OUTER HOUSE, COURT OF SESSION

[2024] CSOH 81

A313/18

OPINION OF LORD FAIRLEY

In the cause

GEORGE CARROLL

Pursuer

against

DUMFRIES AND GALLOWAY COUNCIL

Defender

Pursuer: P Lloyd, Advocate; Dallas McMillan
Defender: C Wilson KC, B Langlands, Advocate; DAC Beachcroft Scotland LLP

20 August 2024

Introduction

[1] The pursuer claims damages from his former employer for psychiatric injury. A diet of proof having been allowed, I heard evidence over eight days, followed by oral and written submissions. Parties were thereafter given the opportunity to lodge supplementary submissions in writing. Both did so.

[2] The pursuer's case consisted of evidence from the pursuer, Mrs Caroline Farish, Mr John Adams, Dr Douglas Patience, Mr Drew Morrice and Ms Kathleen McAdams. The defender led evidence from Ms Alison Gold, Mr John Thin, Mr Keith Miller, Mr Alastair Dodds, Mr Andrew Pattie and Mr William Colley. I found all witnesses to be credible.

There was ultimately very little dispute over the material facts. I will deal below, within the section entitled "analysis", with such issues of relevance and reliability as arose.

Facts

[3] The pursuer is a qualified teacher. He obtained a teaching qualification in further education from Jordanhill College in 1990. Thereafter, over a career spanning more than two decades, he worked in the specialist area of additional support for learning.

[4] In the period prior to 2010, the pursuer worked at Springboig St John's Residential Secondary School, an independent school providing additional support for pupils with learning, social, emotional and behavioural needs. He was made redundant when that school closed in 2010. He then obtained a position as a supply teacher with Glasgow City Council. Thereafter, in January 2011, he secured a position with Scottish Borders Council as Principal Teacher of Additional Support for Learning at Berwickshire High School.

[5] The General Teaching Council for Scotland maintains a register of teachers in Scotland. The register is divided into three sections: primary, secondary, and further education. Pursuant to his 1990 qualification from Jordanhill College, the pursuer had obtained registration within the further education section of the GTCS register. He was not registered within the primary or secondary sections of the register.

[6] In September 2012, the pursuer applied for a position with the defender within one of the defenders' secondary schools, St Joseph's College. The specification for the post did not state what type of GTCS registration was required. The pursuer was interviewed by a panel which included the head teacher of St Joseph's. He was successful in his application and was appointed to the role of Principal Teacher of Pupil Support with effect from

January 2013. His role did not involve him teaching any particular subject. It involved the provision of learning support to pupils of school age. He also had certain management responsibilities.

[7] In October 2013, the pursuer applied for registration within the secondary section of the GTCS register. The GTCS refused his application because the requirements to be a secondary-registered teacher included a requirement for a degree level qualification. The pursuer did not have such a qualification. On 21 October 2013, however, the pursuer was told by his union representative at the EIS, Mr Bradley, that the GTCS had registered him in the secondary category. Mr Bradley's advice was wrong. The document upon which it was based related only to a voting category and was not proof of secondary teaching registration. The pursuer remained registered only in the further education section of the GTCS register.

[8] Whilst in post at St Joseph's, the pursuer applied for a number of other positions with the defender, including deputy head teacher posts and a post of principal teacher at Maxwell Town High School. The advertisement for the Maxwell Town post specifically stated that secondary registration was a requirement.

[9] On 16 March 2015, just over two years into his employment at St Joseph's, the pursuer was contacted by one of the defender's Education Officers, Mrs Gold, who advised him that an issue had arisen with his GTCS registration status. The issue had been raised by the head teacher of St Joseph's, Mrs Jones. Mrs Gold queried the category in which the pursuer was registered with the GTCS. Specifically, she noted that his name appeared only in the further education section of the register and not in the secondary section. Mrs Gold sought an explanation from the pursuer. The pursuer provided her with a copy of the print-out from the GTCS website dated 21 October 2013 which had been given to him by

Mr Bradley, which showed his voting category with the GTCS as "secondary". As noted above, however, that document was not proof of his teaching registration status.

[10] Following his initial discussion with Mrs Gold, the pursuer had a meeting on 19 March 2015 with Mrs Gold and another of the defender's Education Officers, Mr John Thin. In advance of that meeting, Mr Thin had spoken to a representative of the GTCS who confirmed to him that the pursuer had only further education registration. Mrs Gold and Mr Thin checked the GTCS register which also showed this. At the meeting of 19 March 2015, however, the pursuer represented to Ms Gold and Mr Thin that he had secondary registration.

[11] The upshot of the meeting of 19 March 2015 was that the pursuer agreed to provide Ms Gold with evidence from the GTCS about his registration status. On 25 and 26 March 2015, Ms Gold sent the pursuer reminders about that agreement and asked him for a copy of his correspondence with the GTCS and/or the name of the person within the GTCS with whom he was communicating. The pursuer did not provide her with either of those things. Ms Gold wrote to him again on 30 March 2015 advising that, in the absence of the copy correspondence or a name, she would have to contact the GTCS directly. The pursuer told Ms Gold that he regarded that as a threat.

[12] On 2 April 2015, Ms Gold wrote to the pursuer to advise that in the absence of a substantive response regarding his status, she had passed the matter to senior management at Education Services.

[13] In late April 2015, the pursuer's union representative wrote to the GTCS in an effort to obtain information about the pursuer's registration status. The GTCS did not respond to that letter until 11 August 2015. The response made clear that the pursuer was only

registered to teach in further education. It explained the qualifications that he would need to obtain secondary registration to enable him to teach in a secondary school. It also made reference to a specialist category of registration known as "ASN", which stood for Additional Support Needs. The GTCS letter noted, however, that,

> "[g]iven the supplementary nature of this registration, as a general rule our view is that in order to be employed in a school setting, a teacher's mainstream category of GTCS registration must be in a school (and not FE) sector".

[14] The GTCS response of 11 August 2015 was in line with the defender's genuinely held understanding – based upon what it was separately and repeatedly told by the GTCS – that it was necessary for any teacher who was employed in a secondary school to have secondary registration with the GTCS.

[15] Meanwhile, in June 2015, the defender had commenced a formal investigation about the pursuer. Mr Keith Miller, a retired educational officer, was appointed to conduct it. Four issues were identified for investigation, *viz*

- Did the pursuer hold a teaching qualification which allowed him to teach school aged pupils?
- Did the pursuer's qualifications compromise his ability fully to carry out the role of Principal Teacher at St Joseph's?
- Had the pursuer knowingly applied for posts with the defender for which he was not qualified?; and
- Was the pursuer truthful with Ms Gold and Mr Thin at the meeting of 19 March 2015?

[16] The investigation began on 18 June 2015. Between August and November 2015, various people were interviewed including the pursuer, Mr Thin, Ms Gold and Ms Jones.

Those who were interviewed were asked to sign written records of their evidence. Further inquiries were also made by Mr Miller with the GTCS. In the meantime, although the pursuer was not suspended from his employment, he was not permitted to teach classes. Instead, he was allowed only to continue to manage teachers and support assistants within his department. Understandably, the pursuer found this and the related investigation process to be stressful.

[17] On 31 August 2015, the pursuer's union representative, Mr Morrice, wrote to the defender's Director of Education. Within that letter, he expressed concern at the effect that not being able to share teaching and pupil support with colleagues was having on the pursuer's wellbeing.

[18] On 30 September 2015, at the request of the defender, the pursuer had a consultation by telephone with an occupational health advisor from OHAssist, a body which provided advice to the defender in relation to staff health issues. The purpose of the defender's referral was for an assessment to be made of the pursuer's capacity for work, his ability to participate in the ongoing investigation into his registration status and the steps that could be taken to support him. By that time, the pursuer had seen his GP who had prescribed medication for depression.

[19] Based upon the telephone consultation, the representative of OHAssist, Ms Neilson, advised the defender that the pursuer was fit to carry out his adapted duties and to participate in meetings to address the "ongoing organisational issues and investigation". Ms Neilson also advised that the pursuer was "not likely to experience an improvement in his symptoms until the ongoing organisational issues and investigation are resolved." She

recommended counselling and "a speedy conclusion to the ongoing investigation and organisational issues."

[20] On 23 October 2015, Mr Morrice wrote again to the defender's Director of Education. He again expressed concern about the pursuer's wellbeing and suggested either a period of garden leave or a period of working from home. On 28 October 2015, the Director of Education agreed to the proposal that the pursuer should be allowed to work from home. On that same date, however, the pursuer was certified by his GP as being unfit for work for an initial period of 30 days due to "reactive depression". On 28 October 2015, the pursuer commenced a period of sickness absence. He did not return to work at any time after that date.

[21] Mr Miller delivered his investigation report to the defender on 18 December 2015. He identified allegations which he recommended be taken forward to a disciplinary hearing. These included an allegation that the pursuer did not hold a teaching qualification which allowed him to teach school aged pupils, that he had knowingly applied for posts with the defender for which he was not qualified and that he had been untruthful about his registration status at the meeting with Ms Gold and Mr Thin on 19 March 2015.

[22] A formal disciplinary process was thereafter commenced against the pursuer. The pursuer remained on long-term sickness absence. On 20 January 2016, he was invited to attend a disciplinary hearing fixed for 4 February 2016. On 22 January 2016, the pursuer's union representative advised that the pursuer was not fit to participate in such a hearing.

[23] On 8 February 2016, at the request of the defender, the pursuer had a further telephone consultation with Ms Neilson of OHAssist. He reported ongoing symptoms of depression and a diagnosis of whooping cough. Ms Neilson advised the defender that the

pursuer was not fit for work as a result of those conditions. She also expressed the view that he was not, at that stage, fit to attend formal meetings. She recommended postponing the disciplinary hearing for a period of three to four weeks. She again stated: "in my opinion, Mr Carroll's symptoms of depression are likely to continue until the ongoing organisational issues and investigations are resolved". Her prognosis for his recovery from the whooping cough was "a number of weeks".

[24] The disciplinary hearing was re-arranged for 9 March 2016. On 22 February 2016, the pursuer's GP provided a letter which stated that the pursuer was not fit to attend the hearing due to his ongoing anxiety/depression. At around the same time, Mr Morrice expressed concern that the pursuer would be unable to provide him with instructions.

[25] On 1 March 2016, at the request of the defender, the pursuer had a further telephone consultation with Ms Neilson of OHAssist. She reported to the defender that the pursuer "continues to experience significant symptoms of reduced psychological wellbeing associated with the workplace matters". In her opinion, he was unfit for work but was fit to participate in formal meetings. She identified suitable adjustments to facilitate his participation in such meetings. These included having advance written notice of the questions he was to be asked and being allowed to respond in writing. She again stated: "in my opinion, Mr Carroll's symptoms of depression are likely to continue until the ongoing organisational issues and investigations are resolved."

[26] On 4 March 2016, Mr Morrice wrote to the defender to advise that the pursuer was in "considerable distress" and was not fit to participate in the disciplinary hearing. The letter concluded:

> "I accept your general premise that early resolution of disciplinary hearings is in everyone's interests. The investigatory process was, as you are aware, very lengthy

> and I accept that it was a complex exercise. However, there has been a significant impact on George's wellbeing and his GP is clear that he is unfit to participate in the hearing."

[27] The hearing in March 2016 was re-scheduled for 22 April 2016, and arrangements were made for the pursuer to have an in-person meeting with OHAssist on 22 March 2016. On that date, the pursuer was seen by, Dr Simpson, Occupational Physician, who then prepared a report for the defender. Within that report, Dr Simpson stated:

> "**Current capacity for employment**
>
> In my opinion, Mr Carroll remains unfit for work due to depression and anxiety. We discussed the forthcoming planned disciplinary meeting and agreed that to move forward and enable his health to improve it is best that he attends the meeting. He states that his GP also now takes this view. I advise he will be medically fit for the meeting of 22/4/16 and echo the advice of my colleague in her report of 2/3/16 on supportive measures. By its nature, the meeting is likely to prove stressful for Mr Carroll and it will be of great benefit to him to have the support of his Union Representative at the meeting.
>
> **Outlook**
>
> The outlook is that it is reasonable to anticipate that resolution of the current work issues will lead to improvement in Mr Carroll's mental health and enable him to progress back to work fitness. It is difficult to reliably advise on time scales for this, however, it is advised that you consider referral back to Occupational Health after the disciplinary meeting to enable us to reassess his medical progress."

[28] To accommodate the pursuer's availability, the disciplinary hearing eventually took place on 25 rather than 22 April 2016. Following that hearing, he was dismissed from his employment with effect from 10 May 2016. The reason for his dismissal was that, based upon what it had been told by the GTCS, the defender concluded that (a) the pursuer could not teach in a secondary school without being registered in the secondary section of the GTCS register; and (b) he did not at that time have qualifications which enabled him to apply for such registration.

[29] In February 2017, around nine months after his dismissal, the pursuer made an application to the GTCS for registration in Additional Support Needs (3 to 18 years) ("ASN"). That application was approved by the GTCS in March 2017 and resulted in the pursuer being registered to perform an ASN role which the GTCS then recognised allowed him to teach in both primary and secondary schools.

[30] On 9 October 2019, the GTCS and COSLA issued a joint letter the purpose of which was to "clarify the position" regarding registration requirements for teachers. The letter set out the "general requirement" that teachers should be employed in line with their registration categories. The letter also recognised, however, that

> "there are some teachers who are employed in specialist roles such as additional support needs … Such teachers are not affected by the above general requirement."

[31] The pursuer founded upon evidence from and about Mrs Caroline Farish. It was submitted that she was a relevant comparator who had been treated differently by the defender. Mrs Farish has been employed by the defender since 2008. She qualified as a teacher in England before moving to Scotland where she secured full registration in the further education section of the GTCS register. Her first role with the defender was as a teacher in behavioural support. In 2011, an issue arose as to her registration status. At that time, she was working for one day per week in a secondary school operated by the defender but did not have secondary registration. In late August 2021, she advised the defender that she had started a university course which would enable her to meet the requirements for secondary registration. In the meantime, she was allowed to continue working in the school, but only under close supervision by a qualified teacher. Due to the limited amount of secondary teaching which Mrs Farish had been undertaking before the problem came to light, the defender was able to agree to that solution. Mrs Farish subsequently fell behind

with her work on the university course and, as a result, had not secured the necessary qualification by August 2013. She met with her line manager, Mr Keith Miller. Mr Miller agreed to allow her one further academic session to complete the course. It was also agreed that if she did not obtain the necessary qualification by October 2014, she would be redeployed. By October 2015, Mrs Farish had managed to obtain a subject qualification in religious education which allowed her to secure secondary registration.

Agreed facts on injury, causation and foreseeability

[32] Parties ultimately produced three joint minutes of agreed evidence. The first of these agreed *inter alia* the provenance of documents and various facts included within the above chronology.

[33] Agreed facts in the second and third minutes of agreement were that:

- the pursuer developed a major depressive disorder (ICD10-F32.2) on 21 September 2015;
- that major depressive disorder was caused by and thereafter exacerbated by the commencement and continuation of the investigation and disciplinary process; and
- prior to 21 September 2015 it was not reasonably foreseeable to the defender that the investigation and disciplinary process presented a risk of psychiatric injury to the pursuer.

Psychiatric evidence on causation and prognosis

[34] Dr Douglas Patience, consultant psychiatrist, has examined the pursuer and produced five reports about him. The first of these was dated 4 January 2019, and the last was dated 31 August 2023. Dr Patience's conclusions accorded with the agreed fact in the second joint minute that the pursuer developed a major depressive disorder (ICD10 – F32.2) in 2015.

[35] Dr Patience also gave evidence to supplement the agreed facts about causation. The cause of the pursuer's major depressive disorder was workplace stress and uncertainty about his future. The mechanism for his development of the disorder involved long-term threat and uncertainty of outcome. The key threat to the pursuer was that his livelihood was going to be taken away from him. The disciplinary process was therefore a key stressor. In Dr Patience's opinion, the defenders' persistence with the disciplinary process after the onset of the illness in September 2015 is likely to have made the condition worse.

[36] Dr Patience's opinion was also that if, as at 21 September 2015, the defender had stopped the disciplinary process, and if the pursuer had then received appropriate support and treatment, there is a good chance that he would have recovered from his depressive illness such that he would have been able to resume work either as a teacher or in some other capacity within a period of 6 to 12 months.

Agreed evidence on quantum

[37] Given the length of time for which the pursuer has been symptomatic, his prognosis for recovery is now very poor. It is unlikely that he will be able to return to work as a teacher again. It is similarly unlikely that he will be able to work in any other role.

[38] In the event of the defender being found liable to make reparation to the pursuer, quantum of damages was agreed in the third joint minute at £902,834.61 net of recoverable benefits. I was not provided with a breakdown of that figure.

Submissions

[39] The pleadings were not helpful in narrowing the disputed issues. Similarly, an agreed list of issues requested by the court at the start of the proof was extensive and wide-ranging. By the end of the proof, however, there was a greater level of focus, and the following summary of the parties' respective positions is based upon the oral and written submissions made at that stage.

Pursuer

[40] Mr Lloyd submitted that the defender's duty was not to cause unnecessary risk of foreseeable psychiatric harm. In commencing its investigation into the pursuer, the defender was not in breach of that duty because it was not foreseeable to the defender at that time that the pursuer would develop a psychiatric illness as a result. By 21 September 2015, however, the pursuer was suffering from depression. The defender knew that because of the OHAssist report it received at around that time. Around a month later, the defender also knew that the pursuer was certified as unfit for work because of depression. Finally, it knew that his illness had been caused by the ongoing investigation process.

[41] From late September 2015, therefore, it was reasonably foreseeable to the defender that if it persisted in the investigation and, thereafter, the disciplinary process, it would cause further psychiatric harm to the pursuer by exacerbating the condition which he

developed on 21 September 2015. From late September 2015 the defender was, accordingly, under a duty to take reasonable care to avoid causing further psychiatric harm to the pursuer. At that stage, the defender was under a duty to "do something about it" (per Hatton v *Sutherland* [2002] ICR 613). The situation was analogous to that in *Walker* v *Northumberland County Council* [1995] ICR 702. The defender failed in that duty by continuing with the process that it knew had caused the pursuer to suffer psychiatric harm. Had it halted the process at that time, the evidence of Dr Patience suggested that the pursuer would have recovered within a year.

[42] The true issue in this case was not, therefore, foreseeability of harm. Rather, it was whether the duty of care was breached by failing to halt the process. That required consideration of the decision-making in instigating the investigation in the first place. There was never any proper basis for any formal investigation of the pursuer. There was never any basis for the registration issues to be treated as disciplinary matters and, insofar as issues of honesty arose from the other matters, they could have been dealt with less formally or under a separate process. The decision to instigate a formal investigation was never within the range of reasonable options open to the defender.

[43] Alternatively, even if the investigation had some basis at the outset, the defender ought to have reconsidered the matter in September 2015 or shortly thereafter and considered whether it was reasonable and proportionate to continue with a process that had already caused psychiatric harm.

[44] The alternative pleaded ground of breach of the implied contractual duty of trust and confidence was not insisted upon.

Defender

[45] Mr Wilson submitted that the matters Mr Miller was asked to investigate in the summer of 2015 were all related and could not have been dealt with informally. Mr Miller was asked to investigate the issues presented to him to see if any of them merited formal disciplinary procedures. The defender was fully justified in investigating the issues surrounding the pursuer's registration status, his representations at the meeting of 19 March 2015 and his job applications. Both the decision to do so and the procedures adopted were within the range of actions reasonably open to the defender.

[46] It was not accepted by the defender that it knew or ought to have known from September 2015 that the pursuer had developed an illness. In any event, it was not accepted that it was foreseeable that any such illness would be made worse by continuing with the process or that the defender had breached its duty of reasonable care.

[47] The most reliable information available to the defender at the material time was contained in the occupational health reports. In the first report, dated 30 September 2015, it was noted that the pursuer's symptoms were not likely to improve until the investigation was resolved. The same point was made in all of the subsequent occupational health reports. Delay in resolving matters was not in the pursuer's interests. No suggestion was ever made to the defender that the process required to be stopped.

[48] There was no evidence to explain why, by 2017, the position of the GTCS had apparently changed such as to allow the pursuer to teach in primary and secondary schools with only an ASN registration. There was, however, no evidence that the defender should reasonably have anticipated that change in position during 2015 and 2016.

[49] In summary, the pursuer had failed to prove the requisite elements of a claim for psychiatric harm. He had not proved the defender's knowledge of illness even in respect of the period after September 2015. He had not, in any event, proved that exacerbation of the condition which is now admitted to have existed at that date was foreseeable if the process was continued or, if it was, that the decision to do so breached any duty of care.

Relevant law

[50] The most authoritative recent Scottish authority on psychiatric injury in the context of employment is the decision of the Inner House in *K* v *The Chief Constable of the Police Service of Scotland* 2020 SC 399. I was also referred to *Hatton* v *Sutherland* [2002] ICR 613, *Yapp* v *Foreign and Commonwealth Office* [2014] EWCA Civ 1512 - largely for its comprehensive review of the English case law – and *Coventry University* v *Mian* [2014] EWCA Civ 1275. The following summary of relevant principles is drawn from those cases.

[51] Liability for harm in the employment context is not a discrete area of legal principle. It is part of the general field of delictual duties, but one in which there is no need to ask whether there is a duty of care on the employer to his employees, because that is inherent in the existing proximate relationship. The duty of care which applies in an employment setting is a requirement on the employer to take reasonable care to safeguard his employees from unnecessary risk of foreseeable harm. The word "unnecessary" is important because many occupations (for example the police and the armed forces) carry with them an inevitable and unavoidable risk. Whatever the occupation, however, the employer must take reasonable care to eliminate any unnecessary risks, being those which can, with reasonable care, be avoided. The employer's duty extends to taking reasonable care to

safeguard both an employee's mental and physical health from unnecessary risk (*K* v *The Chief Constable*).

[52] A claim for psychiatric injury can only succeed against an employer if the employer knew or ought to have known that its actions would be likely to cause psychiatric harm to the affected employee. That must depend upon what the employer knew, or ought to have known, about the employee who is affected. The starting point is that psychiatric harm is not usually a foreseeable consequence of a decision, even of a disciplinary nature, in the employment context (*K* v *The Chief Constable*; *Hatton*; *Yapp*).

[53] Even, however, if the employer is aware of an employee's vulnerability, it does not follow the employer will always be precluded from taking action which may trigger or exacerbate psychiatric harm. An employer may require either to institute or continue with disciplinary proceedings in a particular set of circumstances. Provided that the action taken does not amount to a want of reasonable care, having regard to all the circumstances, no fault will arise (*K* v *The Chief Constable*).

[54] In the context of a decision to instigate or continue with disciplinary proceedings against an employee, there will only be a breach of a duty of reasonable care where the decision taken by the employer lies outside the range of reasonable actions open to it in all the circumstances (*Coventry University* v *Mian*; *Yapp*).

Analysis

[55] Having regard to the foregoing principles, it is important to recognise that the issues which arise in this case cannot be answered with the benefit of hindsight. Rather, they must

be addressed by reference to what the defender knew (or ought reasonably to have known) in 2015 and 2016.

[56] I make that preliminary observation because the parties devoted a great deal of attention and time at the proof to the issue of whether or not secondary registration was, in fact, ever essential to allow the pursuer to teach in the area of learning support in a secondary school during 2015 and 2016. That is not an issue which I require to determine. The undisputed evidence showed that the clear and repeated advice that the defender received from the GTCS during 2015 and into 2016 was that the pursuer did indeed require secondary registration to be able to teach in any capacity in a secondary school. The only evidence of any exception to that general rule for additional support for learning teachers came much later in the joint letter from the GTCS and COSLA in 2019, almost 3½ years after the pursuer's employment with the defender had ended. Even if, therefore, the advice given to the defender by the GTCS in 2015 and 2016 could be seen with hindsight to have been wrong, the defender cannot be criticised for acting upon it at the time when it was given.

[57] There were ultimately very few areas of dispute in the evidence about the chronology. One important area of conflict, however, related to what was said by the pursuer at the meeting with Ms Gold and Mr Tait on 19 March 2015 and, in particular, whether or not he wrongly represented to them at that meeting that he held secondary registration. The pursuer was adamant that he had made no such representation. Ms Gold and Mr Thin were equally adamant that he had. No note was kept of the meeting of 19 March 2015, but the issue of what was said by the pursuer was re-visited at the investigatory meeting with Mr Miller which the pursuer attended with Mr Morrice, his union representative, on 28 August 2015. A note was kept of that latter meeting. In the

course of it, the pursuer is recorded as having accepted – albeit under explanation – that he did indeed represent to Ms Gold and Mr Thin on 19 March 2015 that he held secondary registration. The pursuer's evidence at the proof was that the relevant section note of the meeting on 28 August 2015 was inaccurate. Mr Morrice, however, gave contrary evidence that the note was accurate. On this issue, I accept the evidence of Mr Morrice as being more reliable than that of the pursuer. His role at the meeting of 28 August 2015 was to represent the pursuer, but he was also an independent witness to what was said. His position was consistent with that of Mr Miller. I also, therefore, accept the evidence of Ms Gold and Mr Thin about what the defender said to them at the meeting of 19 March 2015 in preference to the pursuer's evidence on that issue.

[58] Both parties led evidence from HR specialists on the issue of the reasonableness of the defender's conduct. The pursuer's expert, Kathleen McAdams, had a tendency within her evidence in chief to focus upon what other steps a reasonable employer might/could have taken. That approach was not helpful in considering the relevant issue of whether or not the defender's conduct in instigating and thereafter continuing its formal investigation of the pursuer fell within the range of reasonable actions. In cross-examination, Ms McAdams accepted that the defender's decision to proceed with a formal inquiry into the four issues which Mr Miller was asked to investigate was within the range of reasonable actions. That concession was properly made and accorded with the opinion of the defender's expert, Mr Colley. The issue of the scope of the range of reasonable actions within an employment relationship is, in any event, generally one which the court is able to determine without the assistance of experts.

[59] The issue of the pursuer's honesty in relation to the 19 March 2015 meeting and in his applications for jobs which required secondary registration were both important ones which the defender was plainly entitled to investigate. Having regard to the information which was then being provided to the defender by the GTCS, the defender was also entitled – and indeed bound – to take the issue of the pursuer's registration status very seriously and to take further steps to investigate it. His removal from front-line teaching duties during that time pending formal investigation was inevitable. I therefore reject the pursuer's arguments that there was never any proper basis for Mr Miller's formal investigation. By the summer of 2015, the defender had reasonable and proper grounds to inquire further into the issues which were the subject of that investigation. The decision to commence and thereafter continue with a formal investigation was within the range of reasonable responses open to the defender.

[60] Mr Miller's report of December 2015 gave reasonable grounds to the defender to progress the matters identified in it to a disciplinary process. Its decision in December 2015/January 2016 to take that course was again within the range of reasonable actions properly open to it.

[61] Prior to December 2015, however, the pursuer had become unwell. By at least 30 September 2015, the defender was aware, based upon its interaction with OHAssist, that the pursuer had developed depression. The cause of that condition was Mr Miller's ongoing investigation and the consequent uncertainty on the part of the pursuer over his future.

[62] It is an agreed fact that, at least in the period prior to 21 September 2015, it was not foreseeable to the defender that the investigation would cause the pursuer to suffer psychiatric harm. The pursuer nevertheless invites an inference that from and after late

September 2015 it was (or should have been) foreseeable to the defender that continuing with the process of investigation would cause further harm to him such that the defender should have halted the process at that time. In support of that position, I understood reliance to be placed *inter alia* upon the evidence of Dr Patience whose evidence accorded with the agreed evidence that continuation of the process had, in fact, exacerbated the condition which the pursuer developed on 21 September 2015. It does not follow, however, that such an outcome was foreseeable to the defender in 2015 and 2016.

[63] The difficulty with the pursuer's position is that it views matters with the benefit of hindsight. Importantly, it fails to take account of the advice that the defender received between late September 2015 and March 2016 from OHAssist. On three occasions within that timeframe, Ms Neilson told the defender that the pursuer's symptoms of depression were likely to continue until the ongoing organisational issues and investigations had been resolved. There was no suggestion in any of the OHAssist advice that continuing with the formal process to its conclusion would cause the pursuer's condition materially to worsen. On the contrary, it is clear from the final advice from Dr Simpson in March 2016 that by that time there was universal acceptance that the best way forward was for the pursuer to attend the disciplinary meeting in April 2016 and that resolution of that process was a necessary step towards improvement in his mental health. That advice is consistent with Dr Patience's evidence that the pursuer's very poor prognosis for recovery in the period after 2019 was directly related to the length of time for which his symptoms had persisted.

[64] In any event, even on the hypothesis that the defender ought to have known that continuing the investigation and disciplinary process to conclusion would (or might) exacerbate the pursuer's symptoms of depression for the period of time for which that

process endured, the alternative of pausing the process carried a very clear and foreseeable risk of prolonging the pursuer's depressive symptoms. That was the clear import of the OHAssist advice between September 2015 and March 2016. There was no reason to suppose that pausing the process in or after September 2015 would have brought swifter closure to the registration issue, or to the other issues relating to honesty all of which formed the basis for the proposed disciplinary hearing. Pausing the process after September 2015 carried a foreseeable risk of prolonging the pursuer's illness. The defender's decisions to complete the investigation and press ahead with the disciplinary process were instructed by the advice the defender received from OHAssist. They were within the range of reasonable actions open to it. The defender did not breach its duty of reasonable care by choosing those courses of action.

[65] For completeness, the position in relation Mrs Farish was materially different to that of the pursuer for three reasons. First, there was never any issue of honesty in relation to Mrs Farish. Secondly, following her discussion with the defender, she proposed a time-limited solution to resolve the issue of her registration status. Thirdly, and in contrast to the pursuer, Mrs Farish did not hold a promoted position and only had responsibility for secondary teaching on one day per week. From the defender's perspective, her proposed solution was therefore manageable within the agreed timescale. None of these factors applied to the pursuer. In any event, even if the decision taken by Mr Miller in relation to Mrs Farish fell within the range of reasonable responses, it does not follow that a different decision would not also have done so. That is inherent in the concept of a range of reasonable responses. As I have already noted above, this was a point which the pursuer's HR expert frequently failed to recognise.

Conclusions

[66] For the foregoing reasons, my conclusions on the evidence are that:

a) the defender had reasonable and proper cause to instigate and continue the formal investigation and subsequent disciplinary process involving the pursuer in 2015 and 2016;

b) the pursuer has not established that, in the period after 21 September 2015, it was (or ought to have been) reasonably foreseeable to the defender that continuation of the investigation and disciplinary process would exacerbate the depressive condition which he developed on that date; and

c) in any event, the pursuer has not established that continuation of the investigation and disciplinary process in the period after September 2015 amounted to a breach of the duty of reasonable care owed by the defender to him, having regard to the advice which the defender received from OHAssist between September 2015 and March 2016.

[67] I will therefore grant decree of absolvitor from the first conclusion of the summons and reserve meantime all questions of expenses.