his career. She was much more forthright in giving her answers than the
20 claimant, and she was not shy in coming forward with her views about how she felt, as a family member, the respondents had been treating her nephew, the claimant. After the April 2022 meeting, she stated that she could not see any clear path or strategy from the respondents' HR, and that the claimant was doing the leg-work, and it was her impression that the claimant's case
25 was in the "**too hard pile**".

30. Miss McMenamain spoke of there being "**lots of talk, but no plan in place**" by the Council, and that there was a need to get the claimant's case "**under the nose of somebody more senior**", hence the claimant's correspondence to Morna Armstrong in May 2022, and Tracy McGillivray in December 2022.
30 Speaking of his 2 days in school at the start of term in August 2022, she described the claimant as being "**overwhelmed**", that he could not cope, and

that that was very unlike him, that being out of character, when he was usually extremely stoic.

- 5 31. She recalled the August 2022 meeting with Lorna Murray and Lynette Stewart, having a very touchy / feely tone, with the Head Teacher concerned about the claimant's health, and stressors, but she (Miss McMEnamin) was concerned by the angle taken by HR about whether or not the claimant could teach, and moving on to look at redeployment, which she felt was inappropriate, and badgering by HR. She described it as a "**tricky meeting**", saying it was not her impression that it was to support the claimant back into teaching.
- 10
32. While she was not living the claimant's experience, where he was off work with stress, she explained that, after the subsequent December 2022 meeting, there had then been correspondence with Tracy McGillivray. When the claimant was given no right of appeal against her decision about sickness allowance entitlement, Miss McMEnamin remarked that it was unfair, saying:
- 15 "**It's Paisley, not North Korea.**"
33. While not living in each other's pocket, Miss McMEnamin stated that the claimant is very stoic, and generally, as a family, they don't show emotion very well, but it had taken a lot for the claimant to ask for support, as he
- 20 wanted to have a career and be in a job, but nothing had happened after various meetings to facilitate that to a successful redeployment, and she described that as "**devastating**" for the claimant, who was getting married, and looking at buying a house.
34. In cross-examination, Miss McMEnamin stated that she felt Lorna Murray was
- 25 trying to help the claimant, and she had a good relationship with him, but she did not think the respondents' HR were very good, she felt their discussions were in bad faith, and they seemed to be "**muddling around**".
35. Thereafter, for the remainder of day 3, the Tribunal proceeded to hear sworn evidence from the respondents' first witness, Miss **Lorna Murray**, Head Teacher of St John Ogilvie Primary School. Her evidence in chief was elicited
- 30 by the respondents' solicitor, Ms Thomson, asking her questions, and she

was then cross-examined by the claimant, and asked questions of clarification by Mr Frew, non-legal member of the panel, and by the Judge. Her evidence concluded after some re-examination by the respondents' solicitor.

5 36. We were impressed by Ms Murray's evidence to the Tribunal. It was clear to us that she had a good understanding of the claimant and his known disability, and that there was no animosity by her towards him nor any attempt by her to sideline him in the workplace.

10 37. She was involved with him day-to-day at the school as his workplace, and she attended the supporting attendance meetings where she was accompanied by an officer from HR. She came across to the Tribunal as genuine and concerned for the claimant's welfare and well-being, and trying to help him in the workplace, within the staffing and budget constraints upon her as the Head Teacher. We found Ms Murray to be a credible and reliable witness.

15 38. Finally, on day 4, Monday, 11 September 2023, Tribunal heard sworn evidence from the respondents' second and final witness, Ms **Lynette Stewart**, Senior HD & OD Adviser. In giving her evidence to the Tribunal, Ms Stewart was very much a scene setter. Her evidence in chief was elicited by the respondents' solicitor, Ms Thomson, asking her questions, and she was then cross-examined by the claimant, and asked questions of clarification by
20 Mr Frew and Mr Ashraf, non-legal members of the panel, and by the Judge. Her evidence concluded after some re-examination by the respondents' solicitor.

25 39. Despite her evidence to us that she had about 15 years' HR experience with the Council from 2008, Ms Stewart did not come across to the Tribunal as a clear and confident witness, perhaps due to the fact that she had not been involved in all HR meetings with the claimant, and perhaps due to her involvement post-dating the material events prior to her attendance at the first meeting with the claimant on 31 August 2022.

30 40. Many of the documents lodged in the Joint Bundle related to meetings with the claimant and we heard some evidence from the respondents' two witnesses, Lorna Murray and Lynette Stewart. While Ms Murray had been a

regular attendee at such meetings, along with the claimant and his aunt, there were a variety of HR officers attending different meetings, but the respondents chose to lead evidence from only one of them, Ms Stewart.

41. The respondents having decided not to call anybody else, it was not for this
5 Tribunal, acting on its own initiative, to consider issuing a Witness Order for any other person's attendance. No application was made by the claimant for us to consider issuing a Witness Order on the basis that he felt it was relevant and necessary for a fair hearing for the Tribunal to hear oral evidence from any or all of Elspeth Chisholm, Morna Armstrong, or Tracy McGillivray. At the
10 stage of the Case Management Preliminary Hearing, he had not sought to call them as witnesses, nor had Ms Thomson for the respondents.

42. Ms Stewart spoke generally to HR's involvement with the claimant, referring, where appropriate, to relevant documents in the Joint Bundle. She clarified, for the Tribunal's information, the distinction between local government staff,
15 and teaching staff, who are both employed by the Council, but on different terms and conditions.

43. She explained how the Council employs and deploys staff, how school staffing is operated centrally, school funding arrangements, etc, and how redeployment might be pursued, but when referred to the attendance contact
20 document, at pages 154 to 168 of the Joint Bundle, surprisingly said that she had not seen this document before, and that it was the Head Teacher's record of contacts. More surprisingly, Ms Stewart stated, in answer to clarification sought by the Tribunal, that she had not seen the April 2022 RNIB report until after the claimant had resigned.

25 44. With around 8,000 employees across Renfrewshire Council, Ms Stewart stated there were about 3,000 in Childrens' Services, and of those, with about 50 primary schools, there were maybe around 1,200 primary school teachers.

45. Ms Stewart acknowledged that there were no formal notes of the August and
30 December 2022 meetings she had attended from HR, and that her own handwritten notes were poorly written. She spoke to the 400 or so jobs she had looked at, as noted in the summary table of advertised posts (document

38 in the Joint Bundle, at pages 169 to 173), and she also spoke to, and explained the process around sick pay, cross-referring to the correspondence from Ms McGillivray.

Closing Submissions from Parties

- 5 46. Case management orders and directions for the continued Final Hearing on Friday, 29 September 2023 were issued to both parties under cover of a letter from the Tribunal sent on 12 September 2023, further to the close of evidence the previous day, Monday, 11 September 2023.
- 10 47. Thereafter, on 18 September 2023, the respondents' solicitor provided her 12-page written closing submissions, and an updated joint statement of agreed facts. At the hearing on submissions, we noted, and Ms Thomson confirmed, that there was an obvious typographical error in her paragraph 25a.ii, where her first use of the word "*claimant*" was in error, and it should have read "*respondent*."
- 15 48. On 25 September 2023 the claimant provided his own 4-page closing submission, including hyperlinks to ACAS "***Working for Everyone***" guidance on asking for and agreeing reasonable adjustments (2 pages), and reasonable adjustments at work (7 pages). Also, the claimant provided his revised and final schedule of loss as at 6 September 2023.
- 20 49. Finally, on 28 September 2023, the respondents' solicitor provided a list of case law, with 15 hyperlinks, and an updated counter schedule.
50. As a full copy of each party's written closing submissions are held on the Tribunal's casefile, and we had access to them, and all the documents within the Joint Bundle, during our private deliberations, it is not necessary to repeat here their full terms *verbatim*. That is neither appropriate, nor proportionate.
- 25 51. Both parties made detailed written submissions which the Tribunal found to be informative. Ms Thomson's, while labelled as "***skeletal***", were particularly detailed, and cross-referenced to documents in the Joint Bundle, and to relevant statutory provisions, and case law authorities.

52. The Tribunal has considered both parties' written submissions, and referred to the case law authorities cited by Ms Thomson in her list of authorities, including the further specific case law citations requested by the Tribunal, to signpost us to particular paragraphs of her cited judgments, provided (insofar as not included in her original document) in her subsequent email of 2 October 2023.

53. References are made to essential aspects of the submissions and the cited authorities with reference to the issues to be determined in this judgment, although the Tribunal has considered the totality of the closing submissions from both parties, both written submissions, and oral too, whether or not expressly mentioned in these Reasons.

54. For the purposes of this Judgment, it will be sufficient to note that Ms Thomson summarised the respondents' submissions on liability in her executive summary on the first page of her written submissions, as follows:

It is the respondent's submission to the tribunal that they did not fail to make reasonable adjustments in respect of the claimant for the following reasons:

- A. *No full time small group learning roles existed within core staffing at the school nor Renfrewshire to assign the claimant to.*
- B. *PEF should be used to raise attainment of pupils and is closely reviewed and monitored to ensure it fulfils this requirement.*
- C. *The respondent should not be expected to create such a role.*
- D. *Equipment could not be ordered before the Access to Work grant was approved and was ordered shortly thereafter.*
- E. *The respondent was not made aware of any difficulties the claimant faced with setting up the assistive equipment, either before or after he went off sick. Neither the RNIB report nor any of the occupation health reports mentioned installation could be difficult for the claimant. It is*

not reasonable for the employer to have assumed this given the information available to them.

F. *In line with previous protocol, Lorna Murray could have easily assisted the claimant with setup had she known it caused him difficulties.*

5 G. *The respondent started to seriously look at consideration of non-teaching roles after the September 22 and October 22 Occupational Health reports were issued. It had been considered before this point as a secondary option to the claimant continuing in a teaching role.*

10 H. *The respondent was still looking for suitable roles when the claimant sent his resignation letter on 17 March 2023. The respondent should have been afforded more time to find a suitable alternative role for the claimant.*

15 ***It is the respondent's submission to the tribunal that they did not treat the Claimant unfavourably for a reason arising in consequence of his disability for the following reasons:***

I. *Not providing him a safe working environment was not for a reason arising from the claimant's disability –no evidence was led to support this assertion.*

20 J. *The respondent did not discriminate against the claimant by discounting him for roles without consulting with him about them. Not informing him of the roles and reasons for discounting him from them was not for a reason arising from the claimant's disability. The respondent would have treated all employees in a similar manner.*

25 K. *In terms of not extending his sick pay allowance, there was a procedure in place that allowed the claimant to make representations. He did so and the respondent chose not to exercise the available discretion.*

L. *The respondent was entitled to not extend the sick pay allowance, despite the claimant's disability.*

M. *The claimant's sick note did not reference his disability and was never changed to reflect this.*

It is the respondent's submission to the tribunal that there was no dismissal for the purposes of section 95(1)(c) of the Employment Rights Act 1996 and the respondent did not breach the implied term of trust and confidence for the following reasons:

N. *There was no breach of contract sufficiently serious to entitle the claimant to resign, claiming constructive dismissal.*

O. *The claimant had already applied for alternative roles outside of the council and resigned when he was offered one of the roles and not in response to a repudiatory breach.*

P. *The claimant had determined that he felt more suited to other roles than teaching and was frustrated with the timescales involved in finding him alternative roles.*

Q. *Any such breach of contract was not discriminatory in nature.*

55. On the matter of remedy, Ms Thomson stated, at her paragraph 26, that: *"It (is) submitted that the Claimant is not entitled to any compensation or any other remedy. However, if the Tribunal is minded to award compensation then the respondent respectfully requests that its' [sic] submissions are considered by the Tribunal when making any determination about an award of compensation."* Further, detailed submissions on financial losses, injury to feelings, and failure to mitigate loss, were set forth at paragraphs 27 to 29, and at paragraph 71 (wrongly numbered, and it should have been paragraph 30).

56. In summary, in her oral submissions to the Tribunal, Ms Thomson invited us to dismiss the three heads of complaint brought by the claimant against the respondents, and so find the claimant not entitled to any award of compensation. If, however, the Tribunal were to find for the claimant on any part of his claim, she submitted that any compensation should be significantly

reduced from what the claimant was seeking, and she invited the Tribunal to have regard to her respondents' Counter Schedule of Loss.

57. The claimant, for his part, in his written closing submissions, followed the style used by the respondents' solicitor for ease of reference and made his own written submissions in reply. He submitted that the respondents had failed to make reasonable adjustments, and that they had treated him unfavourably for a reason arising in consequence of his disability. By March 2023, he submitted that he had lost all confidence in the respondents, and he felt that he had no option but to resign, as a direct result of the respondents' failure to make reasonable adjustments and their discriminatory application of a discretionary provision around sick pay.

58. He stated that he had always hoped to secure either an adjusted role or redeployment within Renfrewshire Council, and that it was not his intention to resign, and that he did so once his confidence in his employer had completely broken down. In summary, in his oral submissions, the claimant invited the Tribunal to find in his favour on all three heads of complaint, and to award him appropriate compensation as per his updated Schedule of Loss.

List of Authorities

59. We were provided with a list of authorities from the respondents' solicitor comprising the following:

1. **Tarbuck v Sainsbury's Supermarkets Ltd [2006] UKEAT 0136/06; [2006] IRLR 664**
2. **Garrett v Lidl Ltd [2009] UKEAT 0541/08; [2010] All ER (D) 07 (Feb)**
3. **Ridout v TC Group [1998] UKEAT 1371/97**
4. **Wade v Sheffield Hallam University [2013] UKEAT/0194/12/LA; [2013] All ER (D) 134 (Nov)**
5. **Pnaiser v NHS England [2015] UKEAT/0137/15/LA; [2016] IRLR 170**

6. **Robinson v Department for Work and Pensions [2020] EWCA Civ 859; [2020] IRLR 884**
7. **Browne v The Commissioner of Police of the Metropolis [2018] UKEAT/0278/17**
- 5 8. **O'Hanlon v The Commissioners for HM Revenue & Customs [2007] EWCA Civ 283; [2007] IRLR 404 ; [2007] ICR 1359**
9. **Malik v BCCI SA [1998] AC 20; [1997] UKHL 23; [1997] ICR 606; [1997] IRLR 462**
- 10 10. **Doherty v British Midland Airways Ltd [2005] UKEAT 0684/04 ; [2006] IRLR 90**
11. **Greenhof v Barnsley Metropolitan Borough Council [2005] UKEAT/0285/05/DZM & UKEAT/0286/05; [2006] IRLR 98**
12. **De Lacey v Wechseln Ltd ta The Andrew Hill Salon [2021] UKEAT/0038/20/VP**
- 15 13. **Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871; [2003] IRLR 102; [2003] ICR 318**
14. **Cadogan Hotel Partners Ltd v Ozog [2014] UKEAT/0001/14/DM; [2014] WL 3925328**
15. **Komeng v Creative Support Ltd [2019] UKEAT/0275/18/JOJ**
- 20 60. No case law authorities were cited by the claimant. I explained to him that, as an unrepresented party litigant, I did not necessarily expect him to address the Tribunal on matters of law and that it was my role as Judge to apply the relevant law to the facts of the case, but I would allow him to make any reply he felt appropriate to the case law cited by Ms Thomson, as part of her professional obligation as a solicitor, and officer of the court, to assist the Tribunal, and address us on what she saw as the relevant law from the respondents' perspective.
- 25

61. In the course of the hearing on submissions, on 29 September 2023, Ms Thomson made reference to what the Judge then noted as **Forrester v Warin & Lane 1887 4R HL (75)**, but she did not have a copy of the judgment to hand up to the Judge, for the Tribunal, nor to provide to the claimant.
- 5 62. Further, in the course of that hearing on submissions, the Judge made reference to the following additional case law authorities, neither of which had been cited by Ms Thomson, and sought comments from both parties:
- **Cooper Contracting Ltd v Lindsey [2015] UKEAT/0184/15/JOJ; [2016] ICR D3**: on mitigation of loss; and
 - 10 • **Slade & Another v Biggs & Others [2021] UKEAT EA 2019-687 & 722; [2022] IRLR 216**: on ACAS uplifts.
63. The Judge also made reference to the following statutory provisions, on mitigation of loss, namely **Sections 119(3)(a) and 124(2)(b) with 124(6) of the Equality Act 2010**, given Ms Thomson's written submissions (at her paragraph 29) had focussed on only **Section 123(4) of Employment Rights Act 1996**.
- 15
64. Further, her submissions had not mentioned at all either **Section 124(1ZA) of Employment Rights Act 1996** dealing with the statutory cap and limit on the amount of any compensatory award for unfair dismissal under **Section 123**, or **Section 126 of Employment Rights Act 1996** dealing with the situation where any acts complained of are both unfair dismissal and discrimination, both of which the Judge cited, and sought and obtained both parties' comments upon.
- 20
65. The **Forrester** case was not cited in Ms Thomson's written closing submission for the respondents provided on 12 September 2023. In his research, in preparing a draft Judgment for discussion with the non-legal members of the Tribunal, the Judge was unable to locate the **Forrester** case cited by Ms Thomson.
- 25
66. In advance of our Members' Meeting, the Judge called for Ms Thomson, by letter from the Tribunal dated 17 January 2024, to provide full case name, and
- 30

proper citation, and provide full copy judgment, with a note of the legal principle from that case on which she was inviting the Tribunal to rely.

67. Her written response to the Tribunal, intimated by email on 23 January 2024, stated that: “I refer to the tribunal correspondence dated 17th January 2024. The correct citation for the case referred to in my oral submissions is: **David Forrester v Warin and Craven (1877) 4R. (H.L.) 75**. The Court of Session Inner House judgement is attached, which was endorsed by the House of Lords (also attached). This judgement confirms that there is a general requirement on the person alleging the breach of contract to minimise his losses. I refer the tribunal to the final two paragraphs of the Lord President’s judgement (pp. 193-194). The Lord President appears to accept as trite law (no authority is cited) that a party claiming damages for a breach of contract is required to mitigate their losses ; and affirms that this requirement will be applied strictly. My oral submission expanded upon this through my submissions on the legal test outlined in **Cooper Contracting Ltd v Lindsey [2015] UKEAT/0184/15/JOJ; [2016] ICR D3**, as relates to the facts of this case.”

68. The claimant provided his own comments, by email, intimated on 25 January 2024, stating that: “Thank you to Ms Thomson for providing a copy of the case and an explanation as to her view on its relevance. I dispute the relevancy. Whilst I have no difficulty with a general obligation to mitigate loss, the case referred to bears no resemblance to the circumstance of my case, is outdated and the Lord President’s comment describes a very strict duty which is called into question by one of the other judges. Ms Thomson relies also on **Cooper Contracting Ltd v Lindsay** which is a more current case and where a reasonableness standard is applied. I ask that this is the test adopted. I believe that I acted reasonably in mitigating my losses as set out in my evidence. In particular, I was proactive at seeking a solution which would allow me to remain in employment and attempted to make a case for retention of full pay when this was cut due to both my employers inaction and the discriminatory application of their policy. I resigned only when it was clear that, due to my employers failures, I would shortly have no income and at a point

where I had completely lost all trust and confidence in my employers. My loss was mitigated by obtaining another job, albeit at a significantly lower salary.”

Reserved Judgment

69. When proceedings concluded, on the afternoon of Friday, 29 September
5 2023, both parties were advised that judgment was being reserved, and it
would be issued in writing, with reasons, in due course after private
deliberation by the Tribunal.
70. By letter from the Tribunal, dated 2 October 2023, both parties were advised,
for their information only, that a Members’ Meeting for the full panel would be
10 arranged for the earliest, mutually convenient date, but that parties were not
required to attend the Tribunal on that further date. They would, however, be
advised in due course of the date fixed for their information only, and be
updated again, after that Members’ Meeting, with an anticipated date for issue
of the finalised Judgment.
- 15 71. Unfortunately, on account of the Judge’s other judicial commitments, and
annual leave, it was not possible to arrange a Members’ Meeting within the
Tribunal’s target of aiming for Judgment within 4 weeks thereafter. The Judge
was then on sick leave, out of the office, and unable to progress drafting of a
Judgment. An update from the Vice President was provided to both parties by
20 the Tribunal on 17 November 2023, and 12 December 2023, the latter
informing them that the Tribunal would be unable to issue its Judgment before
the end of the year. On the Judge’s behalf, an apology for the continuing delay
was given in that letter sent to both parties.
72. A further update was provided to both parties by the Tribunal on 10 January
25 2024, and again on 13 February 2024, the latter advising them that Thursday,
15 February 2024, had been fixed for an in-person Members’ Meeting, to be
held in person and in chambers, that being the earliest mutually convenient
date for the full panel to have private deliberation. Parties were informed that
they were not required to attend, and that the Tribunal’s finalised Judgment
30 and Reasons would be issued as soon as possible thereafter, taking account
of forthcoming annual leave for the Judge.

73. In writing up this Judgment, I do understand how anxious the parties must have been. I am very sorry that they have had to wait. For that delay, I offer my sincere apology. With the co-operation and assistance of the two non-legal members of the Tribunal, who bear no responsibility for the delay in finalising this Judgment, the full Tribunal has now agreed the terms of this our unanimous Judgment, having had our Members' Meeting. This unanimous Judgment represents the final product from our private deliberations and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

10 **Issues before the Tribunal**

74. The case called before the full Tribunal for full disposal, including remedy, if appropriate. The issues for determination were, as per the List of Issues, agreed by both parties, as narrated earlier in these Reasons, at paragraph 18 above.

15 **Relevant Law**

75. While the Tribunal received written closing submissions from each of Ms Thomson for the respondents, and from the claimant on his own behalf, Ms Thomson's with some statutory provisions recited, and with many case law references, the Judge has required to give the Tribunal a self-direction on the relevant law to cover all aspects of the case before this Tribunal.

76. We look at all of the relevant statutory provisions in more detail, later in these Reasons, under our section on **Discussion and Deliberation**. While we would normally try to set out all applicable legal principles in a single section of our Reasons, under **Relevant Law**, we consider that, in this case, it would be better and clearer to weave the applicable legal principles into our reasoning when discussing and deliberating on the specific, identified issues before us.

Discussion and Deliberation: Liability

77. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn evidence

from witnesses, as also within the various documents spoken to in evidence at the Final Hearing and produced to us in the Joint Bundle.

78. There was very little, if any, dispute over the statutory provisions or legal principles applicable to the case. When reaching its decision, the Tribunal had regard to its primary findings in fact and, where applicable, the shifting burden of proof under **Section 136 of the Equality Act 2010**. **Section 136 provides** that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the Tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.
79. It was not in dispute that the claimant is a disabled person for the purposes of his claims under the **Equality Act 2010**. It was accepted that the claimant has retinitis pigmentosa. **Section 4 of the Equality Act 2010** provides that disability is a protected characteristic.
80. **Section 39 of the Equality Act 2010** provides that an employer must not discriminate against an employee in certain defined respects, including by dismissing the employee, or subjecting them to any other detriment.
81. The claimant in the present case has brought complaints under the **Equality Act 2010** of the respondents' failure to make reasonable adjustments (**Sections 20 and 21**) and discrimination arising from disability (**Section 15**).
82. He also brought a claim of constructive unfair dismissal, in terms of **Section 95(1)(c) of the Employment Rights Act 1996**, alleging that he had been unfairly dismissed by the respondents contrary to **Sections 94 and 98 of the Employment Rights Act 1996**.
83. We have looked carefully at each of the three heads of complaint pursued by the claimant against the respondents, and we now address them individually, as follows:

Failure to make reasonable adjustments

84. **Section 20 of the Equality Act 2010** imposes a duty on employers to make reasonable adjustments.
85. **Section 20(3)** requires employers to take such steps as it is reasonable to have to take where a provision, criterion or practice ("**PCP**") puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.
86. **Section 21** provides that an employer discriminates against an employee if they fail to comply with the duty to make reasonable adjustments.
87. The adjustments that the claimant submitted would have prevented the respondents' PCP from putting him at a substantial disadvantage were identified as follows:
- (1) Allocating the claimant to 1:1 and group learning environments;
 - (2) The provision of assisting hardware and software including installation by the start of the start of the school year in August 2022.
 - (3) Redeployment of the claimant to a non-teaching role from October 2022 onwards.
88. "**Provision, criterion or practice**" is not defined in the **Equality Act 2010**. The **Equality and Human Rights Commission Code of Practice on Employment ("**EHRC Code**")** states (at paragraph 4.5) that the term "*should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision.*"
89. The EHRC Code also states (at paragraph 4.6) that "*the provision, criterion or practice must be applied to everyone in the relevant group, whether or not they have the protected characteristic in question. On the face of it, the provision, criterion or practice must be neutral. If it is not neutral in this way,*

but expressly applies to people with a specific protected characteristic, it is likely to amount to direct discrimination.”

- 5 90. When considering whether the respondents were in breach of the duty to make reasonable adjustments, the Tribunal has had regard to the guidance provided by the Employment Appeal Tribunal in the case of **Environment Agency v Rowan 2008 ICR 218** by identifying “(a) the provision, criterion or practice applied by or on behalf of an employer, (b) the identity of non-disabled comparators (where appropriate) and (c) the nature and extent of the substantial disadvantage suffered by the claimant.”
- 10 91. In this case, the claimant has submitted that being required to teach a full class was a PCP. The respondents did not dispute that, as a teacher, the claimant was required to teach a class of pupils. They submitted however that the class allocated to the claimant was a composite class containing a maximum of 25 pupils as opposed to 33 pupils being the maximum size for
15 classes.
92. Therefore, submitted the respondents, with regard to proposed adjustment (1), while the claimant was not allocated a small group learning role, his class was not “**full**” as suggested by him. In all the circumstances, the Tribunal concluded that the respondents applied a PCP of having to teach class sizes
20 of up to 33 pupils.
93. Having identified a PCP, the Tribunal went in to consider whether it put the claimant as a disabled person at a substantial disadvantage. As referred to above, in terms of **Section 20(3)**, the duty to make reasonable adjustments will only arise where the claimant was put at a substantial disadvantage in
25 relation to a relevant matter in comparison with persons who are not disabled.
94. “*Substantial*” is defined at **Section 212 of the Equality Act 2010** as meaning “*more than minor or trivial*”. The claimant did not lead any specific evidence to outline the particular disadvantage that the provision, criteria or practice placed him at, but he referred to the fact that disadvantage was narrated in
30 the RNIB and OH reports and recommendations provided to the respondents.

95. There is no obligation on an employer to create a post specifically, which is not otherwise necessary, merely to create a job for a disabled person (**Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664**). Paragraph 50 of that judgment states: “*The Tribunal recognises that the employers might have been willing artificially to create a job but they would have been acting wholly reasonably in not so doing. It cannot therefore be an adjustment that they were required to make as part of their statutory obligation.*”
96. Paragraph 6.28 of the EHRC Employment Statutory Code of Practice states that the Tribunal must consider “*the practicability of the step*” when assessing whether it is reasonable for the employer to take it. No roles existed within the respondents that would have allowed the claimant to have worked solely with small groups of children on a full-time basis. The claimant requested an adjustment that could not feasibly be provided to him, despite his wishes.
97. The respondents submits, and this Tribunal agrees, that it would not be reasonable for a job to be created solely for the purpose of providing the claimant with a small group learning role. Therefore, the refusal of this request was reasonable in the circumstances.
98. Turning then to look at proposed adjustment (2), in the context of whether the respondents should have done more to install the assistive equipment to allow the claimant to adapt to his circumstances at work in August 2022, the Tribunal is required, per the EAT judgment in **Ridout v TC Group [1998] UKEAT/1371/97**, to measure the extent of the respondents’ duty, if any, against the actual or assumed knowledge of the employer both as to the disability and the likelihood of causing the individual a substantial disadvantage in comparison with persons who are not disabled.
99. The claimant did not identify that the equipment not being installed was a barrier to him returning to work. It is reasonable therefore say the respondents to question whether taking the step of installing the equipment would have been effective in preventing the substantial disadvantage claimed.
100. The respondents submit that they were not afforded the opportunity to implement the proposed steps – assistive equipment and teaching support

They had purchased the equipment. They could not reasonably have been expected to know that not installing it would cause the claimant substantial disadvantage.

- 5 101. The claimant submits that he was left to source and arrange his own workplace assessment through RNIB, seek out the software and hardware with no guidance from the respondents. It is common sense that setting up the incomplete equipment would cause him a difficulty. The equipment should have been installed before the start of term. He had offered to attend work over the holidays to look at the equipment and become familiar with it.
- 10 102. It is agreed that the respondents did have knowledge of the claimant's disability. However, the respondents did not have knowledge of the fact that the equipment not being set up for the claimant would cause him the substantial disadvantage that he claims. Therefore, it was not reasonable in the circumstances for the claimant to expect the employer to have assumed
15 knowledge of this based on what they knew of the claimant's disability from discussions with him and the occupational health reports that had been produced.
- 20 103. It was accepted by the claimant and his witness in their evidence that he did not tell the employer that he felt that the equipment not being set up was a barrier to him returning to work. He spoke with the Head Teacher on 17 August 2022, after school, to ask about how he could use the additional teacher in his room to support him. He did not tell her that the equipment not being set up was an issue. He did not mention this as a specific issue at the
25 meeting of 31 August 2022, despite being specifically asked about barriers to returning to work (according to the oral evidence of the claimant, Christine McMenamain and Lorna Murray).
- 30 104. The claimant did not mention this at the meeting of 1 December 2022. In fact, he noted that he could not think of anything that the employer could do to help him get back to work as a teacher (as per his aunt, Christine McMenamain's note produced at page 89 of the Joint Bundle). At this stage, it was the claimant's position that he could not return to teaching as a class teacher.

105. The Tribunal must consider whether taking any particular steps would be effective in preventing the substantial disadvantage (paragraph 6.28 of the EHRC Employment Statutory Code of Practice). By the claimant's own admission at this meeting, he did not feel that the adjustments would be
5 enough to return to his previous role as teacher, despite not having tried them in the classroom context.
106. The claimant did not afford the respondent an opportunity to implement the flexible approach adopted as he was absent before substantively trying the adjustments that had been made. The respondents attempted to make
10 reasonable adjustments by way of purchasing the equipment. They could not reasonably have expected to know that the equipment installation would cause the claimant substantial disadvantage and they were not given the opportunity to rectify this as were never informed. The respondents submit that they acted reasonably in the circumstances. This Tribunal accepts the
15 respondents' position.
107. Turning finally to the proposed adjustment (3) that the respondents should have considered and granted the claimant deployment into a non-teaching role from October 2022 onwards, the claimant submits that the respondents
20 should have started to look for an alternative role for deployment from April 2022 / September 2022, and that the respondents ought to have consulted with him before discounting him for roles.
108. The respondent submits that Lynette Stewart exercised her professional HR experience to try and identify a suitable role for the claimant. None were identified during the period in question, and she acted reasonably by deciding
25 not to contact the claimant to simply confirm this.
109. There is no obligation on the employer, submit the respondents under reference to **Wade v Sheffield Hallam University [2013] UKEAT/0194/12**, to place a disabled person into a role that the employer does not believe that they can perform or, as per **Tarbuck**, to create a role specifically, which is not
30 otherwise necessary, merely to create a job for a disabled person.

110. In relative terms for this type of exercise, only a short time had passed from commencing the alternative roles search. Lynnette Stewart used her experience as an HR advisor to assess the claimant in respect of the roles that arose.
- 5 111. The claimant could not identify a role that would have paid similarly that he was qualified for in his evidence. Given the claimant was on sick leave, for work related stress, the Tribunal recognises and understands why Ms Stewart did not contact the claimant, but, equally important, he did not contact her, despite himself proactively looking for employment outwith the Council.
- 10 112. In all the circumstances, the Tribunal is satisfied that the respondents acted reasonably in the circumstances. The Tribunal did not find that the respondents were in breach of their duty to make reasonable adjustments. Accordingly, the Tribunal finds that the respondents did not fail to make reasonable adjustments for the claimant's disability, contrary to **Sections 20**
15 **and 21 of the Equality Act 2010.**

Discrimination arising from disability

113. In terms of **Section 15(1) of the Equality Act 2010**, a person (A) discriminate against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and they cannot show that the
20 treatment is a proportionate means of achieving a legitimate aim.
114. **Section 15** requires the Tribunal to consider two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? Following the process set out by the EAT in **Pnaiser v NHS England [2016] IRLR 170**, the Tribunal
25 must first identify whether there was unfavourable treatment and by whom. We must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case.

115. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is
5 "something arising in consequence of B's disability".
116. We turn first to consider whether the respondents treated the claimant unfavourably for a reason arising in consequence of his disability by not providing him with a safe working environment as a disabled person. We note and record that we felt there was some confusion here, on the claimant's part,
10 as an unrepresented, party litigant, as between his **Section 20** reasonable adjustments complaint, and this **Section 15** complaint of discrimination arising from disability.
117. The respondents' position is that the reason for the claimant not being provided a safe working environment does not arise from the claimant's
15 disability. Firstly, looking at the assistive equipment not being set up on the claimant's arrival back from school summer holiday, the claimant argues that delays caused by the respondents did not allow for equipment to be properly installed for him. The claimant argues that the respondents should have arranged for the instalment of all of the assistive equipment rather than
20 assuming that he would set up the equipment by himself. The Tribunal has considered the reasonableness of these actions as part of the claimant's reasonable adjustments claim, and these actions by the respondents could not objectively be said to have been due to a reason arising from the claimant's disability.
- 25 118. Secondly, the claimant argues as part of his claim that by not allowing him to work in small group environments, he is not provided with a safe working environment. It is not an argument put forward by the claimant that the respondents did not allow the claimant to work within small groups for any reason arising from his disability. The respondents have provided the Tribunal
30 with evidence of the lack of existence of this type of role within core staffing at Renfrewshire Council schools, and they have provided the Tribunal with evidence as to why a Pupil Equity Fund role did not exist within the service

that would allow the claimant to work with small groups of children on a full-time basis. The respondents assigning the claimant a full class could not objectively be said to have been due to a reason arising from the claimant's disability.

5 119. Next, we have considered whether the respondents treated the claimant unfavourably for a reason arising in consequence of his disability by informing him that alternative roles were not suitable for him without consulting with him about any alternative roles.

10 120. It is a matter of agreement that a meeting took place between the claimant, his aunt, Linda Murray and Lynnette Stewart on 1 December 2022. Both witnesses for the claimant and respondents agreed in their evidence that discussions took place around redeployment and alternative roles for the claimant during that meeting. It is the respondents' position that the claimant did not experience any unfavourable treatment by not being informed of roles
15 that he was discounted for. Lynette Stewart would have followed the same process and been in as regular contact about discounted roles for any other employee. Whilst no comparator is required, it is the respondents' position that the claimant was not treated unfavourably.

20 121. Further, it is the respondents' position that Lynnette Stewart discounting the claimant for roles and not consulting with him regarding these roles was not for a reason arising out of his disability. When she did not inform him of the roles that arose she did not do so by reason of his retinitis pigmentosa. There is no evidence before the Tribunal that suggests that objectively Lynnette Stewart's reason for not informing the claimant of the roles he had been
25 discounted for was because of a reason arising from his disability.

122. Turning then to consider whether the respondents acted unreasonably and in a discriminatory manner in refusing to exercise discretion to extend the full sick pay period, we are satisfied that the respondents' sick pay policy was applied in the circumstances set out in section 6 of the SNCT Handbook.

123. We heard from both of the respondents' witnesses that these are nationally applied employment terms and conditions for teachers across Scotland. The sick pay for teachers would be calculated based on the service completed at the point of absence, and paragraph 6.8 states that "*the council has discretion to extend periods of sick pay where appropriate*". Further the claimant
5 referenced paragraph 6.36 which provides some further guidance on factors that "*the council should give careful consideration to*". The policy does not require sick pay to be automatically extended when these criteria are met.
124. As per Lynnette Stewart's evidence, the Tribunal is satisfied that the
10 respondents used the discretion only in exceptional circumstances. The claimant was entitled to request an extension of sick pay and the facts and on the evidence before us the circumstances of his individual circumstances were considered by respondents' Tracy MacGillivray, Head of Education. It is ultimately a matter of discretion and the same extension request is available
15 to any teaching staff member who wishes to ask for their pay to be extended. Tracy McGillivray sought background information from the Head Teacher and HR advisor and ultimately concluded that sick pay was not merited in the circumstances.
125. Further, it is agreed between the parties that the claimant's fit notes were
20 always noted as work related stress only. The claimant was asked to have his fit notes reviewed and potentially amended by his GP to reference his disability of retinitis pigmentosa being a factor in his absence and a barrier for him returning to work.
126. The claimant stated in his evidence that he had spoken with his GP about this
25 issue but his GP maintained that the reason for his absence did not relate to his disability. Therefore, if it is the claimant's position that his absence from work was unrelated to his disability, particularly in light of this exact question being posed to his GP, it would follow that a reduction in sick pay from full pay to half pay in relation to his absence for work related stress is not unfavourable
30 treatment arising from his disability.

127. Paragraph 17.21 of the EHRC Employment Code states that although there is no automatic obligation to extend contractual sick pay beyond the usual entitlement when a worker is absent as a result of disability-related sickness, an employer should consider whether it would be reasonable to do so. Further, it would only be in highly exceptional cases that it would be reasonable to expect the employer to pay the employee's salary in full when, having exhausted their entitlement to sick pay under the rules of the sick pay scheme, they were absent from work for a disability-related reason: **O'Hanlon v The Commissioners for HM Revenue & Customs [2007] EWCA Civ 283.**
128. It was noted by the respondents' witness Lynnette Stewart that in her 16 years of work at Renfrewshire Council, (the 10 most recent of which were within Education in Children's Services) that there had been only two occasions that she could recall sick pay being extended for employees using the discretion available under the policy. Both times, it had involved employees with terminal illnesses and sick pay was extended at the point of a transfer from half pay to statutory sick pay rather than from full pay to half pay.
129. The Tribunal is satisfied that the respondents did not incorrectly apply the SNCT policy, nor does case law (**O'Hanlon v HMRC**) suggest that the respondents require to extend sick pay periods for employees absent for a disability related reason outwith highly exceptional circumstances. In terms of balancing the needs of the employer and employee, it is the respondents' position that it would be unreasonable to have extended the claimant's sick pay in this case.
130. We have asked ourselves whether the treatment of refusing to exercise discretion to extend the full sick pay period was an appropriate and reasonably necessary way to achieve the aim of managing the allocated budget and applying sick pay discretion in only exceptional circumstances, to prevent a floodgate effect.
131. We heard from the respondents' witness Lynnette Stewart that generally there were a number of teachers that would be off work with sickness absence for

work related stress each year. The claimant was absent with work related stress and requested an extension of his sick pay on that basis. As noted above, the case of **O'Hanlon v HMRC** provided that employers are not expected to extend periods of sick pay unless there are highly exceptional circumstances.

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132. It was the respondents' position that there were no highly exceptional circumstances in this case. Allowing the claimant an extension to his ordinary full pay for the reason of work related stress in these circumstances would create unreasonable financial pressure on the respondents given the number of other teaching employees that are absent for the same reason within the organisation. The Tribunal accepts that argument by the respondents.

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133. In all the circumstances, the Tribunal finds that the respondents did not unlawfully discriminate against the claimant for a reason related to his disability, by treating him unfavourably for a reason arising in consequence of his disability, contrary to **Section 15 of the Equality Act 2010**.

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Constructive dismissal

134. In terms of **Section 94(1) of the Employment Rights Act 1996**, an employee has the right not to be unfairly dismissed by his employer. The claimant, having been continuously employed by the respondents for a period of more than two years ending with the effective date of termination, he has the qualifying period of employment to bring such a claim, in terms of **Section 108**, and so he was not excluded from the right to complain of unfair dismissal. He has presented his complaint of unfair dismissal to the Employment Tribunal in terms of **Section 111 of the Employment Rights Act 1996**.

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135. It is for the claimant to satisfy the Tribunal that he was constructively dismissed by the respondents. Otherwise, the legal effect is that his employment terminated by his resignation is not to be treated as a dismissal. If the Tribunal determines that there has been no dismissal, then it does not need to proceed and determine, in terms of **Section 98 of the Employment Rights Act 1996**, whether the dismissal of the employee is fair or unfair.

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136. In terms of **Section 95(1)(c) of the Employment Rights Act 1996**, an employee is dismissed by their employer if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.
137. It was not in dispute that the claimant, by resigning from his employment, had terminated his employment with the respondents. It was in dispute that he was entitled to do so and claim constructive dismissal by reason of the respondents' conduct. The claimant must prove that the respondents were in a repudiatory breach of his contract of employment. An employee is not able to resign and claim constructive dismissal merely because they perceive that their employer has behaved unreasonably.
138. Following the well-known guidance from the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**, the claimant must prove a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
139. The alleged conduct by the respondents was failure to consider the claimant's requests for reasonable adjustments, which according to the claimant amounted to a breach of the implied term of trust and confidence entitling him to resign and claim constructive dismissal. Whether there has been a breach of the implied term of trust and confidence is a matter for the Tribunal to determine having regard to all the circumstances.
140. Following the judgment of the House of Lords in **Malik v BCCI [1997] ICR 606**, it is a fundamental breach of contract for either party, without reasonable and proper cause, to conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
141. As per the judgment of the Employment Appeal Tribunal in **Morrow v Safeway Stores plc [2002] IRLR 9**, a breach of the implied term of trust and confidence is necessarily fundamental, and the test of whether there was a

repudiatory breach of contract is objective, and it neither depends on the subjective intentions of the employer, nor on the subjective perception of the employee: **Leeds Dental Team Limited v Rose [2014] ICR 94, EAT,**

- 5 142. If the claimant establishes a repudiatory breach of contract, then he must also demonstrate that the breach caused him to resign and that he did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.
- 10 143. In this case, the respondents ordered all hardware and software equipment recommended by the RNIB, and they led evidence as to why a small group learning role could not be provided to the claimant. Lorna Murray confirmed that had she known the claimant required assistance to set this up, she would have assisted him, as she had done in the past with other requests he made for assistance.
- 15 144. The claimant was given a composite class capped at 25 pupils rather than 33 pupils. A teacher was assigned to the claimant's classroom to assist him. Lynnette Stewart confirmed that ordinarily redeployment would take up to six months, if not longer, depending on the circumstances. She was looking for a role within the Council for which the claimant met the minimum criteria and would not suffer too significant a salary reduction. Very few of these roles
20 were advertised within the 7-week period that she was looking for roles for him.
- 25 145. The respondents paid the claimant in line with the sick pay policy and they were entitled to not exercise the available discretion to extend his pay. They managed the claimant's absence in line with their absence management policy. The claimant did not tell the respondents that he required assistance installing the assistive equipment. The claimant did not suggest improvements to the working environment that could be implemented to facilitate his return to work following his absence.
- 30 146. The claimant did not indicate to the respondents that he wished for greater contact from the respondents. The claimant did not raise a grievance against the respondents. A number of the complaints raised by the claimant could

have been easily rectified by the respondents had they been made aware of them. The claimant did not give the respondents sufficient time to assist him with an alternative role.

147. In the circumstances there was no fundamental breach of contract and the claimant was not entitled to resign in response. The respondents had detailed the reasons for their actions in relation to the reasonable adjustments claim and the complaint of discrimination arising from disability claim.
148. Answering the question, did the claimant resign in response to a fundamental breach of contract or for some other reason, the Tribunal recalls from the evidence how the claimant applied for three Civil Service jobs in December 2022. The claimant stated in the meeting on 1 December 2022 that he had no suggestions to alleviate stress and improve the role, and it was the respondents' position that the claimant decided to apply for other roles that he felt would be better suited to.
149. He had applied for the job that he finally accepted before he provided his basic details and job preferences to Lynette Stewart on 11 January 2023. If the claimant's argument is that the employer's fundamental breach of contract related to the delays in finding him an alternative role, as the "final straw" it cannot be said that the resignation was in response to this as he had applied for the alternative role that he accepted months prior.
150. The respondents' position, with which the Tribunal agrees, having heard all the evidence, is that the claimant resigned due to frustration regarding the timescales of finding him an alternative role and not due to any failures by the respondents.
151. Turning next to whether the respondents' actions in this regard were discriminatory, on the grounds of the claimant's disability, the Tribunal notes that where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. It is a matter of degree whether

discriminatory contributing factors render any constructive dismissal discriminatory.

152. The respondents submit that the main reasons for the claimant resigning was due to the alleged delays in communication between the parties and being offered an alternative role that he felt would suit his needs best. These reasons are not discriminatory in nature.

153. The respondents further submit that they ordered all hard and software recommended by RNIB; if asked they would have helped the claimant to install it and make other reasonable improvements to his working environment had they been identified by him; it was unreasonable for them to have to provide the claimant with a small group learning role – none existed; he was given a composite class capped at 25 pupils; a teacher was assigned to assist him; they actively looked for a role for redeployment; he was paid on accordance with their sick pay policy and his absence was managed in accordance with their absence management policy.

154. In all the circumstances, the Tribunal did not find that that there had been a dismissal. On the evidence before us, we are satisfied that the claimant resigned from his employment with the respondents in circumstances where there was no fundamental breach of the employment contract by the respondents.

155. Accordingly, there was no unfair constructive dismissal of the claimant by the respondents, contrary to **Section 98 of the Employment Rights Act 1996**; and so that head of complaint fails, and it is dismissed by the Tribunal.

Disposal

156. For the foregoing reasons, the Tribunal is satisfied that none of the claimant's three heads of complaint against the respondents are well founded, and his claim against the respondents is therefore dismissed in its entirety by the Tribunal.

Closing Remarks

157. As we have dismissed the claim in its entirety, we have not required to go on and consider remedy. As such, we have not recorded the full submissions which we received on that matter, as it is not appropriate or proportionate for us to do so. Nor have we considered parties' competing submissions to us on remedy matters, as it is not necessary for us to do so, given our decision that the claimant's complaints are not well-founded and so fall to be dismissed by the Tribunal for that reason.
158. We close by stating that we recognise that our Judgment will be disappointing for the claimant, because, during the course of the Final Hearing, it was clear to us that he bears a deep sense of grievance and injustice at the way he perceives that he was treated unfairly by the respondents. We appreciate that that is his perception, and so his reality, but, as the independent and objective fact finding Tribunal, applying the relevant law to the facts of this case as we have found them to be, based on the evidence led before us from both parties, we hope that in reading our Judgment, and these Reasons, the claimant will come to understand our reasons for dismissing his claim against the respondents.
159. Further, as regards the respondents, we have a few closing remarks for them too. We trust that the respondents in considering this Judgment will reflect up matters, and identify what lessons might be learned going forward about how to deal with such a situation should it arise again in respect of another employee of the Council.
160. Sometimes, there was lack of clarity, if not ambiguity, as to which set of internal procedures were being used by Council officers from time to time, and not all formal meetings with the claimant were followed up by a written confirmation of what was discussed and agreed. Similarly, not all meetings ended up with joint agreement on a set date for a next meeting, so things were left hanging.
161. The respondents' administration of paperwork, and correspondence with the claimant, was shown to be lacking on several occasions. It is to be hoped that,

arising from this case, lessons have been learned already by the respondents, about the importance of contemporary correspondence, and record / note taking by managers, properly dated, and preferably signed as agreed by both employee and manager / supervisor, and also about a diary / calendar of meetings at appropriate milestones.

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162. This case was, for that reason, somewhat “*paper-light*” compared to other cases that the Tribunal regularly hears across the public sector, where, on account of their internal practices and procedures, documentation from the respondent employer is often much greater in extent and detail than what we were provided with by parties in the Joint Bundle.

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G.Ian McPherson

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Employment Judge

22 March 2024

Date of Judgment

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Date sent to parties

25 March 2024