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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107183/2023

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**Final hearing in Edinburgh
on 10, 11, 12 June and 16, 17 July 2024**

Employment Judge A Jones

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Mr D Love

**Claimant
In person**

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Fife Council

**Respondent
Represented by
Ms R Jeynes, solicitor**

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JUDGMENT

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The claimant was unfairly dismissed by the respondent and the respondent is ordered to reinstate the claimant from 19 August 2024 into the role of primary school teacher and reinstate any benefit to which he might have expected to have received (including pension and any pay rise) between the date of termination of his employment and 19 August 2024 and treated in all respects as if he had never been dismissed. In addition the respondent is ordered to pay to the claimant compensation for loss of earnings between the date of his dismissal and reinstatement of £11,694 net.

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Introduction

1. The claimant claimed that he had been unfairly dismissed by the respondent.

5 The respondent's position was that the claimant had been dismissed for a potentially fair reason being either conduct or some other substantial reason. The claimant did not dispute that he had been dismissed for alleged conduct, but argued that his dismissal was both procedurally and substantively unfair. He sought reinstatement if he were successful in establishing that he had been
10 unfairly dismissed.

2. A joint bundle of documents was lodged. The respondent led evidence from Ms Masterson ('NM') who had been the investigating officer and Ms Maclean ('SM') who had taken the decision to dismiss the claimant. The claimant's wife gave evidence after the conclusion of the respondent's evidence. Mrs Love was due
15 to give evidence in another matter in the following week at the High Court and is employed by Police Scotland. A witness order had been required in order to allow her to obtain time off to give evidence. In these circumstances, the respondent had no objection to Mrs Love giving evidence prior to the claimant's evidence. The claimant lodged an exchange of emails with SM on the third day
20 of the hearing, with no objection from the respondent. The respondent initially sought to lodge additional documents at the same time, but these had not been provided to the claimant in advance. After some discussion, the respondent withdrew its application to lodge further documents. A further policy document was lodged without objection from the claimant in advance of the continued
25 hearing. The claimant also lodged an additional document without objection. The claimant gave evidence on his own account. Both parties helpfully provided written submissions and were given an opportunity to comment on each other's submissions.

Issues to determine

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3. The Tribunal was required to determine whether the claimant had been dismissed for a potentially fair reason being either conduct or some other substantial reason and whether in the circumstances, that dismissal was fair.

The respondent sought to argue that if the claimant had been unfairly dismissed, his conduct had contributed to that dismissal and in addition, if the dismissal was procedurally unfair, the claimant would have been fairly dismissed had a fair procedure been followed.

- 5 4. The claimant sought to be reinstated if he were successful in his claim. The respondent resisted that remedy.

Findings in fact

- 10 5. Having considered the evidence, the documents to which reference was made and the submissions of the parties, the Tribunal found the following material facts to have been established.
6. The claimant was employed by the respondent as a primary school teacher from August 2005 and was latterly based at Duloch Primary School in Dunfermline. He had previously carried out that role in at least one other primary school. He was dismissed without notice on 30 June 2023. At that time
15 his salary was £47,556 gross per annum.
7. The claimant is registered with General Teaching Council of Scotland as is required of all teaching staff in the state sector in Scotland.
8. The police were called to the claimant's house on 5 October 2022 following an
20 incident with the claimant's younger daughter. The claimant was taken to a police station and charged in relation to the matter. He was then released and went to stay with his parents.
9. The claimant called his head teacher, Laura Spence ('LS') on 5 October 2022 once he had been released from custody to tell her what had happened. He
25 was advised to work from home the next day.
10. The claimant was subsequently informed that he was to be suspended from work by letter dated 6 October 2022 which was handed to him by LS in person outside the school. The letter stated that he was not to contact anyone who might be involved in the investigation but that this did not prevent social contact
30 occurring. The decision to suspend the claimant was taken by SM. The letter stated that "we are carrying out an investigation into allegations that:
- On 5 October 2022, you were arrested and charged with assaulting a minor.

- If convicted of this charge, you may be deemed unsuitable to carry out the duties of your post.

The letter went on to say that “an investigation will be carried out which may or may not lead to a disciplinary hearing being convened”.

- 5 11. No investigation was commenced into the matter at that stage. No investigating officer was appointed although SM appointed herself as nominated officer in terms of the respondent’s procedure.
12. The claimant continued to keep in touch with LS as a point of contact during his suspension.
- 10 13. In response to an email from LS on 25 October the claimant said that his daughters were trying to ruin him and there was only one option for him. LS was concerned regarding the content of that email and having contacted HR, called 999 to report her concerns. The police attended where the claimant was staying and spoke to him. A record was kept of that interaction and the police
15 took no further action.
14. On 25 October, the claimant’s daughter went to the police station to report historic matters concerning the claimant. The claimant was not aware that she was going to attend the police station, the police did not at any stage contact the claimant in relation to this matter and he was not aware of this matter until it
20 was brought to his attention by the respondent.
15. The claimant raised the possibility of his attendance at the school Christmas night out with LS in an email exchange on 23 November 2022. By the time of his suspension he had already paid for the event. He was advised to ‘keep an eye on the whatsapp’ regarding details for the evening. The claimant was not
25 discouraged from attending the evening, nor was any advice given to him regarding what he should or shouldn’t say to colleagues during that evening. The claimant reasonably believed that he was being encouraged to attend the evening.
16. Around 8 December 2022, the claimant informed the respondent that he had
30 been told by the procurator fiscal that the charge against him in relation to the incident on 5 October had been dropped.
17. A Christmas event took place on 16 December at which the claimant and his colleagues were present. The claimant informed some of his colleagues that he

had been suspended from work in relation to an incident with his daughter. Most of his colleagues were aware of some of the background to the claimant's suspension at this time.

18. NM was appointed as investigating officer into the allegation against the claimant on 20 December by SM who had determined that she herself should be the nominated officer in terms of the respondent's disciplinary procedure. NM had recently completed investigating officer training provided by the respondent. While NM had carried out an investigation during that training with the support of HR, this was the first matter in respect of which she had been appointed investigating officer since she had completed her training.
19. On 5 January 2023, NM met with LS 'to identify potential witnesses'. No note was taken of that meeting. There was no reason why LS should be in a position to identify relevant witnesses. LS identified other members of staff who had been present at the Christmas night out with whom the claimant had spoken as potential witnesses. LS raised concerns with NM that some staff had been uncomfortable at the claimant's presence at that event and what he had said to them. This was not a matter which NM had been tasked with investigating. There was no reason identified as to why these individuals would be relevant witnesses to the allegation which was being investigated.
20. NM took a statement from LS on 9 January 2023. LS was asked a series of prepared questions which started by asking her to outline what the claimant had said to her on 5 October and the meetings with him thereafter.
21. NM then went on to ask questions of LS regarding the Christmas night out "can you talk me through concerns that arose when LD attended the Christmas staff night out?" and "Subsequently did any colleagues raise concerns with you?". NM then asked LS "in your role as HT had you had any other reason to be concerned about DLs presentation/professional conduct?". None of these questions related to matters which were within the scope of the allegation made against the claimant. In particular, NM engaged in a fishing exercise regarding any additional concerns about the claimant which could be identified. In response, LS set out details of matters which were said to be of concern to her but in respect of which no disciplinary action had been taken against the claimant. The claimant was not at any stage notified that these matters would

be within the scope of the investigation into the allegation made against him regarding 5 October. LS was the claimant's point of contact during his suspension and he was not made aware that she was also a witness and responsible for identifying potential witnesses until he received the investigation report from the respondent with witness statements.

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22. NM then conducted further interviews with five members of staff who had been present at the Christmas night out. During the interviews, NM asked each individual about what was said to them by the claimant at the Christmas night out and whether there were any other occasions when they had concerns regarding the claimant. One colleague, Sarah MacDonald ('S'), who was a neighbour of the claimant was asked about any contact she had had with the claimant prior to the Christmas night out. S informed NM about allegations that the claimant "had been chased the street by some police officers" which she had been told by a third party. S provided NM on request a copy of the message she had received in that regard. The claimant had never been chased down the street by the police. The message was never provided to the claimant nor included in the investigation report. S was then asked if she had any other concerns regarding the claimant and she provided NM with social media posts which were unrelated to the claimant's work and involved issues the claimant had been having with other neighbours.

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23. NM wrote to the claimant on 16 January indicating that "a formal investigation will be carried out under the Council's disciplinary procedure" into the allegations which had been previously notified to the claimant. The letter was the first indication to the claimant that NM had been appointed Investigating officer and it required him to attend an investigatory meeting on 23 January. The letter made no reference to the Christmas night out or any of the information obtained by NM in the statements she had taken to date.

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24. NM did not take reasonable steps to investigate the allegation against the claimant. She did not contact the Procurator Fiscal to see whether any information could be provided by them. She did not contact the police at that stage to determine whether any information could be provided in relation to the allegation specifically. She did not consider whether she should contact the claimant's wife, the social work department who had had involvement with the

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claimant's family or anyone else who might be able to give relevant information in relation to the allegation against the claimant. Instead she focussed on her investigation on what had been said by and to staff at the Christmas night out and conducted a fishing expedition to identify any concerns the claimant's
5 colleagues might have in relation to him. This approach was fundamentally unfair.

25. The claimant attended a meeting with NM on 23 January at which he was accompanied by a trade union representative. The claimant was asked about the events of 5 October and the charge against him which had since been
10 dropped. The claimant explained that he had suffered from long covid. He explained that there was a court case pending regarding his elder daughter involving allegations of sexual assault by a third party against her in Edinburgh. He explained the difficulties which had arisen in relation to this in terms of his daughter's behaviour and the family. The claimant's position in relation to
15 the specific allegation against him was that there had been no quarrel and that he had asked his daughter to get down from a worktop as he said it wouldn't take her weight and that when she had not done as asked he "had tried to pull her down by her clothing on her shoulder". He said that he believed while his younger daughter had made the call to police there had been some element of
20 coercion by his elder daughter and that this had subsequently been confirmed to him by his wife and his younger daughter. He said that his younger daughter had subsequently spoken to a social worker who had been appointed for his other daughter and that she had told the social worker that the pressure had got to her and that she wanted the charges dropped and that the claimant
25 hadn't hurt her. The claimant made reference to the letter from the fiscal indicating that the charges had been dropped and said that he had provided that letter to LS. No steps were taken by NM to investigate what the claimant had said.

26. The claimant was then asked a number of questions regarding the Christmas
30 night out and in particular was asked "How did you feel about making the decision to go to the event, given that you are suspended from the workplace." The claimant indicated that LS had told him that it would be good for him to go. The claimant was also asked about his relationship with his colleagues over the

period he had been at Duloch Primary School. The claimant raised concerns regarding the length of time the process had taken and the lack of communication from the respondent.

27. NM at some point (she could not tell the Tribunal when or how) contacted
5 Police Scotland and the social work department of the respondent council seeking any information held by them regarding the claimant and in relation to the social work department, his family. She also sought to obtain school records held in relation to his daughters. She did not ask for the consent of the claimant, his wife or his children to obtain such information, nor inform the
10 claimant that she was doing so. The requests for information were not limited to the matter being investigation. NM did not inform the claimant of the details of the information she received nor provide copies of what was obtained to the claimant at any time.
28. NM wrote to the claimant's trade union representative on 6 February indicating
15 that "the report is in the process of being quality assured and finalised before being sent to Shelagh McLean".
29. The claimant's trade union representative then wrote to the claimant on 10 February indicating that "I spoke to Shelagh today and the report is finalised and going to her today I believe".
- 20 30. On 10 February, NM received information held by Police Scotland and the respondent's social work department regarding the claimant and their interactions with his family.
31. NM discussed this matter with the HR advisor from whom she was taking
25 advice. The HR advisor then had a telephone conversation with SM regarding the matter. The documents received from social work and the police were not provided to SM, who did not ask to see them. On the basis of that telephone conversation (of which no note was taken), further allegations were drafted in relation to the claimant. The allegations were drafted by an HR advisor who had been supporting NM. SM signed off on the allegations without having read
30 or asked to read the documents from which they arose.
32. SM wrote to the claimant by letter dated 22 February indicating that "I write to information you that further information has come to light as part of this

disciplinary investigation. The further information will be investigated as part of the ongoing investigation and is detailed in the additional allegation below.

- 5 • Wilful, non-disclosure of information to your employer in relation to your behaviour and conduct outside the workplace, that could call into question your suitability to carry out the duties of your post, specifically:
 - On 25 October 2022, your daughter (ML), reported you to the Police in relation to a historical allegation of assault
 - 10 ○ On unknown dates in June/July 2012 you are alleged to have assaulted your wife and subjected her to domestic abuse
 - On an unknown date in 2014 you are alleged to have threatened young children outside of your home with a knife.
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All allegations call into question your professionalism as a teacher. For clarity, all allegations detailed in the bullet points will be investigated as part of the ongoing investigation. As you are currently suspended from work, this will continue.”

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33. NM then wrote to the claimant on 1 March inviting the claimant to a meeting to discuss the further allegations which had been made.

34. LS reported the initial allegation against the claimant to the GTCS for the first time on 8 March 2023. That report also made reference to the further

25 allegations made against the claimant.

35. A further interview took place on 14 March by NM with the claimant. The claimant was not provided with any further information in advance of that meeting. At that meeting the claimant was accompanied by his trade union representative. He asked NM where the information being referred to in the new allegations was gathered from. NM responded “that as part of the

30 investigation process, information had been shared by Police Scotland.” The claimant was not informed that it was NM who had asked Police Scotland for information. In addition some of the information was not from Police Scotland

but from the social work department and from a record NM had obtained from the school of the claimant's daughter. There was no reason why these documents could not have been shared with the claimant. They related to him and his daughters. NM did not consider sharing the information with him and her subsequent suggestion that this was because of data protection issues was an ex post facto excuse for not sharing the information. NM did not take any advice as to whether there was any legal or other prohibition from sharing the information with the claimant at the time.

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36. The claimant was asked why his version of events on 5 October differed from that in the police report which had now been obtained. The claimant was not provided with the police report. The difference referred to was between what the claimant's daughter had said to the police initially and the claimant's version of events. There was no effort made by NM to investigate what the claimant's daughter had subsequently said about the incident.

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37. The claimant was then informed that the claimant's younger daughter had reported the claimant for events which were said to have taken place 10 years before (that is around 2012 when she was 4 years old) on 25 October 2022. The claimant was asked to comment and indicated that the police hadn't spoken to him regarding his daughter's visit to the police that day and therefore he couldn't provide further comment. The claimant was not aware that his daughter had made further allegations against him at that time. NM did not carry out any investigations to determine whether the police had in fact spoken to the claimant at any time regarding this matter. She did not seek to contact the claimant's wife to ascertain whether she had told the claimant of their daughter's visit to the police station. No action was taken by the police in relation to this matter. The claimant was not charged with any offence at any time in relation to these matters and the police did not contact him at any time in relation to these matters.

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38. The claimant was then asked to comment on the allegation that he had threatened children with a knife. There was nothing in any of the information which had been obtained by NM to suggest that the claimant had ever threatened anyone with a knife. The allegation was entirely exaggerated. The claimant was also asked to comment on an anonymous report to

Crimestoppers made in January 2019 that the claimant was being abusive to his children in the family home and that the claimant had a knife and rope in his car. The report referred to had confirmed that on attending the claimant's home, the police had identified that there was no rope or knife in the claimant's car, but NM did not disclose that to the claimant. This allegation had not been referred to in the letter to the claimant. NM then referred to the allegation regarding threatening children with a knife as "shouting in the presence of 5 children aged 6-7 years old, making reference to a knife." Again NM did not provide the claimant with any of the documentation from which she had taken this information. The claimant raised a concern that this incident was not referred to in the letter from SM. The claimant went on to say that he had assisted the police in August 2014 in relation to a complaint against one of their officers and that this might relate to that issue. The claimant indicated that as the police had said that no action would be taken in relation to these matters he did not think it necessary to inform his employer.

39. The claimant also informed NM during this meeting that he had a long history of poor mental health. At no stage was the claimant asked for any other information in relation to his mental health or how it affected him.

40. The claimant was then asked about the allegation which was related to his wife and said to have taken place in June/July 2012. NM indicated in fact the date given was incorrect and it was suggested by her that the incident took place in June 2013. NM referred to school information making reference to this incident and an additional police report. The claimant explained that his wife had not made a report to the police at that time, and that the incident referred to had been when he had responded to being struck by her as part of an argument. He explained that he was arrested and charged in relation to this incident and that he had informed his head teacher at the time and that his current head teacher was also aware of this. The claimant also read out a letter sent by his wife to the procurator fiscal in June 2013 regarding the matter explaining the background to the incident. NM did not ask for a copy of that letter at any time or take any steps to determine whether the claimant's wife would speak to her.

41. The claimant disputed the minutes which were taken of the meeting with NM and an addendum was added to the statement. The claimant was informed of this on 24 March.
42. NM took a further statement from LS on 17 March regarding her knowledge of the claimant's arrest in June 2013. NM also took a statement from the claimant's head teacher during June 2013 Deborah Davidson ('DD') on 20 March 2023 regarding her knowledge of the claimant's arrest in June 2013. NM went on to ask DD if she had any other concerns regarding the claimant's presentation or professional conduct when she was head teacher at the school and whether the claimant had any extended absences during his employment.
43. NM did not carry out any investigations into whether the claimant had contacted anyone within the respondent regarding the alleged incident in 2014.
44. The investigation conducted by NM was fundamentally flawed by virtue of it focussing on issues which were not the subject of allegations against the claimant, such as his relationship with staff at the school and the extent to which he had discussed why he had been suspended, by requesting information from other bodies without the claimant's knowledge, or consent and then failing to provide that information to him and because the allegations which were put to the claimant were inaccurate, exaggerated and misleading.
45. On 23 March 2023 SM wrote to the claimant indicating that she was requesting a PVG scheme record update in relation to the new allegations which had been made against the claimant. An updated record was provided on 28 March 2023.
46. NM then wrote to the claimant on 18 May 2023 indicating that she had concluded her investigation and had provided her investigation report to SM. There was no valid reason for the delay in concluding the investigation.
47. A letter was sent by SM to the claimant on 24 May indicating that the claimant was required to attend a disciplinary hearing in relation to all of the allegations which had been made against him. By this stage SM was aware that the claimant had disclosed the allegation that he had assaulted his wife to the respondent at the time. The investigation report was sent to the claimant with that letter.

48. A disciplinary hearing took place on 23 June. The claimant was accompanied by a trade union representative. SM was accompanied by an HR advisor who had been providing advice to her. At the beginning of the hearing the claimant's trade union representative raised concerns regarding the fairness of the procedure which had been followed. In particular she suggested that matters had been investigated which did not form part of the allegations against the claimant. At one point in the hearing, the representative is noted as stating "I really want to make the point that it is really hard to prepare for today. There seems to other things being brought into consideration that are not in the allegations. I have said that a few times."
49. The claimant was asked by SM during the hearing if he had told the respondent regarding the incident in 2014 to which he replied " I can't recall informing my employer, but I can say that they were aware." No steps were taken by SM to investigate the claimant's position.
50. During the hearing SM is recorded as stating "Speeding has no impact on your ability to do your job as a teacher. Threatening children with a knife absolutely *does. The two are not comparable.*" (stet). There was no evidence at any time that the claimant had threatened anyone with a knife.
51. SM then wrote to the claimant in a letter of 30 June 2023 dismissing him summarily for gross misconduct. In relation to the allegation incident on 5 October 2022, she stated "I consider that your description of this incident constitutes an assault, as you inflicted physical harm or unwanted physical contact on your daughter." She then went on to find that while the claimant had not "to date, been convicted of the charge", "I have concluded that the incident did occur and I am satisfied that it constitutes assault. I have found that as a result of the assault you are unsuitable carry out the duties of your post notwithstanding the lack of conviction."
52. SM found that the claimant had not disclosed that his daughter had reported him to the police on 25 October. The only evidence SM relied upon in this regard was that claimant had stated in an email of 25 October to his headteacher that his "daughters were attempting to ruin him". The letter went on to acknowledge that the claimant's position was that his elder daughter had sought to coerce his younger daughter and that is why he was reported to the

police initially on 5 October but did not explain why she did not take this issue into account when determining this allegation.

53. SM did not uphold the allegation that the claimant had failed to disclose to the respondent that he had been accused of assaulting his wife. The letter went on to state that “However, I will take into account that this incident does support my assessment that there is a pattern of you being arrested on charges of assaulting female/young members of your family.” This was not an allegation which had been made against the claimant.
54. In terms of the allegation that “On an unknown date in 2014 you are alleged to have threatened young children outside your home with a knife”, the letter went on to refer to a police report. No police report had ever been made in relation to this incident. The letter also stated “I have established that you did not inform your employer and that you were aware of the need to do so I have also concluded that the nature of this incident calls into question your suitability to carry out the duties of your post given your role as a teacher of young children and is another incident in a pattern of allegations in relation to you threatening/assaulting children.” There was no evidence that the claimant had threatened anyone with a knife.
55. The letter concluded “having fully considered the information provided to me at the disciplinary hearing and your account and explanation, I have reached the decision that, on the balance of probabilities, your conduct and behaviour outside the workplace, towards your daughters and other children and your failure to appropriately inform your employer in relation to some of these matters seriously calls into question your suitability to continue in your post of teacher.In addition, there is a clear pattern of conduct where you have been or are charged with assaulting or threatening children or females and this is entirely inconsistent with your professional responsibility under the code of Professionalism and Conduct.” The pattern referred to related to two charges one in 2013 and one in 2023, both of which had been dropped by the Fiscal.
56. SM did not take into account the claimant’s clean disciplinary record or his length of service when taking the decision to dismiss him. She did not believe him to have an unblemished service record as complaints had been made against him by parents, although these complaints had not been the subject of

any formal process. SM did not consider the background to the initial allegation which had been against the claimant, that is the family issues prevailing at the time. SM did not take into account the claimant's history of depression when assessing his credibility or reliability or general demeanour during the course of the disciplinary hearing. She did take into account matters which were not the subject of investigation, in particular complaints raised by parents in relation to him and in respect of which no disciplinary action had been taken.

57. The claimant appealed against the decision to dismiss him. His appeal stated that he not been given fair notice of the allegations being considered, that a fair procedure had not been followed and that there was an overstepping in the decision making. In addition, the appeal stated that the chair appeared to be taking account of evidence which the claimant had not been given a copy of. It was also said that the decision was too harsh.

58. An appeal hearing took place on 6 November 2023. No notes were taken of the appeal hearing, which was heard remotely. The claimant's appeal was not upheld and no reasons were given for the decision which was intimated to the claimant in a letter of 6 November.

59. The claimant was informed in a letter of 5 September 2023 that the GTCS had imposed a temporary restriction order such that the claimant was entitled to continue in any teaching role held by him but could not change his role or take up any other teaching post with a Scottish local authority.

Observations on evidence

60. There was little in the way of factual dispute in this case. The main issue which arose in relation to the evidence was who had been responsible for drafting the second set of allegations against the claimant and how the information on which they had been based had been obtained. NM's position was that she had nothing to do with the drafting of the allegations or the decision that further allegations should be made. What remained unclear from her evidence was how and why she had obtained the information which formed the basis of those allegations in the first place. That question was never fully answered by NM or the other respondent's witnesses. There appeared to be no record of the requests made to obtain what was clearly sensitive personal information

regarding the claimant and his family. NM suggested that she may simply have made phone calls or sent an email to obtain this information which the Tribunal found highly implausible.

5 61. SM's evidence on this point was unconvincing. She initially said that NM had drafted the allegations. On the second day of her evidence after she became aware that NM had given evidence to the Tribunal that she had not drafted the allegations, her evidence changed to suggest she had drafted the allegations. However, she acknowledged that at no stage did she see the documents on which the allegations were based. It seemed astonishing to the Tribunal that 10 allegations such as threatening children with a knife could be made by someone without them having considered what evidence there might be to support such an allegation. In the end the Tribunal concluded that someone from HR drafted allegations and then passed them to SM for signing off on, which she did without checking whether the allegations had been made with 15 any factual basis because she had already formed a view of the claimant's guilt.

Relevant law

20 62. Section 98 Employment Rights Act 1996 ('ERA') provides that conduct is a potentially fair reason for dismissal. It also provides that a potentially fair reason for dismissal might be some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

25 63. Section 98(4) ERA provides that where an employer has fulfilled the requirements of establishing a potentially fair reason for dismissal, whether the dismissal is fair or unfair will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonable in treating is as a sufficient reason for dismissing the employee and shall be determined in accordance with equity 30 and the substantial merits of the case.

64. **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** remains authority for the proposition that whether a dismissal is fair or unfair should be determined by

whether objectively speaking dismissal was within the band of reasonable responses open to an employer.

65. Whether an investigation is reasonable or not will depend on the particular circumstances of the case.

- 5 66. **British Home Stores v Burchell 1980 ICR 303** provides that for a dismissal to be fair, an employer must establish a belief in the employee's misconduct, reasonable grounds on which to sustain that belief and the he had carried out as much investigation as was reasonable in the circumstances.

Discussion and decision

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Was there a potentially fair reason for dismissal?

67. In the first instance, consideration was given to the reason for the claimant's dismissal. The Tribunal accepted that the reason for the claimant's dismissal was conduct and this is a potentially fair reason for dismissal. The Tribunal did not accept that the respondent had established that in the alternative the claimant had been dismissed for some other substantial reason. There was no allegation against made to the claimant at any time that the relationship between the respondent and the claimant had broken down at the time of his dismissal. There was no evidence led either during the course of the disciplinary proceedings or during the Tribunal hearing to suggest that might have been the case. It was true to say that the claimant was very aggrieved at how he had been treated by the respondent. However, there was no suggestion made at any stage prior to his dismissal that the relationship had broken down. The allegations against the claimant related to his conduct. There was no suggestion that for instance there would be reputational damage to the respondent if they continued to employ him. There was some suggestion that there were issues between the claimant his colleagues at Duloch Primary School but this was not why the claimant was dismissed and the claimant was never asked to comment on issues between himself and his colleagues at any stage during the procedure.

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68. While the letter of dismissal made reference to breach of mutual trust and confidence this appeared only to relate to the claimant having allegedly failed to

inform the respondent of the second allegations made by his daughter in October 2022 and the alleged incident in the claimant's garden in 2014. This did not appear to have been the basis of the decision to dismiss, which appeared to be based on the allegation that the claimant had assaulted his daughter and that there had been a number of allegations made against him.

Was the investigation fair?

69. Having determined whether the respondent had established a potentially fair reason for dismissal, it was then necessary to consider whether the dismissal was fair. That required consideration of whether a fair investigation had been conducted.

70. In the first instance it was surprising to the Tribunal that the respondent should appoint someone who had just completed their training as an investigator to conduct the investigation into the allegation against the claimant. The Tribunal intends no criticism of NM in this regard, who clearly approached the task with integrity and to the best of her ability. However, the allegation against the claimant involved a criminal complaint which was potentially career ending. In addition, the Tribunal heard that this was the first occasion on which the new procedures which made it easier to dismiss a teacher had resulted in a teacher's dismissal. While NM had the assistance of an HR advisor in this regard, the Tribunal might have expected the respondent, given its size and administrative resources to have appointed an investigator who had significant experience of investigating allegations which could result in dismissal.

71. It was also surprising to the Tribunal that SM should nominate herself as nominated officer to deal with this matter. SM then appointed NM as investigating officer and was involved in the drafting of additional allegations against the claimant once NM had obtained information from police and social work. She was involved in taking the decision to suspend the claimant and was therefore involved in the proceedings from the beginning, through to deciding that further allegations should be put to the claimant, culminating in taking the decision to dismiss him. That of itself would not necessarily render a procedure unfair, but in the view of the Tribunal it resulted in that SM forming a negative

view of the claimant at an early stage which became fixed and that she did not therefore approach the disciplinary hearing with an open mind.

First investigation

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72. It was not clear to the Tribunal why the investigation was not commenced until three months after the initial incident. No reason was given by the respondent. It was not for instance suggested that the respondent was awaiting the outcome of criminal proceedings. Moreover, by this stage the decision had been taken by the procurator fiscal not to pursue the allegation which had been made against the claimant. Therefore, the respondent was well aware that there would be no conviction as there would be no trial. Notwithstanding this fundamental change to the situation, the allegation against the claimant was not altered in any way. The claimant had no contact from the respondent other than his line manager LS between 6 October 2023 and 16 January 2024 when he was advised of NM being appointed as investigating officer. The allegation which was being made against the claimant appeared to be that if the claimant was convicted of a charge which was not going to be pursued against him he would be unsuitable to carry out his role. That seemed to the Tribunal to be a somewhat Kafkaesque approach to take to the allegation and investigation.

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73. In any event, no actual investigation was carried out in relation to the specific allegation which had been made against the claimant. It was also not clear how the claimant could answer the allegation. What in fact seemed to be investigated was what the claimant had said about the initial incident to his colleagues at the Christmas party, the relationship between him and his colleagues and whether there were any other issues in respect of which disciplinary action could be taken against the claimant. A negative view of the claimant's attendance at the party was taken by the respondent despite him being encouraged to attend by LS.

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74. It appeared to the Tribunal that what ended up being investigated was whether the claimant's colleagues had any concerns about working with him. LS identified the claimant's colleagues as relevant witnesses. It was difficult to understand how they could be relevant witnesses in relation to an incident

which had occurred in the claimant's house. NM did not appear to consider interviewing the claimant's wife or the social worker who worked with his daughters, or contacting the police officer who had dealt with the issue, or the procurator fiscal, all of whom could have provided relevant information. Instead, the claimant's colleagues and LS were asked about whether they had any concerns about the claimant's conduct. That was entirely outwith the scope of the investigations and was a fishing exercise. It was a fundamentally unfair approach to take towards the investigation into the allegations which had been made. NM kept referring in evidence to identifying patterns of behaviour and believed that was her role. She appeared to fundamentally misunderstand her role. The role of investigating officer is to investigate allegations which have been made against an employee. What NM seemed to do was seek to identify whether the claimant had ever done anything else which was similar in nature to the allegation which was initially made against him and which was not pursued by the Fiscal or whether there was any other behaviour on his part which could be linked to the allegation. This was fundamentally different from the allegation which was made against the claimant and the claimant was at no stage informed that this was how the investigation was going to proceed. NM made reference in her investigation report to concerns raised by LS regarding the claimant's 'presentation /professional conduct. These included concerns from colleagues and parents. LS explained that "over a period of time" there have been various communications over DL's conduct in relation to smaller issues of misconduct." This approach had the effect of framing the claimant in an entirely negative light and raising issues which were likely to and in the event did result in a negative impression of him being formed by the dismissing officer. It was not reasonable to make reference to these issues in the investigation report, nor indeed to solicit information in the way in which NM did.

75. The report also recorded the position of a colleague of the claimant who said that the information she knew of was that "his daughter was taken by the throat and shaken by DL". It was not clear where this individual had obtained this (entirely unsubstantiated information) which was highly prejudicial to the claimant. It was unreasonable of NM to include it in the investigation report

where no efforts were made to determine where this information had come from or whether there was any substance to it. The report also included reference to the same colleague stating her understanding that “DL ran from the police and there was a video of this taken by a neighbour” which she said she had not seen. This (and the previous information) was no more than gossip and was both entirely unsubstantiated and inappropriate to be included in an investigation report. It was prejudicial to the claimant and it was unreasonable to have included this in the investigation report.

76. NM sought to suggest that there were discrepancies between the version of events of the claimant and others in relation to the initial allegation against him. However, rather than discrepancies between evidence from people who were actually there, NM was suggesting that there were discrepancies in the claimant’s version of events, because of what other suggested that he had said to them about it at the Christmas party. Rather than approach this by asking the claimant whether he had described the incident differently to others and if so why, NM approached the matter again in a rather Kafkaesque fashion by suggesting that the claimant’s version of events given to her had discrepancies as other people had suggested different versions of events, all of which were based on what the claimant (and other unidentified people) had described had happened rather than evidence from those actually involved. NM also suggested that there were discrepancies in that what the police report (which narrated his daughter’s account of events, which was subsequently withdrawn) said was different from his version which was inevitable given that the claimant denied assaulting his daughter.

Second investigation

77. The investigation report did not record how or why information was sought or obtained from Police Scotland, social work or from school information records regarding the claimant and his family. It does not explain who asked for this information, why or what information was asked for. The report records that the information “was in respect to additional allegations that required further investigation and interviews with DL and other witnesses.” That is entirely

inaccurate as it was **as a result of** the information being received that additional allegations were framed against the claimant. The report does not attach any relevant documentation as appendices and even by the conclusion of the Tribunal hearing, it was unclear exactly what documents had been relied upon in framing the allegations given that many documents were heavily redacted when lodged with the Tribunal.

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78. The Tribunal found it very difficult to establish who was responsible for deciding that additional allegations should be made against the claimant and the terms of the allegations. The evidence from the respondent's witnesses was
10 confusing. NM indicated that she had nothing to do with the drafting of the allegations. Her evidence was that she was in a holding position until SM and HR discussed what was to happen next. SM's evidence initially was that information had come through from the police which the council were not aware of and ought to have been. SM appeared entirely unaware and incurious as to
15 how this information had been obtained. She discussed the information with HR (without reading it) and decided that new allegations should be framed by NM and HR. On the second day of her evidence SM indicated that her initial evidence was inaccurate and that she had framed the allegations with the HR officer over a telephone call where they had discussed information received
20 (which SM did not ask for sight of at any stage).

79. The allegations which were drafted as a result of the new information, were essentially that the claimant had not informed the respondent of certain matters. Those matters were that his daughter had reported him to the police on 25 October; that in June/July 2012 he had allegedly assaulted his wife and
25 that on an unknown date in 2014 he had allegedly threatened young children outside his house with a knife.

80. No investigation was carried out in relation to whether or not the claimant had been informed that his daughter had reported him to the police on 25 October. Steps could have been taken to ask his wife, or the police regarding this. The
30 claimant's position was that he was not aware of this until he received the allegation and that his wife had not informed him because of his fragile mental state at the time. The only potential evidence that he had been aware of this was that this was the same day that he had contacted LS and the police had

attended his house because of concerns of his safety and that he had said his daughters were trying to ruin him. No consideration appears to have been given at any stage to the fact that the claimant had already stated that he believed the initial complaint made to the police by his younger daughter had been influenced by his older daughter. It was simply assumed that the claimant would know about the allegations which had been made. No effort was made to clarify the timings of the claimant's daughter having attended the police station and the claimant having sent the email to LS.

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81. In relation to the second allegation, there was no information to suggest that the claimant had assaulted his wife in June/July 2012. He could therefore not be guilty of failing to inform the respondent of this. The claimant was informed at the investigatory meeting with him that the allegation had intended to relate to events in 2013. It is astonishing to the Tribunal that the respondent should take so little care over the framing of such serious allegations and then when their error is discovered at no stage confirm this in writing. This contributed to the confusion in what the claimant was actually accused of doing and when. In any event, it was discovered at an early stage that the claimant had informed his head teacher at the time of what had happened and no action was taken against him by the respondent in that regard. The decision to continue to consider this allegation at the disciplinary hearing contributed to the Tribunal's conclusion that the decision to dismiss the claimant had been prejudged.

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82. The third allegation against the claimant in this regard is the most astonishing. The claimant is accused of threatening children with a knife. The respondent was never at any stage in possession of information which suggested that the claimant had threatened children with a knife. This also contributed to the Tribunal's view that the disciplinary hearing was not approached with an open mind. Rather, by this stage the respondent had taken such a negative view of the claimant that it was inevitable that he would be dismissed and that the respondent was simply seeking to frame allegations against him in the most serious light in order to justify the inevitable decision. It appeared to the Tribunal to be a clear case of confirmation bias on the part of SM. Although it was clear to anyone reading the documentation which was provided that the claimant had not ever threatened anyone, never mind children with knife, at no

stage was any effort made to alter the allegation. SM in evidence before the Tribunal recognised that the allegation 'could have been worded differently'. That failed to recognise the responsibilities of the respondent to ensure that a fair procedure was followed. It would have been apparent to anyone involved in drafting these allegations, and the procedure more generally that the claimant's career was at stake. The failure of the respondent to pay attention to the drafting of the allegations against the claimant and draft them on the basis of the actual information before them is simply unacceptable, entirely unreasonable and indicative of the respondent's general approach to the claimant, that at an early stage it was thought that he was a danger to women and children. It is also notable that no effort was made to highlight these errors when the claimant was referred to the GTCS.

83. The claimant's position in relation to this matter was never investigated. The claimant indicated that there had been a neighbour dispute and that a police officer who was a neighbour had reported an incident to social work three weeks after an event where the claimant had been concerned at children playing on a rope swing attached to a tree in his garden and made reference to cutting the rope down. The claimant said he had complained about the police officer's conduct yet no investigations were carried out in relation to whether this was accurate or not. There was no suggestion that the police had ever attended the claimant's house to discuss the matter with him and all that had happened was that a card had been put through his door by someone from the social work department (information which the claimant volunteered). No effort was made to clarify what had actually happened. Moreover the event had taken place some 9 years before and no account appears to have been taken of this factor at all. In addition, the claimant indicated at the disciplinary hearing that the respondent had been aware of this issue but he could not remember who he had told. No effort was ever made to determine whether his head teacher at the time or anyone else in the respondent's organisation was aware of this issue.

84. The investigating report also made reference to an incident in 2019 when an anonymous call was said to have been made to Crimestoppers in relation to the claimant, expressing concern that he had a knife and rope in his car. The

information received had confirmed that when the police attended there were no such items in the claimant's car. This did not form part of any allegation against the claimant, yet was included in the investigation report. The claimant said he believed that this call had been made by the police officer who had previously reported him to social work prior to him moving away. It was unreasonable for this matter to be referred to in the report when it was not part of the allegations against the claimant, particularly in the way in which it was framed.

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85. Ultimately the respondent took an early view as to the guilt of the claimant and the investigations carried out were focussed on obtaining additional information which would substantiate that view. There was no balance to the investigation and no effort to identify evidence which might be supportive of the claimant's position.

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86. The investigation was therefore fundamentally unfair. It is acknowledged that there is a limit to the steps an employer should be expected to take to investigate an employee's alleged misconduct. However, in the present case, no steps were taken to investigate what the claimant was saying had happened in relation to a number of issues. It would not have been onerous to ask the police or the Procurator Fiscal for information regarding the decision not to proceed with the charge against the claimant. Efforts could have been made to determine whether the claimant's wife or the family's social worker had relevant information. Former head teachers could have been contacted regarding the alleged incident in 2014. None of these steps were taken.

25 **Disciplinary hearing**

87. The Tribunal concluded that SM had made a decision that the claimant would be dismissed prior to the disciplinary hearing commencing. The Tribunal formed this view on the basis of the following factors:

- 30 a. There was no effort to amend the allegations against the claimant when it was known that the charge against the claimant had been dropped;

b. The way in which SM had approached the additional allegations against the claimant without reading the documents on which they were based, asking where they had been obtained from or discussing whether the claimant should have sight of these documents, and

c. SM's interventions during the course of the hearing which indicated to the Tribunal that a decision had already been taken and that the matter was not approached with an open mind on the part of SM.

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88. SM said in evidence that she considered the claimant to be belligerent and hostile during the disciplinary hearing. She appeared to take no account of the claimant's medical condition, that he had been suspended by that stage for almost 9 months despite the original charge having been dropped against him almost 7 months previously and new allegations having been against him 4 months after the initial incident, some of which by that stage the respondent was aware were unsubstantiated, continued to be pursued by the respondent. No account appears to have been taken of the difficult family circumstances being experienced during that period. Rather SM had formed a view of the claimant as a danger to women and children from the outset and viewed his conduct at the hearing through that prism rather than an employee whose career was under threat.

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89. It was clear from the notes of the disciplinary hearing that what was being considered was whether the claimant had assaulted his daughter, not whether he had been charged with that offence. SM is recorded as stating at an early stage in the hearing "Allegation 1 was founded. If I do not look at any other evidence, there is a belief by the police that there was enough to make a charge necessary. We are trying to determine if that would deem DL unsuitable to carry out his post. Do you recognise your employer is not required to have the proof the police investigation must have? Our investigation is to determine whether there is a reasonable belief, without necessarily providing that an assault took place?" The allegation against the claimant appeared therefore to have morphed into an allegation that he had assaulted his daughter (albeit that the specifics of what he was alleged to have done were never put to him by the respondent). SM went on to say that she appreciated that it was a standard

letter the claimant had received regarding the charge being dropped, but that “They are not saying that you have not committed an assault. They are saying that they were not progressing with the case”. None of these comments were indicative of SM approaching the issues with an open mind.

- 5 90. The approach of SM during the disciplinary hearing was to find evidence to support the view she had already reached. Although she suggested that the claimant was belligerent during the hearing, it is clear from the notes of the hearing, that she did not at any stage seek to raise any issues which might have been supportive of the claimant’s position.

10 **Was the decision to dismiss within the band of reasonable responses?**

91. The Tribunal went on to consider whether SM had reasonable grounds on which to sustain the view that the claimant had committed the alleged misconduct. It concluded that she did not. The investigation was fundamentally
15 flawed. SM appeared to base her decision to dismiss on the number of allegations which had been made against the claimant rather than whether these allegations were substantiated. That was her evidence before the employment tribunal. Similarly to NM she kept referring in evidence to a pattern of behaviour.

- 20 92. In relation to the first allegation, SM concluded that the claimant’s description of the incident with his daughter amounted to an assault. That had never been an allegation which had been put to him. SM found that the claimant was unsuitable to carry out his duties because of that “assault”, notwithstanding the lack of conviction. Therefore, SM concluded that the claimant’s own version of
25 events, which was that he had pulled his daughter by her clothing from a worktop after having asked her to get down and having said that it would not take her weight was conduct which meant that he should be dismissed from his role of teacher. That decision is not within the band of reasonable responses.

- 30 93. SM then upheld the allegation that the claimant had been aware of the further allegations made by his daughter without giving consideration to the claimant’s position that he did not know about this matter.

94. In relation to the allegation that the claimant had not disclosed that he had been charged with assaulting his wife, while SM indicated that while she accepted he

had disclosed this information, that she would “take into account that this incident does support my assessment that there is a pattern of you being arrested on charges of assaulting female/young members of your family.” That was not an allegation which had been levelled at the claimant and it was not reasonable to find the claimant guilty of something that had not been put to him directly.

95. SM concluded that the claimant had had not informed the respondent regarding an incident where he was alleged to have threatened young children outside his home with a knife, despite there being no evidence to suggest he had ever threatened anyone with a knife. In her letter of dismissal she made reference to shouting in the presence of children and making reference to a knife. She also stated that this was “another incident in a pattern of allegations in relation to threatening/assaulting children.” She went on to refer to the “threatening children with a knife incident” again in the reasons for her dismissal, despite being aware that there was no evidence that the claimant had ever threatened anyone with a knife. This was entirely unreasonable and also indicative of having adopted a position that she had concluded that the claimant was a danger to children and women. SM’s approach to this matter alone would have rendered the claimant’s dismissal unfair.

96. The Tribunal was mindful that it should not substitute its own views as to the reasonableness of the decision to dismiss. Where a dismissal is reasonable or not will depend upon whether it falls into the band of reasonable responses open to an employer. As highlighted by the respondent in submissions, the Tribunal should only take account of those facts known to those who took the decision to dismiss (**Orr v Milton Keynes Council 2011 ICR 704**).

97. The Tribunal however had no hesitation in concluding that the claimant had been unfairly dismissed. The investigation was flawed from the outset, relevant information was not provided to the claimant and he was misled as to how this was obtained; SM was involved in the procedure throughout and formed a view as to the claimant’s guilt prior to the disciplinary hearing; the allegations made against the claimant were confused, confusing and in some cases either inaccurate or deliberately exaggerated; no consideration was given to the

claimant's clean record and length of service in reaching the decision to dismiss him.

98. For all these reasons the Tribunal concluded that the claimant's dismissal was both procedurally and substantively unfair.

5 **Did the claimant contribute to his dismissal?**

99. The respondent's position was that the claimant had contributed to his dismissal and therefore that any compensation should be reduced to reflect this. The Tribunal did not accept that submission. The claimant was criticised
10 by the respondent for not taking responsibility for his actions or in effect showing contrition. This continued the Kafkaesque theme of the way in which the claimant was treated. His position was that he had done nothing wrong. He conceded that he pulled his daughter off a worktop by her clothes when he was concerned that it might break. It was difficult to understand why the claimant
15 should show remorse for this. The claimant did come across during the proceedings as somewhat combative. However, given his medical conditions, the fact that there had been a family difficulties, and how he perceived that he had been treated by the respondent in relation to his dismissal, that was not surprising.

20 100. The Tribunal therefore concluded that there was no blameworthy conduct on the part of the claimant which would cause any compensation awarded to him to be reduced.

Would the claimant had been dismissed had a fair procedure been followed?

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101. The respondent's position was that even if it was found that the claimant's dismissal was procedurally unfair, that the Polkey principle should apply. The Tribunal did not accept this submission. The proceedings against the claimant were flawed from the outset, when no consideration was given to altering the
30 allegations against him even though he was not to be prosecuted. That was only the beginning of the myriad of procedural flaws in the proceedings, from the fishing for negative comments against the claimant, the obtaining of

sensitive information and not providing that to the claimant, the drafting of allegations which could never be substantiated, the confusing wording of allegations and mistakes which were never formally rectified, the signing off of allegations without looking at the material on which they were said to be based, the length of time before there was any investigation, through to new allegations, and where the claimant's dismissal was almost 9 months after the initial incident, the prejudging of the claimant from the outset and the way in which the disciplinary hearing was conducted. Unfairness was baked into the whole the procedure. The flaws were so serious and numerous that the Tribunal could not accept that had a fair procedure been followed the claimant would have been dismissed.

Remedy

102. The Tribunal then went on to consider the issue of remedy. The claimant wished to be reinstated. His role is that of a primary teacher. He should therefore be reinstated to that position from 16 August 2024 and it is for the parties to discuss where the claimant will be based in carrying out that role. While the Tribunal appreciates that the claimant is currently under a temporary restriction order from the GTCS, which means that he could only teach in the school in which he had worked prior to the order being imposed, and the claimant does not feel able to physically return to work in that school, it does not appear to the Tribunal that this of itself would render it not reasonably practicable to make an order of reinstatement. The date of the order is such that the GTCS may have completed its investigations by that stage and the order may no longer be in force. In addition, it is not clear whether the respondent has yet brought to the GTCS' attention the errors in relation to the matters highlighted in this judgment.

103. The Tribunal did not accept the respondent's argument that it would not be reasonably practicable to re-instate the claimant. The respondent sought to argue that posts made by him on Facebook together with the criticisms made of various members of the respondent's staff and complaints made by him about them, were such that the relationship of trust and confidence had broken down. The Tribunal preferred the submissions of the claimant, that he was extremely

unlikely to have contact with those who had been involved in the decision to dismiss him. In addition, while it is noted that the claimant posted matters on Facebook regarding the proceedings against him, there was nothing offensive or otherwise inappropriate in those posts. There was no evidence led as to who

5 had seen these posts or how widely they had been seen. It was not suggested that there had been media reporting regarding the posts. The claimant was aggrieved, with justification, regarding his treatment by the respondent.

However there was no evidence before the Tribunal to suggest that members of staff were not allowed to post on social media or that the claimant had been

10 in breach of any social media policy of the respondent.

104. In all these circumstances, the Tribunal was satisfied, given that Fife Council covers a wide geographical area and has a number of primary schools within its jurisdiction, that it would be reasonably practicable for the claimant to be reinstated to the role of primary teacher. The Tribunal noted that some of

15 the allegations which were included in the referral to the GTCS regarding the claimant were not established and that the GTCS has not yet completed its investigations. Therefore the Tribunal did not accept the respondent's submissions it was not reasonably practicable for the respondent to comply with the Order of reinstatement.

20 105. The claimant should also be put back in the position he would have been in had he not been dismissed. That requires the claimant's pay and pension rights to be restored as though he had not been dismissed.

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106. On the basis of the information provided, the claimant's net monthly salary was £2,994. He had no income for a month until he secured alternative employment. His net monthly income is understood to be £1,834 in that role. By the date of his reinstatement he will have carried out that role for 7.5 months.

5 He therefore suffered loss of one month's salary of £2994, until the date he secured employment and losses to the date of his reinstatement of 7.5 x £1,160 being the difference in net pay between his role as a primary teacher and his current role. The respondent is ordered to pay this sum to the claimant in compensation for his loss of earnings during the period to the date of

10 reinstatement.

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Employment Judge:	A Jones
Date of Judgment:	29 July 2024
Entered in register:	30 July 2024
and copied to parties	30/07/2024

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