



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4105537/2017**

**Heard in Glasgow on 25 April; 26 April; 23 July; 27 August; 28 August;  
29 August; 19 September; 24 September 2019; and then 25 November;  
26 November and 30 November 2021**

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**Employment Judge J Young**

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**Ms Louise Johnston**

**Claimant  
In Person**

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**The Inverclyde Council**

**Respondent  
Represented by:  
Mr J Hamilton -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant was not unfairly (constructively) dismissed in terms of section 98 of the Employment Rights Act 1996.

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**REASONS**

1. The claimant presented a claim to the Employment Tribunal complaining that she had been unfairly (constructively) dismissed by the respondent. She relied on a breach of the implied term of trust and confidence in that claim. Various matters were asserted by the claimant in particular arising out of her position from 3<sup>rd</sup> April 2017 as a Finance Officer assigned to the Pupil Equity Funding Programme (PEF) instituted by the Scottish Government. On 27<sup>th</sup> June 2017 the claimant received an email from the respondent's then Head of Education which in her view contained an instruction to her to be part of a process which sought to manipulate teacher numbers contrary to the PEF terms. She maintained this was the "final straw" and she had no other option but to resign and did so by letter of 30 June 2017 providing one month's notice.
2. In their response the respondent denied that any of the matters narrated by the claimant had breached the implied term of trust and confidence. In particular what was proposed by the respondent in the email of 27 June 2017 was entirely appropriate, legal and transparent and that the claimant's contention that there was any untoward procedure by the respondent was misconceived.
3. In the course of the Hearing the claimant introduced matters which related to (1) a period of absence through work related stress around June 2016 and the consequences of that; (2) incidents involving her work colleagues between January/June 2016 and (3) consideration by the respondent's Central Management Team (CMT) of posts requested by Head Teachers as part of the PEF. Objection was taken to the introduction of these issues in the claimant's evidence. After argument I allowed the evidence subject to relevance. This evidence was introduced at a stage where it was not clear what relevance it might have to the claim made by the claimant and I did not consider those matters should be excluded.

4. The parties had helpfully liaised in providing an initial joint Inventory of Documents which was added to in the course of the hearing. That resulted in a first joint Inventory of Productions (2 volumes) sections 1 – 68 and paginated 1 – 630 (1<sup>st</sup> Inventory 1-630) and second Joint Inventory of Productions in 16 sections paginated 1 – 76 (2<sup>nd</sup> Inventory 1-76)

### **The Hearing**

5. This final hearing, which it had been agreed would consider liability only and not remedy, took place over a prolonged period. There were various good reasons for postponed dates. The principal delay was occasioned by the restrictions in place as a consequence of the COVID pandemic and the resultant difficulty in fixing the final days of hearing in person being the express desire of the parties.

6. At the hearing evidence was given by the claimant; Jonathan Hamilton, Principal Solicitor with the respondent; Laura McIntyre or McEwan, HR Advisor with the respondent; Erland Voy, Finance Officer with the respondent; Craig Given, Finance Manager with the respondent; Michael Dodson, Finance Officer with the respondent; Rosemary Logan, School Business Officer with the respondent; Steven McNab, Head of Organisation Development Policy with the respondent; Steven Parsons, Secondary Attainment Challenge Lead Officer with the respondent; Mark Coyle, Head Teacher at St John's Primary, Port Glasgow; Ruth Binks, Corporate Director of Education (formerly Head of Education) , Communities and Organisational Development with the respondent; Ian Cameron, Principal Accountant with the respondent; Alan Puckrin, Chief Financial Officer with the respondent and appointed Interim Director of Finance and Corporate Governance from March 2021; Mairi McFarlane, secondee to the Attainment Challenge within Education Department and former Head Teacher with the respondent.

### **Issues for the Tribunal**

7. The issues for the Tribunal were:-

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- (1) What acts did the claimant have in mind at time of resignation which caused her to consider there was a breach of the implied term of trust and confidence?
- (2) Was the email of 27 June 2017 sent by Ruth Binks to the claimant and others the most recent act on the part of the respondent which the claimant says caused or triggered her resignation?
- (3) Did she affirm the contract since that act?
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- (4) If not, was that act by itself a repudiatory breach of contract?
- (5) If not, was it an act which added something to a course of conduct comprising several acts and/or omissions which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?
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- (6) Did the claimant resign wholly or partly in response to that breach?
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- (7) If the email sent of 27 June 2017 is innocuous has there been conduct of the respondent which amounts to a fundamental breach (and has not been affirmed) and the claimant resigned at least partly in response to it?
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8. From the evidence led, admissions made and documents produced I was able to make findings in fact relevant to those issues.

### **Findings in Fact**

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9. The claimant was employed as a Finance Officer and had continuous employment with the respondent in the period between 4 May 2004 and her resignation intimated on 30 June 2017 and taking effect on 30 July 2017.

10. In that role the claimant was responsible to Ian Cameron, Principal Accountant with the respondent from about 2007. Her appraisal from Mr Cameron in the period to 5 November 2015 (2<sup>nd</sup> Inventory 67 – 75) stated that she worked to a consistently high standard and her *“attitude to work is first class and deadlines are always met”*. At that time (November 2015) it was noted that as a result of a Finance Department restructure changes in workload were predicted.

11. That restructure resulted in advice around March 2016 that the Finance Team was to be reduced by one and the claimant was to enter into a competitive interview process.

#### **Issues in period January – June 2016**

12. The claimant indicated there were various issues which affected her in the period January/June 2016 being:-

(a) That she was told by Mr Given that while she was required to go through a competitive interview in respect of the restructure process she would be successful in that process. The claimant regarded this as an unfair process. Mr Given denied making any such statement.

(b) That a colleague Michael Dodson had been selling “firesticks” to other members of staff. Michael Dodson denied this and indicated that he would load firesticks for individuals and occasionally he may receive a gift in exchange but he did not *“sell firesticks”*. He was supported by Mr Cameron in this connection.

(c) That Michael Dodson displayed a “sectarian” poster. This appeared to be a poster which had superimposed the face of a former Chairman of Rangers FC. There was no evidence that this was sectarian in nature.

5 (d) That Michael Dodson had said that he would have Craig Given assaulted "*as his wife was a Rangers fan*". Mr Dodson denied any such remarks stating that he may have said that he wondered why Craig Given would go and watch Rangers when he was a Celtic supporter.

10 (e) That an individual who had a propensity to make "*off colour remarks*" had apparently stated one day "*Louise I wish I had a mirror and then I could see if you had any knickers on*". From the evidence of others it appeared that comment had been made..

15 13. The claimant did not enter into the competitive interview process but instead volunteered to take up a position (still involving finance) within the respondent Environmental and Regeneration department.

20 14. No complaint was made at the time by the claimant on any of these issues. They were not raised within the ET1 lodged or the Further Particulars intimated.

### **Absence from work through stress in June 2016**

25 15. In terms of a letter from the Mistylaw Medical Practice dated 2 November 2018 the claimant attended her doctor on 1 June 2016 complaining of "*problems at work*". At that time it was reported that she was "*changing department*" but that her "*current boss did not want her to leave and had been bullying her and making nasty comments*". She also had some concerns about her husband's health at that time. It was indicated that she had sought some advice from her Union and was to speak to the HR  
30 Department to ask about counselling. She was provided with a "*sick line to cover (4) weeks with the diagnosis being work related stress*" (1<sup>st</sup> Inventory – 577/578).

16. Ian Cameron recalled that in a telephone conversation with the claimant around this time that she was distressed and as a result he contacted his HR Department. He was *“appalled”* when they said that they had no budget to deal with any counselling of the claimant and Mr Cameron raised the matter at a higher level. He was assured that support would be given. He was unaware of any bullying allegation.
17. By letter of 27 June 2016 the respondent HR department advised the claimant that an appointment had been made for her to attend the respondent’s Occupational Health Medical Advisor on 11 July 2016 (2<sup>nd</sup> Inventory – 34). The claimant did not attend the appointment with Occupational Health which had been arranged. She made no representation about any continuing stress to the respondent.
18. The letter from Mistylaw Medical Practice (1<sup>st</sup> Inventory – 577/578) reported that at a further consultation on 29 June 2016 the claimant advised she was *“feeling much better”* and was *“due to return to work the following week and would be starting in her new department. Unfortunately she had not received any contact from the HR Department and was disappointed about that”*.

### **Grievance hearings February 2017**

19. The claimant entered the position within Environmental and Regeneration department around first week in July 2016. However she required to lodge a grievance in relation to that position and a Stage 1 hearing took place on 13 February 2017. The grievance was not upheld and the claimant submitted a Stage 2 grievance appeal. The appeal outcome of 17 February 2017 (1<sup>st</sup> Inventory – 579/581) recounted the grievance which had been lodged which related to tasks for the claimant within *“Facilities Management Section”*. That Stage 2 grievance appeal which was heard by Alan Puckrin partly upheld the grievance and sought to resolve matters by making certain proposals including that there was a potential *“new post within Education Services”* which might be created from additional funding and were the claimant to be on the redeployment register she would be considered as a match for this

post. Mr Puckrin explained that he was aware that additional funding was to come by way of the Scottish Government initiative on PEF and that finance support would be necessary in that respect. He was aware that post may become available very quickly from 17 February 2017.

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20. The letter from the Mistylaw Medical Practice (1<sup>st</sup> inventory 577/578) indicated that the claimant had not reported any *“further problems relating to her work until 27.02.17”* when it was noted that the claimant reported *“she had been under a lot of stress at work due to changing position. In addition a couple of her friends had recently been diagnosed with cancer. She was feeling tense and had a low mood”*. At that time she was prescribed fluoxetine and diazepam as required. On a review on 14 March 2017 she reported further symptoms which were considered to be stress related and the prescription was continued.

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### **The Respondent’s Policy on Stress and Mental Health**

21. The respondent had in place a “Stress, Mental Health and Wellbeing Policy” (1<sup>st</sup> Inventory – 109 (1 – 49)) created in 2008 and updated in a minor way in April 2017 with the date of next review being May 2020 (109 – 4). The policy contains various statements regarding the monitoring and reviewing of measures to reduce stress. It refers to the legal framework underpinning the policy and also a risk assessment form at Appendix 1 in generic terms.

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22. Mr McNab confirmed that no individual risk assessment was carried out by the respondent unless there was a trigger to indicate that an individual employee was experiencing stress or mental health issues. Before any individual assessment was conducted there would need to be an indication of difficulty. If a concern raised then an individual risk assessment would be conducted. Such a trigger might be absence due to work related stress. The respondent’s appraisal process would be utilised to identify stress issues raised by the employee. Employees would be referred to Occupational Health if there was a need for support on stress or mental health. He agreed that the matters narrated within the letter from the claimant’s General

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Practitioner and Statement of Fitness to Work would be sufficient for a reference to Occupational Health for support.

5 23. Mr Cameron confirmed that training on such policy would be conducted through e-learning with refresher courses from time to time in order that Managers were aware of the respondent's aims and objectives in relation to stress and mental health issues. He considered he had acted appropriately when he became aware of the claimant being distressed in the telephone call around June 2016 by making referral to HR and escalating the matter on the  
10 initial response.

24. The grievance raised by the claimant in February 2017 indicated that she considered the situation then complained of had caused her stress. Mr Puckrin considered the stress for the claimant was caused due to the  
15 claimant being required to take on matters in Facilities Management. The issue was whether the claimant should have been given this responsibility in addition to other work. The grievance outcome indicated that that work would be removed from the claimant and as a consequence would remove the stress factor. In addition stress would be removed completely in the view of  
20 Mr Puckrin were the claimant to move from her position in Environment and Regeneration to another role. The Grievance outcome letter indicated a potential role for a Finance officer in Education Services.

#### **Position for Finance officer in Education Services and PEF.**

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25. As had been envisaged by Mr Puckrin an alternative role did arise for a Finance officer which related to the Scottish Attainment Challenge Programme. As part of that Challenge Programme PEF was to be part of the £750 million Attainment Scotland Fund which was to be invested in the  
30 Programme. PEF was to be additional funding allocated directly to schools and targeted at closing the "*poverty related attainment gap*". This funding was to be accessed to its full amount by Head Teachers to enable schools to deliver activities, interventions or resources additional to those which were already planned. Head Teachers were to work in partnership with each other

and their local authority to agree the use of the funding. Local guidance was to set out in more detail how that would operate. Publicly funded primary, secondary and special schools were to receive £1,200 in the school year 2017/18 for each child in primary 1 to S3, or equivalent, who was registered for free school meals under national eligibility criteria.

26. In terms of the National Operational Guidance issued by the Scottish Government (1<sup>st</sup> Inventory 13/18) the respondent was to receive the sum of £2,450,400 by way of PEF over primary, secondary and special schools. In relation to staffing it was stated:-

*“Where schools identify the need to recruit additional staff for an appropriate intervention or activity, they should work closely with the Local Authority (as the employer) to ensure that their job remits and specifications are clearly tied to the aims of the intervention. Head Teachers need to take full account of local HR policies and procedures and that staffing costs include not just salaries but also on-costs such as pensions, sick leave, maternity cover and also potentially recruitment costs. Local guidance should provide further clear details of these costs. Any teachers recruited through Pupil Equity Funding will be excluded from the authority’s contribution to any national teacher numbers and/or ratio commitment, which means it is essential to fill core staffing posts first before recruiting additional teachers”.*

27. A meeting of 14 February 2017 was held with Head Teachers and others to consider amongst other things the funding of central posts from PEF. The Head Teachers agreed funding for central posts such as Finance and HR. Subsequent to the meeting an email covering the main points was sent out by Ruth Binks to the Head Teachers amongst others (1<sup>st</sup> Inventory 36).

28. After further consideration as to the contribution from each school towards the cost of central posts the Head Teachers agreed to funding Finance and HR assistance (1<sup>st</sup> inventory 58). The claimant was to take up the Finance

role commencing 1 April 2017 being the beginning of the respondent's financial year. Her whole salary was to be paid from PEF. The HR assistance funded to an agreed amount was to be shared amongst 4 individuals within HR namely Joanne Orr, Alison Young, Laura McIntyre or  
5 McEwan and Mary Bannon.

29. By 31<sup>st</sup> March the respondent had received an "Offer of Grant for Scottish Attainment Challenge – Pupil Equity Funding – 2017/18" (1<sup>st</sup> inventory 22/29). The respondent was offered a grant of £2,450,400 payable over the financial  
10 year 2017/18. This offer advised that the grant was only to be used "*for the purposes of the Programme and for no other purposes whatsoever*". The "Programme" was defined in Schedule 1 to the grant (2<sup>nd</sup> inventory 35) as:-

*"The payment of the grant will be made to Inverclyde Council in order  
15 to deliver the Pupil Equity Funding to schools. Funding allocations for each school are as set out in the Annex and decisions on the use of this funding should be delegated fully to the Head Teacher, taking account of the terms and conditions as set out in this offer of grant and the National Operational Guidance".*

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30. The offer of grant included the statement that:-

*"Teachers whose posts are funded through by Pupil Equity Funding  
25 will be additional to those which contribute to the grantees pupil teacher ratio commitment agreed separately with Scottish Government and so will not contribute to the delivery of that commitment" (1<sup>st</sup> inventory 23).*

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31. The respondent accepted the terms of this grant which became a binding contract governed by the law of Scotland.

**Job Description for Finance Officer - PEF**

32. The claimant in evidence indicated she was *“happy and excited to take this new role”*.

5 33. There was some dispute over the job description. The respondent had prepared a job description (1<sup>st</sup> inventory 118) which provided that the post title was that of *“Finance Officer – Pupil Equity Fund”*. There was no dispute that the claimant in that role would be responsible to Ian Cameron as the respondent’s Principal Accountant. The claimant’s position was that she did not *“recall ever seeing”* the job description but agreed that it was generally  
10 correct. However:-

(a) where it indicated that part of the role was to *“prepare budget monitoring reports, in conjunction with budget holders, including full variance analysis with priority given to Pupil Equity Funding”* that should be *“exclusive”* to PEF as she was *“working for 27 Head Teachers”*.  
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(b) that where the job description indicated that services provided included *“any other duties and responsibilities as directed by line management”* that would only to relate to matters which were exclusive to PEF.  
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(c) that in discussion with Mr Puckrin she had been told that she would be *“employed by the Head Teachers”* and so be responsible to them.  
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34. Mr Puckrin advised that it was important that there was a direct management line for the claimant that would come from Finance Services through the Principal Accountant. He had no recollection of agreeing that the work of the claimant would only relate to PEF matters for the Head Teachers but as stated in the description that would be a *“priority”*. He indicated that the job description including *“any other duties”* was in all the respondent’s job descriptions an example being the job description of a Finance Officer of  
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November 2016 (1<sup>st</sup> Inventory 39/40). This was a “*new post and targeted to PEF but not to the exclusion of everything else*”.

- 5 35. Mr Cameron’s position was that he retained line management for the claimant and that her tasks were not exclusively to be related to PEF issues particularly given that the schools would not be in operation for 13 weeks of the year due to holidays. This funding was within the umbrella of the Scottish Attainment Challenge and other tasks within that domain would be appropriate for the claimant.
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- 15 36. I accepted that the job description related to the claimant’s post and the terms defined the expected scope of work in the role. The date of its production was noted as 16 February 2017 consistent with the time when PEF came into existence and grant funding became available. It was consistent with Mr Puckrin’s evidence that at the time he heard the second stage grievance appeal he was aware of the post becoming available which if of interest to the claimant would resolve her difficulties in the position in Environmental and Regeneration. I did not consider that there had been any variation of the terms of the job description in any discussion with Mr Puckrin. The claimant was clearly employed by the respondent in terms of the job description. That she could not recall seeing this document did not in my view mean that the job description could not be relied upon by the respondents as defining the responsibilities and expected tasks which related to this particular role.
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- 25 37. The claimant was also provided with a written Statement of Terms and Conditions of Employment for this temporary post for the period to 3 March 2019 with a right of return to her “*substantive post*” thereafter. However that statement did not contain any reference to the job description other than identifying that the post title was that of “*Finance Officer*” within the Finance Service (1<sup>st</sup> inventory 41/45).
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**Appraisal and intimation of role in March 2017**

38. An appraisal was completed for the claimant on 23 March 2017 (1<sup>st</sup> inventory 611 – 620). It was conducted by Craig Given and was positive. It notes that the claimant had been working in a *“new team for the last financial year”* and would be *“moving into a new role within Education in the coming weeks”* and that she should *“continue to seek support when required from her Line Managers and continue to know her deadlines”*. It was also stated that the *“main role in her new job”* would be to *“understand the context of the PEF funding”* and to build up good working relationships with Head Teachers.
39. The complaint made by the claimant was that this appraisal failed to provide any form of mechanism to ask for and obtain support for those employees suffering from stress and/or mental health problems as was identified within the respondent’s policy document. However while there was no specific section which dealt with that particular issue there would seem to be ample opportunity within the appraisal process itself to raise such issues.
40. Prior to the claimant commencing her role Ruth Binks sent an email to interested parties (1<sup>st</sup> inventory 58) on 22<sup>nd</sup> March 2017 indicating that the claimant would undertake the *“Central Finance role”* and in that role would *“allocate budget codes and will be in touch with the schools in due course. She will work alongside HR to ensure that we are able to allocate spend (and parts of spend against posts) to the correct people/projects. Joanne Orr and Alison Young will be monitoring the spreadsheets for HR (although HR advisors Laura and Mary remain in place to support)”*. Amongst those individuals 25 hours per week was intended to be spent on HR support.

**Meeting of 21 April 2017**

41. A meeting was arranged with School Finance Officers whose role was to assist Head teachers in school finance and administration for 21 April 2017. By email of that day (1st Inventory 51) Ruth Binks advised Head Teachers of that meeting which was to look at *“several things”* including PEF. Ruth Binks

requested the claimant to advise School Finance Officers at that meeting that she was appointed to deal with PEF matters and matters which related to PEF appointments should be referred to her. The claimant did so.

5 **Work in April/early May 2017**

42. During April 2017 the claimant required to compile and present a “*compliance framework*” to the 27 teachers of the schools who were to receive PEF together with the Director of Education and others. From around 25 April to 10 8 May 2017 the claimant visited the schools and confirmed with each the requirements and how they were costed. She discussed budgets with the schools and thereafter produced a second version of the budgeted spending of the grant.

15 43. Across all schools there was a requirement for 18 new FTE teachers; 15 FTE non teachers in support posts costing approximately £1.6 million in total. That entailed the recruitment of approximately 90 staff members (some being part time and some being full time).

20 44. With other costs of £0.7 million for materials/IT equipment/central costs that would account for £2.3 million of the grant award leaving £0.2 million unspent for the financial year to 31 March 2018.

**Incident with School Finance Officer**

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45. In the course of visits to schools in April/early May 2017 the claimant visited the Head Teacher at St Andrew’s Primary in Greenock. There she was asked a question about staffing which was not within her PEF remit but she indicated that she may be able to assist by passing on the information once 30 she returned to her office. That day she sent an email (1<sup>st</sup> Inventory 48/49) to Nicola Hurrell being a Project Officer with responsibility for school business and finance coordinators with a copy to the Head Teacher at St Andrew’s stating:-

*"Whilst I was visiting St Andrew's last week to discuss PEF funding, Alan mentioned that Pamela would like to return to her substantive 35 hours from Aug 2017 (reduced to 29.0 hours on 16/4/13). Can you please action if possible".*

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The email attached the details of the individual concerned from a spreadsheet.

46. She received a response from Ms Hurrell that day indicating that she would send an email to Ms Logan and did so indicating :-

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*"Hi Rosemary*

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*Louise mentioned to me when she returned from St Andrew's that Alan had been asking about Pamela returning to her substantive 35 hour post. This isn't part of the PEF funding so she simply passed the message to me on her return.*

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*I am sure Alan (will) be in touch to discuss this with you. Can you please process the appropriate paper work for these posts. Pamela should return to her post in August 17" (1<sup>st</sup> inventory 60/61).*

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47. On receipt of the email from her Line Manager Rosemary Logan was concerned that the claimant may have been overstepping her remit. She had been present at the "Town Hall meeting" when it had been explained that all requests by Head Teachers on PEF matters should be referred to the claimant and not dealt with by School Finance Officers and she expected the same treatment namely that any requests on "core staffing" matters would be referred to her as normal. She considered that if a Head Teacher had asked her about a PEF matter she would have indicated that he/she should speak to the claimant. She expected that the same would be said if a Head Teacher made a query on core staffing matters namely that the claimant would advise that was not her remit and that he/she should speak to the School Finance Officer.

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48. Ms Logan on 5 May 2017 at 07:01 responded (1<sup>st</sup> Inventory 60) to Nicola Hurrell; the Head Teacher concerned and the claimant stating:-

5 *"I am aware Pamela returning to her substantive post is not part of PEF but thanks for reiterating it to me.*

*I can't understand why Mr Connick needed to speak (to) Louise Johnston about this as I have always processed any paper work he has asked me to.*

10 *I am disappointed and feel undermined that both Louise Johnston and yourself felt this matter needed to be brought to my attention, if the implication is that I'm not doing my job properly please can you supply me with the evidence – this will allow me to consider my position whilst discussing the matter further with my trade union.*

15 *No need for you/Louise Johnston to send me screen prints of staff details as I have all this for cluster staff".*

20 *Regards"*

49. Ms Logan in her annoyance on this matter contacted Michael Dodson. He had day to day contact with her as he was a Manager for a strand of funding within the core budget for schools which was within Ms Logan's area. She was in regular contact with Mr Dodson and phoned him. She explained that she had tried to phone Ms Johnston in the meantime but had been unable to contact her. Mr Dodson's position was that this was an education matter and that he was not Ms Johnston's Line Manager but that position was held by Mr Cameron. Ms Logan decided that she would take matters up with Mr Cameron and by email of 8 May 2017 sent to Ian Cameron, Michael Dodson and the claimant an email which stated:-

*"Morning Ian*

*I am sending you this email as it's my understanding you are the Line Manager for Louise Johnston.*

5 *At a recent meeting Louise asked that School Business Officers don't get involved in any matters relating to PEF – I fully understand why this should be the case, I am however concerned that this does not seem to be reciprocated as per attached email.*

10 *Is it possible for you to provide some clarity on the PEF Finance Officer remit"*

50. Mr Cameron responded that day (1st Inventory 63) with information on the role occupied by the claimant stating that he was her Line Manager and as the claimant was on secondment to Education and in a different building “ a  
15 *large element of her day to day work is at the request of Ruth Binks/Education” and “any staffing/finance type requests made by Education would also be part of her current role and as such I don't have an exact remit for her”* He made other comments about the position occupied by the claimant within the context of the PEF funding arrangements and the need to  
20 keep that separate from core budget activity.

51. It was explained that those in the position of School Finance Officers may have felt vulnerable to some extent because there had been talk of centralising their functions within Finance which may have entailed  
25 redundancies. Ruth Binks explained that saving had not been progressed but School Finance Officers would be sensitive about their territory against that background.

52. Certain issues arose for the claimant in respect of this exchange.

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### **Allegation of Bullying**

53. In her evidence the claimant made reference to the respondent's policy and procedures on “Discrimination, Harassment and Victimisation” (1<sup>st</sup> inventory

109 (50 – 70)) and the section on “bullying” (109 (57)) which indicated that an example was:-

5                   “*Copying memos that are critical about someone to others who do not need to know*”.

54. It was maintained that the copying of the email by Rosemary Logan to Michael Dodson was an act of bullying as defined.

10 55. Ms Logan’s position was that she was being transparent in that she had spoken with Michael Dodson with whom she had regular contact on core staffing issues and he had indicated that he did not have responsibility for this particular issue and so she had then emailed Mr Cameron and simply copied Mr Dodson into her email of 8 May 2017 as she had spoken to him on the matter to “*keep him in the loop*”.

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**Manipulation by Ruth Binks; complaint to her; failure to act.**

20 56. In cross examination but not led in her own evidence the claimant made an allegation that Ruth Binks had been manipulative in advising her to tell School Finance Officers that she was responsible for PEF matters and that Finance Officers should refer all such matters to her. Her accusation was that she was being “*set up*” by Ms Binks in that respect. Ms Binks denied any manipulation.

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57. In cross examination of Ruth Binks but not led in her own evidence the claimant suggested following this exchange of emails she had gone to Ruth Binks in tears about her treatment. Ms Binks did not recall that matter.

30 58. It was suggested by the claimant in cross examination of Ms Binks that she had not sought to discipline Rosemary Logan for this matter because Ms Logan’s brother “*was the leader of the Council*”. Ms Binks indicated that it was not for her to take any disciplinary action against Rosemary Logan and

the fact that Ms Logan's brother was leader of the Council had no bearing on the issue.

59. In relation to those issues raised I accepted that the claimant had acted with good intent in passing on a message from a Head Teacher regarding a staffing issue. It was not within her domain but she considered she was being helpful in this respect. Equally given the background one could understand the sensitivity of Ms Logan but her reaction did appear overblown and her email could easily be construed as intent to be cutting. However I did not consider that there had been any bullying made out by the claimant on this territorial dispute. I accepted there was contact with Mr Dodson by Ms Logan on a fairly regular basis and she had raised the issue with him and so there was a reason for him to be included in the email of 8 May 2017.
60. On other matters raised with Ms Binks in cross examination I did not consider that there had been any attempt at manipulation by Ms Binks to set up the claimant in some way so that she was involved in territorial disputes with Finance Officers. There was no evidence that Ms Binks would foresee such territorial disputes arising and wanted to put the claimant in the "*firing line*".
61. Neither did I consider that some preference was being afforded Ms Logan in not pursuing her for disciplinary action either by Ms Binks or others because her brother was the leader of the Council.
62. The evidence did not disclose a formal complaint by the claimant on this matter. While I did consider that on an objective view Ms Logan's response could be described as overreaction, in the context of the sensitivities around Finance Officers' positions I was not inclined to consider that this was a personal attack on the claimant which should have been taken up by management as a disciplinary issue without formal complaint by the claimant.

**Whispered conversations**

63. A further matter that arose was the allegation that subsequent to this incident (and perhaps before) Rosemary Logan and Michael Dodson had whispering telephone conversations in unflattering terms about the claimant. She was unable to relate any particular remarks. She indicated Erland Voy could provide details but while he may have suspected that was the case he was not able to provide any detail of those conversations.

**10 Attainment Challenge Forecasts**

64. In terms of the release from the Scottish Government of March 2017 PEF formed part of the Attainment Scotland Fund under the Scottish Attainment Challenge Programme for 2017/2018.

65. The Scottish Attainment Challenge Programme had run for some years prior to 2017/18 and it was necessary for local authority participants to make grant claims to that Fund for approval. A separate grant was available entitled "*Opportunities For All*".

66. The purpose of these grants is to enable Education Authorities to address the "*attainment gap*" and while under the same umbrella are separate from PEF. Not all authorities were in receipt of funds under the Attainment Challenge but all schools were entitled to PEF.

67. Opportunities for All grant related to funds of approximately £100,000 being made available to encourage school leavers to make progress into other education/employment.

68. In the view of Mr Cameron it was legitimate for the claimant to be involved in these grant returns. In respect of Opportunities For All he estimated that only a few hours would be required for a return. Only 2 people were employed by the respondent under that grant funding. So far as the attainment grant was concerned that was more time consuming and would involve perhaps "2 days

*per quarter*” in respect of the assistance to Education Services in the returns which required to be made to the Scottish Government.

5 69. He considered that seeking the claimant to be involved in these matters was within her job description wherein it indicated that part of the job entailed preparing budget monitoring reports *“in conjunction with budget holders including full variance analysis with priority given to Pupil Equity Funding”*. From that he maintained that the work of the claimant was not exclusively related to PEF. Additionally the claimant would require to perform *“any other*  
10 *duties and responsibilities as directed by line management”*. He considered that the claimant was more than capable of preparing these grant claims and forecasts. She had been involved in the Attainment Challenge claims in the past.

15 70. In mid May 2017 Mr Cameron asked the claimant to be responsible for the preparation of the appropriate claims for the financial year 2017/2018. She made no complaint about being involved in these issues to Mr Cameron or other parties.

20 71. By email of 16 May 2017 (1<sup>st</sup> inventory 64) the claimant advised Mairi McFarlane that:-

25 *“Iain has confirmed that I am now responsible for the primary/secondary attainment challenge. Michael shall still have responsibility to finalise 2016/17”*.

30 72. Michael Dodson had been responsible for preparation of the appropriate applications in 2016/2017 for the Scottish Attainment Challenge. Mairi McFarlane was the individual within the Education Department responsible for submission of the appropriate application for grant to the Scottish Government. She required assistance from Finance to complete the application. It was necessary to submit a quarterly expenditure account for the first quarter of the year (1 April – 30 June 2017) to the Scottish Government. Ms McFarlane responded (1<sup>st</sup> Inventory 64) to the email from

the claimant on 16 May 2017 stating that they should arrange to “*meet up to go over the proposal/plan for 2017/2018*”.

5 73. In the evidence the claimant clearly indicated that she did not consider that Michael Dodson “*pulled his weight*” in respect of workload and was concerned that she had been given this piece of work. She was of the same view in respect of the work involved in “Opportunities for All” albeit not contending work that work on that return was onerous.

#### 10 **Attainment Challenge return**

15 74. The initial claim for attainment funding required to be for a full financial year and was submitted to the Scottish Government approximately in March in each year. Thereafter a return required to be made to the Scottish Government to the end of each quarter i.e. to end June/end September/end December/end March in each year. The forecasted position for the final quarter of the financial year would be prepared mid March and accordingly not all invoices and payments were through or anticipated goods had been received. That meant there was for a 2 week period uncertainty as to whether the forecast was accurate given that not all information was available. That would require matters to be picked up and rationalised in respect of the quarterly return to be made to the Scottish Government for the first quarter of the new financial year.

25 75. Mr Dodson had been responsible for preparation of the grant claim for the year 2016/2017 and also the forecast for the final quarter of that year which had been produced to the Scottish Government. The claimant was to be responsible for the preparation of the forecast for the first quarter of 2017/2018 i.e. to end June 2017.

30

76. In her preparation she noted that there was a difference between the amount of grant claimed and paid by the Scottish Government to the respondent for 2016/17 and the amount spent in the course of the year. The difference was £55,813. She sought information from Mr Dodson who had submitted the

claim documentation up to 31 March 2017. According to the claimant he *“laughed and said he had shredded the documents”*. The claimant’s position on this was that Mr Dodson was playing games as *“his nose was out of joint having been taken off the Attainment Challenge grant claim work”*.

5

77. Mr Dodson denied he had shredded any documents or had indicated that was the case. He still had his working papers which were on *“network drive”* and the claims submitted were available online. Each employee had a personal *“drive”* and the documents could be accessed. The claims and BACS payments were consistent. It was common that the final quarter return to the Scottish Government required to estimate what goods and services would be received by the end of March and commonly items ordered were not received until April and into the following financial year and so could not be included in spend for the current financial year.

10

15

78. The claimant’s position in evidence was that she considered the sum of £55,813 should be paid back to the Scottish Government. That was not the view taken by Mr Cameron in her discussion on this matter with him. His view was that the underspend should be carried forward to the following year and effectively the grant claim for that following year reduced by the underspend amount. He considered this was a normal event whereas the claimant’s position was that he was angry at the suggestion from the claimant that the money required to be repaid and that he *“wanted me to hide from the Scottish Government that overclaimed”*.

20

25

79. The claimant contacted the appropriate person within the Scottish Attainment Challenge Policy Unit within the Scottish Government and on 29 June 2017 that individual sent an email to the claimant (1<sup>st</sup> inventory 88) stating:-

30

*“Hi Louise*

*As discussed on the phone thank you for advising that you have developed an underspend on your 2016/17 grant. It would be helpful if you could please clarify the exact amount across both the primary*

*and secondary programmes and the reason the funds were claimed but not spent.*

*Below is a summary of your approved spend for 2017/18, I propose we deduct the 2016/17 underspend from the allocated figure to allow you to accrue these funds into 2017/18 spend. Please note that this means you will need to spend the full approved amount by March 2018 to be able to claim the full 2017/18 allocation and this should be detailed in your Schedule 2 at draw down”.*

10

80. Within that email it was stated that the total approved spend for 2017/18 was £3,156,013 subject to the underspend figure from 2016/17.

15

81. The claimant responded to that email on 30 June 2017 giving the underspend figures between primary and secondary schools. The Scottish Government advisor then responded stating:-

*“Thank you for confirming, I will send a grant letter with the total grant payable as £3,100,200 but you will need to ensure that you have spent £3,156,013 to claim the full grant which takes into consideration the underspend from last year.*

20

*Hope this makes sense: I will issue a grant letter this afternoon”.*

25

82. Mr Cameron’s position was that the matter was resolved in the way in which he had advised the claimant it should be resolved. He advised that continued to be the practice where there was any underspend in the Attainment Challenge grant monies and that all matters had been declared at the point of audit to Audit (Scotland) and they had no issue with the matter.

30

83. The claimant’s position on this issue was that she was embroiled in an matter which she should not have been asked to do in the first place as her role related to PEF. That caused conflict with Mr Cameron who was unhappy at the issue coming to light and with Mr Dodson who had been “taken off this

*grant work.*” Mr Dodson had then effectively refused any support by stating that his documents had been shredded.

84. This matter had been raised as an issue by the claimant in an email of 28 July 2017 (during her notice period) wherein under the heading “*Inverclyde Council Whistleblowing*” she advised Audit (Scotland) that she wished to notify certain “*serious irregularities*” one being:-

*“For the submission of the 2016/17 final Attainment Challenge grant claim the claim submitted to the SG was increased by £55k (primary and secondary claims) with no supporting documentation. When I was given this task for the new financial year I discovered that the expenditure for 2016/17 didn’t match the grant claim authorised by the Chief Financial Officer. I was told that because Audit Scotland were now taking over the Council’s audit they couldn’t process an expenditure accrual as they had no backup so therefore c/fwd 55k of income to 2017/18. This caused major problems for me and subsequently I notified the SG Attainment Challenge Team and 55k has been reduced from the Council’s 2017/18 funding allocation. This was not welcomed by my superiors at all”.* (1<sup>st</sup> Inventory 94)

85. This account was very different from the position of Mr Cameron and Mr Dodson who considered that the reason for the underspend was simply a timing issue namely that certain anticipated goods and services had not been realised by the year end and so the underspend was carried forward into the next year. The grant claim was not in fact reduced in that it stayed at its level of £3,100,200 but it was made clear that the Council would require to spend £3,156,013 to claim the full grant which took into consideration the underspend from 2016/17.

86. There appeared no disquiet by the Scottish Government representative in the emails of 29 and 30 June 2017 (1<sup>st</sup> inventory 87/88) concerning the approach of carrying forward the underspend. In terms of the Freedom of Information request made by the claimant the “*money from the Scottish Government was*

*recovered in the course of 2 claims in 17/18. This was due to an underspend against the original grant. The quarter 4 is completed before year end and any underspend is clawed back in the following returns” (1<sup>st</sup> Inventory 108.)*

- 5 87. The Audit Reports of Audit Scotland for the years 2016/2017 and 2017/2018 disclosed no issue in relation to this matter (1<sup>st</sup> inventory 236/268 and 400/438). The matter was not an issue raised in the audited annual accounts for 2016/17 and 2017/18 (1<sup>st</sup> inventory 269/390 and 439/532).

10 **Allegation of Missed Deadline for Attainment Challenge Return**

88. An issue arose regarding the quarterly return to the Scottish Government of the Attainment Challenge forecast for the second quarter of the financial year 2017/18 (1 July – 30 September 2017). The ET3 lodged by the respondent  
15 stated:-

*“On 29 June 2017 or thereby Ruth Binks became aware that the claimant had missed a deadline in relation to an important part of her remit, namely to ensure that a quarterly return was prepared and sent to the Scottish Government relating to the Attainment Challenge. The Scottish Government deadline of 28 June 2017 had been missed by the claimant, and without consulting anyone in Education or Finance Services, the claimant herself had contacted the Scottish Government seeking an extension of the deadline. The claimant explained to Ruth Binks that the reason why she had not met the original deadline was that she had been too busy arranging interviews for Sports Coordinators posts, notwithstanding that the claimant had previously been specifically told that she should not engage in interview related work by her Managers and Human Resources. Ruth Binks and the claimant worked together on 29 June 2017 to ensure that the quarterly return was completed and lodged with the Scottish Government”.*

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25

30

89. In her evidence the claimant took exception to this statement. At the adjourned Hearing of 23 July 2019 an amendment was sought by the respondent of that statement to read:-

5                   *“Ruth Binks became aware that the claimant had not been able to meet the original deadline in relation to an important part of her remit relating to the Attainment Challenge. Without consulting anyone in Education or Finance Services, the claimant herself had contacted the Scottish Government seeking an extension of the deadline. The*  
10                   *claimant explained to Ruth Binks that the reason why she had not met the original deadline was that she had been engaging in other activities”.*

90. It was explained by Mr Hamilton that after the claimant’s evidence he had  
15                   made further enquiry in relation to this particular matter and the original statement was in the ET3 had *“misdescribed”* the position. The claimant objected to the amendment. Her position was that this matter had been deliberately misstated by the respondent. Her position was that they knew that this information was incorrect but had chosen not to enter the correct  
20                   information when the ET3 had been drawn up.

91. Mr Hamilton indicated that the information provided was a genuine mistake and there was no deliberate misstatement. I decided to allow the amendment but given the claimant’s position indicated that evidence would be required to  
25                   be given as to the way in which this matter had been originally expressed within the ET3.

92. In those circumstances Mr Hamilton gave evidence to the effect that he had drafted the ET3 and before it had been submitted had circulated that to the  
30                   relevant individuals for their comment. The information on the deadline had been given to him by Ruth Binks in a meeting with her and the statement taken at the time. Given there was no comment on this matter he had lodged the ET3.

93. Ms Binks' position was to acknowledge she had been mistaken in her understanding of the position regarding this deadline and that the position expressed within the amended ET3 was accurate. She had provided the information to Mr Hamilton in terms of the original statement within the ET3 and it was her responsibility that version had been introduced into the pleadings.
94. Ms Binks explained that Mairi McFarlane had been the individual who had been liaising with Ms Johnston on the return for the second quarter of 2017/18 and that there had been an issue over the deadline but not as expressed in the ET3 which was mistaken.
95. In relation to that evidence I was satisfied there was no deliberate misstatement by the respondent in the originating ET3.
96. The responsibility for making the appropriate return to the Scottish Government on the Attainment Challenge rested with Education Services. However for a return to be made there required to be input from Finance and prior to her retirement as a Head Teacher Ms McFarlane had been seconded to the Attainment Challenge Programme with responsibility for the submission of the appropriate grant claim in the year 2017/2018.
97. On 21 June 2017 the Scottish Government supplied the respondent with the appropriate template to be used to present an up to date forecast of expenditure for the financial year *"taking account of any part year costs for staffing including a quarterly draw down profile"*. Return to the Scottish Government was by *"close on Tuesday 27 June"*. Once received the Scottish Government would issue a formal grant letter (2<sup>nd</sup> Inventory3). On 22 June Ms McFarlane sent the claimant, who was to support her in the presentation of the claim, the template advising :-

*"This is different from our normal paper work. I presume that we need to add lots of rows to show projected spend against all of the*

*primary sections and all the secondary sections. Should we arrange to look at it?"*

5 This separate forecast was necessary because of the changes which took place between projected spend and actual spend as the quarter years unfolded. It appeared there was always a tight deadline for submission of this forecast. After an exchange of emails a meeting was arranged between the claimant and Ms McFarlane on 23 June 2017 at 11am.

10 98. The claimant and Mairi McFarlane met as arranged. A large part of the exercise was to consider the current staff in post and compare that with the predicted spend. Mairi McFarlane's position was that she considered the claimant was confident that she would be able to return to her with the appropriate information by Monday 26 June 2017.

15

99. On 26 June 2017 Ms McFarlane emailed the claimant on an unrelated matter and also asked "*How are our predicted spend figures coming along?!*" and received a response to say that they were "*coming along nice – juggling too many plates at once! Speak to you tomorrow*".

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100. The appropriate figures did not arrive on 26 June and on 27 June Ms McFarlane awaited the figures by the close of business but none arrived. The claimant sought to telephone Ms McFarlane but she was engaged in a lengthy telephone call and then at 17:12 on 27 June 2017 emailed Ms McFarlane to say:-

25

*"Hi Mairi*

*I have been trying to ring you – Ewan has agreed to accept tomorrow as the submission date – not a problem at all!"*

30

The reference to "*Ewan*" was to the individual within the Scottish Government who would be expecting receipt of the grant forecast.

101. At this point Ms McFarlane had been frustrated at not getting the figures. She was aware that everyone was busy but presumed that the figures would be coming through. She was reasonably new in the post and wanted to ensure that deadlines were met. Her recollection was that Ruth Binks had phoned Ms McFarlane late on 27 June and Ms McFarlane had expressed  
5 *“frustration to her as still awaiting the figures”*. She acknowledged that she was worried about the deadline of 27 June and expressed that worry to Ruth Binks who was aware that the deadline for the return of the claim form was not being met. While the preparation of the claim looked complex to  
10 Ms McFarlane the claimant had been *“confident to me that get the figures in time”*.

102. Ms McFarlane was aware of the underspend of approximately £55,000 being raised by the claimant but she had no knowledge of how that matter was to  
15 be addressed.

103. The figures were available by 29 June 2017 and Ms McFarlane sent the appropriate information to the Scottish Government on that day (2<sup>nd</sup> inventory 14) stating:-  
20

*“I have attached the information requested from Inverclyde. Apologies again for the delay in sending this.*

*Please contact me if you need any further information”*.  
25

104. A forecast was provided in terms of the template provided (2<sup>nd</sup> inventory 15/17). The email chain and evidence identified that the first request to the claimant for assistance in preparation of the appropriate template was on 22 June 2017. While there was some suggestion that documents (2<sup>nd</sup> inventory  
30 15 – 17) had been blanked in some way to mislead that was not well founded.

105. The grant claim made in terms of the form submitted (1<sup>st</sup> inventory 606/608 and 2<sup>nd</sup> inventory 15/17) indicated the total expected spend was £3,156,013

and taking into account the underspend the total grant amounted to £3,100,200.

5 106. The original grant claim made prior to the commencement of the financial year 2017/2018 which had been submitted under the auspices of Michael Dodson was £3,679,013. The purpose of the forecast at end June 2017 was to indicate whether that claim was still valid or had to be revised given changes in staffing and other circumstances. That figure required to take into account the “underspend” previously narrated. Confirmation of the grant  
10 figure at £3,100,200 was given by the Scottish Government on 30 June 2017. (1<sup>st</sup> inventory 87)

### **Request for Counselling Service by Schools**

15 107. As part of the PEF bids by Head Teachers certain schools had sought the services of a “*Youth counsellor/play therapist*”. It was necessary to seek tenders for this service which was to support children’s health and wellbeing and address behavioural issues. In April 2017 the claimant identified that 6 schools had listed a requirement for such service and there was a need to scope the service which would be required. By email of 21 April 2017  
20 (1<sup>st</sup> inventory 185) the claimant identified certain matters which would require to be clarified and attached documents from possible suppliers of this service asking Mr Parsons if she should “*release this information to the HTs in a way to seek further clarity/confirmation of what counselling service they intend to deliver – the bids are a bit vague*”.

25

108. At a PEF Group meeting on 8 May 2017 it was indicated that Mr Parsons would meet with 2 possible providers of this service (MIND Mosaic and Bright Spark) on their procurement and cost and that the claimant was to “*arrange meeting with all Head Teachers who require counselling service*”.

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109. Thereafter the claimant updated the appropriate Head Teachers and appropriate members of the PEF Group on the delivery of the counselling and therapist service by email of 23 May 2017 (1<sup>st</sup> inventory 186). In that email

she advised that there had been considerable discussion regarding delivery of this service and that it would include “7 schools with the proposed spend in the region of £125,000”. It was stated that “Procurement have advised that in order to obtain best value our contract must be tendered” and a proposed timescale was identified seeking to award the contract as from August 2017.(1<sup>st</sup> Inventory 186)

110. However a final contract was not possible by beginning August 2017 and by email of 22 June 2017 (1<sup>st</sup> Inventory 187) the claimant advised Head Teachers and appropriate members of PEF Group that the proposal was to award an “interim counselling contract whilst a tendered contract is in the process of being advertised” and that the favoured suppliers (MIND Mosaic and Bright Spark) had been requested to provide a quote for the 8 week period between 21 August – 13 October 2017. Guidance was sought on whether that proposal was acceptable. The claimant had been involved in seeking these interim quotations and requesting the appropriate information as to the capacity of the providers to fulfil the contracts.

111. A further proposal from MIND Mosaic was received and issued by the claimant to the appropriate members of the PEF Group and Head Teachers on 26 June 2017 (1<sup>st</sup> inventory 189/190).

112. The Procurement Manager reviewed the contract documentation and an interim contract was placed with MIND Mosaic for the 3 month period.

113. The claimant’s position was that this was additional work which was not within her remit. Also that Mr Parsons had been “posted missing” and she bore the brunt of the work. There was no objection or representation made by the claimant that she should not be involved in this matter.

### **PEF Learning Assistant and Classroom Assistant Posts and ASN Auxiliaries**

On 9 June 2017 the claimant was forwarded an email by Ruth Binks (1<sup>st</sup> inventory 65). That concerned the appointment of “PEF Learning Assistant and Classroom

*Assistant posts and ASN Auxiliaries*". The forwarded email was addressed to Head Teachers stating that at that point the Education Department were not in a position to interview for the posts of PEF Learning Assistant and Classroom Assistant posts and ASN Auxiliaries but it was explained that the Department was holding interviews for "*the bank of supply*" in the next short period and there were many applicants for those posts. Those appointments would relate to core funding rather than PEF funding. It was stated that the Head Teachers had a choice of either interviewing themselves in which case the posts would require to be advertised or those who were to be interviewed for supply posts could be asked whether they were also interested in the PEF posts available. It was stated that:-

*"Beyond this email I don't need details, please let Louise know your preference".*

114. The claimant as a result of this email required to keep a list of those Head Teachers who themselves wished to interview. Samples of the responses (1<sup>st</sup> inventory 65 – 76) contained the responses which required to be kept by the claimant. The claimant's position was that this was not a matter with which she should have been involved as it was essentially an HR matter. There was no evidence that she objected to noting the preferences as suggested. In relation to the interviews it was explained by Mr Cameron that certain of the responses had a budgetary impact and so it was relevant for the claimant to know whether a post was no longer required (1<sup>st</sup> inventory 70) or that the role was to be altered (1<sup>st</sup> inventory 74).

### **Staffing Portal**

115. On 14 June 2017 the claimant was sent an email by Alexander Hughes (1<sup>st</sup> inventory 78) who was within the HR function stating that a member of the HR Department had "*set all PEF posts to the HT for access – if you need anyone else let us know who/what post*". This was a query as to who else should have access to the staffing portal apart from the claimant and Head Teachers. There was no evidence of objection from her at the time.

116. The claimant then requested Business Managers at schools who should have access to the portal other than Head Teachers. Certain of the schools requested access from particular individuals.

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117. The claimant's position was that this demonstrated a lack of ownership by HR of matters which should truly have been the function of HR and she should not have been involved.

10 118. Again there was no evidence of any objection or representation made by the claimant on this matter at the time. Mr Cameron's position was that this was a matter that "*could have been done by HR but possibly (the claimant) because she was Coordinator for PEF*".

15 **Scheme of Delegation**

119. The respondent's process for creating or amending a staffing post is for the particular Department or Service to complete a "*Scheme of Delegation and request to advertise/fill post (VAC1)*" (1<sup>st</sup> inventory 179/184).

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120. The process involves completion of the forms to give details of the particular section to which the post would relate; the post title; working location; status (permanent or temporary); reason for the post; salary costs and the like. That form would then go to Finance Section to ensure that the necessary finance existed for the post to be created. If approved by Finance then the form would be returned to the Department/Service who would then forward the completed form to the HR Department. Even if this was a PEF post it would require to be approved by Finance.

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30 121. In relation to the PEF posts the claimant advised that the Business Support Managers within the schools were not to complete these forms because they were busy on core duties and had been "*told not to do this by the Head Teachers*". Accordingly the claimant was to complete these forms and took on that task. However she did consider this was truly an HR function.

122. On 20 June 2017 a member of the HR Department sent to Hugh Scott (Community and Learning Development Manager), with a copy to the claimant, an email indicating that she had been passed 2 forms for “*PEF CLD worker posts*” but was awaiting the Scheme of Delegation (SOD) “*for these posts that ... are due to commence on 27 July 2017*” (1<sup>st</sup> inventory 81).

123. The claimant responded on 20 June 2017 (1<sup>st</sup> Inventory 81) and in the e mail exchange regarding completion of paperwork asked of HR :-

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*“Alex is this task not part of the 25k funding that Head Teachers are contributing? I am really struggling to take on board any further HR duties”.*

124. To that email the claimant received a response to say that the completion of SOD ‘s was not an HR function and should be provided by the service and HR would action the changes but the claimant would require to know of PEF changes as that affected budget.

125. Ruth Binks who had been copied into the foregoing email exchange between the claimant and HR indicated by email of 20 June 2017 that she had spoken to Head of Service at HR and the claimant was to “*do nothing more for now*” (1<sup>st</sup> inventory 82). The claimant’s position was that no direction was given by Ruth Binks as to what was to be done with that work. There appeared to be no contact with Head Teachers as to what steps should be taken for the completion of those forms.

126. Mr Cameron’s position was that he was unaware the claimant was completing these SOD forms. He did not believe that it was a function for her and should have been conducted by Education Service.

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### **Health and Wellbeing Coach**

127. On 28 June 2017 after interviews had been held for Health and Wellbeing Coaches at certain schools the claimant was asked to contact the

successful/preferred candidates (1<sup>st</sup> inventory 85). She contacted those candidates to say that they had been successful. The process was then for HR to attend to all contractual paper work. The exchange of emails included HR being “*copied in*” as “*interview support*”.

5

128. However on 11 July 2017 one of the successful candidates telephoned the claimant to advise that he had not received his offer of employment. She then raised that issue with HR who advised “*we have not received interview assessment sheets*” and so could not process the matter at that time. The claimant then advised William Bain, Corporate Director:-

10

*“FYI – please note current issue with recruiting PEF posts. There appears to be no ownership of the accountability for the successful recruitment of staff”.*

15

129. She received a reply on 12 July 2017 stating:-

*“Thanks for update. Ruth will pick this up with HR when she returns from leave”.*

20

130. The claimant’s position was that there was no-one in HR taking responsibility for ensuring contracts were being sent out and completed. While the information on that contract issue was not known to the claimant till during her notice period and after resignation she considered it supportive of her position on HR not taking responsibility for PEF issues albeit the Head Teachers had made funding available for support.

25

131. Mark Coyle, Head Teacher at St John’s Primary in Port Glasgow who was involved in the interview process for Health and Wellbeing Coach indicated that at the relevant time the claimant had no objection to being part of the process and contacting preferred/successful candidates. Mr Coyle assumed that there would be interaction with HR on the appointment process. He advised that after interviews he had contacted the claimant and asked her whether he contacted preferred/successful candidates and she had indicated

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that she would do so. He accepted that and appreciated that the claimant was being helpful. After that safeguarding checks would be made by HR.

5 132. Mr Coyle also confirmed that the claimant had been helpful in preparing interview packs for the Head Teachers in relation to the interviews held for these posts. It was also the case that the claimant had assisted in providing a draft job specification for these posts. The Head Teachers then finalised the specification.

### 10 **Approval of Posts by Central Management Team**

133. The process within the respondent for the approval of new appointments was that the Central Management Team (CMT) required to be advised of any new appointments and approve that appointment. That was part of the ordinary  
15 governance in place. Mr Coyle indicated that was part and parcel of any new appointment.

134. The claimant made a Freedom of Information request subsequent to her departure from the employ of the respondent and included within the return  
20 documents were produced relating to PEF funded posts (1<sup>st</sup> inventory 571/573). There it was noted that for PEF funded posts CMT had approved the appointments. In at least one case the approval had been put "*on hold*" on 2 occasions before being agreed by CMT.

25 135. The claimant's position was that she had become aware prior to resignation of CMT approving PEF posts but they should have had no part to play in approving PEF funded posts as the money was directed to Head Teachers to spend as they wished. It was not part of the respondent's funding. That was contrary to the Scheme proposed by the Scottish Government. She had  
30 become aware of the arrangement because she was asked by Ruth Binks to give a presentation to the Chief Executive and CMT Management Team as to why there was a requirement for 90 new posts by the Head Teachers from PEF funding. The claimant saw this as a matter within the Head Teachers domain. She made representation to Mr Cameron that she should not be

asked to make that presentation and he agreed that she should be excused. That took place some time in May 2017.

136. The witnesses for the respondent were of the view that this approval process was part of normal governance and that nothing in the Scheme removed the need for such approval. In this respect reliance was placed on the National Operational Guidance of 2017 (1<sup>st</sup> inventory 13/18) wherein it was stated under “*Staffing*” that Head Teachers “*need to take full account of local HR policies and procedures ...*”. The Guidance also indicated that Head Teachers would require to be “*familiar with local policies and procedures – such as the local Code of Corporate Governance, Local Schemes of Delegation, the role of the section 95 Officer, the local devolved school management policy and local school planning cycle ...*”.

137. The procedures for “*filling existing posts and for the filling of new posts*” had been in place since May 2012 (2<sup>nd</sup> inventory 18/21). The procedure involved submitting new posts to the Principal Accountant prior to being submitted to CMT for approval.

138. In March 2017 it was decided that given the estimated funding gap for the respondent in certain circumstances any permanent vacant posts would only be advertised and filled on a temporary basis for a maximum period of up to 23 months. Exceptions included “*teachers (where posts will be filled as part of the teachers staffing exercise)*”

### **New Job Description**

139. Subsequent to the claimant leaving the employ of the respondent a revised job description had been put in place for the subsequent appointment of a “*Support Officer – Pupil Equity Fund*” which description included “*to prepare all relevant paper work relating to HR and safer recruitment for all Pupil Equity Funding matters*”. That job specification was produced 19 July 2017 (1<sup>st</sup> inventory 575).

**Report to Education and Communities Committee**

140. The claimant assisted in a report to the Education and Communities Committee of 13 June 2017. She had been asked by Caroline McGahey to assist with the figures for placing requests. She assisted Ms McGahey in that matter. It was contended that Ms Binks had been “*in a panic*” about this particular matter but Ms Binks denied there was any sense of urgency as the report could have gone to the next Committee meeting if necessary. The purpose of the report was an update on the progress of school placing requests for the academic year 2017/2018. The report was for noting by the Committee as to the placing requests which had been received and did not introduce any new policy function or strategy (2<sup>nd</sup> inventory 36/40).

**Ruth Binks’ email of 27 June 2017**

141. On 27 June 2017 Ruth Binks sent an email to various parties including all Head Teachers within the primary and secondary school establishments together with the claimant, Ian Cameron, Laura McEwan, Joanne Orr and Craig Given regarding “*PEF teaching posts*”.(1<sup>st</sup> Inventory 84)

142. That email read:-

*“Colleagues,*

*Please note the following specifically about PEF teaching posts:*

*We have managed to secure some but not all of the PEF posts that you requested.*

*Currently we have managed to fill all of our basic core provision for teaching staff in primary (and advertised for secondary). However, like last year, we also have a budget for supernumerary posts that are in place to maintain our pupil teacher ratio.*

*In order to maintain our pupil teacher ratio the supernumerary posts need to be in place. THEREFORE the PEF posts will be paid centrally until the October break. This does not currently apply to promoted posts.*

5

*This means that if you have allocated some of your PEF funding to a basic teacher you should expect an underspend. Louise and Joanne will talk to you about the specifics of this as the underspend will be roughly a quarter of the cost of your teacher .... but this is just to give you a heads up that this is the case.*

10

*(In the interests of sharing good practice and you are looking for a good idea ... the Sports Coach post that has been created seems to be well received and has had some high quality applicants)*

15

*Kind regards, and as always please ask if you have questions”.*

143. The claimant’s position was that this email was the “*last straw*” in her coming to the view that she required to resign. She maintained that she was overworked and stressed at this point and this email resulted in resignation.

20

144. She explained that her view was that there was an anticipation from the Head Teachers that there would be by August 2017 sufficient teachers in place to meet the demands of both “*core teachers*” and “*PEF teachers*”. She stated that Ms Binks “*had not got all in place – they had interviewed enough teachers to fill the posts but not all were offered contracts. I do not know why that was the case*”.

25

145. The claimant maintained that where there was reference to “*supernumerary*” posts that meant “*bank supply teachers who had no specific duties and were counted as part of the “core teachers” to get to the appropriate “pupil/teacher ratio*”. A financial penalty would be imposed on the respondent were they not to comply with the pupil teacher ratio target set for the authority.

30

146. The claimant's position was that this was a manipulation of matters by Ruth Binks by placing teachers who were "*PEF teachers*" into core staffing. The Scheme intended by the Scottish Government was that the "*PEF teachers*" were those appointed by the Head Teacher and it was a breach of the grant conditions to place "*PEF teachers*" into the core staffing to meet pupil teacher ratio.

5

10

147. The position of the respondent was that there was nothing untoward in the approach taken by Ruth Binks in the email of 27 June 2017.

15

148. A national census was taken in one week in September each year to determine the "*pupil teacher ratio which should exist within an education authority*". That ratio informed the education budget. A national census was taken in September 2015 to determine the number of pupils/teachers in the authority area to form the "*pupil/teacher ratio*".

20

149. Between 2015/2016 the Scottish Government met with all Councils to determine whether Councils could keep to the 2015 ratios which were set. The respondent indicated for their part that would involve them employing extra teachers than they needed for the beginning of the school term to meet that pupil/teacher ratio. As they were employing extra teachers compared to the number of actual pupils (as distinct from the "pupil ratio" set), then the additional teachers were known as "supernumerary". However they were still part of the core budget and would be utilised by Head Teachers.

25

30

150. Those supernumerary teachers were to be involved in improving literacy and numeracy and it was for the Head Teacher to allocate as necessary within the primary school structure. Additionally as a school term unfolded they would not retain their "supernumerary status" but come within core teaching as illness/maternity cover/resignation or other reason meant that the anticipated number of teachers was not maintained.

151. The Head Teachers liked to have supernumerary numbers as they got extra assistance paid for out of the core budget and in a climate where there may

be a shortage of teachers then these supernumerary teachers could be utilised. All primary teaching posts are generic and it was not a system that could work within the secondary school structure.

5 152. For the teaching year 2017/2018 the “pupil/teacher ratio” was based on the  
2016 figure and so it was necessary for the respondent to employ the same  
number of teachers as had been the case for 2016 and that recruitment  
process started in May 2017. That recruitment of core staffing was exclusive  
of Head Teachers’ requests for PEF posts. The intention was to interview not  
10 only for “core funded teachers” to meet the pupil teacher ratio but also for the  
“PEF funded teachers”

153. The respondent’s agreed interview process was for panel interviews to select  
for primary schools across the authority. To be employed it was necessary  
15 for candidates to satisfy certain criteria. Candidates would then be ranked  
(with a process of moderation being applied) and then allocated to particular  
schools until all vacancies were filled. That system worked in agreement with  
the Head Teachers and Unions.

20 154. For the school year 2017/18 it was thought that the core budget requirement  
with supernumerary teachers would be filled but there was a shortage of  
teachers and a certain number dropped out. Accordingly it was appropriate  
to take the PEF teachers into the core funding to meet the ratio which an  
authority was required to meet.

25 155. Accordingly the email of 27 June 2017 was sent to advise Head Teachers  
that some posts which were designated to be met out of PEF would until the  
October 2017 break be placed within the core budget. As was stated the  
*“PEF posts will be paid centrally until the October break”*.

30 156. There was no impact on the PEF funding in respect of those teachers who  
would be now paid out of core funding rather than PEF. That funding was still  
being retained to meet any additional PEF posts which were required by  
Head Teachers.

157. Ruth Binks explained that this had been discussed with the Scottish Government and that they were content that the core teaching ratio should have precedence. It was also agreed with the Head Teachers that there was  
5 no sense in one school requiring additional teachers and another having extra teachers and that the core teaching ratio should be maintained across the authority. That was a process that Ms Binks advised was “*replicated all over the country*”. She advised all Head Teachers were aware of the process. Head Teachers got core teachers and supernumerary teachers but not  
10 teachers funded by PEF in that period to the October 2017 break. That was the approach agreed with the Scottish Government. Audit Scotland had inspected the Education Department’s records and were content with that process also.
- 15 158. The evidence from Mark Coyle, Head Teacher at St John’s Primary was that he welcomed the PEF funding which Head Teachers could spend as considered appropriate on teachers/practical issues/activities/resources. He sat on the panel interviews in 2017 for teachers. He confirmed that no separate interviews for PEF/core funded teachers were held but one panel  
20 interviewed for teachers whether they would be funded by core funding or PEF. They were not applying for a specific school but making an application to be employed by the authority in whatever school was allocated. He confirmed that the use of PEF would depend on whether there were sufficient applicants available. If there were insufficient applicants to meet all PEF/core  
25 posts then the core funded posts would take priority. He did not consider that there was any manipulation in the email of 27 June 2017 (1<sup>st</sup> inventory 84). He was not unhappy that he would have additional spending for PEF were sufficient teachers to become available.
- 30 159. He advised that he had one FTE funded by PEF in August 2017 and that individual had gone to “*core funding*” from November 2017 to cover for maternity leave. That meant that individual had then been part of core funding. He advised that Head Teachers were able to “*use PEF funded people for whatever we needed them for*”. He did not see any conflict with

the grant conditions (1<sup>st</sup> inventory 23 – paragraph 2.4) as the paragraph did “not say could not use person for any duties I saw as being needed”.

5 160. The claimant did make a “whistleblowing” complaint on this issue to (Audit Scotland) (1<sup>st</sup> inventory 93) wherein she advised:-

10 *“The issues that directly impacted on my position is the non compliance of SG – PEF funding and the fraudulent method of calculating pupil teacher ratio nos. The last straw for my integrity was when I received an email on 27/6 notifying all Head Teachers that I would be part of this process. This undoubtedly caused me to resign”.*

15 161. There was no evidence that complaint was upheld.

### **Resignation of Claimant**

20 162. The claimant advised that in the last week of June she had issues with the Attainment Grant work; felt overworked in being asked to perform duties outwith her remit; considered she had no support; and had issues in the way that she was dealt with by Mr Dodson and Ms Logan; with the final straw being the email from Ruth Binks of 27 June 2017 . By letter of 30 June 2017 (1<sup>st</sup> inventory 112) she intimated her notice of resignation in the following terms to Ruth Binks:-

25

*“Please accept this letter as notice of my resignation from the position of PEF Finance Officer.*

30

*As per the terms of my employment contract, I will continue to work until Saturday 30<sup>th</sup> July 2017.*

*I have enjoyed being a part of the team and am thankful for the opportunities you have given me during my time here.*

*I hope that I can rely on you for a positive reference in future”.*

163. Subsequent to the letter being intimated Craig Given asked her why she was leaving. She indicated that she had a complaint about Michael Dodson and he advised that he had *“no problem with Michael”*. The claimant indicated that that *“reinforced her decision”*. Mr Given did not recall that particular remark but indicated that he did not *“have a problem with Michael Dodson”* but was aware that the claimant said she did have a conflict with Michael Dodson. He asked if mediation with that individual might help but the claimant did not wish to enter into that process. She indicated at the time she had *“had enough with Inverclyde Council”*. Mr Given was aware prior to that resignation that the claimant felt that she was being asked to do *“HR work”* and should not have been asked to attend the meeting with CMT regarding PEF posts.

15

164. The claimant also had a meeting with Ruth Binks after intimating resignation when she was asked if she was sure *“you want to go down this road?”*. The claimant agreed Ms Binks asked if there was anything that she could do to assist and support her but the claimant but did not *“believe she could deliver”*. The claimant agreed she was given some time to consider matters but on 3<sup>rd</sup> July she informed Ruth Binks that she still wished to resign.

20

165. The claimant worked until 15 July and was then on leave until expiry of her notice period on 30 July 2017.

25

166. In a further letter to the respondent of 14 August 2017 the claimant advised that further to her resignation she wished to *“confirm the basis of my decision”*. That letter indicated:-

30

*“Firstly as previously indicated I was being asked to undertake duties beyond my contractual obligation, particularly I was being asked to deal with HR issues and the roll out of posts under the Pupil Equity Funding Scheme. What I was being asked to do put me in conflict*

*with colleagues in the Education Department causing a significant degree of anxiety and upset.*

5 *The final straw however was the terms of an email from Ruth Binks dated 27 June 2017 to a number of recipients which contained an instruction to me to be part of a process which sought to manipulate future numbers contrary to the terms of the PEF Scheme which would result in Council money being diverted inappropriately.*

10 *In these circumstances, I assert that the Council's duty of mutual trust and confidence towards me has been breached irreparably leaving me with no option but to resign. On the instructions of my union I have intimated a grievance prior to my resignation being effected and I look forward to hearing from you further in terms of the*  
15 *same as soon as possible". (1<sup>st</sup> inventory 113)*

167. Reference to intimation of a grievance was to an email by the claimant to Steven McNab of 27 July 2017 (1<sup>st</sup> inventory 99) wherein it was stated:-

20 *"I am invoking the Council's (Inverclyde Council) grievance procedure with immediate effect; Thursday 27/7/17 at 09:30 hours.*

*After consultation with my solicitor, I have been advised that the Council has breached the terms of my contract of employment.*

25

*Can you please confirm by close of play today that you have received this email".*

168. The email from the claimant of 14 August 2017 was acknowledged on  
30 15 August 2017 and then responded to by letter of 29 August 2017 (1<sup>st</sup> Inventory 114/115). That letter sought to address concerns but also advised that there had been no "record of a formal grievance having been submitted by you prior to leaving the Council's employment" and so there was no

grievance process instituted. No further correspondence took place between the claimant and the respondent.

5 169. The claimant then raised her Tribunal claim on 3 November 2017. The statement of claim essentially followed the terms of the letter to the respondent of 14 August 2017 including reference to the grievance which had been intimated.

10 170. In the course of exchange of Further and Better Particulars a copy of the email of 27 July 2017 advising of the intimation of a grievance was produced by the claimant and in the further exchange of information it was confirmed by the respondent that *“Steven McNab was unaware that the email had been received until the Council’s IT services located the email in Steven McNab’s junk mail after Further and Better Particulars had been received on 25 April*  
15 *2018”*.

171. Mr McNab advised in evidence that he was not aware of the email until 1 May 2018. He had instructed enquiry be made by the Information, Technology and Communications Service within the Council at end April 2017. They had  
20 returned to advise that the email had been found in his “junk” email box. He advised that he had no knowledge of the email prior to that time. He confirmed that the correct email address had been used by the claimant in the intimation of 27 July 2017. He denied deliberately ignoring the email of 27 July 2017 and that he would have been *“happy to proceed with the*  
25 *grievance”* if he had been aware of its intimation.

### **Submissions**

30 172. Each party made very full submissions for which I was grateful. No disrespect is intended in making a summary.

**For the Claimant**

173. It was submitted that the respondent had failed to create a working environment which was suitable given the depressive episode displayed by her. Emphasis was placed on the poster displayed of the former Rangers owner and denigrating conversation of her; a colleague taking orders for coded software on Amazon firesticks and accepting cash/gifts for the service with which Mr Given did not “see a problem”; offensive remark being made by a Manager Hugh Scott in the presence of others and no action taken. These matters took place January/June 2016.
174. Reference was made to the respondent’s policy (1<sup>st</sup> inventory 109 (54)) on “Creating a Supportive Environment” advising that Managers should be vigilant of the behaviour of individuals and that *“managers and supervisors are expected to act before waiting for a complaint to be registered”*.
175. The respondents had failed to support the claimant when she was off ill with stress in June 2016. She had been visibly upset as verified by Erland Voy. Mr Cameron also was concerned at the distress of the claimant around this time when she maintained she had advised that she could not *“live any more”*. Some days later it was stated that there could be no support as there was no budget and Mr Cameron required to contact others to arrange support. However despite returning to work on the 1<sup>st</sup> of July there was no letter from HR until later offering an appointment which she had cancelled.
176. Her stressful condition was confirmed in the letter from Mistylaw Medical Practice but no action taken by the Council.
177. Neither had the Council supported the claimant’s health when she had taken part in a grievance hearing in February 2017. Mr Puckrin confirmed that he was aware of her complaint of stress at that time but did not intervene with any of the day to day managers. His explanation was that he assumed the matter had been resolved by the claimant moving post.

178. Up to February 2017 the evidence was that there was no stress/risk assessment conducted for the claimant's health.

179. In taking up the PEF post she was aware that funding was ring fenced for Head Teachers. Mr Puckrin had indicated that the work involved in this post was very much a "*learning process*". While the claimant was happy to take the position her salary was effectively being funded by the Head Teachers. She accepted that her employer was Inverclyde Council but in truth she was engaged 100% on PEF work. The Head Teachers had not received as far as she was aware any copy of the job description and so they would be uncertain as to precisely the responsibilities of the claimant.

180. There was no doubt in the claimant's mind especially after the "*Town Hall meeting*" with Head Teachers that she was not to be engaged in non PEF related tasks.

181. It was not until 16<sup>th</sup> of May 2017 that she discovered she was part of other work involved in Attainment Challenge while her salary was fully paid from PEF funding.

182. She became responsible for submitting specifications regarding a counselling service. She was involved in the Scheme of Delegation work. She was responsible for contacting interview candidates after interview. She could not recall any call from HR to advise who would be the correct person to deal with those matters.

183. In effect management had failed to provide her with supervision or support from these demands. It was not the case that she had "*volunteered*" to support Head Teachers on these issues. She was simply being professional and agreeing to the demands but that put her under pressure.

184. The new job description for a Support Officer in PEF work (prepared after she had left) (1<sup>st</sup> inventory 575) made specific reference to the preparation of

*“relevant paper work relating to HR and safer recruitment for all Pupil Equity Funding matters”* which was not part of her job description.

- 5 185. It was submitted that Ruth Binks had failed to recall that the claimant had assisted in the preparation of a Committee report on placement requests whereas she was aware that she had helped staff in her lunch break so that such report could be made in time. The fact that she could not recall has created doubt about her integrity as a witness.
- 10 186. The lack of clarity over HR work led to conflict with education colleagues such as Rosemary Logan. The claimant had been told by Ruth Binks that she should make it clear that PEF matters were her domain and that had led to difficulties. She did not consider there was any professional reason why Rosemary Logan should have copied in Michael Dodson into emails at this  
15 conflict.
187. The respondent had also made a false allegation in the ET3 in accusing her of missing a deadline. Only late in the day had the respondent sought to correct their position on this matter after contrary evidence was presented.  
20
188. The Audit Scotland reports presented failed to point to any approval that *“PEF teachers”* could be swallowed into the core expenditure. There was no response to the grievance intimated by email to S McNab on 27 July 2017 3 days before her notice expired. There was no evidence to validate the  
25 assertion that the email had gone to “junk”.
189. The email of 27 June 2017 sent to Head Teachers by Ruth Binks on PEF teachers being allocated to core was not in line with the government guidance. Mark Coyle had advised that he had a PEF teacher from August  
30 2017. That contradicted the assumption by Ruth Spinks that PEF teachers would return to core.
190. The whole essence of the PEF funding was for Head Teachers to be able to impact on school performance on literacy, numeracy and wellbeing. It was

targeted at closing the poverty gap. It was advised by Ruth Binks that she had discussed with the Scottish Government her approach but there was no document to suggest that was the case and it would have been easy to obtain some evidence other than her word given the length of time taken for this case to be resolved. Regardless of funding those PEF teachers should not have been counted as core teachers. They were involved in PEF work and should have been funded in that way. That was the evidence of Mark Coyle. There was no change in the duties of the teachers mentioned by Mr Coyle.

10

191. The claimant stated that she had always been honest and transparent in her evidence and in the questions asked of witnesses but others had not shown the same integrity.

15

192. Mr McNab had not been able to describe the law around work related stress. His position was intervention would only come where it was thought there may be an issue but that did not correspond with policy.

20

193. The claimant had contacted Health and Safety Executive regarding these concerns. There appeared to be no understanding on this area by the respondent's witnesses. Health and safety matters included physical and mental health and it was evident that no procedures had been followed regarding mental health and wellbeing.

25

194. It was maintained by the claimant that she had suffered ill health due to the stress caused by the respondent's negligence. In the end the claimant was unable to cope. There was no support given to her. There was no-one to understand the health problems that she had suffered. The last straw was the email from Ruth Binks which indicated that the Council felt they could "*make everything up as they went along*".

30

**For the Respondent**

195. It was submitted for the respondent that the claimant in correspondence at the time of her resignation and in her ET1 made 3 main claims of matters leading to that resignation namely (1) requiring to perform HR work outwith her duties, (2) conflict with colleagues and (3) email from Ruth Binks of 27 June 2017 being the “last straw” relied upon.

196. Those specific reasons were sought to be supplemented by general issues alluding to alleged work outwith her role constituting excess of workload resulting in her being fearful of her mental health and alleged conflict with staff which created dissatisfaction on how she perceived she was being treated.

**Work Outwith Role**

197. This comprised an allegation that the claimant was being asked to perform HR work connected to the recruitment of a Health and Wellbeing Coach; being asked to assist in the presentation of the Attainment Challenge grant applications; asked to perform Opportunities For All grant work; completing Scheme of Delegation forms; and an allegation that she was asked to do work relating to a counselling service.

198. There were 2 categories namely (i) work which the claimant had taken on but if she had asked if she should be performing those duties then she would have been advised to refrain; and (ii) work which did fall within her role notwithstanding her evidence to the contrary.

**Human Resource Work**

199. The evidence of Mark Coyle was that the claimant put herself forward to engage in a variety of activities relating to the recruitment of a Health and Wellbeing Coach as opposed to having been specifically asked to do so.

There was no reason for Mark Coyle to believe that the claimant was volunteering to do work which fell outwith her role.

5 200. While it was questionable whether this was genuinely HR work or whether it was work that would have been carried out by the School Business Officer within the school (had the claimant not put herself forward for the task) it was accepted that this was work which did fall outwith her role. Had Craig Given or Ian Cameron been asked whether the claimant should engage in that work then they would have advised that she should not do so. The claimant's position seemed to be that she felt the need to engage because she did not consider HR were progressing work with the speed and quality that she expected. There was no encouragement of the claimant to engage in such matters. The work was not undertaken with the consent of her Managers.

10

15

201. It was submitted that the claimant was not one who was reluctant to come forward if she felt that she was being asked to perform a function not within her role. The evidence regarding the claimant complaining about attending a meeting of CMT supported the proposition that when the claimant came forward her Managers were reactive. On that occasion she was told that she should not be engaged in that meeting and she did not attend.

20

202. There was also evidence of the complaint about email exchange in the completion of a specific Scheme of Delegation form for a Council employee. That exchange (1<sup>st</sup> inventory 80) resulted in the claimant being told to do "*nothing more*" by Ms Binks when it came to her attention. (1<sup>st</sup> inventory 82).

25

203. In certain other respects the claimant did require to be involved in email exchanges regarding recruitment because it was necessary for her to know whether the costs came within the PEF budget and indeed whether the appointment fell within the rules of the Scheme. This information was necessary in her role as a Finance Officer..

30

204. The emails which refer to Ruth Binks requesting Head Teachers to let the claimant know if they wished to advertise for their own posts was not

evidence of HR work but rather someone who had a role of oversight for budgets

205. On the only occasions when the claimant objected to matters namely the  
5 completion of a Scheme of Delegation form and attending a meeting of the  
CMT then there was intervention which prevented her conducting that work.  
Otherwise the claimant did not object to any of the work in relation to which  
evidence was led and which the claimant now alleges was outwith her role.

### 10 **Attainment Challenge**

206. The position of the respondent was that this was not work which was outwith  
the claimant's role. Her role did not relate exclusively to PEF work. Her job  
description included reference to work required of her by her Manager. This  
15 work related to the Attainment Challenge and the PEF Initiative was part of  
the Attainment Challenge. There was no evidence that the claimant objected  
to performing that work. She had been involved in this work in previous  
years.

### 20 **Opportunities For All Grant**

207. Again it was submitted that this work fell within the claimant's role and  
constituted in any event a minimal amount of work.

### 25 **Scheme of Delegation Forms**

208. There was certain conflict amongst the respondent witnesses as to whether  
this was something within the claimant's role. Ms Binks and Mr Given  
considered this was something which would reasonably fall within her role. Mr  
30 Cameron considered that if the claimant had advised him of this work and  
that she had time to do it then he would not have objected; but did not  
consider it fell within her role and if the claimant had objected he would have  
intervened.

209. Mr Coyle assumed that this was part of her role and he could not recall having specifically advised the claimant to undertake this work. There was no objection forthcoming from the claimant. In any event on the one occasion in which there was an objection by the claimant Ms Binks intervened. The particular form was for a different type of post namely a “*CLD worker post*” as distinct from other education posts where the claimant completed Scheme of Delegation forms for Head Teachers.

### **Counselling Services**

210. So far as the counselling service was concerned it was necessary for the claimant to be aware of the cost of this service to ensure it was within budget. Head Teachers were interested in promoting this service within the schools. Steven Parsons had the decision making in this respect and the claimant assisted him. Her position was that he was “*missing in action*” and was concerned that the matter required to be taken forward to meet the timescales. Again she took the initiative on herself without being asked. It would appear from the evidence that had she objected then Ian Cameron may have considered that some of the work in this area was outwith her role but it was clear that the claimant had continued on this issue in May/June 2017 without any objection. In any event it was necessary for the claimant to be involved in the majority of matters relating to this initiative given the budgeting considerations.

211. In essence therefore evidence from the respondent was that the only work which the claimant was doing which was outwith her role was done on her own initiative without dissent or objection. None of the examples of work which the claimant was engaged in would represent a breach of contract.

### **Ruth Binks’ email of 27 June 2017**

212. What was proposed in this email was simply that any posts funded through PEF must be additional to those required to fulfil the pupil/teacher ratio and the claimant’s concerns on this were wholly misconceived.

213. The evidence was that the Scottish Government were aware of what was being proposed and took no issue with it. The inspection report of October 2018 by Education Scotland (1<sup>st</sup> inventory 547) specifically relates to the PEF Scheme and Attainment Challenge and gave the respondent a clean bill of health. Audit Scotland were involved in that inspection. The claimant reported the respondent by email to Audit Scotland (1<sup>st</sup> inventory 94) but there was no evidence of any allegation of impropriety being upheld.

214. The explanation given by Ruth Binks on the necessity to maintain pupil/teacher ratio meant that there was nothing untoward in identifying teachers who were to be funded from PEF to be funded from core funding. The process was agreed with the Scottish Government. There were simply not suitable teachers to employ core, supernumerary and PEF teachers from the applications made. Until the October 2017 break all teachers would be funded from core funding. There was nothing improper in the process. The accusation that the use of panel interviews was there to deliberately “*under recruit*” core funded teachers was unfounded.

## 20 **Conflict with Colleagues**

215. It was submitted there was no evidence to support the assertions made by the claimant of difficulties with colleagues. The 2 examples given were Michael Dodson and Rosemary Logan. It was asserted in the Tribunal pleadings that Erland Voy had overheard conversations denigrating the claimant between those 2 individuals. However Mr Voy recalled no such conversation and both Michael Dodson and Rosemary Logan gave evidence that any interactions with themselves or with the claimant related to professional matters. The claimant in cross examination did not put any alleged conversation to Mr Voy.

216. There was disagreement in professional terms as to how to account for £55,813 in the Attainment Challenge accounts. That was an accounting

issue. There may have been disagreement as to how to treat that matter but it was not personal to the claimant.

217. The email exchange between the claimant and Rosemary Logan may have  
5 been robust but it was against the background of the extent of their  
respective roles and responsibilities.

### **Miscellaneous Matters**

10 218. The claimant had not alleged anywhere in her claim that she resigned for any  
matter connected with the alleged sale of Amazon firesticks by Michael  
Dodson; the allegation that there was a picture of the former Ranger Football  
Club Chairman in Michael Dodson's office; the allegation that Michael  
Dodson had expressed a desire to abuse Craig Given because of the football  
15 team his wife allegedly supported; or the allegation that Hugh Scott had made  
inappropriate remarks. Those issues should be disregarded.

219. In any event there was no resignation in response to any of these incidents  
which occurred apparently between January/June 2016. No complaint was  
20 raised or report made on any of these matters at the time.

220. Again the claimant in her claim or in correspondence at the time of  
resignation made no issue that PEF posts were referred to the Corporate  
Management Team. In any event there was nothing irregular in that matter.  
25 It was the practice of the Council for new posts to be submitted to that Team.  
The PEF National Operational Guidance (1<sup>st</sup> inventory 15) states that  
additional staff being employed schools should work with the local authority to  
ensure all remits and specifications were tied to the aims of the intervention  
and "*Head Teachers need to take full account of local HR policies and*  
30 *procedures ...*". The practice here was for new posts to be referred to CMT  
and was not inappropriate. In any event none of the posts were rejected.

221. Neither was it a matter of concern for the claimant when she resigned that  
there had been a breach of any duty by the Council on stress related issues.

There was no concern raised by the claimant about any delayed support being given by HR. Once an appointment was arranged with Occupational Health she cancelled that appointment. Mr Cameron acted quickly when he realised HR were not progressing matters as quickly as he expected. So far  
5 as the letter from Mistylaw Medical Practice was concerned Mr Cameron knew nothing about symptoms reported from February 2017 and March 2017. He was unaware of any stress issue when the claimant commenced the PEF post. He was not involved in the grievance in February 2017. Mr Puckrin's evidence was that the stress of the claimant at that time was related to the  
10 post she was in at that time and the move to a different post was to remove that stressor.

222. Neither was there any substance in a complaint that the Council had a duty to individually risk assess each employee. Mr McNab put forward no  
15 suggestion to suggest that the respondent's legal and or internal obligation in respect of risk assessments were not being met or that there was any concession by Mr McNab to that effect. His evidence was that individual or group risk assessments were carried out where appropriate. That did not constitute evidence or concede that the respondents did not appropriately  
20 assess risk. There was nothing in the claim or in the evidence from the claimant which would suggest that she resigned as a result of the alleged manner in which the Council carried out risk assessments.

223. It was also submitted that there was no relevance in the "missed deadline" in  
25 the Attainment Challenge return on 29 June 2017. The claimant did not resign because of any such allegation. It was a matter which arose within the ET3 which initially incorrectly detailed the position on this forecast. There was no attempt to knowingly mislead the claimant or the Tribunal. The evidence of Mairi McFarlane was that there was a deadline for the financial  
30 forecast to be lodged by 27<sup>th</sup> June 2017 and to meet that deadline financial information required to be given in advance. In the event that the claimant sought to suggest Ruth Binks had falsified evidence that the claimant had missed the deadline then that was incorrect. She had acknowledged her error in this matter.

**Legal Submission for respondent**

224. This was a “last straw” case and the position of the claimant was that she resigned in response to a series of breaches of contract or a course of  
5 conduct by the respondent which taken cumulatively amounted to a breach of the implied term of trust and confidence. Reference was made to ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 and the approach taken by Lord Underhill at paragraph 55. The last straw in this case was the email of 27 June 2017 sent to the claimant and others by Ruth  
10 Binks. It was submitted that waiting 3 days to resign and then doing so with one month’s notice meant that the claimant affirmed the contract.

225. In any event it was submitted that the email was entirely innocuous and appropriate and constituted no breach of contract at all and added nothing to  
15 any earlier conduct.

226. Neither was that email a part of a course of conduct which would amount to a repudiatory breach of the implied term of trust and confidence outlined in  
***Malik v Bank of Credit and Commerce*** [1998] AC 20 and the comments  
20 within ***Omilagu v Waltham Forest London Borough Council*** [2004] EWCA Civ 1493 paragraph 20/22.

227. It was submitted that in line with those authorities if the later act (the last straw) upon which a claimant seeks to rely is entirely innocuous it is not  
25 necessary to examine earlier conduct which has been affirmed.

228. In any event the previous conduct in this case is not made out as a repudiatory breach of contract. There was no vendetta or inappropriate  
conduct towards the claimant by Rosemary Logan or Michael Dodson. Any  
30 differences were on professional issues. In any event the correspondence with Rosemary Logan was between 4/8 May 2017 and resignation did not occur until 30 June 2017 with notice.

229. No grievance was raised by the claimant prior to her resignation on any of these issues and in the whole circumstances the respondent invited the Tribunal to find the claimant was not constructively dismissed.

5 **Discussion**

**The Relevant Law**

10 230. The claimant claims that she has been constructively dismissed as described in section 95(1)(c) of the Employment Rights Act 1996 (ERA). This states that there is a dismissal where the employee terminates the contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

15 231. The case of ***Western Excavating (ECC) Limited v Sharp*** [1978] ICR 221 makes it clear that the employer's conduct must be a repudiatory breach of contract namely that it is "*a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the terms of the contract*". It is clear that it is not sufficient that the employer's conduct is merely unreasonable. It must amount to a material breach of contract giving the employee entitlement to resign without notice because of the breach (even if the employee gives notice).

20 232. The employee then must satisfy the Tribunal that it was this breach that led to the decision to resign and not other factors.

233. If there is a delay between the conduct and the resignation the employee may be deemed to have affirmed the contract and lost the right to claim constructive dismissal. That means the contract continues and there is no dismissal, constructive or otherwise. If an employee delays too long before resigning in response to a breach then they may waive that breach.

234. In this case the term of the contract that the claimant relies upon is that commonly called "trust and confidence". This was defined in ***Malik v Bank of***

***Credit and Commerce International SA (in liquidation)*** [1997] IRLR 462 where Lord Steyn said that an employer shall not “*without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*”.

5

235. In this context the employer’s intent is irrelevant if the behaviour is likely to destroy or seriously damage the relationship. There does not need to be any kind of negative motive. However although an employer’s intention is irrelevant to the question of whether there has been a breach of trust and confidence general intentions are relevant because it may show whether the employer intended to abandon or refuse to be bound by the terms of the employment contract. The Tribunal apply an objective test to ascertain whether there has been a constructive dismissal.

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236. In this case the claimant contends that after a series of events it was one final act which pushed her over the edge and made her resign. This last act has been referred to as “the last straw”. The whole series of events taken together can amount to a breach of the relationship of trust and confidence. Just as the final straw which breaks the camel’s back is not heavy on its own the last event may not be very serious. It does not have to be weighty enough to tip the balance on its own but needs to add something to the scales so that it contributes towards the balance tipping. The test is whether the action of the employer taken as a whole, over time, demonstrates that it did not intend to be bound by the terms of the employment contract either express or implied.

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237. However the last straw has to add something to the breach however insignificant. A perfectly legitimate act by an employer cannot be the last straw (***Waltham Forest v Omilaju*** [2005] IRLR 35). In that case the Court of Appeal set the following guidelines about the last straw namely:-

30

- The last straw must not be completely trivial

- It does not have to be the same character of incident as earlier ones in the series
- 5       • The last straw does not have to be unreasonable or blameworthy conduct on the part of the employer by itself, although in most cases it will be
- 10       • A completely harmless act by the employer cannot be the last straw even if the employee honestly but mistakenly thinks it undermines their trust and confidence in the employer

238. In ***Williams v Governing Body of Alderman Davis Church in Wales Primary School*** [2020] IRLR 589 the EAT held that if the last straw is entirely innocuous that does not necessarily thwart a successful constructive dismissal claim. The previous poor conduct of the employer is relevant where the breach has not been affirmed. It was said:-

20       *“So long as there has been conduct which amounts to a fundamental breach (the breach has not been affirmed), and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent, conduct has also contributed to the decision to resign.”*

239. While an innocuous act therefore cannot be a last straw it will not negate the effects of previous breaches providing the breaches have not been affirmed.

### **Reasons for Resignation**

240. There was difficulty in assessing the particular events upon which the claimant relied when it came to her resignation on 30 June 2017. Certainly at the time of her resignation she gave no written confirmation of any reasons. Once she had intimated her resignation her evidence was that she had a conversation with Craig Given who asked her why she was leaving and she complained about Michael Dodson. At that point Mr Given indicated he had

*"no problem with Michael"* and the claimant indicated that reinforced her decision. She accepted that Mr Given had asked whether a meeting with Mr Dodson would help.

5 241. A further conversation took place with Ruth Binks who asked if the claimant  
*"wished to go down this road"* but without giving any reasons the claimant  
advised that she wished to do so.

10 242. The claimant had intimated a grievance to the respondent on 27 July 2017  
with the grounds being stated that she had been advised that the respondent  
had *"breached the terms of my contract of employment"* but no detail was  
given.

15 243. The information that the claimant supplied both to the respondent and Audit  
Scotland on *"whistleblowing"* dated 27 and 28 July 2017 indicated that issues  
involved the respondent being non-compliant with *"SGPF funding and the  
fraudulent method of calculating pupil teacher ratio numbers"* and that the last  
straw was the *"email on 27/6 notifying all Head Teachers that I would be part  
of this process"* which *"undoubtedly caused me to resign"*.

20 244. The letter of 14 August 2017 from the claimant sought to *"confirm the basis of  
my decision"* on resignation and stated that the reasons were (1) being asked  
to undertake duties beyond her contractual obligations, (2) that put her into  
conflict with her colleagues in the Education Department and (3) the final  
25 straw being the email from Ruth Binks of 27 June 2017 which in the  
claimant's eyes contained an instruction to her and others to be part of a  
process which resulted in *"Council money being diverted inappropriately"*.

30 245. Also the initiating claim within the ET1 claimed that at the time of the  
claimant's appointment there was no *"simultaneous appointment of an HR  
resource to deal with PEF requirement"* and as a consequence the claimant  
had to fill in this resource shortfall and was therefore asked to work outwith  
the terms of her contract. It was stated that placed her in conflict with  
colleagues in the Education Department which caused her anxiety and upset.

Again the email from Ruth Binks of 27 June 2017 was identified as the “final straw” as an *“instruction to the claimant to be part of a process which sought to manipulate teacher numbers contrary to the terms of the”* PEF Scheme. It was maintained that instruction was a material breach of the respondent’s duty of mutual trust and confidence leaving her with no option but to resign.

246. The extensive Further and Better Particulars called upon and responded to by the parties sought to elaborate on these issues.

247. In the Hearing itself the claimant sought to expand on matters which were identified within the conversations she had at time of resignation; letter from her solicitor outlining the basis of resignation and the written pleadings. Under reservation as to relevance I allowed evidence to be led on these matters. It is first necessary to consider which issues should or could be taken into account as contributing to the claim of constructive dismissal.

### **Complaints Regarding Colleagues’ Behaviour**

248. There were particular matters raised with certain witnesses. It was stated that Mr Dodson sold Amazon firesticks in the office; displayed a picture of a former Rangers Football Club Chairman which was described as “sectarian” and had stated that he would want to punch a superior because of the football team his wife allegedly supported. A further allegation was made that a very offensive remark was made by a separate work colleague.

249. There was some ambiguity regarding the timing of events but the conclusion is that these acts all took place between January/June 2016 and at least a year before her resignation. There was no complaint made by the claimant at the time and she continued working without objection through to 30 June 2017. These were not matters which were raised within her letter of 14 August 2017 from her then advisor outlining the basis of her decision for resignation or contained within the ET1 or subsequent further particulars. I did not find that these were matters which even if made out could be

regarded as matters which were in the mind of the claimant as reasons for resignation.

5 250. From the evidence I was not in any event satisfied that there was any extensive trading in Amazon firesticks. There were certainly favours for colleagues who recompensed Mr Dodson but it was not clear just how this affected the claimant and might contribute to breach of the implied term. While display of football club posters might be inadvisable I did not consider the evidence was sufficient to say that there was sectarianism at play. There  
10 was insufficient evidence to make any finding that any form of threat (jocular or not) was being made against a colleague on account of his wife's support of a football team.

15 251. The evidence regarding an offensive sexist remark being made by a colleague was stronger and credible. Clearly that was highly inappropriate and be seen to create an offensive atmosphere. In terms of the respondent Harassment and Victimisation policy (1<sup>st</sup> inventory 109(54)) managers are expected to act before waiting for a complaint to be registered in relation to inappropriate comment. It was stated that Mr Cameron had heard this  
20 comment but took no action. So there were two separate matters (i) that a grossly offensive comment was made and (ii) that a manager heard it but took no action. However for the respondent to have breached the contract I consider that it would still have been necessary for complaint to have been made on those two matters. If the respondent did nothing to investigate, or  
25 failed to investigate adequately, or found either or both that the comment had been made and the manager had heard it and took no action, and the respondent failed to take any action against the perpetrator and/or the manager then that may found breach of contract.

30 252. But no action was taken by the claimant at the time and there was no reference to this matter at all in any conversation with superiors when the claimant decided to resign; in correspondence thereafter; or in the ET1. Neither did the matter appear within the grievance raised by the claimant in

early 2017. So even on this serious issue I could not find that it was in the mind of the claimant when she came to resign.

5 253. Even if these were matters in the mind of the claimant and contributed to resignation if there is a breach of contract by an employer an employee can waive (or ignore) the breach. In waiving a breach an employee will “affirm” the contract showing they intend to continue in employment regardless. In this case I consider that the claimant acted in a way which showed that she considered the employment contract to be continuing. Subsequent to these 10 matters the claimant continued in employment for over a year; sought to and did change role to the Environment and Regeneration Team; entered into a grievance process in respect of matters which arose there; then went onto her further role with Education Department and at no time made any complaint about these matters.

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254. While delay on taking any action as a result of a breach will not necessarily affirm an employment contract the delay here and lack of any complaint implied affirmation in respect of these matters.

#### 20 **Referral of Posts to Central Management Team**

25 255. The claimant pointed to documents which demonstrated that the CMT were being notified of the appointment of “PEF teachers” and issuing approval which it was claimed was contrary to the PEF framework. Her position was that CMT should have nothing to do with the appointment of PEF teachers as 30 that was within the domain and province of the Head Teachers. Again this formed no part of the claimant’s claim of breach of the implied term when she came to resign; in the correspondence thereafter; or in the pleadings before the Tribunal and I did not consider that formed part of her reason for resignation.

256. Her position was that she became aware of the involvement of CMT when she was asked to make a presentation to them about the appointments which were envisaged. She objected to that. It would not appear the objection was

that CMT should have nothing to do with this matter but rather that it was not her role to make that presentation. Her superiors (Ruth Binks and Ian Cameron) agreed and she was not required to attend. While aware of the process it would not appear that she made any particular allegation that it had formed part of her reason for resignation until the hearing and I did not consider it could form an issue to be taken into account.

257. Even if it was the evidence was that this practice of notification and approval of appointments by CMT the had been in place for some considerable time (2<sup>nd</sup> inventory 18/21) and could be regarded as a local policy. The National Guidance for the Pupil Equity Fund advises that in appointments made Head Teachers require to take “*full account of local HR policies and procedures ...*”. Accordingly I did not consider that this was a breach of the guidelines and so not a matter which could be regarded as contributing to a breach of the implied term of trust and confidence. It would not appear that the Head Teachers as spoken to by Mark Coyle had any issue with CMT approving “*PEF posts*”. Also there was no evidence that any appointment proposed by a Head Teacher was blocked which might show actings without a proper cause.

258. A point emphasised by the claimant was that certain of these posts were in terms of documents that she received put on “*hold*” until subsequently approved by CMT. She considered that was interference in the process against the terms of the PEF framework. However it would not appear she received the documents which pointed to that matter until she made her Freedom of Information request on 24 April 2018 which was responded to on 24 May 2018 (1<sup>st</sup> inventory 104/108). The documents received at that time related to her request for information on the actings of CMT in the approval of PEF posts. That information came well after resignation and so could not have been in her mind when resigning.

**The claim that the claimant had “missed a deadline” in relation to the Attainment Challenge return.**

5 259. A distinct issue which arose was the contention within the respondent’s pleadings that the claimant had “*missed a deadline*” in a return to the Scottish Government as part of the Attainment Challenge funding. This arose out of the ET3 response by the respondent (1<sup>st</sup> inventory 159).

10 260. In the course of the hearing the respondent sought to amend that assertion. The claimant maintained that the original formulation of the response was a deliberate attempt to mislead. Against the background of her contention that there was manipulation at play in the PEF matter I considered it appropriate that evidence be given on the circumstances which led to the original paragraph being inserted within the response from the respondent. After  
15 hearing evidence I was satisfied that there was no deliberate attempt to mislead but rather lack of proper enquiry and attention by Ruth Binks which had led to the original assertion being framed in the manner it was in the ET3.

20 261. Given that there was an allegation against the claimant within the ET3 response that she had failed to keep to a deadline with the Scottish Government it was inevitable that there would be considerable evidence on this issue. However it was not an allegation that was made against the claimant prior to her resignation. The offending paragraph appeared after her ET claim had been lodged and while incorrect in its original formulation it was  
25 not an allegation that was being made prior to resignation and so could not form part of the reason for resignation.

30 262. There is a separate issue arising out of the Attainment Challenge namely the claimant’s contention that she should not have been asked to be involved in that work at all as it was outwith the terms of her contract. That is a matter which requires to be dealt with but on the issue of the respondent’s allegation that she had missed a deadline in relation to this Challenge in her return to the Scottish Government it was not a matter which could contribute to her resignation. Suffice to say the assertion by the respondent was not true.

## Health and Safety and Stress Management

263. A matter raised by the claimant in evidence was that the respondent had  
5 failed in their health and safety obligations towards employees. This formed  
a mixture of issues relating to her absence through stress in 2016.

264. One theme was that because of that episode of stress her managers should  
have realised that she was vulnerable. Accordingly when it came to  
10 performing the duties in her role as PEF Finance Officer there should have  
been a greater awareness of work responsibilities. That is a background  
matter which related generally to her claim in respect of events through  
May/June 2017 and is dealt with in that context.

15 265. However separately it was contended that the respondent had failed in their  
obligations because each employee of the Council should be risk assessed .  
The position of the respondent was that they would risk assess where  
appropriate but they did not consider they had an obligation to assess each  
and every individual employee whether or not they considered that there  
20 were any signs that individual might suffer from stress.

266. This matter arose out of questions asked of Steven McNab under reference  
to the general aims of the Council to ensure that up to date policies and  
procedures were in place on health and safety law and those were properly  
25 applied.

267. The position of Mr McNab was that if there were indications of stress then a  
risk assessment would be conducted but it would not be a practice for each  
and every individual employee to be assessed without a trigger such as  
30 absence through stress/anxiety or a complaint of stress/anxiety. The  
claimant's position was that this was not "*what the law actually states*".

268. There was produced the HSE guide on “Work Related Stress What The Law Says” (1<sup>st</sup> inventory 622) which document seeks to advise employers as to how to successfully manage and prevent stress at work.

5 269. The advice indicates certain preventative measures that can be taken in identifying a problem and advises:-

10 *“The law requires you to take action when harm to your employee’s health is “foreseeable”. As an employer you are entitled to expect that employees can cope with the normal pressures of the job unless you know of a particular problem. However there are a number of factors that will help determine whether harm is foreseeable or not including:-*

- 15
- *Is the workload much more than is normal for the job?*
  - *Are the job demands unreasonable when compared with the demands made of others doing comparable work?*
  - 20 ● *Are there signs that employees are suffering from stress, such as prolonged or repeated instances of absence?*
  - *Are there any non-work factors that may be contributing?”*

25 270. This approach was in line with the “Legal Framework” identified in the respondent Stress, Mental Health and Wellbeing Policy document (1<sup>st</sup> Inventory 109 (7)) It also appeared in line with that taken by Mr McNab whose position was that he was aware of the “*need of assessment for risks – for individuals where have evidence of risk to risk assess*” and “*if concerns raised do risk assessment – in general seek to ensure stress minimised – will refer to OH etc if need support on stress or mental health – have done questionnaire to teachers re stress – that repeated elsewhere and got information on that – did employee survey and do ask questions around stress/bullying re managers*”.

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271. From this evidence I was not able to make a finding that the respondent failed to carry out duties under health and safety law in carrying out an individual assessment for each employee as a matter of course which appeared to be the suggestion being made.

272. In any event again a failure by the respondent to comply with health and safety law by not conducting a risk assessment for each individual employee was not any part of the reason for resignation at the relevant time in conversation with her superiors; correspondence with the respondent subsequent to resignation or in the initiating claim to the Tribunal.

273. Also the evidence suggested that at no time had any individual risk assessments been conducted for employees as a matter of course and the claimant had never made any objection to that matter in her years of service and continued to work without complaint that there should be such assessments conducted. Again I considered that even if there had been a breach in this respect the claimant had affirmed the contract.

## 20 **The Claimant's Grievance**

274. On 27 July 2017 the claimant sent an email to Mr McNab of the respondents (1<sup>st</sup> inventory 99) stating that she wished to invoke the grievance procedure with immediate effect. She indicated that she considered the Council had breached the terms of her contract but without specifying the particular grounds.

275. Mr McNab's position was that this email was not seen by him until 1 May 2018 after it was alleged that it had been sent as of 27 July 2017 within the ET pleadings. At that time a search was made within the IT systems and found within Mr McNab's "junk mail". I had no reason to disbelieve that explanation. In any event this could not have formed part of the claimant's reason for resignation as it was an email sent subsequent to the resignation of 30 June 2017. It was sent within her notice period but failure to respond to

the grievance request could not have formed part of her reason for resignation as no such request was made prior to 30 June 2017. Its only importance could have been support for the claimant's view that the respondents did not take employee grievance requests seriously. However  
5 the evidence was that the claimant had raised a previous grievance in respect of her position in Environment and Regeneration and that was processed in terms of the grievance procedure to what would appear to have been a successful outcome for the claimant.

### 10 **Lack of Support on Absence due to Work Related Stress**

276. This issue related to the claimant's absence on 1 June 2016. At that time she was off work for 4 weeks, the diagnosis being "*work related stress*". The letter from Mistylaw Medical Practice (1<sup>st</sup> inventory 57) advised of the  
15 information given by the claimant.

277. In a telephone call at that time with Mr Cameron it was evident that the claimant was distressed. Mr Cameron made contact with the HR Department but was surprised to learn that they had "*no budget*" for a referral for any  
20 support. He did not consider that acceptable and escalated the matter and was advised that support would be put in place.

278. That support was not immediate. A letter from the GP practice indicates that the claimant was again seen on 29 June 2016 and at that time "*reported  
25 feeling much better*". The letter went on to say she was "*due to return to work the following week and would be starting in her new department. Unfortunately she had not received any contact from the HR Department and was disappointed about that*".

30 279. By letter of 27 June 2016 (apparently not received till after the GP appointment of 29 June) the claimant was advised that an appointment had been arranged for her with the respondent's Occupational Health Medical Advisor on 11 July 2016. The purpose of that appointment was to establish whether "*Inverclyde Council can assist you in regaining your health and re-*

*establishing regular attendance at work*". That appointment was cancelled by the claimant.

5 280. The respondent did not respond promptly to the absence of the claimant through work related stress as the offer of investigation/support was not offered until around the expiry of the first Statement of Fitness to Work. However they did not fail to make the offer as an appointment was arranged quite shortly thereafter.

10 281. The letter from the claimant's GP practice indicated that at that time she was feeling better. Her complaint on this issue was that having suffered from work related stress more should have been done to support her thereafter. Again she made no complaint about lack of support at that time or thereafter. She continued to work. She made no complaint about this particular matter  
15 when she raised a grievance in February 2017. She did not claim that this issue was her reason for resigning when she spoke to her superiors end June 2017; or refer to the matter in correspondence in August 2017 or in the Tribunal pleadings. I did not consider in those circumstances that the claimant had in mind this issue when she came to resign end June 2017.  
20 Even if it was I did not consider that this matter constituted breach of contract in that while support was not immediately forthcoming there was investigation/support being offered and there was no indication that support would not have continued had the claimant attended the first appointment. Even if there was a breach of contract I would have considered that the  
25 claimant had affirmed the contract by making no complaint at the time and continuing to work.

### **Failure to Support Health when submitted Grievance**

30 282. The claimant submitted a grievance which in terms of the Stage 2 report (1<sup>st</sup> inventory 579/581) related to her volunteered move to the Environment and Regeneration Team and the subsequent placement within Facilities Management. It was indicated within that grievance report that the claimant considered *"no support or guidance offered to resolve fundamental issues*

*within the facilities management post”* and that this had created stress and that had not been dealt with in the Stage 1 outcome.

5 283. The letter from the claimant’s GP indicates that she was seen again on 27 February 2017 indicating that she was under *“a lot of stress at work due to changing position. In addition a couple of her friends had recently been diagnosed with cancer”*. She was diagnosed certain medication at that time and a review was conducted on 14 March 2017 when her medication was continued.

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284. However subsequent to the grievance hearing the claimant was offered and accepted the post of Finance Officer - PEF. Mr Puckrin’s position was that that post having been offered and accepted there was no need to take any further action on stress related issues as the source of stress being the appointment within Facilities Management had been removed. The next 15 appointment with the claimant appeared to be on 18 July 2017 wherein it was stated that the claimant *“reported that her mood and energy levels were greatly improved. She was feeling confident to take decisions and was about to leave her job. She had a few new job offers in place”*.

20

285. The GP letter would not support any continuing issue with stress for the claimant between March 2017 and July 2017.

286. From the terms of the grievance report the stress experienced by the 25 claimant at that time related to issues within the Facilities Management post. It is clear from the grievance outcome that the claimant was no longer to be involved in that position. Her grievance that she should not have been in that team was upheld. To resolve the grievance one of the proposals was to arrange to have the Facilities Management element removed from the claimant’s remit. As it turned out the claimant accepted the alternative post 30 and it did seem reasonable of Mr Given to consider that the source of stress was removed and there was no need for a further report on account of stress. Indeed that chimes with the letter from the GP practice which indicates no further concerns from March 2017 on stress related issues.

287. Again this was not a matter raised by the claimant when she came to resign or in the correspondence in August 2017 or in the pleadings. She made no complaint of lack of support in February/March 2017 beyond the grievance outcome. In those circumstances I considered (a) it was not a factor in her resignation and did not contribute to the course of conduct (b) on its own it was not a breach of contract or an act that could contribute to a breach of contract and (c) that in any event she had continued to work in accepting the new role which she was “happy and excited” about and affirmed the contract.

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### **Issues relevant to alleged breach of implied term**

288. I considered that the remaining issues which could be founded upon by the claimant in her case of breach of the implied term did fall within the 3 main categories of (1) requiring to do work which she maintained was outwith her contract, (2) conflict with colleagues and (3) the email from Ruth Binks dated 27 June 2017 being the last straw relied upon. I accept that course of conduct should be seen against the background knowledge of the respondent that there had been work related stress experienced by the claimant in 2016/early 2017. Albeit the claimant had shown herself to be a dependable and capable employee in previous assessments that vulnerability would have an impact on workload issues.

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289. In *Harpreet Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 it was stated that in cases of the “last straw” it was sufficient for the Tribunal to consider (i) the most recent act (or omission) on the part of the employer which triggered resignation, (ii) had the claimant confirmed the contract since that act, (iii) if not, was that act on its own a repudiatory breach, (iv) if not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts or omissions which viewed cumulatively amounted to repudiatory breach of the *Malik* term and (v) did the employee resign in response (or partly in response) to that breach.

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290. It is then necessary to consider the act complained of as the “final straw” to ascertain if that (in line with **Omilaju**) is entirely innocuous on the part of the employer in which case it cannot be the final straw or does it contribute (however slightly) to the breach of the implied term of trust and confidence.

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#### **Email from Ruth Binks of 27 June 2017**

291. Considerable evidence was heard on this matter. It was clear that the claimant regarded this email as sinister in its terms. The letter of 14 August 2017 outlining the basis of her decision to resign referred to this as the “final straw” which she believed contained an *“instruction to me to be part of a process which sought to manipulate future numbers contrary to the terms of the PEF Scheme which would result in Council money being diverted inappropriately”*. Her “whistleblowing” complaint to Audit Scotland of 27 July and 2 August 2017 (1<sup>st</sup> inventory 93) referred to the *“fraudulent method of calculating the pupil teacher ratio numbers”* and that the last straw for her integrity was the email which indicated she would be *“part of this process”*.

292. However from the evidence I did not consider that concern was not well founded. The explanation from Ruth Binks contradicted that sinister interpretation. The email concerned primary schools. The key principles of the Guidance issued under the umbrella of the Scottish Attainment Challenge (1<sup>st</sup> inventory 13/18) indicated that *“Head Teachers must have access to the full amount of the allocated Pupil Equity Funding”*. That funding was to enable schools to deliver *“activities interventions and resources which are clearly additional to those which were already planned”*. It was also stated under *“Staffing”* that:-

*“Any teachers recruited through Pupil Equity Funding will be excluded from the authority’s contribution to any national teacher numbers and/or ratio commitment, which means it is essential to fill core staffing posts first before recruiting additional teachers”*.

293. The Offer of Grant (1<sup>st</sup> inventory 22/29) also contained a condition that teachers funded through Pupil Equity Funding would be additional to those which contributed to the respondent's pupil teacher ratio commitment.

5 294. The evidence was that a census was conducted in a week in September to determine the pupil/teacher ratio for schools. The respondent's pupil/teacher ratio had been determined on a 2015 census and the figure was repeated in the Scottish Government request to the respondent (along with other Councils) to maintain the pupil/teacher ratio in that census return. In  
10 discussion with the Government and as agreed that meant the respondent would employ more "*core funded teachers*" for August 2017 than were necessary. Those additional "*supernumerary teachers*" were to be utilised as the Head Teacher saw fit and as the year unfolded cover for staff shortages (departures, illness, maternity leave, part time working and the like). Head  
15 Teachers welcomed the additional numbers of teachers being paid from the core budget as they could help with issues of literacy and numeracy. The "*supernumerary teachers*" only applied to the primary school complement.

295. The recruitment process commenced May 2017 based on the pupil/ratio  
20 figure that was agreed with the Scottish Government. It was necessary for the authority to reach that level of core teaching numbers to utilise the core budget. That was exclusive of any requests for teachers funded by PEF. If an authority did not meet the pupil/teacher ratio then they would be subject to a financial penalty from the Scottish Government.

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296. The respondent was aware of the number of teachers they would require to employ to meet the pupil/teacher ratio for 2017 and also the number of teachers funded by PEF as requested by the Head Teachers. As a result of the interview process sufficient offers were made to cover the core  
30 pupil/teacher ratio and also some Pupil Equity funded teachers. However there was a drop off in teaching numbers in that certain probationers failed; some teachers pulled out; others accepted other posts and left and so in June 2017 it was found that rather than there being sufficient core funded teachers to meet the pupil/teacher ratio there was a shortage. In the primary

school environment the duties of teachers whether they were funded through core budget or by PEF were interchangeable.

5 297. The evidence was that certain criteria required to be met by candidates for posts as agreed with the Head Teachers. In the interviews which were conducted all those who met the criteria were offered posts. Those who did not meet the criteria were not offered a position. In the Freedom of Information request made by the claimant subsequent to resignation she asked how many teachers were interviewed centrally for the start of August 10 2017 academic year and the response was that 104 teachers were interviewed and 82 teacher posts were offered (being those who met the criteria). Of the posts offered 52 teachers started in August 2017 (1<sup>st</sup> inventory 108/109).

15 298. Accordingly the email of 27 June 2017 was to advise teachers that in order to maintain the pupil/teacher ratio the posts intended to be funded from Pupil Equity Fund would be paid out of core budget until the October 2017 school holiday.

20 299. Where the email stated "*This means if you have allocated some of your PEF funding to basic teacher you should expect an underspend*" it meant that the PEF budget would not be used for those teachers who were to be utilised within the core budget to meet the pupil/teacher ratio.

25 300. It was also confirmed that the Head Teacher had no issue with the proposal outlined in the email of 27 June 2017. That was the evidence of Mark Coyle who sat on the interview panel for the selection of teachers in respect of the academic year beginning August 2017. He confirmed that the "*panel graded the applicants*" and that panel interviewed both for core budget or PEF funded teachers. He confirmed that the priority was to find core funded 30 teachers. He explained that he was happy that there would be additional money to be spent from the PEF budget to obtain other resources subsequent to the email of 27 June 2017.

301. He explained that at the beginning of term in August 2017 he had one teacher funded by Pupil Equity but cover for maternity leave was required from November 2017 and that individual then was funded out of the core budget. He did not consider there was anything in the grant which meant that he could not use teachers in his school for *“any duties I saw as being needed”* and had no issue with teachers being funded from the core budget to meet the pupil/teacher ratio. I did not consider that individual position contravened the principle of the respondent requiring to recruit core funded teachers to meet the pupil/teacher ratio before hiring PEF funded teachers.
302. Albeit a complaint had been made to Audit Scotland about this matter there was no evidence that complaint was upheld. Education Scotland had inspected the respondent in the week commencing 30 April 2018. HM Inspectors and associates from education authorities working in partnership with Audit Scotland evaluated the education services provided by the respondent to raise attainment and narrow the poverty related attainment gap. That report indicated that *“Inverclyde’s arrangements for the ongoing financial monitoring of Scottish Attainment Challenge and Pupil Equity Fund spending are sound. Robust monitoring and reporting arrangements ensure that the Education and Communities Committee, Education Service and Head Teachers have regular oversight of how and where the funding is being spent”* (1<sup>st</sup> inventory 562). Also it was stated that one of the strengths of the respondents was *“robust self evaluation, supported by strong strategic governance ...”* (1<sup>st</sup> inventory 564). Ruth Binks explained that in the inspection process the issue of satisfying core budget funded teachers in the first instance to meet pupil/teacher ratio was agreed as the correct way to proceed before utilising PEF. The report itself was not specific on that aspect but I accepted the evidence from Ruth Binks.
303. The annual Audit Report for 2017/18 in respect of the respondent along with the audited accounts (1<sup>st</sup> inventory 400/532) contained no issue regarding teachers originally intended to be funded from PEF being taken into core budget to maintain pupil/teacher ratio.

304. From this evidence I could not find that there had been improper manipulation or fraudulent activity in the proposal within the email of 27 June 2017. The purpose of the email arose as it had not been possible to employ enough teachers to maintain the necessary pupil/teacher ratio out of core funding. As  
5 it was necessary for the authority to maintain that figure then those who were to be funded from PEF funding should be taken into core budget funding until the October break. Subsequently it was possible that some may be transferred from core funding to PEF funding depending on the availability and recruitment of teachers. The use of panel interviews was maintained by  
10 the claimant as a device to deliberately under recruit “core funded” teachers so that a financial saving could be made but the evidence from Mark Coyle was that the Head Teachers agreed to proceed by way of panel interview to save time and there was no separate panel interviews for those teachers who would be funded from core budget than those who were PEF funded.

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305. In that respect the “last straw” founded on by the claimant was a legitimate act by the employer and could not be the “last straw”. In *Omilaju* it was stated that while a last straw does not have to be unreasonable or blameworthy conduct it cannot be a completely harmless act by the employer  
20 even if the employee honestly but mistakenly thinks it undermines their trust and confidence in the employer.

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306. In this case I accept that the claimant may have believed that there was untoward acting by her employer but consider that was misconceived. Prior  
to resignation it would not appear she asked for any explanation of the email from Ruth Binks to get a better understanding of the context or the circumstances which had arisen. It would appear she took a view on the propriety of the acting. As the matter was explained in the course of  
evidence I did not find that there was any foundation for the belief by the  
30 claimant that in some way either Head Teachers were being misled or deceived or that there was improper use of Council money. PEF still remained to be utilised. There was no diminution of that Fund which could be used for any resources considered suitable by the Head Teachers including

the employment of additional teachers were such teachers available beyond core funded teachers.

5 307. That finding is damaging to the case for the claimant in that consistently she has regarded this matter as being the “last straw” and so the inference must be that previous conduct was insufficient for her to consider that there was a breach of the implied term.

10 308. However in ***Williams v Governing Body of Alderman Davies Church in Wales Primary School*** [2002] IRLR 589 the EAT held that if a last straw is entirely innocuous that does not necessarily thwart a successful constructive dismissal claim. While the last straw may be innocuous it will not negate the effect of previous breaches unless they are affirmed.

15 309. That entails a necessity to consider other matters relied upon by the claimant exclusive of those issues which I did not consider could be considered as matters of previous conduct contributing to resignation.

### **Work on Attainment Challenge and Opportunities For All Grant**

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310. The claimant’s position was that she should not have been involved in work on the Attainment Challenge or Opportunities For All Grant because that was outwith her contract. She should only have been involved in PEF matters.

25 311. It was pointed out of course that PEF was effected under the umbrella of the Scottish Attainment Challenge which was all directed towards reducing the attainment gap.

30 312. The job description produced (1<sup>st</sup> inventory 118/119) in February 2017 indicated that a range of financial services were required “*with priority given to Pupil Equity Funding*”. That clearly envisaged that the finance work was not exclusive to PEF matters.

313. The particular description also detailed the services which would be required of the job holder in preparing budget estimates for all aspects of Education Services and:-

5                    *“To prepare grant claims and key statutory returns with priority given to Pupil Equity Funding”.*

314. The job description also included the general clause that the job holder was to perform:-

10                    *“Any other duties and responsibilities as directed by line management”.*

315. The claimant was asked to provide support on the grant claim for the Attainment Challenge which was presented by Education Services. She did so without complaint at the time that this was outwith her contract.

316. It was maintained by the claimant that she had never seen the job description which outlined her responsibilities. If she had not seen the job description then it was difficult to understand why she considered that the Attainment Challenge work was outwith her responsibilities.

317. She maintained that she had been told that her duties would relate to PEF funding but as an experienced Finance Officer she would know that there would be a job description and it would appear she made no enquiry to ascertain what exactly that might entail. If she had she would have found the job description made it clear that while priority was to be given to Pupil Equity Funding that was not work on which she would be exclusively involved.

30 318. The evidence from Mr Cameron was that he did not consider that the claimant being asked to perform other grant work within the broad umbrella of Attainment Challenge was at all unreasonable. The claimant had worked on the returns in respect of the Attainment Challenge grant and knew the procedures involved. He considered there was justification for that within the

job description and in any event given the holiday periods within schools that there would be capacity for the claimant to take on duties which were not exclusively PEF related.

5 319. As regards the Opportunities For All grant work this seemed very slight and was barely mentioned by the claimant as being an issue other than to indicate that she would also consider this was work she was asked to undertake which was not within her contractual duties.

10 320. Again this work would fall within the job description which was produced.

321. I could not make a finding that being asked to assist in these returns was outwith the claimant's contract and thus a breach of contract by the respondent.

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### **Improper Accounting within the Attainment Challenge Grant Returns**

20 322. A separate complaint was that there was manipulation by the respondent within the Attainment Challenge grant returns. This related to the underspend of approximately £55,000 in the grant application for the financial year 2016/2017. The emails to Audit Scotland of 28 July 2017 (1<sup>st</sup> inventory 94) stated that this matter was a serious irregularity.

25 323. The financial year in respect of the grant applications was in the period 1 April - 31 March in each year. Towards the end of the fourth quarter a grant application required to be made to the Scottish Government for payment in respect of that quarter. That submission was made 7 March 2017. That required there to be an estimate made of continuing staff costs and that goods and services being purchased for the 9 primary schools would be  
30 invoiced. If the anticipated receipt of the goods and services and invoices were not made within that period but ultimately became payable in the subsequent financial year then the amount can be carried forward into the subsequent grant returns.

324. In respect of the financial year 2016/2017 the “underspend” amounted to £55,813. Effectively £55,813 had not been spent by the authority within that grant year and so would be carried forward into the subsequent returns to resolve matters.

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325. The claimant’s belief was that the Council would require to repay £55,813 to the Scottish Government in respect of this “underspend”. The approach by Mr Cameron and Mr Dodson was that the amount should be credited to the grant application to be made for the following year and matters would be resolved on that basis.

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326. The claimant did seek advice from the Scottish Government on this matter (1<sup>st</sup> inventory 87/88) and in Mr Cameron’s view the advice from the Scottish Government was that they agreed “*with the way I proposed to deal with matters namely to add on as a spend for the following year*” and “*done in the way I suggested and audited and no issue*”.

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327. So far as there was any suggestion that the claimant’s “*superiors were not pleased*” with this matter Mr Cameron indicated he was not put out as it was an exchange which clarified matters without animosity. There was no evidence that either Ruth Binks or other finance officials were aggrieved by the advice taken from the Scottish Government or the way in which this matter was resolved. It was explained that this same process had been utilised in other years.

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328. On this issue I could not find that there had been improper actings by the respondent in the grant application. The explanation regarding requisite estimates being made of spending to the end of the year appeared cogent. The matter did not bear the interpretation placed on it by the claimant that the grant claim had been “*increased by £55k (primary and secondary claims) with no supporting documentation*”. Neither did there appear to be any merit in the claim that the claimant had been punished by extra work or other disadvantage as a result of discussion with the Scottish Government on the issue.

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**HR Work****General**

329. There were various strands to this issue. It was certain that in the arrangements made on PEF a certain sum of money had been allocated out of the PEF funding to meet the cost of HR support. No particular individual had been assigned to this task but the necessary work was to be shared amongst 4 HR representatives. According to Laura McIntyre the role within HR was to draw up a job description for any candidates; evaluate the grade and identify the appropriate salary and advertise the role. Education Service would contact candidates and arrange the interviews. Once a candidate had been chosen for a job offer then HR would perform the necessary disclosure and other checks.

330. In late April/early May the claimant visited all the primary schools to discuss budget matters and ascertain their plans for spending of their share of the PEF monies. In combination 90 new staff members were proposed being a mixture of teaching and support staff on a full time and part time basis. That accounted for £1.6 million of the PEF budget with other costs for materials/laptop/service costs amounting to £0.7 million making the total fund £2.3 million. Of the PEF grant monies that left £0.2 million for the financial year 1 April 17 – 31 March 2018.

**Scheme of Delegation Forms**

331. For the appointment of employees in teaching or support functions the respondent process is for the particular service to complete a Scheme of Delegation form (1<sup>st</sup> inventory 179/184) and once Finance have approved that there is budget for that post then the HR Department can create the necessary specification and evaluation. The initiating Scheme of Delegation is not prepared by HR. In the Education Service such forms would be created by the Business Officer within the school in the normal run of events. Each primary school had a Business Officer to assist the Head Teacher in such administrative matters.

332. In the particular case of the claimant and the requirement of new staff from the PEF budget the claimant completed these forms. There appeared to be no direct instruction to the claimant to do that but rather a task that she took on to assist Head Teachers. The evidence from Mark Coyle was that he assumed this was part of her role and made no enquiry as to whether preparation of such forms was properly part of the claimant's contractual obligations.
333. There was some dubiety amongst the witnesses as to whether if they had known of the involvement of the claimant in the preparation of these forms it would be considered to have formed part of her contractual obligations or not. The evidence from Mr Cameron was that he was unaware that the claimant was involved in the completion of these forms for proposed staff from the PEF budget and if there had been any objection to it from the claimant it was likely he would have agreed it was not within her role to prepare these forms.
334. In the first instance it did not appear that the preparation of these forms was an "HR matter". It seemed the complaint from the claimant was that HR should have been involved but I did not consider that was made out. On the separate issue of whether it was within her contract that this was clearly a grey area but in any event it did appear that the claimant herself had undertaken this task without complaint or query as to the necessity for her to do so. Her activity in this area seemed borne from a desire to assist as a conscientious employee. I did not consider that there was a failure by the respondent in this situation where there was no indication from the claimant that she objected to undertaking this task.
335. On 20 June 2017 there was an exchange of emails between the claimant and HR regarding the appropriate forms for "*PEF CLD worker posts*". This appeared to be a different form of post from other education posts where the claimant had been completing Scheme of Delegation forms for Head Teachers. In this case the claimant queried whether she should be involved in this matter and indicated she was "*really struggling to take on board any*

*further HR duties*". At that time Ruth Binks became aware of the issue and on the same day advised the claimant "*have spoken to Steven ... do nothing more for now*" and the claimant was no longer involved in the preparation of any forms in relation to that particular post. It did therefore seem that once  
5 the issue was raised with the claimant's superior action was taken.

### **Counselling Service**

336. The Head Teachers had advised that they were interested in a counselling  
10 service to assist children with behavioural difficulties. At a meeting of 8 May 2017 the claimant was to arrange a meeting with Head Teachers who required that service (1<sup>st</sup> inventory 46). Thereafter on 21 April 2017 the claimant sought advice from Steven Parsons on the specification for this counselling service to form part of the PEF tendered process. She attached  
15 various documents she had sourced and asked if she should release that information to the Head Teachers to seek further clarity on the service they intended to deliver as she considered the particulars required of the service were a little vague. Come 23<sup>rd</sup> of May 2017 she advised Head Teachers that it would be necessary for the contract to be tendered and outlined a proposed  
20 timescale. Thereafter she was involved in the award of an interim counselling contract whilst the tendered contract was in the process of being advertised to cover the period from beginning term 2017 to the October break 2017.

337. Her issue on this matter was that this was greater involvement than should  
25 have fallen to her as Steven Parsons was "*missing in action*". It was clear from the evidence that she considered this was a continuing fault of Mr Parsons who as might be expected denied that was the case.

338. It would not appear this was an HR function to progress this particular matter.  
30 The issue was clearly within the domain of Mr Parsons in his position as Attainment Challenge Lead Officer at the time. The claimant's involvement in this matter was necessary to some extent due to the financial implications. It would be necessary for her to know the cost of the proposed service and ensure that it came within the budget and the PEF guidelines. It would not

appear she objected to being involved in this issue. Her objection was that she was essentially left to do the leg work in progressing the appointment in a tight time scale.

5 339. It would appear that the claimant's involvement went beyond simply being  
aware of the cost of this service. Her evidence would show that she went  
beyond what might be expected of a Finance Officer in work that involved her  
to some extent but which expanded beyond what might have been  
considered a necessary part of her role. At the same time it was not a case  
10 that this was "HR work". Again there was no representation made by the  
claimant to Mr Cameron or other superiors that she considered she was  
being asked to perform functions outwith her contractual duties.

### **Appointment of Health and Wellbeing Coach**

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340. On 28 June 2017 the claimant was advised that certain interviews had been  
held for health and wellbeing coaches at certain schools and the successful  
candidates (4) were listed. The email advised "*Louise Johnston to contact  
preferred candidates*". At that time the interview assessment sheets were  
20 enclosed.

341. The following day the claimant advised HR of the successful candidates  
including an individual named Ross Wilson. It would then be an HR function  
to progress the offer of employment (1<sup>st</sup> inventory 85).

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342. However on 11 July 2017 the claimant sent an email to HR advising that no  
offer had yet been made. The response from HR was that they had not  
received the requisite interview assessment sheets but as the claimant  
pointed out those had been with HR since the email of 28 June 2017.

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343. The claimant raised this issue with Wilma Bain on 12 July 2017 indicating that  
there was an issue with recruiting PEF posts and there appeared to be no  
"*ownership/accountability for the successful recruitment of staff*" to which

Ms Bain responded that Ruth Binks would “*pick this up with HR when she returned from leave*”.

5 344. This failure of HR to follow up with an offer of employment to the successful candidate came to the knowledge of the claimant after she had resigned. Accordingly this particular incident could not have been part of the reason for resignation but it was given as evidence of the claimant’s perception of the lack of impetus from HR in PEF matters generally. In this case the instruction did not come from management but from Head Teachers. However given the  
10 particular issue arose after resignation it could not form part of conduct which breached the implied term.

### **Friction with Colleagues**

#### **PEF Learning Assistant and Classroom Assistant Posts and ASN Auxiliaries**

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345. The claimant pointed to an email from Ruth Binks of 8 June 2017 which asked Head Teachers whether they wished to interview by panel or themselves for these posts. She asked that the Head Teachers “*let Louise know your preference*”. While there was a reason for the claimant to know that advertisement for posts was about to commence because that had a financial implication she was not aware of why it was that she was required to keep a note of the requests from Head Teachers as to whether they wished an interview by panel or by themselves. Subsequent emails indicated Head Teachers making a choice.  
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346. It was difficult to see why the claimant would necessarily require to keep that list of preferences but at the same time there was no objection made to any of her superiors that she should be involved in that issue (1<sup>st</sup> inventory 65 – 76).  
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### **Access to Portal**

347. The exchange between the claimant and HR on access to the portal for recruitment (1<sup>st</sup> inventory 78/79) was referred to by the claimant as an

indication of HR work. That was not clear in that it appeared HR was advising the claimant that the portal had been set so that the Head Teachers had access in respect of PEF posts. She was also asked “*if you need anyone else let us know who/what post*” and the claimant made that enquiry and obtained a response. As the person knowledgeable on PEF matters regarding recruitment (which was a financial issue) it did not seem untoward that she might be asked who else should need access to the portal.

### **Being manipulated**

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348. In the course of cross examination of Ruth Binks the claimant contended that the advice from Ruth Binks to advise the that all PEF matters should be directed to her was to “*set her up*” as Ms Binks was aware that this was likely to lead to friction with colleagues. Ms Binks denied any such attempt at manipulation and I found no evidence that there was any underhand motive in the claimant being asked to say to that meeting that she was to be the contact point for PEF matters.

### **Issue with Rosemary Logan**

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349. The particular matter which concerned the claimant was the exchange she had with Rosemary Logan. This related to the email exchange amongst the claimant/ Ms Hurrell / Ms Logan of 4/5 May 2017 (1<sup>st</sup> inventory 60).

350. That prompted the terse response from Ms Logan. It was alleged by the claimant that she had gone to Ruth Binks on this email exchange occurring “*in tears I had a breakdown*” but Ms Binks could not recall that occasion. She had not sought to take any action with Rosemary Logan. Comment on the issues in this incident has been made in the facts and as narrated I did not find the allegation of bullying made out or that the email from M logan should have been raised as a disciplinary matter without a formal complaint being made.

351. The repercussions from this incident was a further claim by the claimant that this matter encouraged a “*whispering campaign*” between Mr Dodson and Ms Logan in unflattering terms of the claimant. She gave no direct evidence of any particular conversation but indicated that Mr Erland Voy would speak to that matter. However Mr Voy indicated that while he was aware of telephone calls between Ms Logan and Mr Dodson he could not recollect any specific conversation and was not able to give evidence on any conversation whispered or otherwise. There was insufficient evidence to make a finding that the claimant was subject to an unflattering “whispering campaign”.

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### **Attainment Challenge papers.**

352. Additional evidence from the claimant of conflict related to the Attainment Challenge work. This was a matter taken over from Mr Dodson because in the claimant’s words “*he was not doing it properly*” and that his “*nose was put out of joint*”. When she asked him for calculations to review the Attainment Challenge submission to the Scottish Government she claimed he had said that he had “*shredded the papers*”. Mr Dodson denied saying that. He indicated that the relevant information was all electronically recorded and that whatever information was necessary could be found within the Council system. Mr Cameron supported the contention that the information was held electronically and could be accessed. So while Mr Dodson may have asserted that papers had been shredded as an unhelpful response information was still available.

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### **Summary**

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353. It was clear that through June 2017 the claimant faced a number of pressures.

354. There were demands on her time in respect of the Attainment Challenge. She had been involved in the financial aspects of that matter previously but on this occasion an issue over an “underspend” arose and a discussion as to how to resolve that matter. There was also a tight timescale in providing the

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appropriate figures to the Education Service in order that they could present the claim.

5 355. At the same time the claimant required to deal with ongoing PEF work inclusive of concluding the counselling service which was required by certain Head Teachers.

10 356. She was clearly irritated at deteriorating relations between her and Mr Dodson and Rosemary Logan.

15 357. She did not consider that she was receiving the support from HR and it did appear that the responsibilities of the Finance Officer for PEF and the limit of that individual's responsibilities as regards personnel matters was not clear. That did result in the claimant becoming involved in matters which could have been covered by the HR function or School Business Officers such as listing preferences for interviews or advising successful candidates and completion of SOD forms

20 358. It seemed to me the essence of the complaint by the claimant was that she had had a period of being off with stress in 2016 and the combination of events towards the end of June 2017 meant possible recurrence. It also did not appear that her direct Manager Mr Cameron had a clear idea of her responsibilities in the PEF role at that time as regards issues such as the preparation of SOD forms and involvement in the appointment of a  
25 Counselling Service beyond the need to be aware of financial issues.

30 359. While this was a new appointment and the claimant an experienced officer there was a blurring of lines of responsibility and a keener eye might have been kept on workload.

360. However the claimant's resignation on 30 June 2017 June was sudden and she gave no opportunity to the respondent to address any of the issues which concerned her. As has been mentioned on a number of occasions she took on responsibilities without complaint. Her position seemed to be that the

respondent "*should have known*" that she was under stress and her mental health likely to be affected but there was no real evidence that that was the case. The letter from Mistylaw Medical Practice discloses no stress related issues being reported at this time.

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361. I accepted the evidence that the stress related condition of which the claimant complained in the Grievance Stage 2 hearing related to the job in which she was working at that time. At that time it was reasonable to consider that on the change of post to PEF Finance Officer the source of stress had been removed. Thereafter there was no obvious sign that the claimant was in a stressed condition which the respondent ignored to her detriment. While there may have been more inquiry made by Mr Cameron as to what responsibility the claimant had taken on and whether her workload was appropriate there seemed no inkling that the point had been reached where the claimant required to resign to protect her mental health.

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362. When she handed in her resignation she was offered support but declined. She indicated that one reason to decline was that she was told by Mr Given that he "*did not have a problem with Mr Dodson*" which indicated to her that "*she should not have a problem with Mr Dodson*". But there was no real opportunity given to the respondent to examine that issue and seek any form of resolution. Ms Binks asked what support might be given but that offer was declined because the claimant "*did not believe she could deliver*" without giving the respondent the opportunity to deliver.

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363. If there had been continued complaint from the claimant about the extent of her workload; level of responsibility; requiring to attend to matters which were non-contractual; difficulties with colleagues and these matters had simply been brushed aside then that may have been sufficient to indicate that the implied term of trust and confidence was breached. However in the absence of that I could not consider that there was any evidence that the respondent acted in a manner calculated or likely to destroy the implied term of trust and confidence. As stated the conduct of the respondent has to go beyond

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unreasonable and must be serious breach of contract to found a claim of constructive dismissal.

5 364. I could not conclude therefore that the relevant actings of the respondent prior to the alleged "last straw" were sufficient to show that the respondent acted in a manner which showed they no longer intended to be bound by the terms of the contract including the implied term of trust and confidence and the claimant does not succeed in her claim.

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Employment Judge: Jim Young  
Date of Judgment: 30 January 2022  
Entered in register: 01 February 2022  
15 and copied to parties