



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107178/2023

Hearing held at Dundee on 15, 16, 17, 18, 19, 23, 24, 25, 26 April 2024

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**Employment Judge McFatridge
Tribunal Member P Fallow
(E Coyle required to withdraw)**

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Mr Graham Wark

Claimant

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Leisure & Culture Dundee

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal was that

1. The claimant's claim of unfair dismissal does not succeed. The claim is dismissed.
2. The claim of disability discrimination does not succeed and is dismissed.

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REASONS

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1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondent. Initially the claimant made a substantial number of other claims including claims of age discrimination
E.T. Z4 (WR)

and sex discrimination as well as claims relating to public interest disclosure. The age and sex discrimination claims were withdrawn immediately prior to the hearing. The claim based on public interest disclosure was withdrawn during the hearing on the afternoon of 23 April 2024 after the end of the claimant's case. The respondent submitted a response in which they denied the claims. They did not accept that the claimant was disabled at the relevant time. At the hearing the claimant went first and gave evidence on his own behalf. Although arrangements were made for another witness to give evidence on behalf of the claimant by CVP at the end of the day the claimant's representative indicated he would not be leading evidence from any other witnesses apart from the claimant. Evidence was led on behalf of the respondent from George Laidlaw a trustee of the respondent who dealt with the claimant's appeal against dismissal, Judith Dobbie the respondent's Managing Director who was the claimant's manager, Stuart Robert Cross one of the respondent's Trustees who had been initially involved in the investigation and John Mullen an independent HR Consultant who had carried out the investigation and made the decision to dismiss the claimant. It had been agreed between the parties that Mr Laidlaw's evidence be taken out of turn before the evidence of the other three witnesses as he was unavailable for the second week of the hearing.

2. At the commencement of the hearing the panel comprised the Employment Judge together with Ms Fallow and Ms Coyle. On Monday 22 April the Tribunal was due to sit however on that day Ms Coyle reported that she was feeling extremely unwell and required to go home. The Tribunal did not sit on that day. On 23 April Ms Coyle had reported to the Tribunal that she was still feeling extremely unwell and was unlikely to be in a position to attend the Tribunal during the rest of the week. Both parties agreed that they would proceed with a panel of two comprising the Employment Judge and Ms Fallow who was the employee member. Ms Coyle took no further part in the hearing or the deliberations of the panel.

3. Both parties had lodged a joint bundle which was added to without objection during the course of the hearing. On the basis of the evidence and the productions the Tribunal found the following essential facts relevant to the claim to be proved or agreed.

Findings in fact

4. The respondent is an arm's-length external organisation (ALEO) of Dundee City Council established in 2011. It is responsible for running various sports and cultural facilities in Dundee. The constitution of Leisure & Culture Dundee was lodged (p198-219). The respondent is run by a Board of Trustees which comprises three elected members of Dundee City Council, two Dundee City Council employees (one of which is Managing Director of the respondent who at the time of these events was Judy Dobbie) and eight independent trustees who serve on a voluntary capacity. The respondent is a registered charity with OSCR. The claimant commenced employment with the respondent on or about 1 February 2012. The claimant had previously worked in a similar role in Aberdeen and in Perth and Kinross. The claimant's statement of employment particulars was lodged (p120-123).
5. The claimant's role was Head of Leisure and Support Services. There were four Heads of Services who reported to the Managing Director who, as noted above, was an employee of Dundee City Council. In or about September 2019 the then Managing Director retired and a recruitment process took place to appoint a successor. At that time the four Heads of Service were the claimant, Paul Henehan who was Head of Support Services, William Gartley who was Head of Cultural Services and Judy Dobbie who was Head of Library and Information Services. The claimant, Mr Gartley and Ms Dobbie all applied for the role of Managing Director and Ms Dobbie was successful. Subsequent to Ms Dobbie's appointment as Managing Director Jayne Gair was appointed as Acting Head of Library and Cultural Services.
6. At the time of Ms Dobbie's appointment the respondent were facing substantial financial challenges. A spreadsheet showing the outline of their financial position was lodged (p220-224). A meeting of the board took place on 4 December 2019. It was attended by Ms Dobbie as Managing Director Designate. The claimant and the two other Heads of Service, Mr Gartley and Mr Henehan were also in attendance. A minute of the meeting was lodged (p1671-1674). Item 3 on the agenda stated:-

“(i) ORGANISATIONAL STRUCTURE REVIEW

A paper was submitted by the Managing Director Designate detailing Terms of Reference for a Structural Review Group, which would review and assess the effectiveness, relevancy and efficiency of the current management and organisational structure against the purposes, values and service agreements which Leisure and Culture Development have providing recommendations to the Board.

To achieve this, the Group would:-

- review the internal organisational structure, management, communication and roles and functions of staff.*
- Review the purpose and values of the organisation against key documents for the City priorities.*
- Provide recommendations to the Board.*

Membership would include:-

*Stuart Cross, Leisure and Culture Dundee Trustee
Ian Mathers, Leisure and Culture Dundee Trustee
Moira Methven, Leisure and Culture Dundee Trustee
Judy Dobbie, Acting Manager Director*

The Group would have delegated authority to progress the Terms of Reference and would keep the Board regularly informed of progress through the Chair.

A clear communications strategy would define the involvement of the Senior Management Team and Board at critical stages in the review process and the aim of the Group was to bring an update to the Board in February, 2020 and to bring proposals for approval by the Board at the earliest opportunity.

Concern was raised regarding the membership of the group, and it was greed that this be discussed separately with the Chair.”

7. At that time the Chair of the Board of Trustees was Sinclair Aitken however shortly after this Moira Methven took over as Chair of the Board of Trustees.

8. As is well known the Covid pandemic broke out in or about March 2020 and little progress was made with the review during 2020. At some point during 2020, Andrea Quinn, an external Consultant, was engaged to assist Ms Dobbie and the other members of the Review Group with their task. A letter dated 4 December 2020 from Ms Quinn to Ms Dobbie and the other Heads of Service including the claimant was lodged which refers to this and to the ongoing budget discussions (p1675). During the period December to February there were continual discussions about the need for the organisation to save money. A report prepared by Judy Dobbie detailing business strategy 2020-2024 was lodged (p1676-1682). This report was being discussed amongst the Heads of Service and was a clear priority for them at this time.

9. As part of the discussion on budget savings the claimant sent an email to Paul Henehan and Judy Dobbie on 2 February 2021 in which he suggested combining Cultural and Library Services into one service area making a saving on one Head of Service post (p1616). At the end of this email he stated:-

"In the spirit of 'offering up' other posts I'm happy to discuss the deletion of my post (HofS Leisure and Sport Services) which would generate some £85K (likely in 22/23)."

He also noted that deleting the Head of Service post for Library Services would also save around £85,000.

10. At this time the claimant also made a proposal to split the ALEO into two ALEOs.

11. Heads of Service regularly met with the Managing Director for Senior Management Team meetings. A Senior Management Team meeting was due to take place on 31 March 2021. There was also to be a pre-Board meeting of the Trustees later that day. At 16:20 on 30 March Judy Dobbie wrote to the claimant and the other three Heads of Service. The email was lodged (p246). It stated:-

"Dear all

At tomorrow's SMT I will be outlining the information relating to the organisational review which will be discussed at the pre-board session with Trustees. In addition, I will provide the background to the change to the recovery plan item, also aware that there are a number of items we didn't get onto on Monday, including Finance Committee, KPMG update, East End Campus update plus the items raised prior to Monday's meeting via email."

12. The claimant and his colleagues were not sent a copy of the report at the time however the following day at the meeting they were presented with a copy of the report. This was lodged (p247-251). One of the main recommendations of the report was that the number of Heads of Service would be reduced from four to three by combining the role of Head of Support Services currently held by Paul Henehan with the role of Head of Library and Information Services currently held on an acting basis by Jayne Gair. The claimant's basic position was that he felt this was a fairly sensible plan however he was concerned about various points in the report and also how the report was presented. Section 3.2 of the report stated:-

"3.2 Since the formation of the SCIO in 2011 when it merged together sport and leisure, library and information and cultural services, the Senior Management Team (SMT) has consisted of four Heads of Service, mirroring those individual parts. The SMT operates within each individual departmental silo and these behaviours have been reinforced for many years, with competitive behaviours encouraged. For example, it became custom and practice that each Head of Service would defend their sections in areas of budget setting, rather than taking an organisational or city-wide perspective, and to do anything else would be seen as a weakness.

3.3 The challenge of bringing together cross-service proposals was evident during the creation of the recent budget strategy and the associated organisational review activity in support of that. As each service area prioritises their service, this

reflects in competitive practices across the team. As we move into resumption and recovery, an environment needs to be created which develops a leadership team that can act corporately for the greater good of the organisation and the city of Dundee.

3.8 Finally, the focus of this strategy is much more than a savings and restructure exercise. Now more than ever, we will be seeking innovative approaches to the way we provide services, which will rely on collaboration between teams and other external organisations, in all sectors. I believe that this is only possible with a refresh of leadership behaviours and a restructure plays a vital part in that.

I intend to create a high performing team by setting new expectations for all leaders and creating a supportive environment which holds all leaders to account for collaborative behaviours on an individual and team basis, thereby improving their collective performance.”

The claimant's view was that neither he nor his colleagues did behave in the manner suggested. His view was that the organisation was held in high regard by others including the CEO of the Council. He disagreed entirely with Ms Dobbie's perception of current behaviours as set out in this document. The claimant was also concerned when during the course of the meeting, Ms Dobbie made it clear that all four posts were being disestablished which essentially meant that all four postholders would require to apply for one of the three new roles if they wished to continue.

13. The document itself made clear that once the report was approved by the Board there would require to be a process of consultation with the trade unions and with staff before anything happened. The new jobs would have to have job descriptions prepared and would require to be evaluated so that the grades could be established. An indicative timetable was provided within the document at page 251 which anticipated consultation commencing on or about 6 October with the appointment process starting on or about 7 May and being completed by 31 July. There were also proposed changes in respect of the extended management team but a

slightly longer timescale was proposed for those with consultation with the trade unions beginning in September 2021 and the appointments process starting in October 2021.

14. Ms Dobbie's view was that given that the respondent had a no redundancies policy which was well known throughout the organisation and given that Jayne Gair was in an acting up post the almost certain outcome was that the claimant would be re-appointed to the corresponding new role as would Mr Haggerty and that it was likely that Mr Henahan would be appointed to the new combined role of Head of Support Libraries and Information Services, That would however be anticipating the process and she was not able to give the claimant or the other directors any firm guarantee as to what would happen given that there was to be a consultation process and thereafter a full and fair recruitment process.

15. The claimant and other members of the team became extremely angry during the course of this meeting. Ms Dobbie's position was that she had been asked to carry out a management restructure and was following the correct process in putting this to the board first. If the board approved it then the appropriate consultations would be carried out. It would be quite improper for her to anticipate the result of these consultations by, for example, assuring the three managers who were in substantive posts that their jobs were safe. During the course of the meeting both Mr Gartley and the claimant behaved extremely aggressively towards Ms Dobbie. Following the meeting Ms Dobbie cried. She considered they were both extremely aggressive. Following that Jayne Gair sent a text to Ms Dobbie. This was sent at 11.14 directly after the meeting. She stated:-

"JG That must have been horrendous for you. You did really well

JD I just came off and cried

JG I am free if you want to talk they were both unacceptably aggressive in my opinion."

The text messages were not lodged but Jayne Gair quoted from them in a statement given at a later date (p603).

16. A further management team meeting took place on Friday 2 April where the claimant and his colleagues raised various issues with Ms Dobbie. Ms Dobbie indicated she was about to go on pre-arranged leave for a week. She would be returning to business on Monday 12 April. She advised them that consultation would start on her return.
17. On Friday 9 April the claimant and Mr Henehan and Mr Gartley submitted a collective grievance to the Chief Executive of Dundee City Council. As noted above, none of the three of them were employed by Dundee City Council.
18. The email sending the grievance was lodged (p252). In the email it states:-
- “... The collective grievance has been sent to you given the conflict of interest within L&CD and your role being the Council’s representative as the main Member.”*
- The grievance itself extends over six pages and was lodged (p253-260).
19. Within the grievance the claimant refers at page 254 to *“the apparent deletion of existing posts”*. He confirmed that the Managing Director had previously stated that there would be no redundancies however the grievance goes on to state that when questioned the Managing Director could not say that jobs were safe. The next paragraph then sets out the grievance issues in which the claimant refers to a failure to follow employment law and that employees had the right to be informed and consulted by their employer. The claimant also alleged that there had been a breach of charities law by the Trustees. The grievance goes on to criticise various points made in the report stating it is not true that there are departmental silos. The claimant’s view was that the grievance was taken against the whole board rather than just Ms Dobbie.
20. Mr Colgan asked Paul Clancy the Executive Director of Children and Family Service within Dundee City Council to deal with the grievance. Mr Clancy issued a letter on 7 July 2021 setting out the outcome. This was lodged (p281-283).

21. Mr Clancy divided the grievance into three parts. With regard to the first part *“Treatment During Organisational Review”* he noted that there was significant concern expressed at the procedure immediately prior to the report going to the board as well as the lack of HR involvement in the process. He also referred to the remit of the organisational review group being clear. It was his view that *“little in the way of consideration of individual feelings around the proposed restructuring took place in the sequencing of events”* and he upheld this part of the grievance.
22. The second part he identified was *“breach of employment rights”* and he did not uphold this part of the grievance. He noted that there was no indication either in the report to the board or at any point in discussions that there were likely to be any compulsory redundancies or for any jobs to be considered at risk of redundancy. He noted that legal advice had been taken and followed.
23. The third point he referred to as *“Disingenuous Portrayal to the Board”*. This was partially upheld. He stated that there was no evidence of a deliberate intention to misrepresent or mislead rather it was Ms Dobbie’s sincere perception of the situation. He stated that whilst there was no such intent it was his view that the report was *“unclear and open to interpretation”* and he accepted that it was not unreasonable for certain statements to be taken personally and he partially upheld this part of the grievance.
24. With regard to his conclusions he noted that the report had been on hold since the grievance was submitted and it was his recommendation that the board be requested to withdraw the report. He also confirmed that the Trustees had not been investigated as part of the process.
25. The claimant and his two colleagues then submitted an appeal. Their letter submitting the appeal was lodged on 27 July 2021 (p285). In the meantime on 8 July Moira Methven, the Chair of the Board had written to the Trustees asking them to confirm that they were happy for the report to be withdrawn as per the recommendations. The report was thereafter withdrawn.

26. Attached to the grievance appeal was a formal letter which was also lodged (p286-288).

27. A meeting to discuss the grievance appeal was fixed to take place on 20 August 2021. This took place via Teams. Following that meeting and before the outcome was known the claimant and his two colleagues wrote to Moira Methven who was the Chair of the Board lodging a further collective grievance. This was lodged (p289-294). In this it is stated that the claimant and his colleagues were aggrieved by two main issues namely that their employment rights had been breached and that they had been misrepresented to Trustees by the content of the Management Restructure Report. Within this they stated again that:-

“The Management Restructure Report which was approved deletes our posts and establishes new posts. This places us in a redundancy situation leaving us at risk of redundancy. By planning and taking such action our employer the Board has to observe employment law. In this instance employees have a legal right to be informed or consulted by their employer about

- *Any possible redundancies*
- *Changes to their contracts*”

28. On 27 August Ms Methven wrote to the claimant and his colleagues in response. She stated:-

“Thanks again for your email which Will and I have had the opportunity to fully consider. As a result it appears to us that a fundamental misunderstanding has arisen regarding the basis of the first of your concerns and we can advise that matters have moved on in relation to the second of your concerns.

In relation to the first concern for the avoidance of any doubt your posts have not been deleted. We are sorry you believe that to be the case. As we all know, certain proposals were made to Leisure and Culture Board for the implementation of these proposals was always and explicitly dependent on the outcome of a consultation with staff and trade unions which for various reasons did not take place.

5 *In relation to the second concern and in any event the report containing those proposals (and about which we have also expressed unhappiness regarding certain statements which were included) has been withdrawn with the agreement of the Board following on from Paul Clancy's findings and recommendations after hearing your Grievance.*

10 *At the same time, the Board agree to review Leisure and Culture's operations as we continue to recover from COVID-19. Any proposals with staffing implications which flow from that review will be the subject of consultation with staff and the trade unions as and when appropriate.*

15 *We hope that clarifies matters and reassures you but if you have any remaining concerns which are not already being heard as part of your grievance appeal to the Chief Executive of Dundee City Council, Gregory Colgan, please let us know."*

29. Mr Colgan issued his response to the collective grievance appeal in a letter dated 6 September 2021 which was lodged (p296). He dismissed the appeal. He noted:-

20 *"On that basis, I must dismiss your appeal regarding the alleged breach of employment law and the resolution which you sought regarding the report has already been provided by Leisure and Culture Dundee, therefore, that part of your grievance has already been addressed."*

He confirmed there was no further right of appeal.

- 25 30. On 7 September 2021 the trade union representative acting on behalf of the claimant and his colleagues wrote to Ms Methven and Mr Dawson acknowledging receipt of her email of 27 August (p297-299). The letter goes on to state:-

30 *"We are disappointed that you have chosen not to respond to, or address the points raised in their grievance and have been dismissive of the serious concerns they have highlighted. Our members have attempted to engage with yourselves on numerous*

occasions but, to date, they have not had the opportunity to have their issues and concerns heard by yourselves or any of the other Trustees of Leisure & Culture Dundee. Your actions have further eroded any remaining trust and confidence our members have in their employer, the Leisure & Culture Dundee Board. It is also of concern to our members that, in your recent email to them, you make mention of their Grievance Appeal with Dundee City Council. This is a private and confidential matter and they, and we, wish to know how you came about that information and what discussions you have had in relation to it.

Our members' grievances centre around a report which was presented to the Board on Management Restructuring. It recommended an approach that set out a new management structure and contained newly established posts which, clearly, deleted their current posts. It was, subsequently, confirmed by the Managing Director that the report had been approved. Our members had also been advised by the Managing Director, prior to the Board meeting, that their posts were to be deleted, replaced with new posts and there was no guarantee they would be matched into the new posts. We do not believe there has been a misunderstanding on the part of our members.

Thank you for now informing our members that the report has been withdrawn as they were unaware of such.

Our members should like to reiterate that an independent review of the lead up to and approval of, the report and the relevant subsequent actions and inactions would enable this grievance to be considered fairly. It would also assist in clarifying whether any breaches to employee rights and/or Trustee legal duties have taken place.

The grievance heard by Dundee City Council at its CEO's insistence, was in relation to the Council's employee Judy Dobbie. This in no way replaced the grievance our members have with their employer, the Leisure & Culture Dundee Board. They have been denied the opportunity to address their grievances and concerns with anyone representing their employer, which is both a further

concern and an unfair and improper way to deal with staff. It is not hard to see why our members have little trust and confidence in their employer.”

31. Later on 7 September Greg Colgan sent a letter to Stuart Fairweather who was one of the union representatives involved. The email was copied to the claimant and others and it was lodged (p300). In the email Mr Colgan provides answers to the two of the questions asked. He states:-

“• *Have posts been deleted by DCC in this way without any employee or trade union consultation? I am advised by Leisure and Culture Dundee that your posts have not been deleted. Dundee City Council consults formally where posts may be deleted (as Leisure and Culture Dundee also intended to do.)*

• *We asked previously for a copy of the no compulsory redundancy policy as part of the appeal. Can this be provided? If this query refers to Dundee City Council, there is not a written policy. There is a practice that has been described as a ‘no compulsory redundancy policy’.*”

32. On 15 September Ms Methven wrote to the other members of the Board setting out the situation and the Board’s position. She noted that she had taken legal advice. The solicitor had advised that they believed that the emails were just a repeat of the previous grievance which was lodged with Dundee City Council. She goes on to say however that the solicitor advised that the Board instruct an independent consultant to review the process for them. She suggests that the independent consultant be instructed and asks for written approval. This was subsequently approved.

33. In the meantime, the claimant and his colleagues continued to write to Ms Methven asking for their grievance to be dealt with (p307, 308, 309). On 23 September Ms Methven wrote to them indicating that she was seeking the approval of the Board for an independent review. Despite this Mr Wark wrote again to Ms Methven on 29 September stating:-

5 *"We are taking the opportunity, prior to this afternoon's Board meeting, to provide you with a gentle reminder that despite raising concerns some 6 months ago we still have had no meaningful contact from any Trustee regarding our grievances. There has been no response to any of those concerns and our recommendation for an independent review remains outstanding."* (p312)

- 10 34. On 30 September Ms Methven wrote to the claimant and his colleagues setting out the history of the matter so far as she was concerned and confirming that the Board were in agreement to an independent review being carried out. She stated:-

15 *"We would propose that this independent review is carried out by Liz Jackson. Liz is a fellow of the Chartered Institute of Personnel and Development (CIPD) and Chair of the CIPD Scotland for seven years.*

20 *Liz brings a depth of experience in Human Resources developed over 30 years working across various industry sectors at director level and running her own consultancy which she has done since 2009. Clients include both public and private sector, charities and not for profit organisations. As a highly sought-after HR professional with a strong background in employment law, Liz is adept at conducting independent review, disciplinaries, grievances and dismissals as a completely independent authority from an organisation.*

25 *Liz has been given full authority by the Board to conduct the review in the form she believes is appropriate. This extends to deciding which witnesses she feels require to be spoken to regarding your outstanding concerns. The review will involve Liz meeting with you to go over your remaining concerns in greater detail to ensure she fully understands these. Will and I would suggest Liz contacts you directly to make arrangements for that meeting and to request any other information she feel she requires from you to commence her review.*

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We have copied Liz into this email and understand that she will make contact with you directly. As stated above, we would not propose to get involved in this review and will let Liz direct how it proceeds.

5 *We trust that the Board's agreement to your request and the proposed arrangements set out above will allow us to move forward in a constructive manner."*

35. At around 3pm on 30 September Liz Jackson wrote an email to the claimant advising that she had been assigned as an independent authority to carry out a review and suggesting a meeting take place on Thursday 7 October over Zoom. She asked him to forward copies of correspondence with Dundee City Council.

36. At this point the claimant was working mainly from home. The claimant was feeling stressed about what was going on and from 4 October he decided that he would regard himself as being on sick leave under the self-certification system. In terms of the respondent's policy he was required to advise his Line Manager Ms Dobbie that he was off sick. The claimant did not do this on 4 October and in fact did not advise Ms Dobbie that he was off sick until 11 October. The claimant did not attend the meeting with Liz Jackson fixed for 7 October and in fact the claimant did not at any time co-operate with Ms Jackson's investigation and report. There was a meeting fixed for 6 October which the claimant and other members of the senior management team were to attend along with members of the Board to discuss future of the organisation. The claimant had a concern that he may say something inappropriate or speak out of turn at this meeting. He was concerned that he may make reference to the deletion of his post in March and asked the Board difficult and challenging questions since he felt his concerns were not dealt with. He was unwilling to attend the meeting and did not do so.

30 37. On 4 October the claimant's union representative and Mr Gartley's union representative wrote to Ms Methven (p316-317). They reiterated their position that the claimant's grievances have not been addressed. They go on to state:-

“Furthermore, your email from 30th September has immediately prejudiced and compromised any independence of the individual you propose to undertake the independent review.

5 *In copying the proposed independent reviewer into your correspondence, our members have already been placed in an unacceptable position. By doing this, you have delivered what appears to be a fait accompli with no opportunity for our members to consider this proposal or discuss the scope of what is investigated.*

10 *Additionally, the proposed reviewer has already made direct contact with our members and has worryingly informed them that you have forwarded confidential and sensitive correspondence between you and them without their knowledge or prior consent. The reviewer also indicates that she is in process of reviewing our*
15 *members grievance with Dundee City Council which should not have been in your possession let alone be shared with a third party. This gives serious concern for data protection breaches.*

In addition to this, we are concerned that Liz Jackson has approached each of our members individually. This is a collective
20 *grievance and should be approached as such. We also note that there has been no offer made to our members to have representation at the meeting. Therefore, in consultation with and on behalf of our Members, we politely refuse your proposal to appoint Liz Jackson as the independent reviewer.*

25 *For the sake of their health, we had advised our members not to attend the strategic planning day scheduled for Wednesday 6th October. Therefore, we are pleased to see that you have taken the decision to postpone the event. By going ahead with this, the LACD Board were putting our members in a situation which would be*
30 *completely inappropriate, particularly given the continuing involvement of Andrea Quinn, given her role in the organisational review process.*

Our members have reported to us ongoing stress caused by this situation and continue to feel threatened by the approach LACD is

taking towards them. This is a matter we have raised with you previously and have still had no recognition of this, let alone proposals of how LACD will address it.”

5 38. The claimant had taken exception to the paragraph in Ms Methven’s email of 30 September where she describes Liz Jackson as being adept at “conducting independent reviews, disciplinaries, grievances and dismissals as a completely independent local authority.” It was the claimant’s position that this statement was threatening because it referred to dismissals.

10 39. Ms Methven responded to this letter on 8 October. This letter was lodged (p318). She said:-

“..... Your original grievance, which was sent to Greg Colgan at Dundee City Council, asks for the following:

- 15 - *An urgent meeting to discuss concerns*
- *The report withdrawn and the organisational review process put on hold*
- *A clear brief for the organisational review*
- *The ORG to be reconstituted with employee representation*
- 20 - *And, if the grievance is upheld, or any part therein, that the matters be referred to the appropriate governance mechanisms i.e. Trustees Code of Conduct.*

25 *Your members’ original grievance hearing, which took place on 7 July 2021, provided you with outcomes 1 and 2. The report was withdrawn and, in respect of outcomes 3 and 4, the Board agreed not to proceed with this particular organisational review. Given the outcome of the grievance, outcome 5 was not relevant or appropriate.*

30 *Furthermore I note that you and your members asked for an independent review by emails dated 20 August, 7 September and 29 September 2021. For that reason, I obtained the Board’s authority to instruct Liz Jackson to determine this as an independent review. I was clear with Liz that this was not a grievance.”*

40. Ms Methven then indicates that she has taken legal advice in respect of the allegations relating to data protection and sets out the view of her legal advisers that no such breach has taken place. She then goes on to state:-

5 *"It is up to you whether your members choose to engage with this independent review. In the event that they do not participate, it may take place in their absence."*

41. The claimant attended his GP on 11 October 2021. The claimant's GP medical records were lodged (p97-117). Although it may involve taking matters slightly out of sequence it is probably as well to set out the course of the claimant's medical history at this stage.
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42. The claimant is noted as contacting his GP triage on 11 October (p107). An appointment slot was booked with the GP practice's Mental Health Nurse Practitioner for the following day. On 12 October Mr Wark had a telephone meeting with the Mental Health Nurse Practitioner. The GP notes state:-
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"Work related stress, sleep disturbance, lack of tolerance, eating junk food as a maladaptive coping mechanism. Feeling angry and concerned he will speak/act impulsively in workplace and so self-certified last week."

20 *Work situation well documented in econsult.*

Has had previous input from counsellor Kate 10 years ago and found this helpful, able to use techniques as self-management. Feeling overwhelmed at present, keen to re-starting Citalopram. Requesting a med 3 cert, had self-certified last week, looking for a med 3 cert from 11/10/21 – 25/10/21 reason; work-related stress."

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Following that meeting the claimant was prescribed Citalopram which is an antidepressant and told to take one 20mg tablet each day.

43. The claimant saw his Nurse Practitioner again on 18 November, 6 December and 20 December. On each occasion he received a further Med 3 certificate indicating that he should refrain from work. There is reference to these meetings in his medical notes on page 106. The claimant had a further consultation on 17 January when he received a
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further Med 3 and a further telephone call with the Nurse Practitioner on 10 March 2022 where he referred to ongoing issues at work. He stated during this telephone encounter that he had found the Citalopram helpful but had decided to come off it as he felt he was feeling better until more recent events at work. By this point, as will be noted below, the respondent had advised the claimant that he should remain off work and there was no further requirement for him to provide sick notes. He contacted the GP practice again on 31 March 2022 where he felt he had made a mistake in coming off the Citalopram. He had a further telephone encounter on 28 April 2022 where he said he was finding the Citalopram was taking effect and his sleep had improved. He noted he felt he had come off the Citalopram too soon. There was a further telephone call on 11 May where the claimant requested an increase in his Citalopram to 30mg and he was prescribed this. He said that his employers had been in touch to set up a meeting and this had triggered an exacerbation in his symptoms. He attended a telephone encounter on 2 June where he said he was feeling the benefit of an increase in the dose. He attended a further telephone consultation on 29 June where he noted that he was not sleeping well but was "ok" in relative terms. He was happy to continue with 30mg Citalopram. He attended a telephone consultation in July and on 18 July his mental health nurse decided that he might benefit from counselling and this was organised. He attended a further meeting on 13 September 2022 where it is noted that he *"Had experienced a significant deterioration in mood following recent contact with employer who he has ongoing difficulties with."* It was noted at this point that he was receiving ongoing support through sessions with Mearns Counselling. In December 2022 the claimant consulted his GP regarding myalgia which he considered was due to stress and low mood. Following a further consultation the claimant continued to suffer from ongoing sleep difficulties and in January 2023 he discussed the short term use of melatonin with the nurse practitioner. The claimant ended up using melatonin for a period of around four months. A mental health review took place on 14 February 2023. He noted that his sleep was improved with melatonin. The claimant was re-referred to counselling and said he was finding counselling very helpful. On 15 May the claimant was also referred to the Community Mental Health Service. The nurse practitioner did not

feel that he met the criteria for this but referred him to psychological services who offered CBT (Cognitive Behavioural Therapy). On 4 July 2023 the claimant was told that he would not be offered any more melatonin since he had been on it for four months. On 8 October 2023 a further review took place. A new Med 3 was issued confirming the claimant was not fit for work for 28 days. It was noted that the claimant was using CBT techniques and psychological therapy and that he was on antidepressants for low mood. It was noted that he had been supported for the last 1.5 years. It was noted that he had been dismissed and that he was working on his appeal and that this made him feel overwhelmed. It is noted that he was suffering from panic attacks, low mood and low self-esteem.

44. Going back to the chronological sequence of events Liz Jackson sent the claimant an email on 8 October noting that he had not attended the proposed meeting nor responded to her emails. She proposed that the meeting take place on Monday 11th at 9:45.

45. On 10 October the claimant sent an email to Judy Dobbie stating that he was unfit for work (p328). The letter stated:-

“As you will be aware my health has been badly affected since you advised me that my post was to be deleted and replaced, with no guarantee of matching and my option was to consider ER or EVR. Your confirmation that the Board had approved the related report and the lack of consultation was very stressful. The apparent unwillingness of the Board’s office bearers to discuss matters and their recent correspondence has exacerbated my feelings of vulnerability and lack of safety in the workplace. Whilst I have been self-managing my health to date, I believe I need additional support and will seek advice from my GP. Therefore I will not be attending work given my health concerns – I am unfit to work – and will revert once I get an appointment with my GP.”

46. The claimant forwarded fit notes as they were issued. In the meantime correspondence continued between the respondent and the union representative for the claimant and Mr Gartley. On 5 November

Ms Methven wrote confirming that the respondent's position was that the original grievance and appeal had been determined. The Board had agreed to an independent review taking place and she was unwilling to meet with the union representatives to discuss anything further. He confirmed that it was up to the claimant and his colleagues whether they co-operated with the review or not.

47. On 16 November Mr Henehan wrote to the claimant and Mr Gartley setting out his position (p339). Essentially he indicated that he wished to break ranks with the other two and would co-operate with Liz Jackson's investigation.

48. In the meantime on 4 November the respondent had written to the claimant in terms of their Policy on Promoting Health and Attendance inviting the claimant to a Review and Support Meeting which was to take place on 15 November. The letter of invitation was in standard terms and was lodged (p342-343). It is proposed the claimant meet with Ms Dobbie who would be supported by Tracy Edgar an HR and Employee Support Manager. A stress discussion document was attached which the claimant was asked to complete in advance of the hearing since he was said to be suffering from stress at work.

49. On 12 November the claimant wrote a lengthy letter to Ms Dobbie. This was lodged (p340-341). In it the claimant said that he was not prepared to attend a meeting with Ms Dobbie. He also wanted any meeting to be on Microsoft Teams and to be with another manager. He stated that if Ms Dobbie was the appropriate individual to meet with him then he would wish the meeting to be mediated "to provide me with a safer environment". He also suggested that he be referred directly to Occupational Health for assessment. The meeting on 15 November did not take place. A meeting was subsequently arranged to take place on 26 November. Ms Dobbie found the meeting to be extremely challenging.

50. The meeting was online and Ms Dobbie attended accompanied by Tracy Edgar from HR. Mr Hagerty, one of the other Heads of Service had also gone off sick at around the same time as the claimant. Ms Dobbie had arranged a meeting with him for earlier that day which had been attended

by Mr Hagerty together with his union representative. When the claimant logged on to the meeting Mr Hagerty logged in as well him and the claimant said that he wished to have Mr Hagerty accompany him at the meeting. Ms Dobbie said she was surprised to see Mr Gartley on the call and this provoked a very aggressive response from the claimant. The claimant spoke much louder than normal and there was a great deal of anger in his tone. During the course of the meeting he spoke over Ms Dobbie on numerous occasions. The claimant behaved extremely aggressively during the course of the meeting. Ms Dobbie indicated that she would refer the claimant to Occupational Health and it was agreed that the referral document would be sent to the claimant in advance.

51. On 2 December Ms Dobbie wrote to the claimant formally confirming this. The letter was lodged (p385-386). She noted that the claimant had not completed the stress discussion document as he felt it was not applicable to his situation. Ms Dobbie notes that the claimant stated that he wanted the issues to be looked at and to understand why certain events had not happened as they should have. She referred back to the report dated 31 March. Ms Dobbie noted that the claimant had been offered counselling but that the claimant had said he would rather speak to Occupational Health direct about this.

52. Also on 2 December the claimant and Mr Gartley sent a further joint grievance to Paul Henehan. They stated that this was a grievance about Judy Dobbie and referred to the meeting and their view of the way this had been conducted.

53. The Occupational Health referral was lodged (p388-389).

“Graham’s absence with work related stress is related to an ongoing collective grievance with the Leisure & Culture Dundee Board, and specifically, issues relating to the reasons for this grievance. Looking to identify arrangements and actions which would support a return to work.”

54. On 3 December the claimant wrote regarding Ms Dobbie's letter and the referral form. He stated that both had felt the stress discussion document was not applicable. He went on to say:-

"I stated there had been no consultation prior to the report being considered by the Board or any discussion or consultation afterwards. I also stated that there has been a refusal to meet with me (and my colleagues) despite submitting the grievance and urging the Chair to discuss the issues contained in the grievance.

I don't like the use of language where I am 'required' to attend – I have suggested and offered to attend. Do you believe it's only in your gift for me to attend? It should be an agreement to attend in the circumstances."

The claimant duly attended Occupational Health and a report was produced. The report was lodged (p399-400). The opinion stated was

"Having completed a well validated mental health evaluation, this colleague indicated that he is experiencing mild symptoms associated with anxiety and depression, which are likely to be associated with the longevity of the situational stress.

We have discussed the benefits of counselling, but Graham has declined any intervention at this time and mentions that as he has a good understanding of the situation and the trigger to this event.

It is suggested that although Graham is currently temporarily unfit for his duties at this stage, a RTW possibly in the next 4-6 weeks, may be achievable, but a RTW with the work related issues unresolved, would only fuel a further possibility that Graham's frustrations over the perceived work related issues, may develop further and if this was to be the case, then further sickness absence could not necessarily be ruled out. It is therefore advised that management enter into dialogue with Graham at the earliest opportunity to resolve the perceived work related issues, or appoint mediation to prevent a deterioration in his general well-being and once fit to RTW, a phased return would help facilitate the transition back into the workplace, working initially from home."

55. The report goes on to state that the claimant was temporarily unfit for his substantive post but that a possible return to work in February may

potentially be achievable. It was noted that no routine Occupational Health review was required.

56. In the meantime Paul Henehan met with Liz Jackson. He also had a meeting with Moira Methven and Judy Dobbie and Ms Methven sent an email to Judy Dobbie following this which was lodged (p401). In this email it is noted that Paul Henehan had indicated that he was very concerned that he was going to be made redundant and that was why he had participated in the grievance. The email goes on to say:-

"When I pointed out that it was stated explicitly in the report that there would be no redundancies and also that it L&CD has a no redundancy policy he said that Graham said that as their jobs were being deleted then in law they were being made redundant.

Paul revealed that he had been actively encouraged to go off sick at the same time as the other two. He also stated that the other two were out to get Judy and I and the Board. He cautioned that we should be very careful as GW would use every trick in the book."

The email goes on to state that Mr Henehan said *"GW's next port of call is OSCR and Kevin Keenan Leader of the Opposition."*

The letter also said that Mr Henehan was now seeking to distance himself from the claimant.

57. On 14 January Judy Dobbie invited the claimant to attend a further meeting on Wednesday 26 January via Microsoft Teams. The claimant was sent a copy of the Occupational Health Report. The meeting duly took place on 26 January. It was attended by the claimant together with his trade union representative. Once again, Ms Dobbie was accompanied by Tracy Edgar of HR. Following the meeting Ms Dobbie wrote to the claimant summarising the outcome. This letter was lodged (p406-407). The claimant indicated that his sick line would be ending on 7 February and he expected some sort of actions to be in place to allow him to return. He said he would be willing to discuss using ACAS or an independent person as a mediator. Ms Dobbie summarised the position in her letter

and said that she would be taking advice about the claimant's proposal. She also went on to state:-

5 *"I note that your current fit note expires on 7 February 2022. I confirm that you do not require to return to work whilst I am taking legal advice and you will continue to receive full pay whilst I am taking this advice. There is no requirement on you to submit a further fit note in the meantime."*

10 58. On 11 February the claimant wrote to Kevin Keenan the Leader of the Opposition on Dundee City Council. The email was lodged (p408-409). It set out concerns regarding Leisure & Culture Dundee. It referred to trying to process grievances and sent a copy of his letter regarding the various concerns he had raised.

15 59. On or about 16 February Liz Jackson completed her report. The report document extends to 23 pages and was lodged (p410-433). On 18 February the claimant, who had not at that point seen the report, wrote to Ms Dobbie complaining about her letter of 4 February. His letter was lodged (p437-438). The claimant set out a number of concerns and provided his version of the meeting. He stated that he wished to be provided with the following information:

- 20
 - *"When did you seek legal advice on mediation?*
 - *When did you receive said legal advice?*
 - *From whom did you seek legal advice?*
 - *What legal advice did you seek?*
 - *What legal advice did you receive?"*

25 In the meantime, the claimant continued a correspondence with Mr Keenan relating to his issues.

30 60. The Board of the respondent met for a private and confidential special meeting on 22 February 2022 in order to discuss the Liz Jackson report. The meeting of this minute was lodged (p1409-1410). At the meeting Liz Jackson was present and gave an overview of her report to those present. She did not hand out copies of the actual report. It is probably as well to set out the section of the minute dealing with the report in full.

“UPDATE ON GRIEVANCE

The Chair gave a brief overview of the grievance and introduced Liz Jackson, Independent Consultant to the Board.

5 *The Chair noted that, as previously approved by the Board, the scope of the report had been extended. This was as a result of the fast moving developments which had unfolded, additional grievances being received, and information which had come to light during the investigation.*

10 *Liz spoke to her report, noting that its content would not be shared with the Board at this point in order that a fair and transparent decision could be reached.*

15 *After considering verbal and written evidence, Liz considered that with regards to the original grievance, all processes and procedures had been followed correctly. Furthermore, as the Organisational Review Report had been withdrawn, all aspects of the grievance in relation to this had been addressed in full and no further action was required. With regards to a breach of the Trustees Code of Conduct, following advice from the Board’s Legal Advisers, it was considered that no breach had taken place.*

20 *It was noted that there were lessons to be learned from this process, in particular consideration of a more robust communication process between the Board and Senior Management Team, however this was a matter for the Board to consider out with this meeting.*

25 *Liz then outlined the five potential outcomes/recommendations which were contained in the report, based on her findings and conclusions.*

- 30
- No further action be taken and the individuals return to the workplace*
 - A mediation exercise be undertaken to resolve the grievance and a return to the workplace occur thereafter*
 - A protected conversation be held with the individuals and a settlement agreement be negotiated*

- *A dismissal on the grounds of Some Other Substantial Reason (SOSR) take place*
- *Due to evidence of behaviours prior to the grievance, a Gross Misconduct dismissal take place*

5 *Both the Chair and Managing Director advised the Board that they were not prepared to take part in any mediation exercise due to their opinion that the individuals would not engage in this process in the manner in which it was intended. This was based on the previous verbal and written communication that they had been*
10 *party to with the individuals.*

Thereafter, the Board had a detailed discussion of the merits on the recommendations. It was agreed that this had been an extremely difficult period for the Managing Director, and thanks were extended to her for her professionalism, strong leadership and
15 *commitment to L&CD. It was agreed that the first two options would be unlikely to achieve a positive outcome for L&CD, and discussion concentrated on the remaining three options. Consideration was given to the availability of funding for a negotiated settlement, noting that this would not be any more than would be awarded by*
20 *an Employment Tribunal.*

In conclusion, the Board agreed that in the first instance, the option of Protected Conversation be taken forward on an individual basis, noting that it may be advantageous if the newest members consider taking on this role, due to having had no previous contact with the
25 *individuals.”*

61. Liz Jackson's written report contained her conclusions at p432-433. Paragraph 6.3 states:-

30 *“Having concluded the review, significant allegations have been presented which in the main can be evidenced either by first hand observations or in written materials. Resolution going forward is a primary consideration and the Board is therefore required to consider the content of this report in conjunction with the proposed possible outcomes/recommendations*

- (a) *The potential of an irretrievable breakdown in the working relationship between the senior team (the Board) and GW/BG which can give rise to a fair dismissal and would be under some other substantial reason (SOSR).*
- 5 (b) *The potential of a gross misconduct case thus consideration or disciplinary action against both GW and BG based on evidence that has come to light throughout the independent review.*
- (c) *The potential of initiating mediation with a view to resolving current issues. Mediation can work if all parties agree to participate fully in the process. At this stage it is doubted that*
- 10 *JD and MM would be willing to participate.*
- (d) *The potential of having a protected conversation and having an off the record discussion with the view to agreeing a negotiated financial exit under a settlement agreement.*
- 15 (e) *Both GW and BG returned to work after their period of ill health and no further action is taken. In this event clear parameters would need to be set as to what is or is not acceptable behaviour in the workplace. This could also be linked to mediation where all parties agree.*
- 20 *It is recommended that the five possible outcomes are considered fully with regard to the team dynamic, the seniority of the people involved, the impact of the breakdown and working relationships and how this affects Leisure & Culture Dundee operationally and also how it affects team members personally and professionally.”*
- 25 62. The Tribunal’s view was that the minute at page 1409 did not accurately set out what Liz Jackson said at the meeting regarding the five potential outcomes. For the reasons given below the Tribunal’s view was that at this meeting Liz Jackson set out her conclusions in the same way as they were set out in her written report.
- 30 63. Following this meeting, Mr Colin McLeod, a recently appointed member of the Board wrote to the claimant seeking to meet with a view to carrying out a protected conversation. The claimant was invited to a meeting to take place on 9 March (p445). Immediately prior to this the claimant sent

a further letter of grievance to Paul Henehan. This letter was lodged (p443-444). He complained of harassment by Judy Dobbie. He referred again to there having been no consultation during the period prior to the Leisure & Culture Dundee Board's Consideration of the Management Restructure Report in March 2021. He again referred to his post as having been deleted when it palpably had not. He made an inspecific complaint that *"racist and sexist comments made by the former Chair and current Vice Chair were to be investigated but do not appear to have been investigated and no feedback has been given"*. He complained about a number of other matters on the second page. He also noted that Judy Dobbie had not responded to his requests for details in relation to the legal advice she had obtained.

64. The claimant's union representative wrote to Mr McLeod on 7 March complaining about the position and setting out the view of the claimant and Mr Gartley. The letter repeated their concerns about the process to date. Mr McLeod responded on 8 March expressing surprise at their concern about Mr McLeod writing an email to them. He offered to reschedule the meeting to 11 March as one of the complaints made had been that the claimant had not received five days' notice. He confirmed that the purpose of the meeting was for a protected conversation. The claimant's union representative responded on 10 March (p449). He stated that Mr Gartley was on annual leave until 21 March. He referred to the various outstanding grievances and suggested the meetings be organised after 21 March. He also stated that they would prefer a more neutral venue than the office of the respondent's solicitor.

65. The meeting eventually took place in a neutral venue however it did not result in a settlement of the dispute between the parties. The Tribunal did not hear any evidence in relation to it as it was a protected conversation.

66. Following the failure of the protected conversation the respondent's Chair, Ms Methven asked Stuart Cross who had been a member of the Board since 2019 to carry out an investigation as to whether there had been a breakdown in trust and confidence between the claimant and the respondent specifically the Managing Director and Chair of the Board. Mr Cross was to be supported by Blackadders who were the respondent's

solicitors and also by John Mullen a freelance HR Consultant. Mr Cross had previously been Chair of a number of Trusts and was an experienced Trustee. He qualified as a solicitor in 1982 and practised as a solicitor for some years before moving to the University of Dundee as a Lecturer. He then became Professor of Law and Head of the Law School until his retirement in 2019. He had previously been involved in the organisational review and had been at the meeting of the Board which had taken place on 22 February 2022. He was very clear that no decision in relation to dismissing the claimant had been made at that meeting. His understanding was that he was to carry out a completely independent review of matters. Mr Cross wrote to the claimant on 8 April 2022 advising of his appointment and confirming that Mr Wark was suspended. His letter was lodged (p468). The letter had been drafted for Mr Cross by Blackadders solicitors.

67. The first paragraph of the letter stated:-

"I am writing to confirm your suspension from work while I investigate matters relating to a perceived breakdown in relations between you and the organisation, specifically the Managing Director and Chair of the Board. I will require to speak to various people including you and it is preferable that you remain away from the workplace while I conduct these meetings. You should not interpret my decision to suspend you as any indication that I have formed a conclusive view about the perceived breakdown."

68. The claimant took exception to the first paragraph of this letter since it was his position that, although he had been told that he need not attend work nor submit any further fit notes, it was his view that he had not been suspended up to that point.

69. The claimant wrote to OSCR on 12 May 2022 complaining about the respondent. The letter was lodged (p469-470). He wrote to Stuart Cross on 13 April questioning the opening sentence of the letter at p468. He asked for his IT access to be restored. He also asked what policy Mr Cross was operating under (p471). Mr Cross responded on 14 April to advise that the claimant's IT access would be re-instated. He explained

that the IT access was automatically cut off once an employee had not worked for 31 days. He went on to say that the investigation was not being undertaken in accordance with the specific policy and that the respondent did not have a policy to cover situations where there is a perceived breakdown in relationships nor is there any legal requirement to have such a policy. Mr Cross had taken legal advice in relation to this response (p472).

70. Mr Cross met with Liz Jackson, author of the report on 18 April 2022. He was accompanied by Mr Mullen who took notes. Mr Mullen's notes of the meeting were lodged (p473-483). Mr Cross wrote to the claimant on 2 May 2022 to update him of progress. He said that he had met with Liz Jackson and that he would forward the notes of the meeting once they had been typed up. He then asked if the claimant was prepared to attend a meeting on either 9th or 10th May. He said that he would intend to meet with Moira Methven and Judy Dobbie separately along with any others whom he deemed relevant. The letter was lodged (p484). The claimant did not respond to the choice of dates and a reminder was sent by Mr Cross on 4 May (p485). The claimant then confirmed on 5 May that he would attend a meeting with Mr Cross on 10 May. The letter was lodged (p486). The final paragraph of the letter states:-

"I am alerting you that your emails have caused me great upset and distress therefore do not correspond with me directly from this point forward. Instead I should be grateful for you to put all correspondence for me to my trade union representative Jim Cunningham."

Mr Cross then wrote to Mr Cunningham confirming the meeting which was to take place on 10 May.

71. On 9 May Mr Cunningham wrote again to Mr Cross seeking a postponement of the meeting. The letter was lodged (p489-490). He complained that an attachment sent to Mr Gartley was intended for Mr Wark and Mr Wark had been unable to open the attachment sent. He requested a postponement (p489-490). The postponement was granted and on 13 May Mr Cross wrote again to Mr Cunningham fixing the meeting

for Wednesday 18 May 2022 via Teams. He said he had received the unredacted minutes of the meeting with Liz Jackson and that these had been forwarded on 9 May. He now attached the report from Liz Jackson. He confirmed that the report had not been sent to the Board for review but that instead Liz Jackson had verbalised her findings and gave various recommendations to the Board meeting on 22 February (p491-492).

72. The claimant read Ms Jackson's report together with the minutes. The claimant was upset by a number of matters contained in the report. He considered many of the statements which portrayed him in a poor light to be inaccurate.

73. The meeting with Mr Cross eventually took place on 24 May after some further coming and going between Mr Cross and the claimant's union representative. It was attended by the claimant and his union representative. Mr Cross was accompanied by Mr Mullen who took notes. Mr Mullen's notes were lodged (p501-521). The Tribunal accepted these as accurate. At the commencement of the meeting the claimant read out a prepared statement. At the end of the meeting Mr Cross asked the claimant's union representative to send a copy of this statement together with a copy of the grievances of 20 August 2022, 2 December 2021 and 3 March 2022. The statement was duly sent. The grievances were not. The claimant's statement is at p523-533.

74. At the meeting the claimant was asked some questions by Mr Cross after he had read out his statement. Mr Cross asked the claimant if he believed that the four individuals mentioned by him using the word fabrications, untrue and untruth had lied. The claimant's response was that the statements they had made were not true. He was asked if what Ms Dobbie said about his self-certification on 11 October was untrue. The claimant then set out his position which was that he had self-certified the week prior to 11 October and that he could therefore could not be criticised for failing to attend a meeting on 6 October. The claimant said that he felt that Ms Methven and Ms Dobbie had suffered a failure of memory and was happy to put things that way rather than fabrication. The claimant was asked if Liz Jackson had emailed him inviting him to meetings on 5 and 11 October. The claimant said he would have to check that. Mr Cross put

to the claimant a number of comments made by Moira Methven which the claimant disagreed with. He asked the claimant if he had spoken to Paul Henehan and told him that he wanted people being held to account. There was a discussion regarding the grievances. Essentially the claimant's position was that he did not accept anything critical of him which anyone else said. The claimant then went on to criticise Judy Dobbie's people management skills. He criticised her for failing to follow policies and procedures and said that this had tested the relationship. He set out his view which was that the relationship with Moira Methven and Judy Dobbie was damaged but not broken. At the end of the meeting Mr Cunningham made it clear that the claimant and his union were still interested in mediation.

75. Mr Cross wrote to the claimant's representative again on 15 June advising of progress to date. He reminded the claimant's representative that he still needed a copy of the claimant's statement and the grievances. Mr Cross met with Judy Dobbie on 16 June. He was accompanied by Mr Mullen who took notes. Mr Mullen's notes were lodged (p535-544). The Tribunal accepted this as being an accurate record of what took place at this meeting.

76. Mr Cross met with Moira Methven on 22 June. Once again, he was accompanied by Mr Mullen who prepared a note. Mr Mullen's note was lodged (p558-570). The Tribunal considered this to be an accurate record of the meeting. On 5 July 2022 Mr Cross met with Paul Henehan. He was again accompanied by Mr Mullen who took a note of the meeting. Mr Mullen's note is lodged (p571-579). The Tribunal accepted this was an accurate record of what took place at that meeting. The claimant wrote again to Mr Cunningham on 18 July to update him regarding progress. The letter was lodged (p580). He noted that he had still not received the copies of the various grievances. He said that the email which Mr Cunningham had forwarded was blank in respect of attachments.

77. Mr Cunningham wrote to Mr Cross on 27 July copying his letter to the claimant (p594). In paragraph 4 of this letter Mr Cunningham set out a concern about there being other named individuals in the grievance. For this reason he indicated he was only prepared to provide a statement

saying the date when the grievances were lodged but was not prepared to provide actual copies of them.

78. Mr Cross found this extremely puzzling. The situation was that the claimant was making a big point to the effect that his grievances had not been addressed but he was then refusing to let Mr Cross see these grievances.

79. On 18 August Mr Cross met with Tracy Edgar. On this occasion notes were taken by Jane Lockhart. A copy of these notes was lodged (p606-608). These related mainly to Mr Gartley however there was also some reference to the claimant.

80. On 7 September Mr Cross wrote again to Mr Cunningham with regard to obtaining copies of the grievances. Having enclosed copies of the minutes of the meetings with Judy Dobbie and Moira Methven he then went on to state:-

"Having reviewed your email, Jim, dated 27 July 2022, it now appears that Graham is unwilling to provide either the grievance dated 2 December 2021 or the harassment complaint dated 3 March 2022. In your email, you suggest that it would be 'inappropriate for Graham to provide the details of the other 2 complaints without seeking the permission of, or at least advising those mentioned, which Graham is unable to do at this time.' I am surprised at this, given the fact that you mention that the complaints are about Leisure and Culture Dundee individuals.

Please note that I have been tasked with assessing whether or not Graham's relationship with Leisure and Culture Dundee has irretrievably broken down. Arguably my request to Graham for copies of these complaints dated 2 December 2021 and 3 March 2022, both at our meeting on 24 May 2022 and in my subsequent emails to you, dated 7 June, 15 June and 21 June 2022, are lawful instructions. Perhaps you can ask Graham again whether he is willing to either provide these complaints or seek the consents you mention in your email dated 27 July 2022 within the next seven days."

81. Mr Cross sent this on the basis of legal advice having spoken to the respondent's solicitors regarding this. He felt it was essential that he get copies of these grievances so that he could complete his task. On 13 September Mr Cunningham the claimant's union representative wrote to Mr Cross sending copies of the grievances. He complained about Mr Cross's letter and describes it as threatening, he asks why Mr Cross has asked for them. He also states he does not consider this to be a reasonable instruction.

82. Mr Cross responded on 22 September (p614) setting out his explanation. He said it was important that he see the grievances to assist him in assessing whether the claimant's relationship with Leisure and Culture Dundee had broken down. He asked if the claimant was fit enough to attend a further meeting.

83. Mr Cross met with Jayne Gair on 29 September. He was accompanied by a Claire Brook who took notes. These notes were lodged (p615-623). The tribunal accepted them as accurate.

84. On 29 September Mr Cunningham wrote to Mr Henahan submitting a bullying complaint by the claimant against Stuart Cross (p624). The complaint stated:-

"I write to submit a bullying complaint on behalf of Graham Wark against Stuart Cross, Leisure & Culture Dundee Trustee, the grievance is in regard to Stuart Cross's involvement in Graham's dispute with Leisure & Culture Dundee, his failure to adhere to organisational procedures, his conduct and behaviour, which in our view fall below the standards expected of a holder of public office and have contributed to a period of significant ill health for Graham."

On the same date Mr Cunningham wrote a lengthy letter to Mr Cross stating that the claimant would not attend any further meetings until the grievances had been investigated by Dundee City Council and the grievance processes exhausted.

85. On 30 September Jayne Gair sent to Mr Cross a number of emails which she had received from the claimant around the time of the meeting in April 2021 which she had referred to in her meeting with Mr Cross.
86. Mr Cross wrote to Mr Cunningham on 4 October acknowledging his letter and confirming that he had not appreciated the claimant found his emails threatening. He noted the position and stated that given the claimant's apparent state of health he had advised Tracy Edgar to obtain a report from Occupational Health about his ability to engage in a further meeting.
87. The claimant met with Occupational Health on 27 October 2022 and on that date Karen Kirkpatrick a Registered General Nurse produced a report. The report was lodged (p650-651). It was noted that the claimant had requested the report not be shared with Stuart Cross and in fact Stuart Cross was not sent a copy of the report until shortly before he gave evidence in the Tribunal proceedings. Ms Kirkpatrick set out her opinion that the claimant remained temporarily unfit to attend any formal work meetings. She noted that once his symptoms had improved and he was able to attend the required work meetings she would recommend that the work meetings take place in a different location and that time out periods be allowed. She notes that Mr Wark had explained that he did not feel it was appropriate for the assigned Investigating Officer to be chairing any formal work meetings that he is expected to attend. He said that contact with Mr Cross had caused him to have increased and severe levels of anxiety and panic attacks. The claimant had said he could not currently attend any work meetings with Mr Cross. He said he was unsure of the detail of the allegations against him. Following this, a decision was made by the respondent that Mr Cross no longer be involved in the investigation. It was agreed that John Mullen who was an entirely independent HR professional and who had attended many of the meetings already held with the claimant and the various other parties involved would take over the investigation.
88. The arrangements for Mr Mullen to take over the investigation were carried out by Messrs Blackadders, the respondent's solicitors. Initially, Mr Mullen was simply asked to continue with the investigation however subsequent to this in January 2023 Mr Mullen was given full delegated authority not

only to carry out the investigation but also to decide on the outcome. His remit was to investigate the complaint raised against Stuart Cross and secondly to investigate whether the relationship between the claimant and his employer had irretrievably broken down. Mr Mullen had been a Human Resources professional for 35 years including 24 years in RAF personnel and five years with a manufacturing company. He took his role as an independent PR Consultant seriously having been employed in this role for around six years. Mr Mullen had not been at any of the Board meetings and had no site of any Board minutes. He had no knowledge of anything that might have taken place at the special Board meeting in February 2022. This remained the case until after he had made his decision.

89. On 18 November 2022 Tracy Edgar of the respondent's HR department wrote to the claimant confirming that the OH report stated that the Investigating Officer was causing him increased anxiety and panic attacks. She confirmed that someone else other than Mr Cross would Chair the formal meetings with him. She asked if the claimant would be fit enough to attend a formal meeting if Mr Cross was not the Investigating Officer (p670). The claimant was sent a copy of the Occupational Health referral by Ms Edgar on 25 November (p672). The Occupational Health referral was not shared with Mr Mullen however Mr Mullen was told that the claimant would not be well enough to attend meetings with him until after the New Year.

90. In the meantime, on 24 November 2022 the respondent became aware that the press were investigating a story about management issues at Leisure & Culture Dundee. On 24 November Tracy Edgar wrote to the claimant and Mr Gartley stating:-

"Just wanted to make you both aware LACD have received notification that the press may release a story regarding allegations of bullying potentially naming you both and informing that you are suspended on full pay which is coming from the public purse. Don't want this to come as a surprise to you both. I would remind you however not to speak to any third parties regarding the situation."

The email was lodged (p671). The email was copied to Mr Cunningham the claimant's trade union representative. Two days later the claimant was away from home when a member of the Press called and left a note for him. The claimant contacted his GMB representative, Mr Cunningham and asked him to contact the press. Despite the terms of the email Mr Cunningham contacted the press and provided them with information. He spoke to the claimant regarding the information which he provided to the press. A story subsequently appeared in the Dundee Courier which is the local newspaper on or about 14 December. Judy Dobbie was sent copies of the article and this copy together with the email was lodged (p694-701). The article contains extensive quotations from Mr Cunningham to the effect that the claimant and Mr Gartley were whistleblowers and that they had been suspended despite no substantive allegations whatsoever having been made against them. It was stated that they had *"called out wrongdoing when they came across it."* It is recorded that the respondent was approached for comments as were a number of other named individuals who had all refused to comment on individual cases.

91. The claimant was further referred to Occupational Health and the report obtained dated 12 December 2022. This is lodged (p689-691). It was not passed to Mr Mullen but Ms Edgar advised Mr Mullen of some of the relevant contents.

92. On 19 January the claimant wrote to Tracy Edgar lodging what he described as a grievance regarding the involvement of Mr Mullen in the respondent's processes. The email was lodged (p725-726). He complained about not having a follow up meeting in respect of the Occupational Health referral. He asked her to set out clearly the process to which he was being objected. He said he was questioning the validity of using Mr Mullen. On 27 January Ms Mullen responded to the effect that she was not the person to whom he should address a grievance. She explained the processes, she also indicated that the claimant had access to the Dundee City Council's Harassment Support Officers (p733).

93. On 27 January 2023 Mr Mullen wrote to Mr Cunningham the claimant's union representative requesting the claimant attend a meeting at

11.00 am on 3 February to address both the issues he had been asked to deal with. He noted that Tracy Edgar had advised him that the latest Occupational Health report dated 12 December 2022 indicated that the conclusion of the investigations should lower some of the claimant's anxiety. He also noted the five adjustments which had been proposed in that report.

94. It was noted that the first part of the meeting would be to deal with the issues regarding Mr Cross and that the second part of the meeting would be to allow the claimant to respond to the allegation that there had been a material breakdown in the relationship between him and Leisure and Culture Dundee in respect of his line manager Judy Dobbie and the Chair of the Trustees Moira Methven. On the second page of his letter (page 735) Mr Mullen set out a number of issues. It is probably as well to set these paragraphs out in full. The letter states:-

"The concerns about the perceived breakdown in relationship arise from the following issues:

- *Graham's behaviour in meetings was intended to, or had the effect of, belittling Judy Dobbie and undermining her.*
- *Graham's lack of respect for Judy Dobbie in her role as Managing Director has resulted in a very challenging working relationship.*
- *Graham's overall behaviour had the effect of undermining Judy Dobbie's professional reputation with a possible outcome being either Judy Dobbie's dismissal or to make her position untenable.*
- *Alongside Billy Gartley, Graham caused Judy Dobbie to be anxious regarding the working relationship with him.*
- *Since March 2021, Graham has engaged in questionable, disingenuous, or at times unprofessional behaviour, the meaning of which is not to reach resolution and has led to instability in the business:*
 - *Graham proceeded to lodge a grievance with Dundee City Council in April 2021, bypassing Judy Dobbie or the Board of Trustees.*

- *Graham stated that Moira should fall on her sword and/or that Judy's position would be untenable and/or he was looking for people to be held to account.*
- *Graham failed to engage with Liz Jackson or respond to her correspondence in respect of the independent review which she had been appointed by LACD to undertake.*
- *Graham purports to have sent an email to Liz Jackson on 3 December 2021 but no such email was received by her.*
- *Graham's intention not to attend the executive strategy day in October 2021.*
- *Graham's confrontational behaviour, including but not limited to, the meeting on 26 November 2021.*
- *Lodging repeated grievances about the same issues, despite the decisions being issued by Dundee City Council, both initially and on appeal.*
- *Emailing a complaint to LACD Trustees dated 18 November 2021 including Paul Henehan's name in this complaint, despite Paul advising Graham by email that he had 'broken rank', and also blind copying selected Trustees.*
- *Unsubstantiated allegations of bullying about Judy Dobbie including an adversarial tone in communications with her.*
- *Unsubstantiated allegations of bullying about Moira Methven including an adversarial tone in correspondence with Moira.*
- *Involvement in unfavourable press coverage in Dundee Courier in December 2022.*

Given all of the above, and the concerns of the team members, including Judy, Moira, Paul, Tracy Edgar and Jayne Gair, I am keen to discuss with Graham whether he believes the relationship has broken down irretrievably or whether it is possible for the

relationship to be repaired, to allow a collegiate and harmonious working environment going forward.”

95. Along with this letter were sent a substantial number of documents. The letter and list of documents is lodged at pages 734-736.

5 96. On 27 January shortly after receiving this the claimant wrote to Martin Tyson of OSCR making a number of complaints about the respondent. Essentially, these repeat most of the matters previously raised. The letter was lodged (p737-744). The letter was copied to Michael Marra MSP.

10 97. On 1 February the claimant wrote to Tracy Edgar essentially complaining about her response of 27 January. The email was lodged. He began the email by stating:-

15 *“The content, as well as the omissions, within the email has made me very distraught. I have experienced four days of extreme anxiety and depression whilst many of my thoughts over the weekend turned to self harming and suicide.”*

He then went on to refer to his request for a follow up meeting to discuss the Occupational Health report. He noted that if this was not being provided then he did not feel he was fit enough to attend two meetings on the same day with Mr Mullen. He asked about the process for complaining if trustees provided false and misleading statements to the investigation. He went on to suggest that a further Occupational Health referral would be appropriate. (p745-746).

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25 98. The claimant resubmitted his grievance to Paul Henehan on 1 February (p747-748). On 3 February Tracy Edgar responded to the claimant providing answers to three questions he had asked confirming essentially that there was no set procedure for dealing with complaints against Trustees nor was there a set procedure in place for dealing with false or misleading information provided in an investigation. She noted his comments were speculative without any detail as to which Trustees or staff members have provided false or misleading information. She noted that the claimant had already lodged complaints about the Managing Director and that these were being addressed (p749). The claimant wrote

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again to Gregory Colgan of Dundee City Council on 8 February (p751). He enclosed a further letter of grievance (p752-755). Essentially this repeated the earlier allegations.

5 99. The claimant eventually did meet with Mr Mullen on 17 March. By this time in correspondence with Ms Edgar it had been agreed that the first meeting would only deal with the matter of the grievance in relation to Mr Cross and this would be dealt with first. Mr Mullen also told the claimant that he would provide the various adjustments he had set out in his earlier letter and that he would be happy for the meeting to proceed at the claimant's pace.

10 100. The claimant was accompanied at the meeting by Mr Cunningham and Mr Mullen was accompanied by Jenna MacBeth an HR Consultant who took notes. Ms MacBeth's notes were lodged and the Tribunal considered them to be accurate. The meeting commenced at 10:30 and ended at 15 12:34 with a short break at around 11:04. At the end of the meeting it was agreed there were still matters to be gone through. In all there were three meetings which dealt with the complaint in relation to Stuart Cross. A further meeting took place on 31 March 2023 and again lasted just over two hours. The claimant was again accompanied by Mr Cunningham and Jenna MacBeth accompanied Mr Mullen and took notes. These notes are 20 lodged (p803-815). The Tribunal considered them to be an accurate record of what took place. At the beginning of the meeting Mr Mullen checked Mr Wark's welfare to make sure and asked him how he had been after the last meeting. The meeting stopped at 12:47 as the claimant said 25 he wanted to adjourn and reconvene. Just before the meeting ended Mr Wark spent some time setting out his position and saying why he was aggrieved. He said:-

30 *"I worked hard and for my work to be criticised and post deleted I have never been defensive [around budgets], that is why I am aggrieved."*

101. Prior to the next meeting Mr Mullen wrote to the claimant in relation to a matter the claimant had raised at the start of one of the meetings in relation to an Occupational Health report which had just been obtained. The email

was lodged (p820). The claimant had indicated that the report received following the recent meeting with Occupational Health advised amongst other points that meetings should be kept to one item of discussion only. Mr Mullen said:-

5 *“To ensure that I take into account the recommendations of the report from Occupational Health as you advised, please confirm consent for the most recent OH reports to be shared with me prior to our next meeting on Thursday, 27th April 2023.”*

102. The claimant emailed Tracy Edgar on 13 April referring to a previous
10 request that he had made to access a recording of what had been said at the Occupational Health consultation (p821). Ms Edgar responded on 14 April to confirm she had previously noted that the respondent never asked and will never ask for a recording of any Occupational Health meeting from the clinician. She confirmed that the respondent were
15 working on the basis of the most recent Occupational Health report and that as previously discussed with the claimant that had not been disclosed to Mr Mullen.

103. At this point the situation was that the claimant had told Mr Mullen that something ought to be in the Occupational Health report which was not
20 actually in the report namely that the meetings had to stick to one subject only. Despite the fact that Mr Mullen had accepted that the meetings would only deal with one matter only Mr Mullen was asking for a copy of the report to see if there was anything else he needed to state.

104. The claimant wrote to Tracy Edgar on 7 April accusing her of becoming
25 confrontational towards him. There was then further discussion where the claimant confirmed his position that the report did not fully reflect the discussion which had taken place. In any event the claimant eventually obtained a copy of the report which was shared by him. The claimant wrote to Mr Mullen on 17 April sending a copy of the report and asking
30 that it be treated in confidence. He said that he had initially been suspicious of Mr Mullen’s reason for asking for the report and had become distressed with Tracy’s response. He said that Tracy Edgar failed to ensure the Occupational Health report was comprehensive. He said:-

"I am willing to attend another OH appointment. Alternatively I can have my GP provide information on my condition and how best to ensure I can engage fully with you."

105. Mr Mullen emailed the claimant on 18 April (p837). He referred to the reason he had requested the Occupational Health report. He went on to state:-

"I have read your email thread below with Tracy and note that you say you stated to the Occupational therapist that 'I was fit to address a single item and that the meeting would only focus on my complaint regarding Stuart Cross'. Notwithstanding that Gillian McKeeman has not narrated this in her report, I am satisfied to proceed on the basis, that the meeting on 27th April will focus solely on the single item of your complaint against S. Cross.

I am mindful that this will be the third meeting that you and I will have had regarding this single issue, and it would be my intention that we conclude all of the points which you wish to make regarding that issue on 27th April. Recognising your medical situation, and not in any way seeking to pressurise you, if it would help you to commit the points which you want to make to writing, in the eventuality that we finish the meeting on 27th April without having exhausted all of your points, you can then send me the written points at the end of the meeting."

106. A further meeting then took place on 27 April 2023. Once again, Mr Cunningham accompanied the claimant and Jenna MacBeth accompanied Mr Mullen and took notes. These notes are lodged (p838-851). The Tribunal consider these to be an accurate record of what took place at that meeting. Towards the end of the meeting the subject of a without prejudice meeting was raised and the claimant suggested the process be paused. Mr Mullen stated this might be possible but could not make a decision himself. In the meantime he confirmed that the claimant would have until 12 May to submit any further information regarding the Stuart Cross complaint. There would then be a further meeting on 8 May.

107. This deadline was later extended by Mr Mullen to 11 May. The claimant sent further representations to Mr Mullen on 9 May (p857-869). In the meantime there had been a brief exchange between Mr Mullen and Mr Cunningham where Mr Cunningham appears to state that the claimant had not requested a without prejudice conversation. In any event, Mr Mullen repeated his position that whilst he had delegated authority to deal with certain matters he did not have authority to instigate or agree to a protected conversation.

108. Mr Mullen treated the additional documentation provided by the claimant as additional information. The claimant was then invited to a further meeting on 12 May. A note of this was provided. Once again Mr Cunningham accompanied the claimant and Jenna MacBeth accompanied Mr Mullen and took notes. The notes were lodged (p877-899). The Tribunal consider these to be an accurate record of what took place.

109. During the meeting there were a couple of exchanges it is as well to record. There is one on page 879 where the claimant referred to the resolution of the complaint about Stuart Cross perhaps meaning there was no need to continue with the trust and confidence issue. He said:-

"GW - Completing that first bit, may mean there is no need to go to hearing but you have conjoined it. It was a biased investigation (by SC), in the course of the investigation have proved that to you with what is in writing, pretty indisputable what's been said. No redundancy policy in LACD. Can give the information from TE to say that's not true.

This whole thing is impacting on me, its fundamentally wrong. Happy to proceed to discuss this.

Raised this at the beginning, you are taking a report to the Board who have tried to end my employment twice. With the Chair of the Board being one of the perpetrators of making false and misleading statements. And SC as senior member, I'm demonstrating that he has not done his investigation properly.

Stuff on MM unequivocal, stuff on PH is unequivocal.

Even flagging these up, I think will be ignored.

JM – I'd like to think you are wrong on that one. My remit is to provide my decision which will be done so with integrity.

JC – we are not questioning that.”

110. Mr Wark then went on to question Mr Mullen's authority. He said that if he
5 were making a decision on the Stuart Cross complaint he would not be going back to the Board but for dealing with things such as untruthful statements he should be setting up disciplinary meetings.

111. Subsequently the claimant made a number of comments about MM and JD. He stated:-

10 *“They are carrying some sort of issue, either to do with me or themselves. I was being accused of my nose being out of joint due to JD getting job. MM's nose was out of joint when Stewart Murdoch got the job in the Council so everyone was surprised when she came back as Director. If my face didn't fit, fine. Claims that*
15 *myself and BG made JD anxious. If JD feels anxious, is that about BG and me or is that more about herself?*
LJ observed that JD's management skills were not at the level for her post, so more likely it is her not me. Other thing, has she been to GP? Does she have anxiety? Or is it that she's just a bit nervous
20 *about meetings because her people management skills are not at the level she needs? Lacking confidence?*
For me to defend myself, these are just views and opinions without evidence.
Some of the issues I've raised, haven't got a real answer why
25 *people have answered like that.” (p880)*

112. Subsequently the claimant spoke about the allegation that JD was frightened to challenge him. He said:-

30 *“JD said she has a 'fear' to challenge me. My staff wouldn't say that about me. Staff from all over in my career, they'll say that's not how I behave, I'm a very inclusive manager.”*

The claimant then spoke of a meeting when it was said that someone else had said JD gave as good as she got. He went on to say:-

5 *"These are just little anecdotes, it's my word against JD, but I did say to my staff, they were surprised too. Essentially I spoke to them, I was getting advice on how I'd deal with that. If the perception is that I shout? JD had been in meetings with me. Don't say I won't argue my case but I'm not disrespectful. Also wondered if that was JD's expectation of how meetings would go. So I looking for advice from my team, find out how she reacted previously. She was always quite quiet up to then, it was a character flip – don't know if how she felt that's how she should be as MD. I was surprised, not how I behave and never has been. I don't behave like that."*

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Mr Mullen asked if there had been any meetings where they had been 'going at it'. The claimant responded:-

15 *"No, only meeting I can think of was the Occ. Health referral meeting where I was distressed about comments JD was making. I wrote to her in advance of that meeting to say I was uncomfortable. I have a diagnosis from my GP."*

Mr Mullen continued to put to the claimant the various allegations in relation to the alleged loss of trust and confidence. He put to the claimant that the claimant did not have a lot of respect for Judy Dobbie. The claimant said:-

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25 *"I don't have a lack of respect for JD. I have tried to support her. Asked her what's her vision? She doesn't answer. Asked why don't you talk about what your presentation at interview was? So we can align our services to her vision. She (JD) went to the extended Management Team, asked them for their visions. Bizarre, shouldn't be delegating her vision to others. JD at times is her own worst enemy. Doesn't answer things. At that Board meeting, she should have said to the Board 'I am on that committee, I will take that forward'. At times, she undermines herself. All Management Team knew she was on that committee and didn't say anything, undermining herself with that behaviour."*

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At times she would make statements where they were clearly not true. There was a lot said around Kirkton Community Hub. I was heavily involved and what she said wasn't true but I wasn't calling her out in meetings. I gave her, her place as MD."

5 He then went on to say:-

10 *"Would defer to her, think she found that difficult. Whole idea of strategy. I don't think she had managed to interface with the Council very well, so when we have the Recovery Group work during the pandemic, we had a strategy in LACD to get the income generating services open as quickly as possible. Council had their own priorities. We were at the bottom of their list. We were taking it on us to push things forward. JD found it difficult to say to the Council that we needed to open our facilities. We were under pressure from Council to get back to generating income but they weren't supporting." (p887)*

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113. The claimant also indicated that in his view Judy Dobbie was really struggling with the notion of leading the organisation (p890). It was put to the claimant that his behaviour had the effect of undermining Judy Dobbie's professional reputation. The claimant's position was that his behaviour had been 'exemplary' (p891).

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114. It was put to the claimant that he and Mr Gartley caused Judy Dobbie to be anxious regarding the working relationship. The claimant's position was that he found this an astonishing allegation. He said:-

25 *"Is this JD just feeling a bit nervous or does JD have diagnosed anxiety? Am I the cause of her anxiety? If so there is processes that can be followed. Not once has she said she's anxious about working with me. I'm not saying she doesn't feel that way, but I haven't done anything – I am prepared, I am very good with finances; my own staff will say to me, how do you work that out? Can you do that in your head? I am good with finance. Is that what has made her anxious? Maybe she's just uncomfortable that I can do that. In Management meetings if someone says something I don't agree with, you will say; have you thought about this? Normal*

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way of working. This notion that BG and I were acting like that to make her anxious, I'm not saying she isn't anxious. I'm anxious coming to a meeting with you John, I have a diagnosis, but we still do these things. I have delivered presentations, done things that make me anxious, part of it, manage my own anxiety. If I have caused JD a serious case of anxiety, she has not made me aware. I have said JD is a cause of my anxiety and stress." (p892)

115. By the time fixed to close this meeting there were still matters to be discussed and it was agreed that there would be a further meeting. The next meeting took place on 26 May 2023. Once again the claimant was accompanied by Mr Cunningham and Mr Mullen was accompanied by Jenna MacBeth who took notes. Ms MacBeth's notes were lodged (p916-937). The Tribunal found these to be an accurate record of what took place at this meeting. During the meeting the claimant maintained his position. He noted that it was now up to Mr Mullen. He said:-

"Suppose it's over to you, answer any further questions. I believe that, all of us were finding our feet in management team but this breakdown in relationship, I'm surprised its discussed in those terms. Upset post was deleted, professionally upset. Had raised concerns about Trustees and their behaviours. Don't think anything happened with those concerns. Was doing it as that is my job to raise concerns. Management restructure, when getting feedback from PC was told that JD took legal advice on Management restructure report. I mean providing that legal advice was accurate that's fine, now that see Blackadders were behind some of these letters and information – if they gave advice on that report then it makes sense, its not HR proofed. Took legal advice the whole way through, ACAS Mediation advice is not valid so what else is not valid. Telling a MD to not communicate with her staff is not good advice."

The claimant then summarised his view of what had occurred (p921-922). At the end of the meeting Mr Mullen asked if there was anything that had not been covered. The claimant raised the issue of the Liz Jackson report. He said it was unreliable. He made the point again that he was unwell.

Mr Mullen asked if Mr Cunningham had anything to add. Mr Cunningham stated:-

“Appreciate how you have conducted these meetings feel has been done fairly and without bias.” (p937)

- 5 116. Mr Mullen’s plan was that after having met with the claimant and obtained all the information he could from the claimant (which he had done over some five meetings) the next part was to go back to anyone referenced during the course of these meetings in order to put to them the things that the claimant had said.
- 10 117. Mr Mullen met with Stuart Cross on 22 June. He was accompanied by Sharon Pryor an HR Consultant who took notes. These notes were lodged (p946-951). The Tribunal accepted they were an accurate record of what took place at that meeting.
- 15 118. Mr Mullen met with Moira Methven on 27 June. He was again accompanied by Ms Pryor who took notes. These notes were lodged (p952-959). The Tribunal accepted they were an accurate record of what took place at that meeting. Mr Mullen met with Judy Dobbie on 27 June 2023. On this occasion notes were also taken by Sharon Pryor. These notes were lodged (p960-974). The Tribunal considered these to be an accurate record of what took place at that meeting. The claimant also met with Tracy Edgar on 12 July 2023. Notes were again taken by Sharon Pryor (these are to be found at p977-985). The Tribunal considered these to be an accurate record of what took place.
- 20 119. Following these meetings Mr Mullen considered his decision in respect of both matters and spent some weeks writing out his decision letter. He wrote to the claimant regarding the bullying complaint on 23 August 2023. This letter was lodged (p992-1000). Mr Mullen prepared his letter based on what he had been told by the claimant and what he had followed up with the various individual’s reference.
- 25 120. Similarly, Mr Mullen sent his outcome letter in relation to the employment relationship breakdown on 23 August 2023 also. This was lodged (p1001-1023). Mr Mullen had originally considered that he should report back to
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the Board but having considered matters further he felt that having found that the relationship had broken down he should simply move straight to termination of employment. He checked the legal position with the respondent's solicitors Messrs Blackadders before doing so but otherwise he was entirely responsible for writing the letter himself.

121. With regard to the bullying allegation Mr Mullen could see absolutely no evidence that could substantiate the allegation that the correspondence was threatening. He set out his reasoning on this point in the first paragraph on p993. With regard to the second point that Mr Cross had put the claimant under duress and threatened him in relation to the grievances Mr Mullen's view was that it was perfectly acceptable for Mr Cross to ask to see these grievances and the claimant had originally been happy to provide them but had then for some reason changed his mind. This point was not upheld. With regard to the third point Mr Mullen set out his timeline and noted that the claimant's complaints regarding Judy Dobbie were dated after 27 August 2021 when the claimant would have been well aware that the report he complained of had been withdrawn. (p994)

122. With regard to the fourth point, the allegation that Stuart Cross did not provide information on the process he was undertaking Mr Mullen set out his position regarding this and was clear that Mr Cross had set out the position in the email sent to both the claimant and Mr Cunningham on 14 April 2022. He did not find this point upheld (p994). Again, with regard to allegation 5 Mr Mullen again set out the timeline. Mr Mullen's position was that he had never actually seen the Liz Jackson report because he wanted to go in with an open mind. He did not believe that he needed to see it.

123. With regard to point 6 he did not consider that there was a conflict of interest and this was not upheld (p995). Mr Mullen did not uphold point 7 either on the basis that the claimant and Mr Cunningham were referring to a policy which was not applicable (p995).

124. Point 8 related to an allegation made by the claimant that he had found it threatening that Stuart Cross had emailed him at 10:11pm and 10:30 on 2

May and 10:37 on 4 May. Mr Mullen noted that the claimant had himself sent out emails to Mr Mullen outwith working hours. He also noted that immediately the point was raised Mr Cross had then started to email Mr Cunningham direct.

5 125. Mr Mullen had ascertained that at this particular time when these emails were being sent Mr Cross's wife was extremely ill and he had often found himself working late into the evening. Mr Mullen noted that Mr Cross was a volunteer in his role and had other pressures on his time. Mr Mullen did not think it reasonable to assume that Mr Cross would know that sending the claimant emails late at night would have been a cause for concern but
10 noted that as soon as Mr Cross was advised that the claimant would prefer correspondence to go to his representative he complied.. He did not uphold this point (p996). It is also noteworthy that the claimant had not actually complained about the timing of the emails until several months
15 later.

126. Point 9 related to the allegation that a transcript of a meeting with Liz Jackson had been shared which contained personal information regarding the claimant which was sent to Mr Gartley and also comments about Mr Gartley which were shared with the claimant. Mr Mullen noted that a
20 summary of Liz Jackson's report had been sent to both claimant and Mr Gartley on 5 May but Mr Mullen considered this to be a genuine error from Mr Cross with no intention of breaching confidentiality and he had subsequently apologised for this. Mr Mullen noted that the claimant and Mr Gartley shared the same trade union representative and had previously
25 shared correspondence on the topic being parties the same collective grievance. Mr Mullen went on to say:-

"Had I believed that Stuart's sharing of information had damaged the whole procedure, then this point would have had more weight. However, I note that, after the error was raised, no further issues were raised until your grievance dated 29 September 2022."
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Mr Mullen's position was that he partially upheld this point but it was not sufficient to outweigh the other points contained in the grievance.

127. Point 10 related to the claimant's position that the Board had not read or had a copy of the report before it determined there was a breakdown in the relationship between the claimant and a couple of Trustees. Mr Mullen noted that the Board had received a verbalised summary by Ms Jackson. Mr Cross did not have visibility of the full report from Ms Jackson until just before his meeting with her and he considered that Mr Cross would therefore be unbiased. The position was that rather than jump to a conclusion the respondent had authorised first Mr Cross to carry out an investigation into whether the relationship had broken down and thereafter Mr Mullen. Mr Mullen had met with the claimant on numerous occasions over a period of many months in order to investigate the matter. With regard to points 11 and 12 Mr Mullen set out extremely detailed findings and did not uphold these allegations. With regard to point 13 Mr Mullen indicated he had been at the meeting where it was alleged Stuart Cross had behaved inappropriately and he confirmed that this was not his view. This point was also not upheld (p998).
128. Point 16 referred to an allegation that Mr Cross had referred the claimant to Occupational Health without any information, contact or notification. Mr Mullen noted that Mr Cunningham, the union representative had been advised. This point was not upheld.
129. With regard to point 17 Mr Mullen set out the timeline and concluded that the point being made by the claimant was not upheld.
130. The final point was the allegation that Mr Cross's behaviour had been improper, offensive and humiliating. Mr Mullen's position was that he had not been able to obtain any evidence which would indicate that Mr Cross's behaviour had been intimidating or hostile. He noted that the meeting with Mr Cross had taken place on 24 May 2022 and at no point during the meeting or immediately afterwards had any objections been raised to the way that the meeting had been conducted. No complaint was made until more than four months after the meeting. Mr Mullen's position was that having dealt with this grievance he had no proposals to make.
131. The letter in relation to the employment relationship breakdown is extremely lengthy and detailed. Mr Mullen set out how he investigated the

position and set out his thinking on the first two pages (p1001-1002). He set out the detailed concerns into his findings on pages 1003 to 10006. This sets out his reasoning in the allegation that the claimant's behaviour in meetings was intended to or had the effect of belittling Judy Dobbie and undermining her. The findings are extremely detailed and there is little point in repeating the terms of the letter here. Point 2 related to the claimant's lack of respect for Judy Dobbie and her role as Managing Director and that this resulted in a very challenging working relationship. Once again, Mr Mullen sets out his findings in extreme detail (p1006-1008). He concluded that there was sufficient evidence available to him to show that the claimant had displayed a lack of respect for Judy Dobbie in her role as Managing Director which had resulted in a very challenging working relationship. He went on to say:-

"I am of the view that, whilst you are a difficult personality for Judy to manage and that, in itself does not on its own result in a breakdown in the working relationship, the manner in which you have communicated with Judy and the way in which your behaviour has manifested itself, leads me to find that there has been a breakdown in your working relationship with Judy."

Mr Mullen then goes through the evidence in respect of each allegation and summarises these and then provided a conclusion based on the evidence. With reference to allegation 4 which related to causing Judy Dobbie to be anxious Mr Mullen summarised the main points from his meeting with Judy Dobbie, cross referenced with the meeting he had had with Jayne Gair and Tracy Edgar and the responses from the claimant. He concluded that alongside Mr Gartley the claimant caused Judy Dobbie to be anxious regarding the working relationship with the claimant which had led to the breakdown in the relationship.

132. Allegation 5 was a general allegation that:-

"Since March 2021, you have engaged in questionable, disingenuous, or at times unprofessional behaviour, the meaning of which is not to reach resolution and has led to instability in the business". (p1010)

It was taken along with allegation 6 which was also in general terms. There were a substantial number of specific points relating to this which Mr Mullen went through individually. In each case Mr Mullen set out the evidence and then summarised his findings. He found that the claimant had lodged a grievance with Dundee City Council bypassing Judy Dobbie and the Board. He found that the claimant had stated that Moira Methven should fall on her sword and/or that Judy's position would be untenable and that he was looking for people to be held to account. He found that the claimant had failed to engage with Liz Jackson or respond to correspondence in respect of her review. There was an allegation that he had purported to send an email to Liz Jackson on 3 December 2021 but no such email was received by her. He accepted that this may have been human error. With regard to allegation e. he noted that the claimant had failed to attend the executive strategy day in October 2021 but this had been cancelled anyway and did not contribute to the breakdown in relationship. On point f. he found that the claimant's confrontational behaviour including but not limited to the absence management meeting on 26 November 2021 did lead to a breakdown in the working relationship. Allegation g. referred to lodging repeated grievances about the same issues despite the decision being issued by the City Council both initially and on appeal. Mr Mullen listed all the various grievances the claimant had lodged. He went on to state:-

"The number of these grievances indicate to me that you have no intention of resolving the irretrievable breakdown in the relationship between you and your employer. You were given an outcome to your original grievance but chose to appeal this. You lodged a further grievance about the same issues. This highlights instead that the relationship has broken down, and that you have been unable to accept the findings in relation to your grievances. This, in my conclusion, further supports my conclusion that you have not been looking for resolution."

Allegation h. related to the claimant including Paul Henehan's name on a complaint despite Paul Henehan advising the claimant by email that he had broken rank and also blind copying selected Trustees. Mr Mullen concluded that there was a degree of uncertainty on the point.

Mr Henehan was quite clear that he had broken ranks and was able to evidence this. Paul had however sent a message on WhatsApp to indicate he had *“read through the final version and looks ok to me”* which could have indicated that he was still part of the process. Mr Mullen went on to state:-

“I should caveat that I have discounted whether you intentionally included Paul’s name on the complaint when reaching my final decision as to whether the working relationship has broken down. I am however clear that you did blind copy selected Trustees, based on the evidence I have seen. This leads me to find that, in blind copying selected Trustees, this has contributed to the breakdown in relationship.”

133. With regard to paragraph i. which related to unsubstantiated allegations of bullying about Judy Dobbie Mr Mullen found that there was uncertainty and giving the claimant the benefit of the doubt he did not make a finding.

134. Allegation j. related to unsubstantiated allegations of bullying about Moira Methven including an adversarial tone in correspondence with Moira Methven. Mr Mullen considered the evidence and then found:-

“I consider both the tone of your emails to the Chair of L&CD and in the WhatsApp response that you have no respect for Moira in her role. This would again indicate that you did not have an intention of resolving the breakdown in your working relationship with Moira. This factor contributes to my findings that there has been a breakdown in your relationship with Moira and your employer.”

135. Paragraph k. related to the claimant’s involvement in unfavourable press coverage in the Dundee Courier. Having examined the evidence in considerable detail (p1018-1020) Mr Mullen’s position was that the claimant had not any direct involvement in the article. He went on to say however:-

“What I was able to find though was that you have permitted your Trade Union Representative, Jim Cunningham to comment on this article on your behalf.”

5 He noted the various points which had been made in The Courier article which had clearly been leaked to them and formed the view that Mr Cunningham had been authorised to make various statements and that the claimant had permitted Mr Cunningham to support the claims by giving a number of quotes. Mr Mullen also noted that despite Tracy Edgar’s instruction not to speak to third parties the claimant had been emailing
10 various MSPs and elected members over the whole period and as recently as 8 February. He noted that Moira Methven’s view was that certain of the comments which were made were defamatory and that Mr Mullen agreed with this. He concluded that these matters had contributed to the breakdown in relationship. Mr Mullen then analysed the position in detail
15 over pages 1020-1023. He then went on to state at p1023:-

*“Having carefully taken time to consider the evidence and noted the responses you provided to me at our meetings, it is my conclusion that the relationships between you and your line manager, and between you and the Chair of the Board, have broken down
20 irretrievably. I am unable to see any evidence which points to this being a salvageable situation. It is accordingly my decision, with the authority delegated to me, that your employment be terminated with immediate effect.*

*You will be paid in lieu of your 12-week notice period. You will also
25 be paid for any holiday you have accrued but not yet taken.”*

136. Mr Mullen did consider whether mediation would be an option however he had put this to Judy Dobbie and taken into account her view. He also considered the evidence and the behaviour of Mr Wark and thought it unlikely that mediation would resolve matters. He noted in his conclusion
30 that Moira Methven had stated that she cried when she read one of the emails sent by the claimant to the representatives of the people of Dundee which had accused her of flagrant lying. He noted Ms Methven’s position that she could not work with someone who made these allegations. Mr Mullen also considered the possibility of a change of role however

given the size of the organisation and the claimant's extremely senior role in this he felt this was simply not possible. He was aware that both Moira Methven and Judy Dobbie had said they would resign if the claimant returned to the workplace. He believed that in the circumstances there was no alternative to dismissing the claimant.

137. The claimant was offered the right of appeal and submitted a lengthy appeal against both the bullying complaint outcome and the termination of employment. Both are dated 6 September. The bullying appeal is at pages 1025-1030. The complaint against termination of employment at 1031-1038. The appeal was heard by Mr Laidlaw, another Member of the Board. Mr Laidlaw had been a Trustee since 2017. He had moved to Dundee in 1981 as a Lecturer in Computer Education and had been heavily involved in Community Schools being Head Teacher of Kirkton High School. He became involved in a number of community organisations and had spent 37 years of his career in education. He had been aware of the reorganisation report and had attended both the pre-meeting and the Board Meeting in March 2021 when it was presented. He had attended the Board Meeting on 22 February. It was his view that at that meeting Liz Jackson gave a verbal presentation giving options. His understanding was that no view had been taken and no judgment had been made in respect of the future of the claimant and Mr Gartley. He disputed that the minute of the meeting was correct. There had certainly been no decision made to dismiss. Mr Laidlaw had had very limited contact with the claimant over the years. He had had more contact with Mr Gartley since Mr Gartley had been involved with him while he was still a Head Teacher. His contact with the claimant had been limited to being at the same Board meetings. He did not attend meetings relating to the specific areas dealt with by the claimant. His understanding was that Liz Jackson's report had been withdrawn. When the protected conversation did not result in a settlement he understood the Board to decide that they should investigate whether there had been a breakdown in relationship. He had had absolutely no involvement since then other than hearing at Board meetings about the progress which was being made in relation to this investigation. Initially, it had been decided that another Board Member would hear both Mr Gartley's appeal and the claimant's appeal. It was

eventually decided it would be better for these to be heard separately. It was only at this stage that Mr Laidlaw was approached by Moira Methven and asked if he would do it.

5 138. Mr Laidlaw dealt with both the appeal against the outcome of the bullying allegation against Mr Cross and also the termination of employment.

139. Mr Laidlaw wrote to the claimant on 22 September 2023 suggesting various dates for a meeting (p1039). He stated:-

10 *“I would propose to conduct both appeals by way of review of the decisions made by John Mullen focusing on your grounds of appeal. ... Having met with you and heard your appeal grounds, it may be that I need to conduct further follow up investigations. If so, you would be advised of the follow up investigations and I would propose to issue a decision in writing.”*

15 140. Mr Laidlaw wrote a further letter to the claimant on 26 October. It was sent at 8:23 in the morning (p1042-1044). In this, Mr Laidlaw sought to summarise various appeal points in a systematic way. During this he was not seeking to re-present the appeal but simply to set them out in a form which could easily be dealt with systematically.

141. The claimant responded to this email.

20 142. The claimant also wrote regarding the date and the date was changed.

143. The appeal hearing took place on 30 October 2023. Mr Laidlaw arranged for the meeting to be recorded and for the notes to be transcribed. The notes of this meeting which was the appeal against the bullying allegation were lodged (p1045-1112). The notes are a verbatim record of what took place at the hearing.

25 144. The dismissal appeal hearing took place on 7 November 2023. The claimant was accompanied by Mr Cunningham. Mr Laidlaw was accompanied by Carrol Douglas-Welsh, an HR Consultant. Once again the meeting was recorded and the recording was transcribed. The transcription notes are lodged at pages 1118-1213. The Tribunal

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accepted that these are a verbatim record of what took place at the hearing.

145. At this meeting Mr Laidlaw said they would use the Agenda which he provided so as to be able to deal with matters systematically. During the
5 meeting all appeal points listed in the Agenda were got through.

146. After the two meetings Mr Laidlaw went through both transcripts and provided a list of questions. These were questions which he would arrange to send to various people who had been involved. The questions were simply sent out to these individuals rather than have them asked at
10 a meeting. He prepared questions for Stuart Cross which were sent to Mr Cross. The table providing the questions and answers were lodged (p1245-1253). He also sent questions to Mr Mullen. Once again, the questions together with Mr Mullen's answers were lodged (p1254-1258). He sent questions to Mr Henahan and again the questions and answers
15 are lodged (p1259-1260). He had questions for Tracy Edgar and once again the questions and answers are lodged (p1261-1262). One of the claimant's complaints was about the length of time Mr Mullen took and in his answers Mr Mullen set out his reasons for taking the length of time he did (p1254). Mr Wark sent various further emails to Mr Laidlaw which
20 Mr Laidlaw considered. Mr Wark also sent a number of further documents to Mr Laidlaw.

147. Mr Laidlaw wrote his findings in respect of the appeal against the bullying complaint in a letter dated 25 January 2024. This was lodged (p1278-1285). He said he could find no evidence or reason to uphold any of the
25 claimant's five grounds of appeal. He did however note that he accepted that the claimant had been wrongly accused of rearranging an Occupational Health appointment and had stated this in his response to appeal point 4 on page 5 of the letter (p1283).

148. Mr Laidlaw dealt with the appeal against termination of employment in a
30 letter sent to the claimant on 25 January (p1286-1293). He stated under Outcome:-

"I have taken care to consider all points contained in your appeal and consider the additional documents and information both

presented and raised about the process and outcome; however, I can find no evidence or reason to uphold any of your 7 grounds of appeal. Whilst I appreciate this is not the outcome you were hoping for, I must advise you that this now concludes the appeal process. There is no further right of appeal under the LACD grievance procedure.

I wish you all the best for the future and would like to thank you for your cooperation throughout this process.”

149. Following the termination of his employment the claimant has not sought other employment. He felt that his reputation had been damaged with colleagues and peers throughout the sector in that he had been portrayed as angry and aggressive. He feels that his health has been damaged and that he is unlikely to work again. He feels that he would not have confidence to begin with another organisation for fear he would be treated in the same way. The claimant's view is that a mediated settlement with Ms Dobbie and Ms Methven would be possible and he would wish to engage in mediation and then be reinstated into his previous employment.

Matters arising from the evidence

150. In general terms the Tribunal found the evidence of the respondent's witnesses to be both credible and reliable. Mr Laidlaw was an extremely straightforward and credible witness. He was a volunteer Trustee with lengthy and senior experience in the education sector. He did not have any axe to grind and the Tribunal were entirely satisfied that he had approached his task in an open and straightforward way. He answered questions put to him in cross examination honestly and directly. Ms Dobbie was clearly still somewhat upset and emotional over the matter and it was clear that the claimant's behaviour had caused her considerable distress which was still a factor. That having been said, she gave straightforward answers to all questions and made concessions where she felt she could have done better or where she had made mistakes. Her evidence was credible and reliable.

151. Mr Cross was an extremely good witness who again answered questions in an entirely straightforward and clearly honest way. He had had a

distinguished career and sat on the Board of Trustees as a volunteer. We had absolutely no doubt that he would not have involved himself in any cover up and that he had approached his task in a straightforward and honourable way. He clearly explained his reasoning for the steps he took.

5 His evidence was at the particular time that he was involved with the events in question he was going through some difficult personal circumstances due to illness in his close family. We had no hesitation in accepting his evidence as entirely reliable and credible. We also felt that he would not have put his name to or allowed himself to become

10 associated with any underhand practice.

152. Mr Mullen was similarly an extremely impressive witness. He was very straightforward. It was clear that he took his own view on matters and was not influenced by anyone else. As an HR professional of many years' standing we had again no doubt that he would have refused to put his

15 name to anything which he did not believe in. We accepted his evidence about the process he carried out in its entirety.

153. The claimant on the other hand was a less impressive witness. In this case there were not all that many issues where the parties disputed the facts however there were a number of apparently straightforward matters

20 which the claimant attempted to put a sinister gloss on. The claimant was often evasive in cross examination and did not answer the questions which were put to him but instead sought to at all times to put forward his alternative version of what had taken place. In evidence in chief the claimant essentially stated that the suggestion made on 31 March about

25 changing four heads of department to three had come out of the blue and was a considerable shock to him and his colleagues. In cross examination he was taken through the various documents which are referred to in our findings above and which clearly show that the claimant was well aware that the review was taking place and that the issue of changing from four

30 heads of department to three was something which had previously been raised. The claimant's position was that he had self-certified himself as ill from 4 October. Although the claimant sought to gloss over it in cross examination it was absolutely clear that he had not contacted his line manager as was required by the respondent's policy and that the first his

35 line manager had known about it was when he provided his fit note a week

later. The claimant's evidence was at times extremely disingenuous such as where he flatly denied having been in touch with the press but then accepted that he had contacted his union and that his union representative had spoken extensively to the press with his authorisation. During the hearing the claimant continually referred to his post having been deleted on 31 March. Although when it was specifically put to him he accepted that the report in which this proposal had been made had been withdrawn he then continued to give evidence to the effect that his post had been deleted. There were also a number of points in his evidence where his lack of any respect for Ms Dobbie was clearly evident. When it was suggested he said that he had tried to help Ms Dobbie and spoke of an incident where he had explained a part of Council procedure to her. It did not appear to occur to him that this may be regarded as derogatory in a situation where Ms Dobbie had been at the Council longer than he had.

154. In submissions the claimant's representative made extensive reference to the minute of the meeting on 22 February as showing that the respondent had made their mind up to dismiss the claimant over a year before they actually did. Essentially it was put forward that the whole process after that was a sham. The Tribunal did not accept that this was the case for the following reasons:

1. We had credible evidence from those who had been at the meeting that this was not what had been said.
2. The actions of the respondent when the protected conversation failed were not to move straight to dismissal as the minute would suggest but instead to carry out an extensive, thorough and lengthy investigation process.
3. Having heard the evidence of Mr Cross, Mr Mullen and Mr Laidlaw we have absolutely no doubt that these individuals would not have associated themselves with any sham process. All three individuals who were involved in the process clearly approached their task with integrity and genuinely sought to investigate matters in a thorough and professional way. This included in the case of Mr Mullen and Mr Cross

having to put up with extremely challenging behaviour from the claimant.

Discussion and decision

Issues

- 5 155. As noted above the claimant had originally made a substantial number of claims however the discrimination claims other than disability discrimination were dropped prior to the hearing. During the course of the hearing the claimant withdrew the claims relating to public interest disclosure. By the time of submissions the only claims which the Tribunal
10 required to consider were the claim of unfair dismissal and a claim under section 15 of the Equality Act for discrimination arising from disability.

Discussion and decision

156. Each party submitted full written submissions which were then expanded upon orally. Rather than attempt to repeat these submissions they will be
15 referred to where appropriate in the discussion below. The Tribunal is grateful to Counsel on both sides for providing clear and well set out submissions which focussed on the legal and factual issues in the case. This has made the Tribunal's task easier.

157. It is appropriate to deal with each of the two claims in turn.

20 *Unfair dismissal*

158. Section 98 of the Employment Rights Act 1996 states:-

“(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show

- 25 *(a) the reason (or if more than one, the principal reason) for the dismissal and*

- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the
30 employee held.”*

159. In this case there was a dispute between the parties as to the reason for the dismissal. The respondent did not seek at any stage to rely on any of the reasons set out in subsection (2) but stated that the reason was ‘some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held’ namely a breakdown in trust and confidence. It was the claimant’s position that in actual fact the reason was the claimant’s conduct. The claimant’s representative quite properly referred to a number of cases in particular ***Leach v The Office of Communication* [2012] ICR 1069** to make it clear that an employer cannot rely on some other substantial reason where the real reason for the dismissal is in fact conduct.
160. In the case of ***Abernethy v Mott, Hay and Anderson* [1974] ICR 323** the Court of Appeal described a reason for dismissal as “*a set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee.*”
161. In this case the decision to dismiss was made by Mr Mullen who had been given full authority by the Board to deal with matters as he thought fit. The decision was upheld by Mr Laidlaw who dealt with the appeal. In the case of each of these we were entirely satisfied that the reason for their decision was that they genuinely believed that trust and confidence between the claimant and the organisation had broken down and that there was no reasonable alternative to dismissal. In the Tribunal’s view it was clear from reading the notes of the various meetings which took place between Mr Mullen and the claimant that Mr Mullen was not simply seeking to explore the claimant’s conduct. We were satisfied that this was not one of those cases where an employer really has in mind to dismiss an employee for conduct reasons but decides to label it as some other substantial reason in order to get round difficulties with a conduct dismissal.
162. It was clear from the questions being asked by Mr Mullen (and indeed, before him by Mr Cross) that there was a focus on relationships rather than simply individual conduct issues. The Tribunal were entirely satisfied that the reason for the claimant’s dismissal was not conduct but was because of the perceived breakdown in trust and confidence. The

claimant's own conduct was one of the strands of evidence which led the decision makers to believe that there had been a breakdown in trust and confidence but their decision was also based on a forward looking assessment as to whether there was any possibility of that breakdown being remedied.

163. The question remains however as to whether the breach of trust and confidence which they found amounted to a "*substantial reason justifying dismissal*" so as to make the decision a potentially fair reason in terms of section 98(1).

164. The Tribunal's view was that in SOSR dismissals the two questions of whether the dismissal is fair in terms of section 98(4) and whether the reason was a "*substantial reason entitling the employer to dismiss*" are to some extent interlinked and it is probably as well for us to deal with these two points together.

165. Section 98(4) of the Employment Rights Act goes on to state:-

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

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

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

166. In this case it was the respondent's position that by February 2022 there had been a substantial number of issues arising in relation to the management of the claimant. It was clear that these had pre-dated the reorganisation proposals which had been suggested in March 2021 and then withdrawn a few months later.

167. The claimant had submitted a grievance and although this had been dealt with together with an appeal he persisted in stating that he had been unfairly selected for redundancy and that his post had been deleted when

this was quite clearly not the case. The claimant's line manager and the Chairman of the Board who was ultimately responsible had tried to deal with these concerns. The claimant and his colleague following their grievance and unsuccessful appeal had submitted a further grievance and also demanded an independent report. An independent report had been instructed from an independent HR Consultant and for entirely spurious reasons the claimant and one colleague had refused to co-operate with the HR Consultant who was entrusted with the task. The other colleague did co-operate with this report and subsequently explained both his reason for having initially raised the grievance- that the claimant had told him his job was at risk, and his subsequent reason for breaking ranks- that he thought the claimant had an agenda to try to get rid of the managing director. The Tribunal's view was that the reason given by the claimant for non-co-operation was entirely inadequate. Any HR professional is likely to have experience of dismissals and disciplinaries as well as dealing with grievances. The suggestion that the respondent should have employed someone who had no experience of disciplinaries or dismissals is a strange one. It is significant that at this point one Mr. Henahan who had been with the claimant at an earlier stage decides to break ranks and co-operate with the enquiry. The conclusion of this enquiry is that it would appear that there may well have been a breakdown of trust and confidence. Once again we consider it noteworthy that that subsequently Mr. Henahan reports that by this time the claimant is actively talking about seeking to bring about the removal of the Managing Director and Chairman of the Board. It appears that the claimant is in full campaigning mode and seeking to fight with the respondent rather than co-operate in doing the job he is paid to do. In October the claimant goes off sick having first of all advised the respondent through his union that he has no intention of attending an important meeting which has been fixed in order to discuss reorganisation. It is worth noting that the background here is that the respondent are under considerable financial pressure and that management action will be required in order to reorganise the business going forward. The claimant has gone off sick. His colleague Mr Gartley has also gone off sick. The claimant attends a sickness management meeting with his line manager where he brings his colleague (also off sick) as a witness. This is a difficult meeting which reduces his manager to

tears. The claimant's manager had also been in tears following the meeting the previous March. At this point the respondent explores the option of a protected conversation but that goes nowhere. Following this, the Tribunal's view is that it is clear from the evidence that the respondent's Board wished to carry out an investigation to see if the relationship has indeed broken down irretrievably or whether it can be resolved in any way.

168. The respondent first of all engaged Mr Cross with the assistance of Mr Mullen. The claimant then asked for Mr Cross to be removed and following a referral to Occupational Health which indicates that the claimant feels unable to work with Mr Cross then Mr Cross is duly removed. The Tribunal's view is that the claimant's reasons for seeking the removal of Mr Cross were entirely inadequate and that essentially the claimant was trying to be as difficult as possible. The investigation is then taken over by Mr Mullen. Mr Mullen complies with all of the adjustments which the claimant seeks. He holds a number of meetings. He agrees to first of all deal with the complaint made about Mr Cross. In the view of the Tribunal the complaint made about Mr Cross was entirely spurious and was simply another example of the claimant trying to be as difficult as possible. He blames his depression but there is absolutely no independent medical evidence to suggest this is a factor. He is simply frustrated at not getting his own way. The claimant's position is that he was upset by receiving emails in May around 10pm however he does not mention his upset to Mr Cross at the time but instead raises the matter in September many months later. By this time the claimant has also indicated that he feels bullied by Mr Cross making a perfectly reasonable request that the claimant provides him with copies of his grievances. The claimant had first of all agreed to provide Mr Cross with this information at a meeting. The claimant then reneged on this promise and for reasons which are fairly incomprehensible refuses to provide them. Mr Cross advises the claimant in the gentlest of terms that he remains an employee albeit he has been suspended on full pay for many, many months and the claimant's reaction is to demand Mr Cross's removal. The Tribunal considered that Mr Mullen's conclusions regarding the complaint about Mr Cross were extremely forgiving to the claimant in the circumstances.

169. Mr Mullen goes on to consider whether trust and confidence has broken down. Once again he complies with all of the claimant's requests for reasonable adjustments which the claimant has through Occupational Health. He holds a number of meetings. During those meetings his view is that the claimant makes it clear that there has been a complete breakdown of trust and confidence. Whilst the claimant says that he would be prepared to attend mediation with his manager and the Chair of the Board Mr Mullen is aware that both of these individuals have stated that they are not prepared to mediate with the claimant. Mr. Mullen believes from what he has heard from the claimant that any mediation would be unsuccessful. In those circumstances Mr Mullen concludes that the working relationship has indeed broken down.
170. We were referred by the respondent to the recent case of **Guy Matthews v CGI IT UK Ltd EA2022011335/BA**. This was decided on 25 March 2024. In that case the respondent had dismissed on the basis of a breakdown in trust and confidence without having carried out any procedure whatsoever. Despite this, the EAT held that the ET had been entitled to find that this was one of these rare cases where a dismissal may be fair although there had been no formal procedure.
171. The Tribunal's view was the respondent had carried out an extremely full investigation and an exhaustive procedure in this case to determine whether trust and confidence had broken down. We also considered that not only was Mr Mullen entitled to take the view that there had been a breakdown in trust and confidence the Tribunal's view was that he was entirely correct to come to that view.
172. The Tribunal's view was that this was not a case like **Turner v Vestric** where the respondent had been partly responsible for the breakdown in trust and confidence. In the view of the Tribunal there was therefore no situation here such as **Royal Bank of Scotland v McAdie [2008] ICR 1087** where the respondent were required to go the extra mile in order to repair the relationship. The Tribunal's view was that even although the respondent were not under this obligation, looked at objectively there was really nothing else which the respondent could do given the clear findings

made by Mr Mullen. There were no other jobs the claimant could be redeployed to given his seniority.

173. At various points during his evidence the claimant expressed the view that the respondent were entirely to blame for any breakdown in trust and confidence. The claimant referred to his own conduct as having been impeccable. He continually harped back to his allegation that the respondent had deleted his post. The Tribunal's view was that whilst this was the point where the claimant's narrative of events started it was clear on the evidence that relationships had been strained within the organisation for some time. Ms Dobbie stated that the claimant's previous line manager had wanted an easy life and had not been prepared to stand up to the claimant. Ms Dobbie's evidence was that the claimant had been extremely difficult over a number of matters leading up to March. These matters are referred to obliquely in the report. The claimant's view was that by preparing this report the respondent were in some way breaching employment laws. That is far from the case. Many employers seek to reorganise their business on a very regular basis and such plans of reorganisation often involve posts being changed and responsibilities being reallocated. Employment law requires there to be a process of consultation and where redundancy dismissals are required as a result of the organisation further consultation and discussion of ways to avoid these. In each such reorganisation there will come a point where a plan which has hitherto only been within the mind of management and naturally kept confidential will be shared with other employees who are likely to be affected by it. There is absolutely nothing wrong with that. The issue would be if following the unveiling of the plan an employer proceeded to dismiss people without going through the appropriate consultation process. It is clear however that in this case the respondent planned to do things properly and in accordance with employment law.

174. We are aware that in the claimant's initial grievance there was a suggestion that the employer had not complied with Dundee City Council's rules about giving fair notice to staff. We were not provided with a note of what these rules were and we have to say that we consider the decision of the grievance outcome to be extremely kind to the claimant and his colleagues. It would appear that the person who dealt with the grievance

had an exaggerated view of an employer's duty to care for the feelings of staff. That having been said however there is no doubt that the situation thereafter was that the report was withdrawn. The claimant had had an apology for his feelings having been hurt by the way it was done. The respondent were still requiring to reorganise the business to save money and the claimant was entirely failing to co-operate with management.

175. The Tribunal considered that the procedure adopted by Mr Mullen to be fairly impeccable. The respondent spent a considerable amount of time investigating the matter and gave the claimant every opportunity to demonstrate that there was a way for the employment relationship to be repaired. Mr Mullen's approach was painstaking in its attention to detail and we have only sought to summarise the broad outline in our findings in fact. Reading the claimant's contribution it is difficult to avoid the conclusion that the claimant's view was that he wished to campaign to have his line manager and the Chair of the Board removed and that short of that there was no repairing the employment relationship. It was noteworthy that Ms Dobbie said that she would have to resign if the claimant returned to work. Mr Henahan said that he would be professional about it but would find it extremely difficult. He said that he had observed the way the claimant operated with Ms Dobbie's predecessor and that he would find it very difficult to be on the receiving end of that. The Chair of the Board had also indicated that she would resign if the claimant returned to work. The Chair of the Board was however to be resigning fairly shortly in any event.

176. The Tribunal in this case entirely echoes the statement of Underhill J in the case of **Leach** in the EAT which is quoted by the Court of Appeal with approval at section 40 where he states:-

"We have already observed that we do not regard that language is helpful. We have observed a growing trend among parties to employment litigation to regard the indication of loss of trust and confidence as an automatic solvent of obligations; it is not."

Whilst entirely agreeing with Underhill J we felt this was one of the rare cases where the reason for dismissal could properly be stated as a

breakdown of trust and confidence and naming it thus was not a surrogate for a finding relating to conduct. In this case Mr Mullen formed the belief that there had been a complete breakdown of trust and confidence and that there was really no going back in this case a breakdown in trust and confidence was genuinely the reason for dismissal and there was in fact a breakdown of trust and confidence. The Tribunal accepted that there was no realistic alternative to dismissal of the claimant.

177. We should say that we are not in any way endorsing the approach taken by the board in this case as the preferred approach when managers report having difficulties in dealing with awkward employees. The respondent has clearly incurred very substantial costs in proceeding to investigate the possibility of there being a breakdown in trust and confidence in the painstaking and time consuming way they did. The process of investigation took well over a year during which time the claimant was suspended on full pay. Other employers may well have taken up the suggestion of Liz Jackson when she proposed that a more robust approach required to be taken to communications between the board and senior managers. More robust management of the claimant may well have led either to the claimant abandoning what appears to be his campaign to undermine the managing director or indeed might have led to conduct issues being raised. At the end of the day however the respondent proceeded as they did and the tribunals view was that the dismissal was fair in terms of s98 of the Employment Rights Act.

178. The breakdown in trust and confidence was established and the degree of breakdown which was established meant that this amounted to a substantial reason justifying dismissal of the claimant. The claim for unfair dismissal is therefore dismissed.

Disability discrimination

179. In submissions the claimant's representative confirmed that the sole claim being made was one of discrimination arising from disability in terms of section 15 of the Equality Act 2010. Section 15 states

“(1) A person (A) discriminates against a disabled person (B) if

(a) A treats B unfavourably because of something arising in consequence of B's disability and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

5 (2) Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability.”

180. In this case the claimant relied on the disability of anxiety and depression. The respondent did not accept that the claimant was disabled during the whole course of events. The respondent accepted that as at the date of dismissal, 23 August 2023 the claimant is likely to have been disabled in terms of the Equality Act. The Tribunal would agree with that on the basis that by this time the claimant's health condition had lasted for more than a year. The Tribunal's position however was what whilst the claimant was at work (in the period up to October 2021) then there was no real material on which we could make a finding that he was disabled. The claimant's evidence was that he had previously consulted his GP about issues with anxiety shortly before he commenced employment with the respondent at a time when his previous employment with Aberdeen Council was breaking down. On the basis of the claimant's evidence however this was a situational reaction and any symptoms settled down fairly quickly and certainly did not last 12 months. The clear evidence was that it was situational and there was no evidence led to suggest that at that time or at any other point prior to October 2021, that it would recur.

25 181. The claimant first consulted with his GP in October 2021. He had a telephone appointment with a mental health nurse. He was prescribed antidepressants. The Occupational Health Report which was obtained the following month stated he was suffering from mild symptoms of anxiety and depression and that he should be able to return to work in four to six weeks. On that basis there was really no reason to suggest that the claimant was suffering from a long term condition which was something which would last 12 months. There was also nothing really to suggest that this was a recurrence of his earlier problem in that once again it appeared to be entirely situational. The Tribunal accepted that at some point thereafter and certainly by October 2022 the claimant qualified as disabled

on the basis that by now he had had a long term condition. The Tribunal also accepted that by October 2022 the respondent were aware of this since although the claimant had not been submitting fit notes since February there was sufficient reference in correspondence from the claimant to his mental condition that they could be held to have been put on notice that he was still having difficulties.

182. With regard to the section 15 claim we were in some difficulty in understanding exactly what this claim was. In submissions the claimant's position was that *"to the extent that the respondent's/Mr Mullen's view of the conduct of the claimant was influenced by that conduct while he was disabled by a work related stress condition in particular during his Absence Management Meeting with Mrs Dobbie on 26th November 2021 and his non-attendance at the Executive Strategy Day in October 2021 then this something (his agitated and apparently angry state) arising from the claimant's disability caused the respondent to discriminate against him contrary to section 15 of the Equality Act 2010 by contributing to his dismissal."*

183. The principal difficulty with the claimant's case as stated is that the claimant provided absolutely no evidence to substantiate it. There was absolutely no medical evidence provided to show that the claimant's particular disability would cause him to act in an aggressive, agitated and apparently angry way. It was not open to us to make a finding that the claimant's behaviour was caused by his disability based on judicial knowledge. The tribunal every day hears about employees who suffer from anxiety and depression who attend absence management meetings and do not behave in the aggressive way the claimant did. The claimant's own evidence was that quite to the contrary. He said his behaviour had been entirely impeccable throughout. His evidence was that he had behaved entirely reasonably throughout. Whilst the Tribunal's view is that the claimant's evidence could not be accepted on this point, the Tribunal's view that it was not up to us without further medical evidence to make a finding that the claimant's behaviour should be attributed to his disability. This was not something the claimant ever raised with Mr Mullen or with Mr Laidlaw. It is not something which was reported to the respondent by their Occupational Health providers following any of the examinations for

which they sent the claimant. In the view of the Tribunal, this lack of evidence fatally undermines the claimant's case under section 15. At the end of the day the Tribunal's view was that much of the behaviour which the claimant now says ought to have been excused by Mr Mullen on the basis that it was caused by the claimant's disability actually pre-dates his disability. Furthermore, even if we are wrong about the date or if there were any alleged disability related behaviour which postdates the point at which we consider the claimant became disabled then there is absolutely no evidence from which the Tribunal could properly conclude that this behaviour was linked to any underlying disability. For this reason the claim under section 15 also fails. The claims are dismissed.

Employment Judge: I McFatridge

Date Judgment Issued: 18 June 2024

Date sent to parties 20 June 2024