



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 44

A227/18

OPINION OF LORD SUMMERS

In the cause

T

Pursuer

against

W

Defender

**Pursuer: E MacKenzie QC, P Stuart; Balfour + Manson LLP
Defender: C Murray, C Fraser; Clyde & Co (Scotland) LLP**

27 May 2022

Introduction

[1] The pursuer is Mrs T. She is 46 years of age. She was formerly employed by the defender as a primary school teacher and is now working as a private tutor. In this action she seeks damages for personal injury. She claims that while she was in the employment of the defender it did not take reasonable care for her safety and exposed her to unnecessary risk of psychiatric injury.

[2] This case was scheduled to last three weeks. In the event it took five weeks spread over three diets of proof. The evidence of the witnesses was given by means of WebEx. I was supplied with Witness Statements and expert reports. The parties prepared a detailed

Joint Minute agreeing a large number of background details. I have where necessary incorporated material from the Joint Minute into the Opinion.

[3] The Opinion is a lengthy one. This is a consequence of the large number of witnesses called, the plethora of faults attributed to the defender and the lengthy period over which the faults are said to have occurred. Although Witness Statements were supplied it would not appear to me that this led to a more efficient use of court time. The Witness Statements were not used in substitution for evidence in chief. The witnesses were for the most part examined extensively about matters covered in the Witness Statements as well as other matters. In consequence the oral evidence represents the substance of the case. I have consulted the Written Statements where the oral evidence was unclear but for the most part I have proceeded on the basis of the oral evidence. There was no suggestion in closing submissions that I should prefer any part of the written evidence over the oral evidence nor was I referred to the Witness Statements for evidence that was not otherwise led at proof. I was also supplied with expert reports. I have had regard to these and the oral evidence of the experts led at proof. Before finalising the opinion I asked parties for their submissions on anonymisation. I am grateful for their written submissions and accept that although ordinarily parties and witnesses should be named in the interests of open justice, it is appropriate to anonymise this opinion. This has necessitated not only the anonymisation of the parties but also the anonymisation of witnesses and the names of certain schools. I consider that otherwise "jigsaw" identification would be possible. I accept that this course should not be followed readily but in this case given the severity of the pursuer's mental health problems as well as the references to her child I consider it is the appropriate course to follow.

[4] In an endeavour to make the opinion accessible, I have broken down the factual evidence into three periods. In each the pursuer worked under a different head teacher. The first covers the period when NT was head teacher (2012-2013), the second covers LG's period as head teacher (2014-2015) and the third covers VB's period as head teacher (2016). I have treated the lengthy absence between November 2015 and July 2016 before the pursuer moved to L Primary School as part of the second period. These divisions are intended to make the evidence easier to access and digest and should not be taken to imply that I consider the evidence does not require to be taken as a whole. Where appropriate I have digressed to deal with aspects of the evidence that are best taken out of sequence.

The background

[5] The pursuer holds a BA in Music and is a gifted musician. She began her teaching career as a nursery school teacher. She achieved a postgraduate qualification in 2000-2001. She was employed by the defender on 5 January 2004 as a supply teacher and then became a permanent teacher. In 2005 she moved to AW Primary School, West Lothian and taught nursery class. In 2009 she became a primary school teacher. She went on maternity leave in 2011.

Period 1 - The pursuer's circumstances

[6] In 2012 the pursuer returned to work after the birth of her child. In this Opinion she is designated as E. When she returned her head teacher was RM. She was replaced by FB who in turn was replaced by NT. FB and NT were temporary appointments. NT was in the role about a year. She moved to another school at the end of 2013. Before leaving AW Primary School, RM arranged observations for the pursuer. An observation involves a

teacher observing another teacher in class with a view to providing constructive criticism of their teaching skills. The constructive criticism is provided by giving feedback after the lesson is over. The aim is to enable the teacher under observation to improve their teaching skills. Observations can be provided on an informal basis. In evidence it was explained that monitoring staff performance is a routine feature of a head teacher's responsibilities and observations are an accepted feature of a teacher's professional life. If the problems that the observations are designed to correct persist a head teacher may initiate a formal procedure. It is governed by the Framework on Teacher Competence (Joint Bundle p4941). The Framework is produced by the General Teaching Council for Scotland (GTCS). It sets the standards by which fitness to teach is measured. If it is necessary to scrutinise a teacher's competence a process is set up governed by the Framework. This was described in evidence as the Competence Process. Observations under the Competence Process have three stages. In Stage 1 the teacher is set targets and areas for improvement are identified. This is described in an Action Plan. The teacher is then observed in class to determine whether the targets are being met and the improvements achieved. The teacher is then given feedback. In recognition of the stress that the exercise may cause, the teacher is provided with a mentor whose purpose is to provide support. If the teacher fails Stage 1, Stage 2 begins. Stage 2 differs from Stage 1 in that it is operated on a more formal basis. Its nature is set out in the Framework (Joint Bundle p4947). Stage 3 is a disciplinary process. It proceeds on the basis that there has been long running under performance. The teacher is given a comprehensive overview report at Stage 3 that identifies the areas where the teacher is underperforming, the support mechanisms and professional development opportunities offered to the teacher and performance milestones. The report may lead to dismissal. If dismissal occurs the teacher is referred to the GTCS under article 25 of the Public Services

Reform (GTC Scotland) Order 2011. The GTCS decides whether the teacher should remain on the teaching register.

[7] Although RM did not give evidence, KM the principal teacher at AW Primary School in 2012 during RM's tenure was able to give evidence about decisions that RM took. She was involved in RM's decision to commence observations of the pursuer. She indicated that RM thought the pursuer lacked requisite teaching skills. Specifically she did not think the pursuer had good classroom management skills and struggled to maintain discipline in her class. As a result the pursuer's class was noisy. Because AW Primary School is a small school with an open plan layout her class was apt to disrupt other classes. To address this issue RM arranged two informal observations. One of them was conducted by KM. RM notified JI, an Education Officer with the defender, of her decision to conduct observations. In recognition of the stressful nature of observations and to provide assistance to the pursuer KM was asked to support the pursuer.

Medical background

[8] At this stage it is convenient to say a little about the pursuer's medical history. What follows is based on the Joint Minute and evidence led in the proof. I consider it is important to say before commencing my summary of this evidence that the defender was unaware of the pursuer's medical background. The defender had no means of forcing the pursuer to disclose her medical history or her GP notes and never tried to do so. NT, as we shall see, encouraged the pursuer to go to her GP in 2013 but apart from that no attempt was made to get the pursuer to take medical advice or enquire what advice she had received. Thus while the pursuer's GP was entitled to communicate on behalf of the pursuer and make

recommendations that he or she thought would be beneficial to the pursuer's mental health, the defender was not permitted to ask the GP to supply information or assistance.

[9] The first indication that the pursuer had prior mental health issues appears in 1992 when the medical notes disclose she received counselling. In 1997 she decided to study to be a teacher. She suffered from depression. She was prescribed Diazepam and Sertraline. She suspended her studies for six months to enable her to recover. In that time she was referred to a community psychiatric nurse. She had suicidal thoughts. According to her GP notes the pursuer had only agreed to undertake teacher training because of parental pressure. The pursuer advised her GP that she had considered self-harm. In 2001 the pursuer had a panic attack. There were difficulties with her teaching placement. She was referred by her GP Dr Gourlay for psychological assessment and Paroxetine was prescribed. I was referred to a letter of 28 November 2002 from Dr Tait a consultant psychiatrist and psychotherapist at Murray Royal Hospital, Perth. At this time the pursuer was a probationary nursery teacher at Craighlowan School, Perth. The letter rehearses the pursuer's situation at the school. She advised that she was the subject of unjust criticism from a senior member of staff in the nursery department. The pursuer criticised the head teacher and her mentor (Joint Bundle pp3314-5). I was referred to another letter from Dr Tait. It records the pursuer as saying that she had encountered difficulties in securing registration with the GTCS. It states that Craighlowan School was dissatisfied with her performance. It would appear that despite their reservations they decided to co-operate with her registration for "bureaucratic" reasons (Joint Bundle p3300). In 2003 she was referred for anger management.

[10] In 2005 she had panic attacks. In 2008 she was absent from work with depression after a miscarriage. After starting work as a primary school teacher with the defender a parent had made two complaints about her; see GP Notes for 2 November 2009 (Joint

Bundle p2999). The GP notes refer to an episode of self-harm and suicidal ideation but notes that she had no active plans to self-harm. Her GP issued MED3 sick lines on the grounds of anxiety and depression and she was absent from work for three weeks. She was referred to the Psychology Department at St John's Hospital, Livingston. Dr Alison Tulloh wrote to her GP by letter dated 22 April 2010 (Joint Bundle p3084). Dr Tulloh records that the pursuer was very paranoid; that everyone was out to get her; that she did not have her head teacher's support and that her work colleagues were not to be trusted. The pursuer was directed to this in cross-examination. The pursuer advised that this episode occurred when an assessment at school had gone badly. She felt unsupported and thought the staff were antagonistic to her. She thought about self-harming. She returned to work. In October 2010 her GP notes that the pursuer was complaining that her head teacher was criticising her, her sleep was disturbed and that she was sometimes crying at night. She thought people were talking about her. Dr Tulloh noted that the pursuer had a difficult relationship with her head teacher, was very sensitive to the idea that she was not coping in her classroom and that she saw normal concerns for her wellbeing as threatening (see Joint Minute 2(o)). On 10 March 2011 she gave birth to E, her daughter. On 25 March 2011 she was referred to psychiatry by her GP as a result of low mood and thoughts of harming her baby (Joint Minute 2(q)). She was diagnosed as having an adjustment disorder with a brief depressive reaction. She was not considered to be suffering from a mental illness at that time. She continued to be prescribed fluoxetine, an anti-depressant, and Zopiclone, a sleeping tablet. In 2013 she was taking fluoxetine, diazepam, an anti-anxiety drug and Zopiclone.

The Commencement of Informal Observations - 2013

[11] NT took over as head teacher in August 2012. She met her staff and took stock of the teachers. She also thought that the pursuer's teaching skills required improvement. In particular she thought that the pursuer needed to develop the skills necessary to control children and maintain authority in the classroom. After several months NT decided that a formal competence process should be commenced and that Stage 1 observations were necessary. She advised JI of her decision. NT asked her for advice as to how she should manage the Competence Process. To begin with NT arranged team teaching with the pursuer and gave her opportunities to watch other teachers in action. There were meetings between the pursuer, NT and KM designed to give her guidance and support. The pursuer was advised of the decision to begin a Competence Process in January 2013. At a meeting on 29 January 2013 an action plan was discussed. It was agreed that the pursuer would be observed by LL. Another meeting took place on 26 February 2013 (Joint Bundle p748). The pursuer discussed her progress towards the targets she had been set with NT and KM. The pursuer in evidence stated that she had no complaints at this stage. She accepted that the process was supportive. At this stage the Competence Process had not commenced although it was under active discussion and observations were underway.

[12] In March 2014 there was a complaint by a parent that the pursuer had left his child unsupervised. It transpired that the pursuer had entrusted the child to another pupil and asked the pupil to escort the child. There was a dispute as to whether she had asked the pupil to take the child to the school door or the school gates. The pursuer stated that she had asked the pupil to take the child to the door and not the gate. The child's father was due to meet the child. It was alleged that the pupil took the child to the gates and then left the child alone. The father was late. When he arrived he found the child alone and

unsupervised. The child was visually impaired. The father complained. The pursuer met NT on 14 March 2013 to discuss this, another incident involving a P5 child, and a maths lesson. The minute is in the Joint Bundle p751. NT advised the pursuer that she should not have left the child unsupervised. The pursuer did not consider that the complaint was justified. She had left the pupil in question with another pupil who agreed to take the child. The child with the visual impairment was to be met there by the pupil's father. He was late. Whether or not the child should have been taken to the door or gate, there was no protocol for her to follow. When a protocol was later agreed it allowed a pupil to take such a child to the school office. The pursuer considered that this vindicated her actions since it permitted a teacher to allow a pupil to escort a child. It would not appear the new protocol permitted a teacher to allow a child to be taken out the school whether to the school door or gates. The pursuer thought that NT had treated her unfairly.

[13] On 18 March 2013 the pursuer visited her GP. She advised her GP that her problems had worsened over the past month. The GP note summarises them as:

"Problems at school, stressful, problems with parents of some pupils, headteacher unsupportive, union involved. Thoughts of cutting self with knife but feels needs to continue teaching classes..."

The pursuer was at that time already being treated for clinical depression. Her GP increased her dosage of fluoxetine and prescribed diazepam.

[14] KM was the pursuer's mentor and spoke to her regularly. KM was aware that the pursuer was anxious. She thought that her anxiety stemmed from the prospect of having to undergo the Competence Process. But she was unaware of anything other than that. She thought that anxiety about the Competence Process was understandable. She had no concerns about the pursuer's health or wellbeing. She noticed that the pursuer often sought help from fellow staff members. But she did not consider this to be concerning.

[15] An observation took place on 21 March 2013. The pursuer was teaching a P5/6 class. It was a maths lesson. NT did the observation. The pursuer acknowledged that the lesson did not go well. After the lesson she met NT for feedback. Three features of the lesson were graded as positive but overall NT considered it was a weak lesson. The pursuer stated that she accepted NT's assessment. She went on however to make a number of criticisms that demonstrate that she did not in reality accept NT's views. The pursuer thought that NT was "setting her up to fail". In her estimation NT knew that the P5/6 class the pursuer was asked to teach was challenging and that the pursuer would not be able to control the class. The pursuer considered her lesson was graded as "weak" because of her difficulty in managing the class. She did not think this was fair. Counsel for the defender pointed out to the pursuer that NT's note of the observation did not criticise her classroom management. Instead it criticised the pursuer for failing to teach a key skill. The pursuer did not accept this was the true reason for the grading. The pursuer thought that NT had failed to make allowance for the fact that the class was difficult to manage. The pursuer also thought the grade should have given her credit for her overall teaching skills and her ability to teach younger children. It was not clear to me whether this was a legitimate criticism. No evidence was led to explain whether it was proper to take account of matters extraneous to the lesson itself. The pursuer recalled that during the lesson she had said "stop shouting at me" to her pupils. NT had told her that she should not have done this. It was not good practice to blame children. The pursuer did not accept that this was a valid criticism. NT was not asked about this matter. I am not able to offer an opinion as to whether it was a fair criticism or not. The case does not require me to have a view.

[16] The pursuer later heard that KD, the defender's Senior Human Resources manager, had met with NT before the feedback meeting. The pursuer said she was "uncomfortable"

when she heard this. She thought it was suspicious and concluded that NT and the defender's Human Resources department were "out to get her". The pursuer's position was that the defender, as represented by NT and KD from the Human Resources department, intended to use the Competence Process to procure her dismissal.

Commencement of Observations under the Framework - 2013

[17] The pursuer said she was devastated by the decision to commence the Competence Process. Her mentor KM however did not recall any indication that the pursuer was devastated. The pursuer was perhaps anxious but no more than KM would have considered normal in the circumstances.

[18] On 27 March 2013 NT met the pursuer to discuss the commencement of formal observations. The pursuer asked to be accompanied by EA, the pursuer's EIS (Educational Institute of Scotland) representative. KM was also present. EA was an experienced teacher. She had taught in a number of positions before becoming a head teacher. An Action Plan was proposed. The Action Plan was a record of how the observations were to be carried out and the arrangements to be made in that connection. It was agreed that the observations were to be carried out by NT. KM, was to continue in the role of mentor.

[19] The pursuer went to her GP after this meeting. Her GP notes for 8 April 2013 record that she was depressed and that she was having difficulty at work. The GP notes say that the pursuer told had stated a grievance under the defenders' Grievance Procedure against NT. This was not true. The pursuer had not begun a grievance against NT. The pursuer was asked about this in cross-examination. She stated that the GP notes were wrong. While she wished to begin a grievance the EIS had advised against it. Whatever the position the GP notes make it plain that the pursuer was upset with NT.

[20] An Action Plan was proposed and was supposed to start on 16 April 2013. This did not happen. The pursuer did not wish KM to remain as her mentor. She had formed the opinion that KM was also antagonistic to her. The defender suggested LM. The pursuer rejected her because she wanted a more experienced teacher. The pursuer said that during these discussions NT accused her of trying to frustrate the Competence Process.

[21] At a meeting on 17 April 2013 the pursuer scored out the words “aware of expected improvements” on a form used in the Action Plan. The pursuer explained that she had done this because although she was aware of the expected improvements, she thought they were unjustifiable. She was not willing to agree to a statement that presupposed the need for improvements. In her opinion the Competence Process should not have been started. In addition the pursuer did not think that the defender had adequately explained to her which improvements she was expected to make.

[22] The pursuer was shown a minute of a meeting of 25 April 2013 which discussed a maths lesson that had been observed by NT (Joint Bundle p967). It contained various criticisms of the pursuer’s teaching and areas for development. She accepted that the minute was an accurate account of the meeting. It would appear however that NT’s views, as recorded in the minute, were not copied to the pursuer. The pursuer took the view that this showed that the defender was concealing information from her. She described the minute as a “secret document”. I take it that she thought she was entitled to see the minute containing NT’s views and the minute had been withheld from her.

The pursuer’s first absence from school

[23] On 7 May 2013 the pursuer was due to have a meeting in the afternoon with NT and EA to approve the Action Plan that was to be used in the Competence Process. It was based

on the informal action plan that had been operated up to this point. The pursuer indicated beforehand that she was unwilling to sign the Action Plan. NT had asked Human Resources what she should do. The meeting between the pursuer, NT and EA did not take place. The pursuer's father RP came to the school and took her home. After collecting his daughter he went to NT's office to tell her that the pursuer had left the school. NT asked him why she had left. NT could not recall his exact words. But they were, to the effect that "[I] should know what [I] was doing to [his] daughter" or "[I] should know what was wrong with [his] daughter" or "you know why she's ill". NT said this surprised and upset her. She did not know that there was anything wrong with the pursuer. She assumed that the pursuer was upset because the Competence Process was about to begin. She did not know that the pursuer thought she was setting her up to fail.

[24] Ordinarily the unexpected departure of a teacher from school would result in significant disruption. But the day in question was an "in service" day. No pupils were in school. NT was able to make arrangements to cover the pursuer's class during her period of absence. The pursuer was signed off work for two weeks. The pursuer's EIS representative contacted NT and told her that the pursuer had left the school because she was upset by the Competence Process. EA did not allege that the pursuer had any grievance with NT nor did she indicate that the pursuer had any medical problem or health issue.

[25] The pursuer considered that her absence was authorised. NT had not taken any disciplinary steps. The pursuer thought that NT had in effect authorised her absence from school. While it is correct that no disciplinary measures were taken, NT said that she told the pursuer that she should not have left the school without speaking to her and obtaining permission.

[26] The pursuer's GP note for 7 May 2013 (Joint Bundle p2992) indicates that the pursuer was signed off on the basis of "depression/work-related stress". The sick notes are designated MED3s. Although the MED3 was not lodged, and it is not possible to say with certainty what was on the MED3, its terms can be deduced from the GP notes. They indicate that a MED3 was sent that stated that the pursuer was suffering from "depression/work-related stress". The GP notes state that the pursuer had a "melt down" at school and was "hysterical". The notes say that the pursuer blamed NT for her condition and claimed NT was singling her out. The pursuer told her GP that her union considered she was being harassed. This does not appear to be accurate. EA had no criticisms to make of NT's conduct in this connection and in evidence did not express this view of NT's conduct.

[27] NT defended her decision to begin the Competence Process. She stated that her aim was to improve the pursuer's teaching skills. She was not seeking to harass the pursuer. She did not appreciate that the pursuer thought that she was bullying her. In her opinion the pursuer would have stated a grievance if she really thought that she was being bullied. NT indicated that the decision to begin observations was not proof that she was antagonistic to the pursuer. She was observing other teachers in AW Primary School at that time. They did not complain that they were being singled out. In her assessment the pursuer's complaints were unjust and based on misperception. KM likewise denied that NT was antagonistic to the pursuer. She advised that she tried to support the pursuer.

The aftermath of the pursuer's absence from school.

[28] After the pursuer's departure from the school on 7 May 2013, NT phoned the pursuer at home to establish when she would be fit to return to work. She advised the pursuer of the availability of counselling (Joint Bundle pp1049-50). The pursuer contacted

the counselling service and found it helpful. The GP notes (Joint Bundle p2992) indicate that she returned after a fortnight. Her duties were restricted in her first week back. Her work was confined to teaching hours. I infer that this means she was not obliged to do any work that was not classroom based. Given that NT was her head teacher this must have been arranged by NT.

[29] Although NT did not know that the pursuer thought she was being harassed or bullied, she was aware that the pursuer was stressed. But she thought that this was because of the Competence Process. All of the teachers that spoke about the Competence Process said that it was stressful not least because it might result in a loss of employment. NT knew that the pursuer had been to her GP and was aware of the terms of the MED3. But she said that she was unaware of the risk of clinical depression. The Human Resources department had seen the MED3 and did not advise her that clinical depression was a risk. She thought that if the GP had suggested a phased return to work she might have realised that something more serious was afoot. She thought that she might have realised there was a risk of clinical depression if the pursuer had suffered a breakdown of the sort that occurred later on 26 September 2013, or if she had started arriving late for work or if her behaviour with her colleagues had changed. She thought she would have recognised these as "red flags". But she did not see this sort of behaviour in the period up to June and the end of the term. In her day to day interactions with the pursuer before she went off work NT had not noticed any issue with the pursuer. AW Primary School was a small school and she saw the pursuer all the time.

[30] After the pursuer went off sick NT took guidance from KD in the defender's Human Resources department as to how she should be managed. In implement of the advice she was given she spoke to the pursuer twice a week. She asked the pursuer to tell her what

support she needed and told her that she was willing to implement any suggestions. The pursuer at one stage wanted her own class. NT accommodated this request. I am not clear when this request was accommodated. NT proposed spreading out the observations and expanding the time frame of the Competence Process. She expressed a willingness to postpone Stage 1 to October 2013. The pursuer accepted that NT had made this offer (Joint Bundle p760; Minute 23 May 2013). NT encouraged the pursuer to make an appointment with her GP (Joint Bundle p2992; GP note 3 June 2013). NT explained that she hoped the GP would then update her on the pursuer's medical position. The pursuer accepted that NT advised her to speak to her GP. On 21 June 2013 NT again advised the pursuer to go to her doctor.

[31] The pursuer had other health issues at this time. In June 2013 the pursuer had an asthma attack. She was taken by ambulance to hospital from her home. She was off sick.

The Commencement of Stage 1

[32] The Action Plan was signed off in May 2013. Stage 1 began on 23 May 2013. A P2/3 handwriting and music class was observed on 13 June 2013 (Joint Bundle p548). NT carried out the observation. She had not carried out a formal observation before. She spoke to her line manager and the defender's Human Resources department before commencing the process. She liaised with another head teacher who had experience of the process. She read the policy document applicable to the process.

[33] The pursuer thought the lesson went okay. In her view the children had been well behaved. NT graded the lesson as "satisfactory". The pursuer stated that NT told her at the feedback meeting that she needed to improve her behaviour management. In the pursuer's view this was an unjustified criticism and was inconsistent with the feedback form. If the

children were well behaved she could not see why she should be criticised for poor behaviour management. She raised what she saw as the inconsistency between the good behaviour of the children and NT's feedback. She regarded NT's feedback as confusing. She thought the assessment was imbalanced as there were so many positives and yet her weaknesses were highlighted.

[34] NT acknowledged that the pursuer raised these issues with her. She did not accept that her concern with the pursuer's behaviour management was unjustified. More generally she was concerned that the pursuer appeared fixated by her grading and was not engaging effectively with feedback. In her view the pursuer's failure to engage effectively with feedback was characteristic of the pursuer. She thought that the pursuer found it difficult to engage in self-criticism. The result of this was that the feedback sessions were not as helpful to the pursuer as they should have been. The purpose of the feedback was to help the pursuer recognise the weaknesses in her teaching and make appropriate corrections. NT did not think the pursuer was paying attention to her feedback and as a result the process was not proving effective.

[35] After the summer break, the pursuer and NT met in August 2013. The pursuer walked out of the meeting. I was not shown any record of the meeting but this does not appear to be in dispute. NT indicated that the meeting was convened to discuss her concerns with the pursuer's planning. It would appear to me that the walk out was what made NT realise that her relationship with the pursuer was not good.

[36] NT introduced reflective questions to the Competence Process. She indicated that her aim was to get the pursuer to focus on her teaching and not her grades. She hoped that reflective questions would help the pursuer appreciate that the Competence Process was not a personal vendetta. The pursuer for her part did not wish to meet NT face to face. She

would have preferred feedback by email. She found face to face meetings stressful. She thought that email feedback was better because she could share it with her EIS representative and get her advice. The pursuer discussed her concerns with EA. She was told that she should “keep her head down” and not make a fuss. The pursuer continued to believe however that NT was harassing her and was “out to get her”.

[37] An observation was conducted on 24 August 2014 by NT. In respect of the three areas designated for improvement, the lesson was graded “weak”, “satisfactory” and “weak”. Feedback was given and there was an opportunity for reflection. In the assessment form under “Issues for Action” she graded the lesson as “overall weak”.

[38] On 5 September 2013 another observation took place with a composite class at AW Primary School. The pursuer was observed by NT. She rated the lesson as “satisfactory”, “satisfactory (with elements of weak)” and “satisfactory”. A feedback sheet was sent to the pursuer on 11 September 2013 (Joint Bundle pp554-557). I was referred to a sheet that explained the meaning of the grades. A “satisfactory” grade meant that the “strengths just outweigh weaknesses” a “weak” grade meant “important weaknesses” (see Joint Bundle p579)

[39] The last page in the record (p5, Joint Bundle p558) sets out a series of reflective questions. NT’s handwritten comments are filled in against each question. There is a summary of the discussion between the pursuer and NT (see for example the handwritten comments against question 2). On the last page (page 6) there are other handwritten comments. They refer to three points “also discussed” and describe the pursuer’s overall performance as “weak” because key skills were not taught. NT confirmed that pages 5 and 6 were in her handwriting.

[40] NT was referred to a typed version of her feedback (Joint Bundle p769). It was incomplete. NT thought she had started to type it up but it had not been completed. She thought the typed portion was sent to the pursuer and the handwritten notes were her record of what was discussed in the feedback session as they discussed the reflective questions.

[41] The pursuer said that while she had received pages 1-4 she was not given the final pages at the feedback session headed "Reflective Questions for Discussion" (pp558 and 559 in the Joint Bundle). In cross-examination she stated that the information on page 6 had been added by NT after the feedback. The pursuer was suspicious that an overall grade was on the last page. She thought its natural place was at the start where the grades for her areas of improvement are found. She did not accept that NT was entitled to characterise her performance as "weak". In her estimation the front sheet showed that her performance was "satisfactory". The pursuer accepted that the record on page 5 of their discussion of the Reflective Discussions was accurate, even though she had not been given a copy of the document. But she stated that the rear of the document was inaccurate. It states:

"Also discussed:

- Overall rating of the lesson - weak as key skills very (*sic*) not being taught
- lack of progression in learning for ¼ of pupils
- lack of support evident"

The pursuer said that this was false. NT did not discuss her overall rating at the feedback session. She denied that NT said the lesson was "weak".

[42] NT did not accept that she had added the final page at a later stage. Her handwritten comment on page 6 said "also discussed". Her recollection was that the matters on page 6 had been discussed with the pursuer. She was not sure of this however. Eight years had passed since the feedback session and she did not have an exact memory.

[43] NT was asked to explain the apparent inconsistency between the grades on the front sheet and the overall grade on the back sheet. She thought that it might have been because key skills were not taught. Thus while the three specific areas for review under the Competence Process had been graded as satisfactory, she had a more general concern which was that the overall purpose of teaching was not being achieved. The children were not learning. This was a major failure and an overall verdict of weak was justified in such a situation. She pointed out that she had used the word “weak” in the Issues for Action section and had referred to aspects of the lesson as “poor”. She thought that her interaction with the pursuer in the feedback session might have influenced her conclusion that the lesson was overall “weak”. The pursuer would not accept criticism of her teaching. She explained that the typed part of the form was completed before the feedback session and the handwritten part was added at or immediately after feedback. NT thought in hindsight it would have been better if it had all been typed. It was the first time she had tried to do provide feedback that way.

The observation on 24 September 2013

[44] There was a further observation with NT on 24 September 2013 (Joint Bundle p561). This was followed by feedback on 26 September at 8.15am. The pursuer had graded herself. She graded the three elements of her teaching under review as “good”, “good” and “good”. The pursuer and NT met to discuss the feedback. At that time NT had not typed up the form or allocated any grade. She intended to go through the reflective questions with the pursuer and do the grades later. At the meeting the pursuer asked NT what her grade was. The pursuer stated she was told it was “weak like the last one”. The pursuer was taken aback by this. As far as she was concerned her last lesson had not been weak. It had been

satisfactory. She challenged NT. According to the pursuer NT then showed her page 6 (Joint Bundle p558) which stated that her previous lesson was weak. The pursuer told NT that she did not think that she was being supported. According to the pursuer NT was upset by this.

[45] The meeting was brought to a halt because NT had another meeting to attend. An educational psychologist knocked on the door and reminded her that a multi-agency meeting involving a number of parents and pupils was about to begin. NT advised the pursuer that she would get back to her in the afternoon. The pursuer returned to her class.

[46] At some stage thereafter there was a discussion between the pursuer and EA about the feedback session. EA gave a hearsay account of what the pursuer had told her had been said by NT. The pursuer said that after further deliberation and on looking further at the evidence, NT had decided "satisfactory" was too positive and that she had decided to downgrade it to weak. EA said she made representations to JI about the matter and said that "this was not acceptable. If the lesson was satisfactory it was satisfactory".

[47] At the mid-morning break at 10.45 the pursuer spoke to KM. She was in a distressed state and told KM she was terrified. KM confirmed that the pursuer was distressed. The pursuer wanted to go home. KM persuaded her to remain at the school. The pursuer stated that KM thought she was not fit to be in school and should not return to her class. KM did not remember saying this and NT had no recollection of KM telling her this. KM did however organise cover for the pursuer's class and her own class so she could talk to the pursuer. After talking to her KM contacted NT. NT was in the middle of meetings. She broke off from the meetings to meet the pursuer. The pursuer explained that she was upset because she thought that she had been graded as satisfactory and that she had now been told that it was weak. She was upset because this meant that the Competence Process would

continue. NT said that whether the Competence Process continued was not a matter for her as head teacher. The pursuer wanted to see her feedback form and the grades given. NT said that she would complete the form as soon as she could. She then returned to her meetings.

[48] Taking matters out of chronological order, it is convenient to note at this stage that when NT did grade the lesson of 24 September 2013 she graded the three points in the Action Plan as “weak, “satisfactory with elements of weak” and “weak”. She did not give an overall grading. There were no handwritten notes for the feedback session on 26 September 2013.

[49] NT sought advice. She tried to speak to KD of Human Resources. She was unable to reach her. She then spoke to her line manager JI. It was suggested that she speak to FT of the Human Resources department. On contacting him she asked whether she should let the pursuer go home. He advised against it. NT then contacted KM to say that Human Resources advised against allowing the pursuer to go home. KM then relayed this to the pursuer.

[50] The pursuer, NT and KM then arranged to meet. KM said that the pursuer had calmed down but when NT entered the room and asked the pursuer “how are things?” the pursuer then became very upset again. There was considerable divergence in the evidence as to what ensued. The pursuer stated that KM offered to speak on her behalf but NT would not permit her to do so. Neither KM nor NT accepted that this was correct. The pursuer stated that she was not prepared to meet with two senior teachers without support and wanted an EIS representative to be present. Neither NT nor KM could recollect such a request. KM pointed out that it was an informal meeting, not the sort of meeting where EIS representatives would have been present. As she recollected matters they were simply

trying to calm down the pursuer. The pursuer stated that NT gave her five minutes to get representation. Neither NT nor KM could remember this. KM was confident that if such a request had been made she would have remembered it. NT confirmed that she was under pressure of time since she had other meetings to attend. NT stated that she then followed the advice she had received from Human Resources and asked the pursuer to set out her issues in writing and make contact EA, her EIS representative. She asked KM to get the pursuer something to drink. She said that the pursuer had been crying and her eyes were puffy. She did not think it would be a good idea if the pursuer walked through the school in a distressed state. She told the pursuer that she should be back in her class by lunchtime. The pursuer stated that at this stage she walked out of the meeting. She said that as she was leaving NT told her that she would report her and that she was refusing feedback. Neither NT nor KM had any memory of this being said. KM and NT then went back to their respective duties. KM did not see the pursuer again that day.

[51] The pursuer felt that NT's unwillingness to allow KM to speak on her behalf showed that she was hostile to the pursuer. She said that despite her distress NT was unsympathetic towards her.

[52] The pursuer returned to her class. A short time later she returned and spoke to NT. On her return NT agreed that she could have 45 minutes out. NT asked her to reflect on what further support she wanted and to tell her what support she thought would help when they met again.

[53] At lunch the pursuer was sobbing and unable to eat. The pursuer phoned home. Her mother answered the call. The pursuer was incoherent and unable to speak to her mother. Another member of staff MM took the phone to explain to her mother what was wrong. RP her father then drove to the school to pick her up. He phoned to tell her when

he arrived. The pursuer left the school by the fire door to avoid walking past NT's office. She got into her father's car which was in the car park. Her father then phoned NT and told her that the pursuer had left the school and would not be returning. NT asked to speak to the pursuer. The pursuer refused to speak to NT. The pursuer understood that NT wanted to speak to her in person. In her evidence NT did not say she wanted the pursuer to return to the school. Her evidence was that she asked RP to give the phone to the pursuer so she could speak to her. RP's evidence was that NT wanted the pursuer to return to the school and speak to her. He told NT that she would not be coming back into school. The pursuer did not speak to NT. The pursuer said that she thought that if she went back to the school NT would try to prevent her leaving. NT said that she asked to speak to the pursuer because this was required by the defender's policy. The Policy on Sickness Absence does not require face to face meetings. They then tried to phone EA, JI, an Education Officer, and the pursuer's mentor. None of them were free.

[54] In the pursuer's absence NT drafted KM in to cover the pursuer's class. She spoke to JI after RP's phone call. KD of the defender's Human Resources department contacted her at the end of the day. The upshot was that the defender issued the letter referred to below.

[55] The pursuer's husband CT gave evidence about what happened to his wife that morning. I do not consider that I require to rehearse all of his evidence. He was not present during the school meetings and to the extent he gave evidence about what took place at the school, his evidence is hearsay. Although of course his hearsay is admissible it added nothing to the evidence of the eye witnesses. He did however offer direct evidence about the aftermath. He indicated that the pursuer went to her parents' house that night. The pursuer's car was retrieved from the school car park later that day. In his view

26 September 2013 was a turning point for the pursuer and from that point on she began to suffer from serious psychological problems.

The phone call on 27 September 2013

[56] The following day, 27 September 2013, NT phoned the pursuer. NT only vaguely remembered the call. The purpose of the call was to ask how the pursuer was and to establish how long she would be off work. She stated that the Human Resources department told her what questions she had to ask. She was told to inform the pursuer that she would be subject to disciplinary action because she had left the school without permission. NT asked the pursuer whether she would be returning to school the following Tuesday so that she could arrange cover. The pursuer's husband CT was in the room when this call was made. He could overhear the call and said that NT spoke loudly. In his view her tone was threatening and aggressive. He stated that she told the pursuer that her departure from school would be treated as an unauthorised absence and that she would not be paid for her period of absence. He thought that the conversation was one-sided. He accepted that NT had asked the pursuer how she was feeling and that the pursuer had advised her that she was upset and anxious.

[57] In his view the pursuer's absence was authorised because her father had notified NT that she had left school. He opined that in the circumstances this was a sensible way to let the school know she would not be coming back to teach. He also gave evidence that NT knew that the pursuer suffered from anxiety and had mental health issues. I am not persuaded that his evidence in this connection has any weight. What NT knew about the pursuer's mental health is best demonstrated by reference to the documents in the hands of the defender and those who were able to give direct evidence about the information given to

the defender. I also consider that whether or not it was an authorised absence is not a matter for him. That issue is best assessed under reference to the terms of the defender's Sickness Absence Policy and those responsible for applying its terms. He opined that the defender had an agenda to remove his wife. In his view the standards his wife was expected to achieve were constantly changed and the pursuer could do nothing right. He thought that the defender's conduct was designed to break the pursuer down.

The Disciplinary Letter

[58] A Disciplinary Letter (Joint Bundle p980) was sent on 27 September 2013 explaining that it was necessary to investigate the pursuer's unauthorised absence. NT accepted that she did not tell Human Resources that the pursuer had been in an upset condition or that father had telephoned to explain why he was taking her away from school. KD confirmed this. She only discovered this aspect of matters from AD after the disciplinary investigation began. NT explained that she considered the pursuer's failure to speak to her was a problem. She had no information about how long she was expecting to be off. She pointed out that this was the second time her father had removed the pursuer from school. After the first episode of unauthorised absence it had been explained to the pursuer that she was not entitled to leave without notice. NT explained that the repercussions of a teacher leaving school were significant. She thought in these circumstances she was justified in regarding it as a disciplinary matter and that it was for others to decide whether in light of the defender's Absence Policy her absence could be said to be authorised.

[59] A disciplinary investigation then took place. AD was appointed to investigate. She decided that discipline was inappropriate and referred the pursuer for counselling. KD thought that the decision to initiate a disciplinary investigation was appropriate because

there was the risk that there would be dispute about what occurred and the facts needed to be established. In her view a disciplinary investigation would allow a neutral person to make a determination. KD was asked to comment on the pursuer's evidence that NT had threatened to withhold salary. KD was not in a position to know what NT had said. All she could say was that there was a power to do so but that it had not been exercised.

The aftermath of 24 September 2013

[60] The pursuer was off for the remainder of the calendar year. Her GP notes indicate that this was due to anxiety and stress. The pursuer told her GP that she thought that NT was trying to prevent her from meeting the goals of the Action Plan. The notes indicate that the pursuer was in a "worsening situation" at work. In December 2013 while she was off she received a letter from JI inviting her to a meeting with KD, from the Human Resources department. There was a discussion of how the disciplinary process should proceed. It was decided that the presenting officer should be NT and JI the reviewing officer. This meeting appears to have occurred in January 2014. After investigation the defender decided not to take disciplinary action (see Joint Bundle p4537). Instead she was referred for counselling in May 2014.

[61] NT said that she was unaware that the pursuer had a negative view of her until about August/September 2013. She thought that up to then they had a good relationship. She was not aware that the pursuer had a history of depression and knew nothing of the various psychological problems the pursuer had in the past. She stated that she would have expected the pursuer's GP to contact the school if the GP had concerns about the pursuer's mental health. She indicated that she was in regular contact with the pursuer. When the pursuer complained that she was not supporting her, NT said that she had asked the

pursuer what more she could do for her. She recalled an occasion when she asked the pursuer to think about the issue of support over the weekend and to tell her what she wanted. The pursuer did not contact her. NT then sought to contact her. The pursuer could not say what help she needed. NT said she researched the options she could pursue but was unable to identify any other step that would have assisted the pursuer.

[62] On 8 October 2013 (Joint Bundle p2185) EA emailed NT to express her concern that the Competence Review would not assist the pursuer's "recovery".

[63] NT referred the pursuer to Occupational Health on 17 October 2013 (Joint Bundle p1049). The defender's Sickness and Absence policy stated that where an employee was absent from work three times within a defined period, a referral to Occupational Health was necessary. NT referred the pursuer on this basis. NT explained that while she was conscious of the pursuer's anxiety and stress she felt that this was because she was struggling with the Competence Process. In the referral she said so. She thought that the trigger for her absence was the negative feedback the pursuer had received on 24 September 2013. In her view the cause of the pursuer's difficulty was the pursuer's unwillingness to accept the legitimacy of the Competence Process. In her view the pursuer began to become emotionally unstable in August and September 2013. She thought that the reason the pursuer was upset and left school was because she was told her performance was weak and that the process would have to continue.

[64] The pursuer's counsel suggested to NT that she was process driven and blind to the pursuer's emotional predicament. NT denied this. She considered that her regular meetings with the pursuer, the fact that she arranged counselling and referred her to Occupational Health indicated that she was alert to the pursuer's emotional and mental needs. She gave her opportunities to speak to staff. She had sought to care for her wellbeing. She had been

trained to promote health and welfare. Her use of reflective questions was a product of that training. Its object was to remove barriers to learning. She also cited her liaison with Human Resources as proof that she was aware of the pursuer's emotional needs.

Occupational Health involvement

[65] The Occupational Nurse Anne Young provided a report dated 17 October 2013 (Joint Bundle p1053). At that stage she worked with BUPA. She was a specialist nurse. She had no training in psychiatry. She had no access to the pursuer's GP notes. She did not have authority to refer the pursuer to a psychiatrist or psychologist. If she had thought that was necessary she could have asked the patient's consent and written to the GP with a view to getting specialist input. She did not ask the pursuer to consent to the provision of specialist input nor did any of the Occupational Health staff thereafter.

[66] Anne Young concluded that the pursuer was unfit for work. The report narrates that the pursuer's relationship with NT had broken down. The pursuer blamed NT for that. In Anne Young's view the pursuer and NT could not work together since NT was the cause of her anxiety. The pursuer told her that she was subject to a form of performance management and that the process had been restarted due to changes in the guidelines that governed the process. The pursuer complained that the gaps between observations were too short. The pursuer did not advise Anne Young of the difficulties described in her medical history.

[67] NT was sent a copy of the report. She stated that she found it upsetting. She became emotionally upset at this stage in her evidence. She said that she felt she had "gone over and above" in her attempts to support the pursuer and help her improve as a teacher. She had never had to do this before. She felt she had checked everything out and listened to

what the pursuer said. She found it very hard to be blamed by the pursuer for her health condition.

[68] The defender raised the possibility of using a Stress Audit Management Tool to evaluate the pursuer's situation. The pursuer would not agree to the use of the tool. She stated that her EIS representative told her that it would involve speaking to NT. Her EIS representative did not consider this to be in her interests. The pursuer therefore refused to co-operate. Susan Gordon stated that the pursuer refused because she was nervous that it would be used against her. Anne Young, who had advised the defender to use the Tool, said that she was not familiar with it. As she understood it, the Tool required an employee to answer questions about their work situation and these are then discussed. Its purpose is to identify the causes of stress and to facilitate resolution.

[69] A further Occupational Health report was supplied on 9 December 2013. By that stage Anne Young had transferred to work with another Occupational Health provider "Working on Wellbeing". It advised that the pursuer's symptoms had settled slightly and that the counselling provided by the defender was proving beneficial. It said that she was fit to participate in the disciplinary process that had been initiated by the defender and that she could return to work provided it was phased over four weeks. She did not recommend any adjustments to the pursuer's work situation.

[70] A further Occupational Health report instructed by NT was supplied on 6 January 2014. It began by stating that the pursuer had been referred to Occupational Health because of "a stress, anxiety or depression related issue" (Joint Bundle p1061). It advised that her symptoms had settled further and that the pursuer would be fit to return to work in 2-4 weeks. No adjustments were recommended. Anne Young, the Occupational Health nurse, did not consider the pursuer required further review. Anne Young stated that she

could have written to the pursuer's GP if she considered that she needed further information. She would have done so for example if she had thought that the pursuer was not able to give her full information. Anne Young did not make any recommendations about the Competence Process save to indicate that the gaps between the observations should be extended. Anne Young said this recommendation was based on the pursuer's explanation of why she was finding the Competence Process difficult. She did not have enough knowledge to say whether that was operationally possible. Anne Young closed the case.

[71] Occupational Health Reports are copied to the employee and the defender's Human Resources department. It then passes the report to the relevant manager. NT received the first two reports but had left AW Primary School before the third report was completed.

[72] Because of the personal difficulties between the pursuer and NT, JI took over responsibility for managing the pursuer. They met on 14 October 2013 and it was decided that observations should continue.

[73] At this stage it is convenient to reflect on some of the evidence given.

The pursuer's view of the Competence Process

[74] The pursuer did not accept the validity of the Competence Process. She felt that it should never have been started. In her view the observation that had led to its commencement was unfair because the class included pupils with significant behavioural difficulties. This explained her poor result. The pursuer took the view that NT had failed to take account of her teaching in other classes. She also thought that she was under excessive scrutiny. She thought that NT visited her class more than other teachers. Ostensibly these visits were to see if she was putting her learning into practice. The pursuer however felt it

was more than that. She stated that NT once came in to her class twice in the space of an hour. She felt that NT would not or could not tell her why her teaching was inadequate. She did not think that NT had identified areas in which the pursuer required to demonstrate improvement. The pursuer found the decision to commence the Competence Process devastating and throughout the period of observations found the experience incredibly stressful. She thought that NT did not appreciate what she was going through.

The defender's knowledge of the pursuer's mental health

[75] NT was aware that the MED3s referred to stress and anxiety. This information came to her in her capacity as head teacher. She was not aware of the pursuer's medical history outlined at the start of the Opinion. The GP did however send a letter on 29 November 2013 (Joint Bundle p. 2448). Having checked my notes this letter does not appear to have been put to any witness, possibly because it is in the Joint Minute at paragraph 6. It is marked "to whom it may concern". It is not clear to me whether it was seen by NT. I assume however it was received by the Human Resources department. It supplies slightly more detail than the meagre information on the MED3. The GP stated that the pursuer was suffering from anxiety, stress and low mood for which she was prescribed medication and that she had attended on 27 September 2013 with an acute exacerbation of her symptoms of anxiety which she explained was related to ongoing problems at her workplace; that she had been diagnosed with work related stress and anxiety and that she had been provided with a medical certificate stating that she was not fit for work because of work related stress and anxiety.

[76] NT thought that the pursuer's difficulties stemmed from the stress caused by the observations. She did not know of any way of removing the stress. The Action Plan

contained measures designed to ameliorate stress. The Action Plan supplied a mentor and counselling was available. She was able to refer the pursuer to Occupational Health. She relied on those measures as an appropriate response to the pursuer's stress and anxiety.

[77] NT stated that she began to wonder whether the strain of the Competence Process was having a negative impact on the pursuer's teaching competence in late August/early September 2013.

[78] KM stated that even though she was the pursuer's mentor from March to September 2013 the pursuer did not tell her she was anxious or depressed. The pursuer once confided in her that she was on anti-depressants but KM was not sure if she was meant to know this and did nothing about it. She did not state when the pursuer shared this confidence with her. She did not appreciate that the pursuer was at risk of a serious mental breakdown. She said that she and the pursuer had an open relationship and the pursuer spoke to her freely.

Concerns with the pursuer's conduct - 2012-2013

[79] NT thought that the pursuer was resistant to help. In her judgement the pursuer fought the Competence Process rather than using it to improve her teaching skills. KM thought that the pursuer lacked insight into why the Competence Process had begun in the first place. She did not think the pursuer understood the level of concern that existed. She also thought that she was apt to deflect blame on to others. In that connection she referred to an occasion when the pursuer was asked about an incident where she shouted at pupils. Her response was to say that KM did the same.

[80] She thought that the pursuer was prone to blaming the children if things went wrong. The pursuer argued with her pupils and failed to treat them consistently. The pursuer

depended to an excessive extent on the school management to keep order in her class. She had shared classes with the pursuer and had first-hand experience of this matter. The pursuer struggled to manage classes that other teachers managed successfully.

[81] NT did not think that the pursuer should have walked out of school. The professional way of coping with the situation was to ask for time out. In her opinion the pursuer had walked out because she was not willing to face up to unwelcome feedback. NT stated that the pursuer was inclined to seek sympathy rather than take responsibility for her difficulties. She thought the pursuer was prone to looking at matters from her own perspective and was not good at seeing matters objectively.

The Staff's Perception of NT's conduct

[82] KM did not think that NT was antagonistic to the pursuer. She thought that the pursuer was wrong to interpret the commencement of the Competence Process as evidence of NT being antagonistic to the pursuer. NT set high standards for herself and the staff. KM thought that NT had the interest of the children at heart. That was why the observations were begun. In her view NT did things by the book. The pursuer misinterpreted NT's decision to begin the Action Plan.

[83] JI did not accept that NT had acted inappropriately towards the pursuer. In her view if NT had bullied the pursuer, the pursuer would have begun a grievance procedure. She thought that NT had liaised closely with KD and FT from Human Resources and with JI, the defender's Education Officer, in taking the various steps criticised by the pursuer. She thought that NT strove to provide suitable support for the pursuer.

The defender's policy on sickness absence

[84] The defender's Sickness Absence Policy (Joint Bundle p2490). It provides at 4.1.1 that:

"On each occasion of sickness absence, employees must comply with the standard notification and certification requirements. In exceptional circumstances, if an employee is unable to make contact personally he/she should arrange for someone else to do soon (*sic*) their behalf."

[85] NT was asked whether the pursuer's circumstances on 24 September 2013 were exceptional. She did not think that her view mattered. The defender's Human Resources department had taken the decision. They told her that the pursuer's absence was unauthorised. On being pressed she expressed the view that the pursuer's case was not exceptional. She did not see why the pursuer would not speak to her. KD likewise did not think the circumstances were exceptional. She accepted that if the pursuer had been hospitalised that would have been another matter. In that situation the pursuer would be physically incapable of speaking to the defender. She explained that the Policy places the responsibility for reporting on employees and that it was not desirable to permit vicarious reporting. The Policy's approach was designed to put the employee in touch with the defender so that enquiries could be made that could not on confidentiality grounds be made with someone who was not an employee. She did not think that the pursuer's upset was a sufficient reason for leaving the school. She did not think the pursuer's fear that if she went to NT's office she would be prevented from returning home was reasonable. She accepted that her decision to begin an investigation was based on the information given to her by NT. She had been told that the pursuer had become upset because of negative feedback. She accepted that if the pursuer was very upset to the extent that she was incapable of speaking

to NT that would be a different matter. NT had told her that the pursuer had walked out because she did not want to be in school.

[86] NT was also referred to the defender's Fair Treatment at Work Policy. She denied that her conduct was a breach of the Policy and denied intimidation.

[87] She was also referred to the following provisions of the defender's Managing Stress at Work Policy:

"1.1 The council is committed to providing a safe and supportive working environment that is both sufficiently challenging and motivating for all employees.

1.2 Individual employees may, at certain times experience symptoms of stress arising from demands placed upon them from sources which may or may not be work-related. The council, therefore, places considerable importance on developing a work environment and culture where employees can be open about their experience and concerns, and are supported in preventing the causes and managing the effects of stress at work."

[88] She was referred to the aims of the Policy in paragraph 2 and in particular to the following bullet points:

- ensure suitable and sufficient risk assessments are conducted to prevent, identify and control sources of work-related stress through the use of stress risk assessment tools;
- ...
- develop mechanisms for identifying and analysing trends in stress-related absence data and take appropriate action;

[89] NT did not accept that she should have requested a risk assessment. She understood a risk assessment was necessary for events such as school trips. She was unaware that they had any use in the situation she was in. She did not see how a risk assessment would help. Stress and anxiety was inherent in the Competence Process.

[90] JC, the defender's Head of Education Services, gave evidence about the defender's policies. He described the defender's apparatus for dealing with a teacher who was

suffering from stress and anxiety. He considered that informal emotional support was an important part of the package of support. If it was thought that the usual supports were insufficient, Occupational Health could be contacted. He would expect a head teacher to refer the teacher to Occupational Health if stress and anxiety was a significant factor. The defender promoted the availability of support from Occupational Health to all staff through the defender's intranet service. He acknowledged that it could be anticipated that stress levels could be very high such in processes such as competence or disciplinary processes. Human Resources were responsible for supporting a teacher in those situations. The head teacher was expected to contact Human Resources so as to enable support to be provided. In the Competence Process a nominated officer was available to all employees and as a rule support was also available from the person's Trade Union. In relation to grievance procedures support was provided by an Education Officer. Their role was to explain the process to the individual and supply emotional support. He acknowledged that the defender's policies were fundamental to their responsibilities and had to be followed. In relation to stress at work he accepted that the aim of the policy was to minimise stress where it was causing injury or harm to the employee's health. JI gave evidence to the same effect.

[91] The pursuer put certain provisions to JC. From the Managing Stress at Work Policy:

“7.2 Managers will undertake regular risk assessments to identify the main causes of work-related stress for their employees and take appropriate and prompt action to prevent, manage or treat stress.

...

8.3 All managers will be effectively trained and given sufficient knowledge of their role in tackling work-related stress.

...

9.2 Employees can discuss their concerns with their line manager, Human Resources or the council's Occupational Health Unit. Employees may also consult their Trade Union Representative..."

[92] From the defender's Managing Stress at Work Procedure:

"5.4.1 A key element of the council's Managing Sickness Absence Policy is the need to establish effective support mechanisms to assist an employee's return to normal work following a period of sickness absence, particularly after periods of prolonged absence. Where an employee returns to work following prolonged absence due to work-related stress, a suitable return to work programme should be put in place.

...

5.4.4 The extent of support required by employees returning to work will vary. Managers are required to assess the level of support needed in each individual case based on the results of risk assessments and advice received from the Occupational Health and Safety Team, Human Resources and any other specialist advisers..."

[93] In relation to the Managing Stress at Work Policy he acknowledged that a risk assessment was appropriate to stress at work situations. The head teacher would have to take account of stressors in managing employees. This would include managing an employee's workload whether on an individual or group basis. Specialist help could come from Occupational Health. He accepted that if Occupational Health recommended it, a psychiatrist or psychologist could be brought in to give advice. It would not be appropriate for a head teacher to contact the pursuer's GP. Occupational Health could liaise with the pursuer's GP if appropriate. He accepted that a multi-disciplinary approach to the pursuer's case was possible but stated that a decision of that nature was not within a teacher's sphere of competence and that Occupational Health would have to take the lead in this connection. He had never heard of a multi-disciplinary meeting being arranged. In relation to 5.4.4 he said that specialist advisers could be brought in where the issue was outside the expertise of the Occupational Health facility. Thus if a reasonable adjustment was called for because of a

hearing or visual issue, he would expect outside specialist help. JI likewise stated that she was unaware of any other option available to the defender in seeking to address the pursuer's anxiety and stress. She deferred to the Human Resources department in this connection. Measures such as reducing working hours, cutting back the pursuer's workload or giving a teacher a break were issues that she would have expected a head teacher to identify and were not for an Education Officer. If a head teacher wanted to reduce a teacher's hours, JC would have to be involved. Head teachers reported to the Head of Service in connection with matters of this nature. She stated that she dealt with the pursuer sympathetically.

[94] In relation to Managing Stress at Work Procedure, JC accepted that in cases of continuous absence an employee who had been off with stress should have a suitable return to work programme as anticipated by paragraph 5.4.1. Return to work meetings should be held. They did not have to be documented and could be delivered by means of meetings and discussion. In such discussions he would expect consideration to be given to phasing a return. If necessary any risk identified could be risk assessed.

The second period

The pursuer's return to work in 2014

[95] NT left AW Primary School in December 2013 to take up a permanent post elsewhere. A new head teacher called LG was appointed in January 2014. LG remained in this post until October 2017. The pursuer returned to work on 28 January 2014. Her manager during her sickness absence was JI and she managed the return to work process. The Occupational Health recommendation of a phased return to work was accepted at a meeting with JI and EA, the pursuer's EIS representative. The return was phased over four

weeks and a return to work interview was completed. JI stated that the pursuer was offered support at the interview and her readiness to resume teaching was discussed. She confirmed that she was keen to return to work. At the return to work interview she was advised that that the Competence Process would have to continue. KM stated that the pursuer was upset by this. It was agreed that the pursuer would be monitored for six months after her return to work. The pursuer thought that this was because of the events in September 2013. She stated that she thought it was “unprofessional” to monitor her. She considered that she had been justified in leaving the school in September 2013 and was aggrieved with the defender’s decision. The pursuer said that she was asked to sign a document agreeing to the plan. The pursuer said that her EIS representative TG told her not to sign. The pursuer would not sign the document. She said she was told that unless she signed she would be disciplined.

[96] In this new period KM continued to be involved with the pursuer. She assisted with class planning. The pursuer frequently sought her advice and that of other teachers. KM stated that when the pursuer restarted at AW Primary School the pursuer was very positive and full of energy.

[97] LG was told by NT during handover that the pursuer was off work with anxiety and depression. She was not told of the circumstances that accompanied her sickness absence and it would appear she was not made aware of the rift between the pursuer and NT.

[98] The pursuer stated that after she returned to work, in about February 2014 LG told her that there was “no harm in going back to nursery work”. The pursuer thought this showed that LG had already decided that she was not fit to teach in primary school even though LG had not seen her teach. The pursuer said that this showed that LG had accepted NT’s assessment. She thought LG’s suggestion was demeaning since in her view nursery

teachers require lower qualifications and are paid less. LG denied that she had said this.

She stated that when she took over she decided to give the pursuer an opportunity to prove herself and felt that she should make up her own mind about her teaching ability. LG stated that the pursuer told her that she had gone off because of her problems with NT.

[99] LG was responsible for the pursuer for about two years. The GP notes and other sources of evidence indicate that she had a better relationship with the pursuer than NT. According to LG the pursuer did not appear to be unhappy. The pursuer reported that she was well. She did not report any concerns about her health and LG did not detect any issue. In her view the pursuer was a determined character. If she had a poor observation she seemed determined to bounce back. She asked to watch other teachers and was active in trying to improve her skills. The pursuer expressed satisfaction with the supports that were in place. LG would not accept that there was a downward spiral in the pursuer's Action Plan grades over her period in charge of the pursuer. The grades remained consistently low. The pursuer was upset by this state of affairs but LG thought her reaction was understandable and normal. The pursuer worked hard to improve her performance. LG noticed that the pursuer found it hard to wait for her feedback. In order to minimise the stress the pursuer was subject to, LG tried to provide feedback quickly. LG said that doing so was often a challenge.

[100] LG described the pursuer's teaching practice as the worst she had ever seen. The pursuer's classroom was chaotic and noisy. She was unable to provide the children with clear explanations. In her view the pursuer did not reach satisfactory standards in respect of the three areas for improvement: "communication with learners", "differentiation" and "behaviour management". She did not consider there was any link between the pursuer's stress and anxiety and her bad teaching practice. The pursuer's deficits were manifest when

she was in good spirits and making no complaints as they were when she was depressed. In an open plan school her inability to teach effectively was a source of serious concern.

[101] When pressed to say what steps she had taken to minimise the risk of anxiety and depression she explained that she treated the pursuer with kindness, respect and dignity. She considered she had a good relationship with the pursuer. She met with her every two weeks or so. These were informal meetings not performance reviews. LG used them to find out how the pursuer was and to provide help with her teaching skills. She noted that the pursuer had been provided with counselling though this had come to an end when she took over. She was told that the pursuer had found it beneficial. She made it clear that if further counselling was needed she willing to refer the pursuer. She explained that she knew that the pursuer was in receipt of advice from her GP but the advice was confidential and she did not know what the pursuer and GP discussed.

[102] She stated that classroom observations are a normal part of a teacher's work life. She acknowledged that they are inherently stressful. She explained that a head teacher should have regard to observations but also to feedback and what was visible to the head teacher in school on a day to day basis. As she explained head teachers walk through their schools and classrooms and can see a teacher's classroom performance. She indicated that the pursuer's complaint that observations were too close together was acknowledged and they were spaced out. LG stated that it was not possible to stop the Competence Process even if that was what the pursuer wanted since that would be contrary to the interests of the pupils. Stopping the Process or pausing it for a prolonged period was not a reasonable adjustment in her view since it was harmful to the interests of the children. In some cases stress could be minimised by altering a teacher's working pattern but here the pursuer was already working part time. She stated that the pursuer received more support from her than any

other teacher she knew. She stated that she desperately wanted the pursuer to improve her teaching skills.

[103] The pursuer's counsel referred LG to the defender's policies on stress at work. In particular LG was asked why she had not conducted a risk assessment. LG did not appear to think that she had any responsibility in this connection despite the terms of eg paragraph 3.2 of the Managing Stress at Work Procedure. It provides:

"3.2.1 Managers are responsible for conducting risk assessments at least annually or when circumstances change, to identify the main sources of work-related stress. Work methods and activities will be assessed with a view to eliminating or reducing the risk of work-related stress to an acceptable level."

She did not consider that she should have taken any additional steps to risk assess the pursuer. She thought that this would only be necessary if she was contacted and alerted to the need to take further steps eg by the pursuer's GP. She thought that counselling should be seen as offering specialist advice. The pursuer's counsel asked her whether specialist input from a psychologist or psychiatrist was an option she should have considered. LG accepted that it was an option but stated that she had no experience of asking for specialist help. She stated that she was dependent on appropriate medical guidance. No one had advised her that the pursuer might be at risk of harm. She was aware that the pursuer was under stress but there was no indication that this was anything other than the ordinary stresses of work. Nor was she aware that the pursuer was clinically vulnerable. LG indicated that she was not trained to identify the signs of clinical depression or to gauge when someone was under dangerous levels of stress. Thus she looked to Occupational Health and the pursuer's GP. She was not entitled to make a referral to a GP or any other medical professional.

The Action Plan

[104] The Action Plan dated 14 April 2013 (Joint Bundle p694) was superseded during LG's period of responsibility for the Competence Process. The first Action Plan was based on 2003 GTCS standards (Joint Bundle 2522). The new Action Plan was based on the December 2012 GTCS standards (Joint Bundle pp711 and 1219). The defender had produced a new policy for Managing Teacher Underperformance. It came into effect in July 2014. LG had seen the new policy in draft form and redrafted the pursuer's Action Plan to fit with the new policy. She reviewed the pursuer's Action Plan on 15 February 2014. The new Action Plan used the revised GTCS standards. It was dated 10 June 2014 (Joint Bundle p711). LG explained that the main difference between the two policies was that under the previous policy the areas for development were fixed whereas the new policy required the head teacher and the other parties to the process to formulate their own plans. It would also appear that under the new policy there had to be a reviewing officer who made the relevant decision and a presenting officer. JI was the reviewing officer and LG was the presenting officer.

[105] The pursuer stated in her evidence that this was not fair. Whereas before there had been six areas of review there were now three. The pursuer said she was not told that there would be a new approach and considered that the defender was "moving the goal posts". She stated that when she saw that her goals had reduced to three she thought that this meant that she had met three of the criteria.

[106] LG rejected this evidence. The decision to reduce the areas of review was made at the pursuer's request. There appear to have been various explanations for the reduction from six to three. NT at an earlier stage had suggested that the pursuer would benefit from a reduction in goals. The pursuer agreed with that. The change was designed to simplify

matters for the pursuer. It appears to have been accepted that the pursuer had made some progress. It was agreed that some of the goals were not critical. Those that remained were amalgamated into three criteria. JI confirmed that she had liaised with KD and that the aim in reducing the pursuer's criteria to three was so that she had fewer targets to aim at and to focus on the GTCS standards that were important. LG thought that the best strategy was to focus on the issues that were most in need of improvement. At the pursuer's request, the defender changed the way it set out what had been achieved and sustained. This was set this out in a column on right side of the sheet. The terms of the new Action Plan were negotiated between the pursuer, her EIS representative and LG.

[107] The pursuer accepted that these changes were for her benefit. She thought however that the material at paragraph 2.2.1 of the letter of 10 June 2014 had been added because of what had happened in the disciplinary process.

[108] The pursuer stated that she was told that because a new review process had been introduced she would be re-started at Stage 1 again. She said this did not happen. When the new Action Plan was introduced she was still in Stage 1. Since there is no evidence to indicate that a new Competence Process was started the pursuer must be mistaken. It may be that the pursuer thought that a new Competence Process would be begun because LG decided to give the pursuer a chance to prove herself. In other words she decided that in view of the pursuer's concerns about NT she would form her own view of the pursuer's teaching. LG stated that she was entitled to form her own view. She could have recommended the termination of Competence Process if she thought that was appropriate.

The pursuer's support

[109] One of the major issues in the case was whether or not the pursuer was adequately supported. There are two accounts of the support given to the pursuer in Period 2.

Although they were written after the commencement of Period 2 they refer back to the supports given during the time in question. The first is attached to an Occupational Health referral by LG dated 23 September 2014 (Joint Bundle p. 4722). It states:

“Support in place for T:

T has a detailed action plan which clearly outlines her areas for development.

Dates and times for observed teaching sessions have been agreed well in advance to give T maximum preparation time.

Prompt and regular feedback on her progress has been provided with suggestions as to how to improve.

T has fortnightly meetings with her in-school mentor to discuss this feedback and further support provided.

Opportunities (*sic*) have been provided for T to team teach and learn from colleagues.

Her mentor has supported by modelling lessons and T has engaged with peer visits in school.

A good practice visit to another school has been arranged but not carried out yet.

Professional reading has been supplied.

T has filmed her own lessons to support the process of self evaluation.

T has been receiving counselling as a result of a previous referral to Occupational Health and she has reported a positive impact on her ability to cope with the performance management process.

A recent visit to her G.P. resulted in her medication being increased. T was advised by her G.P. to make another referral to Occupational Health to see if any further supports could be offered.”

The second is attached to a form requesting Occupational Health input dated 18 March 2015 (Joint Bundle p. 1073). It repeats the first account to some extent but also includes additional measures. It demonstrates that LG responded to Occupational Health's request to lengthen the gaps between observations:

“Throughout the investigation T will continue to receive the following support:

A detailed action plan clearly outlines T's areas for development.

Regular classroom observations – directly linked to the areas for improvement within the action plan.

Prompt feedback from the observed lessons to identify strengths, areas for improvement and suggest next steps.

Dates and times for observed teaching sessions – agreed in advance to give T maximum preparation time.

A minimum of 9 teaching days between observations – requested by T and her union representative. This was a measure suggested by Occupational Health following the previous referral dated 23/09/14.

Fortnightly meetings with her mentor to discuss feedback and further support provided.

Fortnightly reviews with HT to discuss her progress and identify further supports.

Opportunities for T to team teach and learn from colleagues.

A further opportunity to visit another school for a 'good practice' visit.

Professional reading has been supplied, however, T has indicated that she learns best by 'seeing and doing'.

T has previously filmed her own lessons to support the process of self evaluation – it is recommended that she continues to do this.

In addition to this:

T has received counselling as a result of a referral to Occupational Health after a long period of absence (Sep 13 –Jan 14). Prior to the summer holiday in June 2014, she reported a positive impact on her ability to cope with performance management process, however, this is a support that she chose not to pursue.

During the review meetings, T has been asked to outline any further support required to help her through this process. Every attempt has been made to meet T's request within the parameters of the competence process."

RP's intervention

[110] On 13 May 2014 the pursuer's father came to the school with a view to speaking to LG. The pursuer asked LG if her father could meet her. LG agreed. It was an unscheduled meeting. RP explained to LG that she had not fully understood the significance of events in 2013. The pursuer had been assessed as competent and NT had downgraded her without justification. He stated that he was concerned that if the Competence Process continued his daughter might have another breakdown like that which had occurred in September 2013. In his view the pursuer needed time to recover her confidence. The record of the meeting is in Joint Bundle p834. RP accepted that the minute was accurate. He accepted that he did not tell LG that the pursuer had any current mental health issues.

[111] He denied that the purpose of the meeting was to intimidate LG. He thought she had consented to meeting him. He thought he had every right to speak to LG. The pursuer thought that LG was happy to meet with her father. She also thought that it was normal for family members to represent members of staff. LG did not share their perspective. She stated that she found the meeting uncomfortable. RP kept asking her questions that she did not feel at liberty to answer since they concerned the pursuer. The pursuer was an adult and the issues he was asking about were personal and professional. LG stated that she had to ask the pursuer for permission to answer. RP told her that he had two other children. One was a GP and the other was a solicitor. He said that in light of this it could not be true that the pursuer was failing to meet acceptable standards. LG brought the meeting to an end because she thought that its purpose was to intimidate and interfere with her professional

responsibilities. She said that when she realised what was going on she brought the meeting to a halt.

[112] After RP left LG spoke to Human Resources. She felt that he came to see her because he was concerned that the process was unfavourable to his daughter and he wanted it stopped. She did not think that she should have to justify her professional judgement to him. She noted that RP did not allege that there was any current threat to his daughter's health or wellbeing. His complaints were about the events of 2013 and NT. Nor did he allege that the Competence Process was affecting the pursuer's health. The Minute was drawn up that day. She found RP assertive. She had no doubt that his intention was to stop the Competence Process. He was not able to accept that his daughter was not performing adequately. RP was of the view that the EIS were not representing the pursuer properly. He thought the defender was engaged in a long-term, deliberate course of harassment. He described it as a "deliberate attempt to bury her".

The pursuer's domestic problems 2014.

[113] RP gave evidence that at this time the Social Work Department removed E from the custody of the pursuer and her husband. E was six. The Social Work Department advised the family that unless some arrangement was made E would be put into the hands of foster carers. RP said the Social Work Department put "a gun to their head". After a brief period in foster care he and his wife took over the care of E. He stated that CT was too stressed to care for E. The Social Work Department was willing to allow CT to see E at bedtime.

Mr and Mrs RP were authorised to take over her care of E for a period of six months but in fact they cared for her for three months between June and August 2014. She slept at their house and they took her to school. For a short time they had to go to England to look after

RP's mother. At that time E was placed with friends of the pursuer and CT. Thereafter the pursuer, CT, and E were allowed to stay with his son and family on the Isle of Wight. I was not told why the pursuer or her husband could not look after E. This was the only evidence I heard about this aspect of the pursuer's life.

The observations continue

[114] An observation was conducted on 20 May 2014 by KM. It indicated that while the pursuer had some strengths, her overall performance was weak. The form was signed by LG and not KM (Joint Bundle p588). The pursuer said that LG should not have signed the form. She did not believe that KM had given her a weak grading. She thought that LG had overridden KM and downgraded her. The pursuer did not think that her poor results had anything to do with her teaching but that she was still being downgraded because of the incident with NT in September 2013. I do not have any note of this allegation being put to either LG or KM. I note that the pursuer signed the minute along with LG on 21 May 2014. I also note that the signing space on the last page appears to be set up for signature by a head teacher.

[115] Between February and June 2014 the pursuer's mentor was LL. LG stated that she was assigned to the pursuer because she was an excellent teacher and had a good relationship with the pursuer. The pursuer however believed that she kept secret notes on her. She based this belief on observing LL accessing a folder which had notes about her team teaching with the pursuer. The pursuer said that she thought they were secret notes because these notes had not been shared with her.

[116] The pursuer saw her GP again on 26 May 2014 and indicated that she was not coping because of a lack of support. When challenged by the defender's counsel to explain in what

respect she lacked support, the pursuer stated that the GP note referred to family support. The pursuer went on however to say that LG had refused to permit the pursuer to observe her teaching. It consider it is more likely that the GP note is referring to a lack of professional support.

[117] On 18 June 2014 a competence outcome meeting took place. JI wrote to the pursuer providing a summary of a competence review. She advised that the defender had concluded that the pursuer was not achieving the GTCs standards and that if by the end of Stage 2 she had not achieved the targets set then she was liable to disciplinary action (Joint Bundle p639, 721-727).

Stage 2 of the Action Plan

[118] The pursuer returned after the summer break in August 2014. She gave evidence that she felt more confident. At that time she was sharing a class with KM. Stage 2 of the Action Plan began with a meeting on 22 August 2014. The Action Plan was finalised on 15 October 2014. There were five meetings before the pursuer and her EIS representative JM reached agreement. JM was not aware that the pursuer had any concerns over the objectives of the Action Plan. He said his focus was on the fairness of the process. He had argued that the gaps between observations should be long enough to enable the pursuer to recover and absorb the appropriate lessons. The agreement was that there should not be less than nine days between observations. He accepted that the observations were spaced out in accordance with this agreement. He was shown a Minute of a meeting setting out the supports to be provided to the pursuer (Joint Bundle p857). JM accepted that these supports were available to the pursuer from the commencement of the process.

[119] After Stage 2 began there were of five observed classes. Four were graded as “weak” and one as “satisfactory”. LG conducted an observation on 30 October 2014. The feedback highlighted the pursuer’s strengths. But the verdict was that “overall today’s lesson was judged to be weak” (Joint Bundle 608). The form was signed by the pursuer and LG. LG stated that the pursuer was not making sustained progress. While she could occasionally reach an acceptable standard for the most part she did not. LG stated that the pursuer was consistently poor through Stage 2 and that it became evident that she was not making the necessary progress. She stated that she looked for positives when she observed the pursuer but she was so poor that it was hard to find one. She had never been in such a position before nor since.

Deterioration in the pursuer’s mood

[120] As the process wore on and her grades showed no sign of improving, the pursuer became more anxious, her sleep was disturbed, and she became mistrustful of fellow staff members. She stopped going to the staff room. Her parents came to the school with E. The pursuer went to their car for lunch. She became suspicious of her work colleagues and thought that her job share teacher KM was taking notes about her teaching performance.

[121] The pursuer was critical of the continuance of the observations. As she saw it no account was taken of the observation that had been graded as satisfactory. She felt that the observations were too close together. She thought she needed more time to internalise the lessons from her observations and time to practise. In cross-examination she accepted that her poor performance at this stage had nothing to do with NT. She complained that the approach of the defender was negative and that the process had become personal and was not objective.

[122] At this time she met regularly with her mentor LL. LG on her request relieved her of the need to complete a self-evaluation report so that she could concentrate on her lessons.

[123] The pursuer was referred to Occupational Health on 23 September 2014 by LG (Joint Bundle pp1064, 1066). The pursuer's GP had suggested that it would be desirable. In making the referral LG referred to work related stress as a result of the performance management process. The form had a number of boxes each of which designated a reason or referral. She ticked the box entitled "performance deterioration". She stated that she ticked this box because it was the box that was closest to her concern. However she did not think that the pursuer's performance as a teacher had deteriorated. Had there been an "other" box she would have ticked it. The reason for referral was her concern over the pursuer's wellbeing. The pursuer had stopped using the staff room. She was on the phone a lot.

[124] The Occupational Health report (Joint Bundle p1070) is dated 1 October 2014. She met with the pursuer to discuss its recommendations. LG disagreed with some of the information the pursuer had provided to the Occupational Health nurse. The pursuer had told the nurse that the Action Plan was to be restarted. LG did not consider that this was correct. The Action Plan was continuing.

[125] LG was asked about the pursuer's state of mind at this time. She said that one episode stuck in her mind. At the end of the school day she came across the pursuer sitting on the floor. She had lost her car keys. She was raking frantically through her bag. It was full of teaching resources and they had become scattered over the ground. LG said she sat down beside the pursuer to try to calm her down. Although she did not set out what she took from this episode, I take it that she thought that it illustrated the pursuer's frame of mind. The pursuer was in a panicked state.

[126] The pursuer's EIS representatives were not always consistent. EA had argued for a reduction in observations and a longer gap between them. LG had accepted her request and planned accordingly. JM however argued that the observations should be regular. LG agreed to delay planning and drafted two plans so that the pursuer could decide which the best option was.

[127] A meeting took place on 15 October 2014 (Joint Bundle p891). LG accepted that the cause of the pursuer's stress and anxiety was the Competence Process. But all that could be done to support her through that process had been done. There was nothing that she could reasonably have requested that had not been done short of a request to stop the Competence Process or put it on hold indefinitely. That would have been inconsistent with the defender's educational responsibilities. While specialist medical advice was an option, she had no reason to think that the pursuer was at risk and had no knowledge of what type of expertise could assist the pursuer. The pursuer had access to her GP and if intervention was needed she thought it had to come from the pursuer's own medical advisors. LG felt that the pursuer was in the best place to assess her mental health. She did not have any basis for seeking medical advice. The pursuer could have taken time off work if she felt it was needed for health reasons. LG could not force that. The pursuer's counsel challenged this view. He suggested that it would have been a good idea to recognise that things were not going well and that it would have been better to identify the cause, and review what measures were needed to support the pursuer. He suggested that a multi-disciplinary approach would be beneficial. LG pointed out that she did not have the insight or knowledge to make these decisions. She did not know what the pursuer felt and if she was telling her counsellors that her mental health was suffering, she had no means of finding

out. She was not aware of what the pursuer was saying to her GP. The most recent Occupational Health report stated that the pursuer was fit for work.

[128] A GP's letter of 20 November 2014 refers to "severe stress and anxiety" (Joint Bundle p2449; Joint Minute, para 10(a)). On 24 November 2014 at a Stage 2 review meeting the pursuer's progress was reviewed (Joint Bundle 642). The notes say "JT feeling stressed" (p643); "not coping in the process" (p644). The minutes recognise the process had been "running since March '13 – enormous toll + impact on confidence (shot to pieces) + impact on family + child" (p647). The pursuer was said to be "going over the edge" (p649). It was agreed that LG would present the evidence and the Reviewing Officer would decide whether to progress to Stage 3.

[129] KD indicated that in the run up to Christmas the pursuer's observations were postponed. It was recognised that she was a part time teacher and did not have the same opportunities as a full time teacher to practice her skills. They gave her additional time. LG acknowledged that a Competence Review was meant to be a speedy process but because of the pursuer's repeated sickness absences this had not happened. The pauses designed to assist the pursuer's recovery conspired to delay matters.

The Jellis report

[130] Reference was also made in evidence to a report commissioned by the defender by Dr Chris Jellis of Durham University (Joint Bundle p2542). It confirmed that the class that the pursuer taught was doing well and there were no concerns. LG said that it was from the Centre for Evaluation and Monitoring and was done every year. She did not accept that it shed any light on the pursuer's teaching ability. It was not a process designed to monitor the performance of individual teachers. It covered a range of classes not just the class the

pursuer taught. JI likewise confirmed that the report was not related to teacher competence. KM was shown the report. She had not seen it before. At the time she was sharing a class with the pursuer (P3/4 in 2014/15). The class had a wide range of ability. KM did not accept that this report had anything to say about class behaviour. The author had not observed the class. In her view anyone who observed the class would have seen the problems.

An EIS challenge to the Competence Process

[131] I was referred to an email from JM dated 16 October 2014 (Joint Bundle p2486) in which he raised concerns about the review process. It was sent to MN, the Head of Education. His understanding was that it was passed to JC who had responsibility for quality assurance. JC however had no recollection of seeing the email. He was confident that he would have remembered if he had. If however he had seen it, he could have done nothing about it. If there was an issue with the process itself that was for the GTCS and the trade unions and local negotiating committees. He said that he had responsibility for primary schools up to June 2015. For a short period thereafter he had responsibility for both primary and secondary schools but from October 2015 onwards he was responsible only for secondary schools. DM had responsibility for primary schools from October 2014. Nothing came of this email. JM's concerns were never articulated or explored. He did not pursue the matter.

The commencement of the grievance process

[132] The pursuer's final observation was on 13 January 2015. On 1 February 2015 she completed Stage 2. The first review meeting under Stage 3 was due to take place on 12 February 2015. The second was scheduled for 19 February 2015.

[133] On 9 February 2015 the pursuer hand delivered a grievance to the defender. The grievance consisted of 35 separate grievances (p1670 of the Joint Bundle). In essence she complained that the Competence Process was unfair, should not have been commenced and asked the defender to terminate the Competence Process. The pursuer was asked why the grievance was stated just before Stage 3 was due to commence. She explained that it had taken some time to formulate. It had been drafted by her father and had been reviewed by JM, her EIS representative. She denied that the purpose of the grievance was to prevent the Competence Process moving to Stage 3.

[134] The pursuer stated that after lodging the grievance she received a phone call at about 6.30pm on 10 February 2015 from KD of the defender's Human Resources department. The pursuer said that she was told that the review meeting would not be postponed and that she was not permitted to lodge a grievance. She stated that she was given the impression that KD thought that the grievance was a delaying tactic. She said KD pointed out that the Competence Process had begun two years before and the pursuer should have stated her grievance then. The pursuer said she explained that she was not trying to frustrate Stage 3. She stated that the grievance came late in the day because of the way the Competence Process had gone. It had frustrated her. In her view the Competence Process should have been stopped. The pursuer said that KD said that the Competence Process could not be stopped while the grievance procedure was concluded. The Competence Process had to continue. The pursuer said that she could understand this to a certain extent. The pursuer considered that the defender's determination to proceed was proof that they wanted rid of her. She stated that she was devastated by the defender's decision to proceed with the Competence Process.

[135] KD denied having telephoned the pursuer. She claimed to be “shocked and stunned” by the pursuer’s evidence. She indicated that normal practice was that on receipt of a grievance the defender would liaise with the employee’s EIS representative rather than the member of staff. KD said that her involvement with the case was ending at that time. It was not her task to decide how the grievance should be dealt with. She denied having phoned the pursuer.

[136] The pursuer took the position that the Competence Process should be stopped until such time as the grievance was disposed. The grievance created a dilemma for the defender. If the Competence Process was deficient it might have to be restarted. In that situation pressing on would be a waste of time and resources.

[137] JC, the defender’s Head of Education Services, was appointed to be the Nominated Officer for the grievance. He had a senior post in the defender’s organisation. Only the CEO and deputy CEO ranked above him. He had been a teacher and head teacher before taking up his post in 2013. He was asked to deal with the grievance because he was not an Education Officer and had no involvement in the Competence Process. He explained that while grievances were often dealt with by less senior members of staff, grievances that involved the conduct of head teachers and Education Officers were suitable to someone of his seniority. In general where a decision was of greater significance eg amending a contract of employment from full time to part time or a final absence management meeting or a temporary redeployment following a disciplinary meeting, he would be the appropriate person for such a decision.

[138] He contacted Human Resources to seek their advice. AE, a senior Human Resources advisor, advised him that the Competence Process should not be paused. The process was so far advanced it should be allowed to continue. JC accepted this advice. He sent a letter to

that effect on 11 February 2015 (Joint Bundle p1682); see also letter of 27 February 2015 (Joint bundle p1797). The pursuer was advised that some of the issues of which she complained were more appropriately raised under the defender's Bullying and Harassment Policy. JC took the view that the grievance was largely concerned with the Competence Process and that grievance procedure was not suitable for complex and lengthy complaints. He had never seen a grievance of such a length before nor since. JC considered that he had a discretion whether or not to hear the grievance before Stage 3 completed. He decided that he should not hear the grievance at that time.

The pursuer's mental health

[139] LG referred the pursuer to Occupational Health on 18 March 2015. She referred to "performance deterioration" for the reasons explained above. The referral indicated that the pursuer was suffering from increased levels of anxiety.

[140] The Occupational Health report (Joint Bundle p1080) dated 14 April 2015 stated that the pursuer was fit for work. It recommended the completion of the grievance before progressing the Competence Process. JC explained that he could not stop the Competence Process because of the defender's statutory responsibility to provide suitable quality teaching to the children in their schools. The Competence Process indicated that the pursuer was not meeting requisite standards and he did not consider that the defender could permit that state of affairs to persist longer than necessary.

[141] The reports did not identify further measures to be taken. The pursuer was in receipt of counselling. She accepted that she could have made an appointment with her GP if she needed help for her mental health difficulties. The pursuer accepted that the defender gave her all the supports she asked for. The only occasion when she had been turned down was

when she asked to observe LG teaching (see above). She did not however consider LG to be supportive. LG had presented documents at review meetings which had not been communicated to the pursuer beforehand. The pursuer also alleged that she had failed to implement support plans. I was not referred to any support plan that LG had failed to implement. The pursuer said that the process was unsupportive since it involved monitoring her teaching and regular observations. The pursuer felt under pressure because her every step was monitored. She felt singled out because none of the other teachers were going through the process she was being asked to go through even though all teachers have things they need to improve on. She said her support felt like a box ticking exercise. The pursuer said that in reducing her targets to three the process had become hard for her to understand.

[142] On 9 September 2015 her GP notes indicate that she was having problems with LG. The pursuer stated that she thought that their working relationship began to change in May 2015. She had become suspicious of LG. The pursuer did not think that she was “out to get her” but she considered that she had failed to stop the Competence Process and was making it difficult for the pursuer to prove that she was competent.

The Competence Process continues

[143] JC wrote on 4 November 2015. The letter advised the pursuer that at Stage 3 she would be liable to dismissal for gross misconduct. He intimated that the letter was written on advice from Human Resources. He was asked whether he appreciated the effect such a letter might have on someone who was under stress. JC did not answer this question directly. I took it however that he accepted that the letter would be upsetting. He expressly accepted that the letter was not well worded. The reference to gross misconduct was

inappropriate. He acknowledged that the pursuer's competence not conduct was the issue. He thought that the pursuer's EIS representative would explain to the pursuer that her conduct was not being impeached. The wording of the letter was taken up by TG the pursuer's EIS representative with the defender. He stated that it was not appropriate to suggest that the pursuer had been guilty of gross misconduct. He appears to have said that if the pursuer was to be dismissed it would be dismissal for "some other substantial reason" (Employment Rights Act 1996). TG said he wrote to JC to make this point. The defender conceded that an error had been made. The defender did not refer to gross misconduct in subsequent correspondence. This was an unfortunate lapse by the defender.

[144] JC stated that the defender considered how to minimise the levels of stress for the pursuer. It was thought that running the grievance and the Stage 3 Investigation side by side would avoid duplicating two stressful processes. JC was referred to his letter of 18 November 2015 (Joint Bundle p1715). He accepted the processes were not identical. In her grievance for example the pursuer complained that the defender had altered the criteria used in the Competence Process. JC accepted that this might be viewed as an independent grievance. But in his view the key question was whether the process should have been started in the first place. He thought that the defender's approach would cut the amount of evidence down and reduce the time spent on the matter. It would be less stressful to have one process rather than two processes one after the other. Grievance procedure was designed to deal with short issues and provide swift solutions. It was not meant to deal with these sort of issues.

[145] He remained of the view that his decision was correct. The Investigation Report produced in the Competence Process dealt with all the issues raised by the grievance. If the supposed benefit of the grievance process was a swift resolution, the pursuer and her EIS

representative had displayed no appetite for speed. The pursuer had repeatedly postponed hearings at the last moment. He pointed out that the pursuer went off sick on 16 March 2014 six days before the hearing. While he had eventually decided to separate the grievance from the Competence Process, he made it clear that he was not conceding that he had made an error. He had done so because matters had reached an impasse.

[146] The pursuer stated that TG advised her not to challenge the decision to combine the grievance procedure with the Investigation at Stage 3.

The outcome of the Competence Process - Stage 3

[147] Stage 3 went ahead. FT was appointed the Investigating Officer. There were two investigation interviews; one in May 2015 and one in June 2015. TG felt they were too long and detailed and that as a result the pursuer was placed under stress. He was of the view that the investigation was unnecessary since the issues under examination were not in dispute. He also accepted however that the pursuer wanted to respond in detail. He felt that she became enmeshed with the various incidents upon which the defender relied that she never had an opportunity to explain why she had a grievance.

[148] The Disciplinary Investigation Report was completed (Joint Bundle p2802). The defender communicated the outcome of Stage 3 by letter of 18 November 2015 (Joint Bundle p1715). The Investigation Report that preceded this decision was hand delivered to the pursuer by JC. He stated that he chose to deliver it by hand because of its size. The decision and appendices were in two large folders and he did not wish to post them. He handed it to the pursuer in the staff room of AW Primary School. TG criticised this action as intimidating. JC found that she had not achieved the standard of a registered teacher and

that dismissal was appropriate. Her case was then passed to the GTCS for a decision on her fitness to teach and registration.

[149] The pursuer stated that she was devastated by the Report. It contained a lot of information that had not been brought to her attention before. In particular she learned that MM and LL who had mentored her were critical of her teaching skills. She was upset that they had not said to her face what they said in their statements to the defender. She thought that FT, the Investigating Officer, had asked leading questions of his interviewees and as a result the report was unbalanced. The EIS representative, EA, was among those who stated that the pursuer was not reaching the requisite standards. The pursuer was not able to accept this. She pointed out that at an earlier stage she had been graded as "satisfactory" and EA had encouraged her to keep going and make sure the next grade was the same. She thought EA had contradicted herself. She also thought that EA was not in a position to offer an opinion since she had never observed the pursuer. The pursuer thought everyone was against her. LG said that the pursuer was mistaken.

The second grievance

[150] The pursuer had commenced a second grievance on 1 April 2016 designed to challenge the refusal to separate her first grievance from the Competence Process. JC responded on 29 April 2016. JC took the view that an impasse had been reached and so he acceded to the pursuer's wish. He said that if he had not done so he could not see how the Competence Process could progress. On three occasions dates for hearings had been set up and had been called off at short notice by the pursuer or her EIS representative. He remitted the grievance to a new investigation officer, DM.

Grievance hearing June 2016

[151] On 14 June 2016 DM, the Head of Education, convened a hearing. It took place on 23 June 2016 and was attended by the pursuer, FT as the Investigating Officer, LD from Human Resources and DM of the EIS. DM worked for the defender between 2012 and 2020 first as a head teacher and then as Head of Education. DM represented the pursuer. He was an Assistant Secretary of the EIS and a teacher. He was an experienced EIS representative and had represented teachers in competence processes before. He usually became involved when matters were at an advanced stage and had experience of liaising with parties' legal representatives in connection with hearings before the GTCS. He also had experience of grievance processes when working as a local secretary for the EIS in Strathclyde and North Lanarkshire Councils.

[152] The pursuer stated that when they arrived they were informed that the defender intended to call witnesses. The pursuer stated that she had not been advised beforehand that witnesses would be called. She was also concerned because she saw some large files in DM's possession. She concluded that these were the Investigation Report and its appendices. The pursuer stated that DM asked which witnesses would give evidence and was told that he would find out when they were called. She stated that DM then decided that he could not conduct the hearing and both he and the pursuer withdrew. DM partly corroborated this account. He stated he withdrew because he had no prior warning that witnesses were to be led. He thought that the hearing was confined to the question of whether the correct process was being followed. He thought it was an "ambush". DM had no memory of witnesses being present but she was willing to accept that if DM and the pursuer said otherwise, there must have been witnesses. She accepted that notice should have been given if the defender intended to rely on witnesses. DM said that the Disciplinary

Investigation files were given to her. She did not see what relevance these files would have had and had no recollection of looking at documents from the Competence Process. She said that she had been asked to hear a grievance and she would have done so independently and fairly. Her main concern at the hearing was the aggressive manner adopted by DM and his antagonism towards FT. She understood her role was to hear from the pursuer and not any witnesses. Given the objections raised by the pursuer's representative and after consultation with Human Resources she decided to adjourn the hearing.

Third grievance

[153] The pursuer began a third grievance on 14 June 2016 complaining that the defender had failed to consider the possibility of giving her a temporary deployment to another primary school. This was dealt with by DM. As I relate below it was eventually agreed that the pursuer should be sent to L Primary School.

The combination of the grievance and the Competence Process

[154] The pursuer referred to the defender's policy which stated that if a grievance was lodged, the investigation should be commenced within 10 days. This had not been done. She also expressed concern that FT had a role in the Competence Process and in the grievance at the same time.

[155] DM had a number of criticisms of the procedure the defender was following. He thought that FT should not have been appointed as the nominated officer to assist DM since he was the Investigating Officer in the Disciplinary Process. In his view he could not be neutral. He took the view that FT had in effect become a prosecutor. DM did not accept there was anything untoward in the presence of FT. He was not there to advise her. His

role was to answer any questions she had. Human Resources had advised that his role was appropriate.

[156] DM expressed the view that the defender should not have tried to combine the grievance procedure and Competence Process. In his judgement they served different purposes and were governed by a different procedures. If there was a proposal to roll the two processes together the pursuer should have been asked to agree to that and she had not done so. TG agreed with these points.

The aftermath of the investigation

[157] The pursuer was signed off sick from 20 November 2015 to July 2016 on the basis of her anxiety. She stated that her mental health had deteriorated to the extent that she realised she was not fit to work in this period of time. She also stated that since the Investigation Report advised her that she should not discuss its terms with anyone she felt that she should not go to school as she would be tempted to do so. In addition some of the teachers at AW Primary School had been critical of her. There were only nine teachers at the school. In this situation she felt she could not go back to AW Primary School. Her GP notes for 1 December 2015 state that she went off sick because she was having personal problems relating to relationships. In her GP notes for 7 January 2016 the pursuer told her GP she expected to be dismissed but that if so it may be an unfair dismissal. She felt that it was wrong that there had been no hearing of her grievance relating to Stage 1.

Witnesses

[158] Hereunder I summarise the evidence of witnesses whose evidence supplements the general summary given above.

KM

[159] The pursuer's sister Dr KM, a GP, gave evidence that before 2013 the pursuer functioned normally. Although the pursuer had a history of anxiety she had not experienced undue stress or anxiety. She acknowledged that she had some health problems after the birth of E but that these had been overcome. She was unaware of any health or work related issues prior to 2013. In her view the pursuer enjoyed her work as a primary school teacher. She accepted that prior to 2013 she had intermittent contact with the pursuer. She was married with three children and had a busy life. Her involvement with the pursuer increased to daily contact when the pursuer was admitted to hospital in 2016. KM appeared to be unaware of the pursuer's medical difficulties prior to 2013 or the treatment the pursuer had been given for anxiety and depression.

[160] The pursuer's counsel asked KM questions about the causes of the pursuer's subsequent mental health issues. I have reservations about this evidence. KM was not a medical expert or a treating physician. She was the pursuer's sister. In these circumstances I am not inclined to lay much weight on her views about the causes of the pursuer's difficulties. She gave evidence about what she would have done had she been the pursuer's GP. She said that she would have signed her off as sick in the period 2013-2016. I do not think she was in a position to say whether the pursuer was bullied or what occurred on 26 September 2013. She acknowledged that what she knew was from her parents and the pursuer. I am content to accept that she gave informal advice to the pursuer about her anxiety and attended Occupational Health appointments with the pursuer. She stated that at the time of the proof the pursuer was much better although anxious about the court

proceedings. In her view the pursuer's health is back where it was prior to the events of 2013.

LG

[161] LG thought that the pursuer's family exercised an unhelpful influence on the pursuer. In this she was supported by the pursuer's EIS representative EA (Joint Bundle p1978). She thought that they encouraged the pursuer to obstruct the Competence Process. As a result it was more combative and protracted than it should have been. She also thought that JM's stance was unhelpful. Unlike EA, he asked for things that in her view the defender could not deliver. He asked for a 12 month break in the Action Plan. He asked the defender to stop the observations but allow the pursuer to carry on teaching. He should have known that could not be done.

[162] She thought that the pursuer's classroom management skills were seriously lacking. The pursuer put children out of her class too often. She did not think that the pursuer understood how humiliating this was for a child. If it had to be done then it should be for a short time. Counsel for the defender drew her attention to a lesson that was not subject to observation. The pursuer is recorded to have been shouting and screeching at a pupil in an afternoon lesson. LG said that no action was taken over the incident but that it was not an appropriate way to deal with a child (Joint Bundle p929). LG thought that the pursuer was prone to blame others for her own failings. She accepted that AW Primary School was based in a deprived area and the children were needy. In her view however the problem was not the pupils but the pursuer. She would have expected other teachers to encounter the same problems with the pupils if it was an issue with the pupils. But other teachers in the school did not have the same difficulties.

[163] LG stated that one of the difficulties she encountered was that the pursuer was prone to misunderstand or misinterpret feedback provided in the Competence Process. Because of this LG started to provide written feedback. She asked the pursuer to sign the feedback form after it had been discussed and agreed. The practice was not always successful. The pursuer was apt to change her mind after signing off on the feedback. In LG's view this was because of her family's influence. She noted that after speaking to them the pursuer was apt to take a different stance from that which she had taken at meetings. More generally she found the pursuer reluctant to accept criticism. She heard what she wanted to hear.

[164] The pursuer depended to an unusual extent on a support worker in teaching her classes. In LG's view this suggested that her teaching skills were deficient. A teacher would not be expected to rely so heavily on external support. In her opinion the pursuer was deficient in basic teaching skills. She did not think the pursuer had the capacity to improve these skills. The pursuer had been in receipt of help for a prolonged period with little sign of improvement. She was not optimistic that further opportunities to learn or practise these skills would change matters. She had asked other senior figures to check her observations. There was agreement that her assessments were fair.

[165] In her opinion the pursuer had enjoyed significant emotional support at AW Primary School. The staff were caring and helpful. The pursuer was not able in her opinion to distinguish professional judgements from personal judgements. She interpreted a critical professional judgement as a critical personal judgement. LG stated that she held no animosity towards the pursuer and that she treated her the same way throughout her time at the school. She stated that the last time she saw the pursuer was when she came to the school with her mother to collect her belongings. She had said goodbye and wished her well.

JJ

[166] JJ was not directly involved with the pursuer. In evidence however she stated that she had done one observation and concurred that the pursuer had difficulty with managing children's behaviour.

[167] She recognised that the defender was obliged to provide teachers of satisfactory ability and she recognised that the defender had sought to help the pursuer improve her teaching ability. She accepted that the Competence Process was stressful. She considered that there were two ways in which the stress the pursuer was under might have been removed. First, if the defender had suspended her from teaching because it foresaw that to allow her to continue to do so would involve a risk to her health. She said that such an intervention would have required clear medical evidence. But the defender did not have such evidence nor did the pursuer present any information to indicate that she was at risk of psychiatric injury. The pursuer had presented herself as fit for work. Occupational Health had not signalled that she was unfit for work or at risk of a breakdown. Second, the stress would have been avoided if the Competence Process had been brought to a conclusion because the Competence Process was not achieving its goal. The pursuer rejected feedback and fought its conclusions. This prolonged the agony. JJ was told she was not at liberty to drop the Action Plan. Once it had started it had to be brought to an appropriate conclusion. If the Competence Process did not bring about improvement, it moved forward to the next stage.

KD

[168] KD stated that they all wanted the pursuer to succeed and to complete the Competence Process. She stated that “no one wanted to see her in the position she was in”. She offered a personal anecdote. During a meeting with the pursuer there was a break. The conversation appears to have taken place in the school gym. They discussed the fact that they both had girls of the same age. She discussed the competing demands of work and caring for children. It would seem that the pursuer was the breadwinner and needed to keep her job. They talked about Christmas presents. She told the pursuer that she needed to take advantage of any referrals for support. She said that she said it was important that she enjoy her daughter E and remember what was important in life. She was aware that there were tensions at home that were impacting the pursuer’s daughter.

[169] She thought that she had a good rapport with the pursuer. She understood that a balance had to be struck between the need for education of a suitable quality and the need to continue observations and the pursuer’s welfare. She discussed with her manager whether in this situation it was reasonable to pause observations. She stressed that at this time the pursuer had received support that indicated she was fit for work.

[170] KD said that it is possible to suspend employees if it is thought that they are a risk to themselves or others but the power is rarely used. In this connection reference was made to chapter 10 of the defender’s Disciplinary Policy. She advised that a precautionary suspension is usually applied where there is a disciplinary concern. She advised that although she had been employed by the defender for many years she had never seen a case of medical suspension. She advised that it was not unusual for someone to want to carry on when they were not really fit to do so. This happened when for example the employee did not want other staff to have to take on their workload.

[171] KD said that it was usually for employees to decide whether they were fit to carry on in their employment. There were limits on the defender's powers. It could not compel anyone to go to their GP. It could refer to Occupational Health but the defender did not have the power to refer a staff member to a medical expert eg a psychiatrist. In the pursuer's case the defender was supplied with reports from Occupational Health that said she was fit to work. KD did not have the knowledge or expertise to challenge these reports. It was for the pursuer to take herself out of the situation not for the defender to do that for her. The pursuer did not tell Occupational Health that she was not fit to continue. Her GP did not indicate that she was unable to continue. There was no indication that she might hurt a pupil and there had been no indication of self-harm or that she was a danger to herself in any way. She acknowledged that some quite extreme language was used to describe her predicament at the end of 2014. JM said she was "shot to pieces" and that the process had caused an "enormous toll". The defender was told she was "going over the edge" (Joint Bundle p649).

DM

[172] DM did not become involved with the pursuer until April 2014. In his view the pursuer was an anxious individual. The Competence Process made this worse. She did not trust the defender. In particular she had lost confidence in the way the Competence Process was handled both by the management of the school and the defender's senior officials. He thought that in its informal stages such a process could only work if it had the trust of the teacher. He agreed with JM that observations needed to be subject to realistic timescales and realistic management. He thought that there were too many targets and these were not achievable in the time set. In his opinion JM's views had been overlooked by the defender.

He endorsed the view that the pursuer had been handled unfairly and thought that it was not surprising that she felt under pressure.

[173] In cross-examination he was accepted that the targets set by the Action Plan and the observations had been agreed beforehand with the pursuer and JM. In relation to delay he was asked why, if speed was of the essence, the Action Plan had been delayed by the pursuer's failure to progress her grievance. He accepted that this caused delay but took the view that the grievance procedure was so unfair he had no choice but to object to it.

Counsel for the defender pressed him on why the pursuer had not sought to fix another hearing so as to progress the grievance procedure. DM said that it was a matter for the defender to fix a hearing and that if there was delay it was the defender's fault.

TG

[174] TG made it clear that it was not for him to express a view on the pursuer's competence as a teacher. He considered that during Stages 1 and 2 of the Competence Process the defender was focussed on trying to improve the pursuer's teaching skills and that the defender made a variety of accommodations to assist the pursuer. He thought neither the pursuer nor defender had acted unreasonably.

[175] He was asked why hearings were repeatedly postponed in the grievance procedure. In particular the defender's counsel directed him to the delay between March 2015 and November 2015. TG thought that the pursuer's ill health was to blame. The pursuer did not communicate with him in this period and he thought this was because of her mental health issues.

Period 3*The pursuer's Return to Work in 2016*

[176] On or about 12 January 2016 discussions began about a transfer to another school. DM and the pursuer's GP supported this suggestion. Occupational Health took the position that the pursuer was fit to return to work provided it was not at AW Primary School. The pursuer had told Occupational Health that she had lost trust in the staff and that she believed they were conspiring against her.

[177] The Occupational Health report dated 12 January 2016 (Joint Bundle p1089) was supplied by a Dr Kathryn Allan, a consultant Occupational Physician. The report concluded that the Competence Process was the cause of the pursuer's difficulties. Dr Allan said she was unaware of any factors in her personal life that would have a significant impact on the pursuer's psychological health. The pursuer complained that she was unable to put her point of view across and this frustrated her. I am not clear why the pursuer thought she was unable to put her view over. She had been in a position to express her point of view throughout the process and was assisted in that connection by her EIS representatives. Perhaps she meant that she was frustrated that the defender had not accepted her point of view. Dr Kathryn Allan thought that she was being appropriately treated by her GP and had reasonably good symptom control. Dr Allan thought that the pursuer would be fit to return to work after the Competence Process had concluded. She wrote an accompanying letter to the same effect (Joint Bundle p1092). In the letter Dr Kathryn Allan stated that the pursuer wanted to pursue a teaching career. She thought that the pursuer would need time after the conclusion of the Competence Process to regain stamina and resilience and would be fit thereafter to resume teaching in class.

[178] The letter was put to DM. She accepted that it conveyed the message that the pursuer was vulnerable. In her view however the package the defender devised was designed to enable the pursuer to regain her resilience and stamina. She was pressed on whether a failure to follow these recommendations suggested that the pursuer's mental health and wellbeing would be at risk. DM acknowledged that this was so but said that the defender took measures to address these issues. In her view the defender had done its best to support the pursuer. She was not medically qualified and was not able to say how a return to work would impact on the pursuer's psychological wellbeing. She was unable to say what exactly the expression "stamina and resilience" meant. She considered that measures supportive of the pursuer's mental health were put in place and that if more was required she would have expected the Occupational Health Report to say so. She pointed out that the pursuer and her EIS representative were aware of Occupational Health's views and asked if the pursuer could be given a placement in another school. The Occupational Health report said she was fit for work.

[179] A further letter by Dr Kathryn Allan was written on 26 April 2016. It stated that the pursuer's sleep, mood and energy levels were improving. It suggested a temporary redeployment to another teaching post where the pursuer could regain her stamina free of the pressure of "performance management" (Joint Bundle p1094). Dr Allan suggested a short, phased return with increasing hours.

[180] On 1 June 2016 (Joint Bundle p4535) there was an absence review meeting conducted by LG and attended by the pursuer, TG, and MG of the Human Resources department. The recommendations of Occupational Health were considered. It was decided that the pursuer should return to AW Primary School (Joint Bundle p4536). The pursuer said that she was devastated by this decision. She said that they did not discuss the matter with her and that

she was simply confronted with their decision. DM explained the background to the decision. She advised that redeploying a teacher is not straightforward. Before it can be done a vacancy has to exist. New posts are advertised on an annual basis in March/April with a view to the start of a new term in August. DM could not simply create a post for the pursuer. She operated under budgetary constraints.

[181] DM was referred to a GP sick note of 9 June 2016 (Joint Bundle p1437). It stated that the pursuer was suffering anxiety as a result of a poor performance review with a breakdown of interpersonal relationships at work. Dr Toolis expressed the view that the pursuer was ready to return to work but that if she went back to AW Primary School she would suffer increased stress. The note states as follows in capital letters, "patient will need professional and personal support in return to work and should not return to previous work location until performance issue resolved". DM did not accept that the note suggested that the pursuer was vulnerable to work related stress. She accepted that the pursuer needed to be carefully managed and needed support.

[182] There was a further meeting. LG and MG were present. They indicated that having taken advice the decision that the pursuer should return to AW Primary School would not be changed. The pursuer challenged this decision. She raised a grievance dated 13 July 2016 (Joint Bundle pp1557-1558). The pursuer said she should be given a temporary redeployment to another school and that this would be a reasonable adjustment. The grievance was dealt with by DM, Head of Education.

[183] On 18 August 2016 Dr Toolis again recommended deployment to a new school and amended work duties, plus the provision of personal support. At this time an unexpected vacancy emerged at L Primary School. DM thought that it would be suitable for the pursuer

because the head teacher, VB, was an experienced head teacher. She could be relied on to be supportive of the pursuer.

The placement at L Primary School

[184] On the morning of Thursday 1 September 2016 DM, GC from Human Resources and DM, the pursuer's EIS representative, met to discuss the possibility of temporary redeployment. The pursuer was informed that the defender was willing to redeploy her to L Primary School. The pursuer indicated that she wanted a junior class. The pursuer stated that DM told her that they could not guarantee an early years class but she did guarantee that the pursuer would not be given a primary 6/7 class. There is a roughly contemporaneous note on the Occupational Health nurse's notes for 6 September 2016. It states "redeployed to L PS (temp). P7 class. Was told this would not be the case initially but decided to bite the bullet" (Joint Bundle p4126). This is a note of the pursuer's recollection. It indicates that the pursuer thought she was told she would not get a P7 class. It does not support the pursuer's evidence that DM guaranteed the pursuer would not be given a P7 class. DM and DM confirmed that the pursuer asked for a lower age class. Neither of them could remember DM guaranteeing the pursuer would not be given a P7 class. DM's recollection was that she told the pursuer that she was not in a position to guarantee a lower years class. She was adamant that she had not told the pursuer she would not get a P6/7 class.

[185] The pursuer also stated that DM told her that she would be treated the same as the other teachers and would not be under special observations. The pursuer was referred to a letter of 5 September 2016 (Joint Bundle p1464) which stated that monitoring would continue but that a "less formal approach" would be taken. The pursuer said that she

thought this meant that she would be treated the same way as other teachers. DM denied saying that the pursuer was to be treated the same as other teachers. She did not accept that the letter could be interpreted to mean that. The pursuer was not told that the Competence Process was over or had been suspended. DM understood them to have agreed to reduce the level of observations. That is what she understood by "less formal". DM was of the view that since the Action Plan was still in place observations had to continue. He did not think there was an agreement to stop observations. He considered that it was appropriate to continue observations. He also accepted that VB had to be told about the Competence Process and the pursuer's background.

[186] In the afternoon of 1 September 2016 DM phoned to say that a primary 7 class was available. The pursuer expressed her concern and told DM that it would be a challenge. The pursuer said she was told that it was a "take it or leave it" offer and if she refused she would be sent back to AW Primary School. DM denied saying this. The pursuer took advice from DM. He considered that she had no reasonable basis to refuse the offer. As a registered teacher primary school teacher she should be able to teach all years. He took the view that it was an opportunity she had to take. He thought however that the defender could have found a more suitable place for the pursuer if it had wanted. Under cross-examination however he resiled from that position. He accepted that the defender was not a large local council with many teaching posts to fill. He did not know if they had other posts suitable to the pursuer at that time and accepted that he could not say that the defender could have found a post for the pursuer if it wanted. DM stated that from her perspective the pursuer had been passed fit to work and was keen to resume teaching. She did not have any concerns about the level of support available to the pursuer.

A new start

[187] The pursuer commenced on Monday 5 September 2016 (see Joint Bundle p1464). She was given a phased return spread over four weeks. It was agreed that the pursuer should work Monday-Wednesday with the same hours as she had done at AW Primary School. It was agreed that VB the head teacher would be told about the Competence Process but that observations under the Competence Process would not be commenced on her return to school. On the same day she returned to work the pursuer received a letter from DM in connection with the grievance. It stated that VB would be apprised of the background to the transfer to enable her to provide suitable support.

[188] The head teacher in L Primary School was VB. She had been a teacher for 30 years, and head teacher at L Primary School for 13 years. L Primary School had 160 pupils with about 40 in the nursery. She had 26 teachers under her supervision. She had a principal teacher, a deputy head teacher and a learning support teacher. It was based in an area of social deprivation. DM was advised shortly before the new term began that one of the teachers, Mrs K, had been appointed to a school in Edinburgh. DM contacted VB and told her that she had to take the pursuer on as teaching cover. She was not provided with any details of the pursuer's background. VB was told that the pursuer was a teacher who would benefit from a fresh start. There was some discussion of the arrangements that were needed to make the transition to L Primary School.

[189] It was not clear whether the first contact between the pursuer and VB was by phone or in person. When they did meet the pursuer told her that she had reservations about taking a P7 class but that she was willing to give it a try. VB noted that the pursuer was at ease and happy to be in the school. The pursuer attempted to discuss the failings of her previous head teachers. VB stopped the discussion. She thought it was unprofessional for

the pursuer to criticise her previous head teachers. She was aware that the pursuer had clashed with her head teachers. She thought that if a fresh start was needed nothing would be gained from a discussion of the past.

At the head teacher's door

[190] The pursuer stated that at the end of her first day back (5 September 2016) she went to VB's office. The door was ajar. Inside she could hear FT, the Investigating Officer in the Competence Process, discussing the Investigation Report with VB. She overheard FT saying that the pursuer was not taking on board concerns about her teaching. The pursuer said she walked away. She did not enter the room to complain as she thought she would become upset. The pursuer received a letter dated 5 September 2016 which explained that the defender had decided it was necessary to apprise VB of the matters under investigation in the Competence Process and the Investigatory report. She thought that this explained why FT had come to see VB.

[191] The pursuer was critical of this meeting. FT was not a teacher and had not been involved in the Action Plan. The pursuer stated that at a review meeting she asked VB about the meeting. She thought the meeting occurred in her third week at the school. Her memory must be inaccurate. The Occupational Nurse's physician's notes are dated 6 September 2016 (see below) and state that the conversation in question occurred the day before. According to the pursuer VB told her she was entitled to talk to whoever she wanted. In the pursuer's view the conversation she overheard demonstrated that the defender was intent on undermining her and she stood no chance of making a success of her placement. She was critical of the fact that the conversation took place with an open door when it should have been closed.

[192] VB did not accept that such a conversation had occurred. She confirmed that FT had been in the school and met with her. He was a Business Support Manager. He came once a month to deal with issues such as finance, fire risk, staff contracts and budget. VB agreed that they had talked about the pursuer but only because of the financial consequences of a new member of staff coming on to the school payroll. There was a discussion of the nature of her employment at the school and how long her contract would last. She denied discussing the pursuer's teaching competence or any aspect of the Competence Process. That would not have been a matter within FT's remit. FT was in her experience discreet and professional. It would have been out of character for him to raise such an issue. Her recollection was that they had discussed Mrs K's finishing date and how the pursuer was to be paid since there was an overlap between the teachers and both would be paid from her budget. She was at a loss to know how the pursuer could have heard the discussion. Her office door would have been closed for such a meeting. VB thought that the pursuer had seen FT in the school and misunderstood the reason for his visit. If she had known that the meeting was concerning the pursuer she would have spoken to her to nip it in the bud.

[193] The pursuer's account was to some extent supported by Occupational Health notes (Joint Bundle p4126) dated 6 September 2016. They relate what the pursuer told the consultant. They are not easy to decipher but appear to say:

"at the end of the day yesterday ... went to the head teacher's room. Overheard conversation between head and previous investigating officer. Eroded her trust and confidence. Feels she should have been informed. Feels previous investigating officer should not have been involved. Concern that door should have been shut".

[194] The report by Dr Fraser Watt, consultant Occupational Physician, is dated the same day (Joint Bundle p1097). He refers to the conversation the pursuer claimed to have overheard and suggests that her concerns about what she overheard be explored with her.

The report states that the pursuer was quite positive about her return to work. She reported some feelings of anxiety but there was no evidence of undue agitation or thought disturbance. Dr Fraser Watt opined that there was no “medical barrier” to the pursuer continuing her phased return to work. He recommended the grievance procedure be wound up as quickly as possible and that she should be provided with suitable support to facilitate her reintegration. He also recommended the provision of an experienced colleague as a mentor.

[195] VB accepted it was her job to manage the pursuer’s return to work. The task of planning her return up to this point had been with Human Resources and Occupational Health. Once a new teacher was in the school she accepted that it was her responsibility to look after any mental health issues she or he may have had. VB was not aware the pursuer had any mental health concerns. VB did much the same as LG when she took over as head teacher at AW Primary School. She did not seek to follow the formal Competence Process. She said she treated the pursuer as if she was a member of her own staff. Observations took place but these were of the type she used with her own staff, adjusted to fit the pursuer’s position.

[196] The pursuer gradually built up her teaching hours over the phased return. By the time of the feedback session on 13 September 2016 she was teaching her class three days a week.

[197] In the Joint Bundle at p1521 is a document setting out meetings and support offered to the pursuer in the period 27 September 2016 to 5 October 2016. It shows regular meetings and discussions about a variety of topics. There was a meeting on 28 September 2016 at BA. She met again with VB at 2pm the next day. She met the deputy head teacher with whom she was job sharing on 3 October 2016. There were meetings before school on 4 October

2016. In that meeting VB discussed “teaching points”. The pursuer stated that at the meeting on 4 October 2016 in the deputy head teacher’s office the GTCS standards were given to her. The pursuer repeated her complaint that it included areas of competence that she had not been asked to address in the Action Plan. The pursuer did not dispute the accuracy of this list of meetings and interventions.

The pursuer’s new class

[198] The class to which the pursuer was allocated had a full time member of support staff. The pursuer said that the member of staff in question was off sick when she began work. VB did not think this was correct. Even if it was correct she advised that another support teacher would have taken the place of the missing member of support staff. The pursuer stated that it was a mixed class with some disruptive pupils.

[199] It was agreed that the pursuer would observe Mrs K, the departing teacher, in the two week overlap before Mrs K left the school. This would allow the pursuer time to build a rapport with the pupils. Mrs K was a full time teacher. Since the pursuer was part time it was decided that when the pursuer took over she would teach three days and the deputy head teacher would teach the other two days. VB explained that no mentor was necessary at this time. The pursuer had no classroom responsibility so she did not require help with her teaching. If any help was needed Mrs K was available to provide help. Once Mrs K had left, Mrs W the deputy head teacher shared the class with the pursuer. Mrs W could provide support to the pursuer.

[200] VB and other staff members arranged observations for the pursuer. The pursuer on her own initiative set up observations with another staff member. VB indicated that it was clear to her from an early stage that the pursuer was struggling with her class. There were

regular behaviour referrals. As she walked through the school she saw evidence of the pursuer's difficulties as she passed her classroom. She thought that this was to be expected in the early stages and was not concerned to begin with. VB was referred to an observation by Mrs K on 21 September followed by feedback. Another with VB occurred on 27 September 2016. It had some positives but also a long list of concerns (Joint Bundle p628). VB spoke to her at length. The behaviour in the pursuer's class had begun to deteriorate. In her view this was because the children did not understand what they were meant to be doing and were getting frustrated. This created increased noise levels. She thought the pursuer was not managing the children's behaviour in a consistent way. She noted that the pursuer did not seem able to take on board her advice.

[201] On 3 October 2016 the pursuer, DM of the EIS, GK of Human Resources, and VB met to review matters. The pursuer said that VB undermined her by saying that she needed more support than less experienced teachers. VB confirmed she said that the pursuer needed more support than was normal but denied mentioning less experienced teachers. VB denied that she said this to make the pursuer feel weak. All she meant was that she had "pulled out the stops" and done everything possible to help the pursuer. She had been given more support than other members of staff who had been there from the start of term.

[202] The pursuer accepted that she found the pupils a challenge. In her view she was not getting a fair chance to prove herself. She said that she was not being supported adequately. She was under the strain of constant observations. The pursuer said that she did not feel mentally fit to be at work. She felt however that if she wanted to keep her job she had to persevere. She felt under stress. In particular she said she was put under pressure by VB. She said that on one occasion the Principal Teacher, Head Teacher and Deputy Head Teacher were in her room. The pursuer stated that she was observed on 13, 21 and

27 September 2016. In her view this was abnormal. She would have expected to be observed at most once a term if she was being treated as a normal teacher. The pursuer stated that she had no mentor and no support. She contacted the EIS representative in the school to seek help with her lesson planning. She said was finding this difficult because of a lack of co-ordination with the other teachers that shared her class.

Criticisms of the transition

[203] In the pursuer's view the defender was setting her up to fail. She thought they wanted rid of her. There was no handover meeting. Mrs K was only with her for a fortnight. The pursuer accepted that she had not asked for a mentor. The mentor she was given was unsuitable because Mrs W was part of management. VB disagreed. In her experience the best mentors were senior figures. Because they had less teaching responsibilities they could devote more time to the role. Mentoring often involved a lot of work and this was best done by someone who had time out of class. She thought that Mrs W was an ideal mentor.

[204] The pursuer stated that she was not given any information about the children with additional support needs in her class until her final day at L Primary School. VB said that this was not true. The pursuer was given information about the difficult pupils and their identity from the outset. She briefed the pursuer on the needs of the children in her class. In any event the pursuer had access to Mrs K's teaching plans. These contained the relevant information. The class in question had children with learning as well as behavioural issues. As she watched Mrs K during the fortnight the pursuer would have been able to see with her own eyes who was difficult to manage. She could talk to her fellow teachers who would provide advice and information.

[205] The defender's Policy and Procedure on Managing Sickness Absence provides:

"5.1.1 Line Managers must conduct and record that a return to work meeting with employees has taken place following each occasion of sickness absence."

[206] I was also referred to the defender's Mental Well Being Policy (May 2016):

"7.8 Where an employee is advised by their GP to take some time off as a result of a stress-related health condition, the relevant provisions of the council's Managing Policy on Managing Sickness Absence will apply in conjunction with this policy. In these circumstances, managers should adopt a proactive but sensitive approach so that the employee does not feel isolated or guilty. In this regard the manager should establish with the employee whether regular contact would be helpful and how this should be arranged during the period of absence.

7.8 (*sic*) A key element of the council's Managing Sickness Absence Policy is the need to establish effective support mechanisms to assist an employee's return to normal work following a period of sickness absence, particularly after periods of prolonged absence. Where an employee returns to work following prolonged absence due to work-related stress, a suitable return to work programme should be put in place."

[207] DM said that return to work meetings did not have to occur before a worker restarted work. They could occur in the period after the worker had returned. VB did not think that a return to work meeting as envisaged by the Policy was needed. In her view the pursuer was making a new start not returning to AW Primary School. But in any event all that a return to work meeting was intended to achieve was achieved by other means. The defender had discussed the pursuer's return to work in consultation with the pursuer and her EIS representative. They had agreed to phase her return and reduce the level of monitoring as set out in the letter of 5 September 2016. Once the pursuer came to L Primary School, VB had familiarised the pursuer with the school and given her the tools and knowledge necessary to teach her class. Informal supports were provided. VB explained to the pursuer that she had an open door policy and was always around to provide support. She thought that she had a good relationship with the pursuer. The pursuer spoke to her if

she had any difficulty and she directed the pursuer to those who could help her. She had a strong and settled group of staff. They provided a welcoming and supportive environment. DM did not accept that regular meetings to monitor the pursuer's health and wellbeing and to review her support measures were required. She did not think the defender's Policy had anything to say about this. She did not accept that given the complexity of the pursuer's case and her long absences, unresolved grievance, greater planning was necessary or desirable.

Medical advice

[208] DM stated that the pursuer's GP had advised that the pursuer was fit to return to any school other than AW Primary School. But DM felt that the GP would not have understood the difference between teaching younger pupils and older pupils and that the GP's view had to be treated cautiously on that account. He thought by contrast that Occupational Health would have understood the difference. Initially he said that an independent medical review (impliedly by Occupational Health) was necessary. In cross-examination he stated that Occupational Health should have been asked to say whether the placement in L Primary School was suitable. He acknowledged that he had not raised this with the defender. In hindsight he felt that he should have advised the pursuer to ask for further medical guidance when it emerged that she was to get a senior class. He thought that it was a big step to ask her to take the P6/7 class. He accepted however that he was looking at things with the benefit of hindsight. DM thought that the medical advice taken was suitable and appropriate. The defender had acted on the recommendations made to it. The pursuer's GP had not suggested any other step. The EIS had not suggested any other course of action.

Failure to identify a suitable role

[209] The pursuer's counsel put to DM the suggestion that there had been a failure to give wide consideration to the identification of a suitable temporary role for the pursuer. She did not accept this. The pursuer, DM, and the VB had discussed the options open to the pursuer. There was nothing to indicate that a more suitable temporary role was available or that if the search had begun earlier it would have made any difference. DM pointed out that the pursuer had asked for a redeployment. She did not feel that the defender should have explored redeployment before being asked by the pursuer.

The classroom incident on 5 October 2016

[210] On 5 October 2016 there was an incident in the pursuer's class. The support worker reported to VB that the children in the pursuer's class were throwing things about. VB, her Principal, and her Deputy Head Teacher went along to the class. Rather than all three walking in simultaneously, the Deputy Head went in. VB and the principal teacher remained outside and dealt with children who had been put out of the class. The lesson was a maths lesson. The Deputy Head Teacher settled the class down. She suggested to the pursuer that she should revisit the lesson. The pursuer was offered time out. She took time out. When the pursuer returned the class was calm again. But matters escalated again later that morning. VB was alerted by other teachers to the situation. When VB entered two boys were on the verge of a physical fight. She sent one to the Positive Support Base and the other to the Deputy Head Teacher. VB was of the view that the pursuer had lost control of her classroom. She asked DM to come to the school.

[211] DM accepted that ordinarily a member of her team would have gone to the school. But given the magnitude of the concern reported by VB it was thought that DM should

attend. DM accepted that L Primary School often had to deal with problems with pupil's behaviour. She thought that VB was very experienced with dealing with disruptive children. But the situation described by her was out of the ordinary. She was concerned about the safety of the children.

[212] The record indicates that VB spoke to the pursuer at lunchtime. VB was of the opinion that the pursuer was not in control and did not know how to regain control of the class. She was concerned about her. She told her that she was concerned and told her that what she had witnessed was not safe. The pursuer began to cry. According to the pursuer VB asked her if she thought she was in the right job. VB denied saying this. My notes have two versions of the pursuer's words. The pursuer either said "I just can't teach" or "I just want to teach". VB tried to encourage her by saying that teaching careers were available in other contexts eg adult literacy. She told the pursuer that her sister was an adult literacy teacher. She told her that she should think about her health and think about the impact that the stress and upset was having on her own life. The pursuer asked to go home. VB agreed to this.

[213] The pursuer was referred to a record of the incident (Joint Bundle p1522). The pursuer found this upsetting and became tearful. She stated that she had never seen the record of the incident before. She accepted the description in broad terms. She agreed that the class had become disrupted though she did not think that all the pupils were involved. She accepted that she had become tearful and had to leave the classroom. She agreed that she was not fit to teach in the afternoon.

[214] The pursuer complained however that she was never given any details what it was she had done wrong. She also said that her colleagues who had given statements in connection with the incident had betrayed her even though their statements contained

expressions of sympathy. She thought that only one had expressed concern. She was a pupil support worker. In her view the rest had betrayed her.

[215] DM accepted that the incident of 5 October 2016 was serious. He accepted that the VB was correct to have stepped in. The pursuer told him she did not know why the defender later suspended her. She told him that members of the management team of the school had been standing outside her room and that she did not know why she was under scrutiny. He accepted that the head teacher VB enjoyed a good reputation and was seen as fair to her staff.

The precautionary suspension

[216] About a week later on 11 October 2016 DM came to the school to see the pursuer. She gave her a letter placing the pursuer on precautionary suspension. She followed the letter up with a telephone call to make sure the pursuer had got home safely and to confirm the reasons for her precautionary suspension. The pursuer left school that day not to return.

[217] DM said that the reason for the precautionary suspension was concern for the safety of the children and the pursuer's own wellbeing. She thought that it was best to remove the pursuer from the school in order to allow the facts to be established. She stated that when she visited the school she found the pursuer's manner concerning. The pursuer did not appear to know why she was being suspended. In her view however the pursuer could have been under no illusion as to why she had been suspended. This was DM's last involvement with the pursuer.

[218] DM was referred to the defender's Disciplinary Procedure for Teacher's Policy (Joint Bundle p4442) and paragraph 8 on gross misconduct and paragraph 10 on precautionary suspension (p4449-4450). The pursuer's counsel put to her that it was the pursuer's

competence not her conduct that was the issue. DM said that the letter had been drafted by her Human Resources department. She said that the pursuer had “sat back and let chaos happen”. She felt that this could be described as gross misconduct. She pointed out that this was a provisional characterisation. The suspension was a precautionary measure so that the allegations could be investigated. The pursuer’s counsel put the examples of gross misconduct set out in the ACAS Guide (Joint Bundle p4319) to DM. She thought that “a serious breach of health and safety rules” or “bringing the organisation into serious disrepute” covered the situation in question. She was directed to 10.2 where “causing loss, damage or injury through serious negligence” were recognised examples of gross misconduct then gross misconduct was a suitable description.

The aftermath

[219] After returning home the pursuer went to her GP. After a number of visits to A&E at St John’s Hospital, Livingston she was admitted to the psychiatric ward on 16 November 2016. She was an inpatient for about seven weeks and was discharged in January 2017. In this time the pursuer tried on two occasions to commit suicide. I do not think it fitting to set out the details. She was readmitted to hospital for a further ten days. The pursuer spent a month at the Priory Glasgow and things thereafter improved. The pursuer reached an agreement in May 2017 in relation to the termination of her employment. This was followed by another suicide attempt and a hospital admission. E was placed in the care of her parents. The pursuer attempted self-harm in August 2017. After another episode of attempted suicide she was placed at Lochgilphead Hospital. This was her last inpatient admission. She takes a variety of medication and is under the care of a consultant at St John’s Hospital and has the support of a Community Psychiatric nurse.

Letter of 25 November 2016

[220] The defender's Deputy Chief Executive EC wrote to the pursuer inviting her to attend an absence review meeting on 8 December 2016. At this stage the pursuer was in hospital. DM said she agreed that the letter should not have been written. The defender knew the pursuer was in hospital. She thought that the letter was written because someone had unthinkingly prepared a letter in conformity with standard practice where there was an employee absence. She agreed that this was insensitive.

VB

[221] She thought she had handled the pursuer fairly and sensitively. She did not know anything about the pursuer's personal life or her medical background. She thought that she had a good relationship with the pursuer. She said that she had not seen any sign of anxiety or depression. She only noticed anxiety and stress on 5 October 2016. She did not think that the crisis was due to a lack of support. Had it not been for the support she was receiving she thought the crisis would have occurred more quickly. In her opinion the pursuer had received emotional support, advice and encouragement from Mrs K and other staff members but it had not prevented the events of 5 October 2016 occurring. She did not think it was possible to say that the episode was attributable to the unruly nature of the class. She pointed out that such an incident had not occurred prior to the pursuer taking over the class from Mrs K and did not occur again after the pursuer's suspension. She stated that a new teacher took over the class at New Year and there were no further issues with the class's behaviour. She accepted that the class was a challenging one but teachers should have the

ability to deal with challenging behaviour. All her classes had some disruptive elements in them.

The present position

[222] The pursuer gave evidence that her health is now much improved. She has returned to work as a tutor and trades through a private company called "Mrs T the Tutor". She set this business up in 2020 and has helped parents to provide home schooling during the Covid pandemic. She continues to take anti-depressant medication and is reviewed annually at St John's Hospital, Livingston. She has access to a psychiatric nurse at her GP practice.

[223] The pursuer raised an unfair dismissal claim at the Employment Tribunal. Her claim was settled. No details of the terms of settlement were disclosed to the court. Her employment with the defender came to an end in 2017.

[224] At the time of the proof the defender's referral to the GTCS had not been concluded. The pursuer indicated that she wished to return to teaching as a peripatetic music teacher. If she did return to primary school teaching as she was not sure whether it would be as a full or part time teacher. The pursuer thought as her daughter grew older she might be able to return to full time employment. The pursuer indicated that had it not been for her psychiatric injury she would have continued to work as a teacher to her retirement. She would have returned to full time employment once her daughter had reached primary 5. She did not consider that the mental health issues she had experienced prior to her employment with the defender would have impeded her employment.

Expert witnesses

[225] In my opinion all the experts did their best to provide helpful evidence. Where I rejected their evidence I did so because the factual evidence on which they based their opinion had been shown to be faulty or unsatisfactory in some way or where I thought the facts supported one expert's judgement rather than the other. The pursuer was critical of Professor Wood's evidence. While I thought that his counterpart Mr Farquhar was a more impressive witness, I did not have any qualms about his expertise or objectivity. He was supportive of the defender's position and as I would expect from an education expert was focused on the issue of competence. But that did not dispose me to regard his evidence with caution. Dr Patience observed that the issues raised by this case were within the province of an Occupational Health physician. He said that although Occupational Health physicians would occasionally come to him for advice on matters within his sphere of expertise neither he nor the other medical witnesses was an Occupational Health expert. I can see merit in his evidence. I can see that the workplace may well raise issues that are not regularly encountered in mainstream psychiatry/psychology. There was some evidence from those that were Occupational Health practitioners. Anne Young gave evidence but the consultants who saw the pursuer thereafter were not led in evidence. According to their reports, Dr Kathryn Allan and Dr Fraser Watt were satisfied that the pursuer was fit to return to work subject to certain qualifications. Neither of them desiderated the measures suggested by Dr Harper or Susan Gordon. In particular the final report of Dr Fraser Watt did not comment adversely on the placement in L Primary School or recommend supports of the sort desiderated by the pursuer's experts. The absence of supportive expert evidence from an Occupational Health practitioner was a weakness in the pursuer's case.

Susan Gordon

[226] The pursuer led Susan Gordon, an HR consultant, as an expert witness. Her report is dated 6 November 2020 (Joint Bundle at p4247). She supplied an additional report of 18 December 2020 (Joint Bundle p4541). Her experience was largely in the oil industry. She had no experience of the educational sector. She had experience of dealing with grievance and disciplinary procedures and mental health issues. She did not think her lack of knowledge of the education sector hindered her from giving evidence. In her view the principles of good HR practice were the same whatever form of employment was in view. She admitted that she had little knowledge of the pursuer's medical background. Her understanding was that the pursuer's past medical problems were not significant.

[227] She said that if a competence or disciplinary process was launched there should be supports provided since it was foreseeable that this would create stress. The aim was to avoid creating unnecessary pressure. She assumed that, because there was no record of support in the papers, the pursuer had not been supported by a mentor or her head teacher. She acknowledged that KM had supplied support to the pursuer. But as she understood it her support was confined to competence matters and not the pursuer's wellbeing. She accepted however that she did not know what support had been provided. In her view if the support was linked to the Competence Process the employee would not be able to benefit from it. It was necessary to have someone who had no role in the Competence Process to provide support. She thought that the Competence Process was focussed on improving the pursuer's performance and failed to address the question of whether the reason she was under-performing was because the Competence Process was undermining her.

[228] She thought it was necessary to stop the Competence Process to establish whether the pursuer's difficulties were performance related or connected to her wellbeing. Because she thought that the pursuer's problems arose from her difficult relationship with NT she felt that mediation should have been put in place and this would have been helpful.

[229] She acknowledged that the pursuer's GP did not advise the defender that the pursuer was clinically depressed. But she thought the head teacher should still have picked up the signals from the pursuer at work. She considered that there were strong signals in May 2013 that the pursuer was vulnerable. She thought that the defender should have appreciated that the pursuer's upset with the Competence Process was indicative of an underlying issue. She thought that the pursuer's tears and her sickness absence was indicative of a problem. She accepted that if there was no sign that the pursuer was having any problems it would be acceptable for the defender not to record the supports being supplied. But if there was any issue there should have been a record. If however matters seemed normal then she accepted that the absence of any record would be unsurprising.

[230] She said that support had to be respectful. This was not just a matter of what was said but also how it was said. She thought that NT had failed to communicate respectfully. She said that poor body language was the sort of thing that could undermine support. She accepted that she had no evidence that those who represented the defender had exhibited poor body language. On being pressed by counsel for the defender she stated that she thought the meetings on 26 September 2013 had been heated and that NT had not communicated properly with the pursuer.

[231] Her understanding was that the pursuer left the school because of NT's behaviour. If in fact the pursuer left the school because she had discovered the Competence Process was going to continue that would be different. She accepted that if NT began the investigation

because she was advised to do by Human Resources her decision would be reasonable. But she thought it should have been wrapped up quickly.

[232] She was critical of the spacing between observations. There was insufficient time between observations for the pursuer to recover and learn.

[233] She suggested that the pursuer's case required to be managed by a case manager. This should have been started in May 2013. The manager would be responsible for counselling and Occupational Health support. This role could have been performed by the head teacher or an Occupational Health professional. That person would preside over a multi-disciplinary team. The pursuer would have an opportunity to participate in their discussions. Its task would be to work out if there were mitigations that would reduce the stress.

[234] She also thought that the defender should have persisted with the use of Stress Management Audit tools. She advised that they helped identify issues for discussion and brought structure to the assessment of issues that were often very emotional. The tool required the manager and employee to answer a series of questions and think about specific issues. It identified causes of stress, mitigations and provided a record of discussions to enable further discussion. The pursuer had told her that she refused to use a Stress Management Audit tool because she was afraid that it might be used against her. This could have been avoided if the tool had been explained to the pursuer. She thought this would have happened had a case manager been involved. I note that in examination in chief the pursuer gave a different explanation for her rejection of a Stress Management Audit tool. She stated that the EIS had advised her not to use the tool because it would mean meeting NT. Susan Gordon thought that the pursuer's refusal to complete the Stress Management

Audit tool should not have been the end of the matter. If there had been a case management team in place the tool could have been completed in co-operation with her line manager.

[235] She recommended the involvement of specialist advice. In this case that would involve Occupational Health professionals, psychological services and the pursuer's GP. In her opinion it was essential to involve the individual and provide support. She considered regular reviews were also important.

[236] In cross-examination she indicated that the Human Resources department should have been aware of the absence from work in March 2010. She understood that her absence was due to a miscarriage. In her view the defender should have known the pursuer's "back story". She accepted this was not for the pursuer's head teacher but for the defender's Human Resources department. She defended her view that colleagues could be used by the defender as a source of information about the pursuer. She thought that if her fellow employees saw matters that caused concern it was legitimate for that information to be communicated with the head teacher or Human Resources. The markers of mental health issues are changes in behaviour, sickness absence patterns or declines in performance. There could be strong signals in the form of sickness notes that referred to depression or anxiety. In that situation it was necessary to speak to the individual to establish what the issue was. People reacted to stress in different ways. Some fight, some withdraw and others are paralysed by indecision.

[237] During the pursuer's absence from work she thought that keeping in touch was important. She thought that keeping specialists involved was important. Once the pursuer was cleared to return to work a plan should be developed to enable that to happen. The pursuer should have an induction, be brought up to speed with changes in the workplace and be reminded about how to use processes and systems and obtain the information

required for the job. This should have been organised by someone with no involvement with the Competence Process since it was a wellbeing issue as opposed to a competence issue. On the first day back the pursuer should have been welcomed and reintroduced to her work. She should have been given an opportunity to give the “team” any information about her absence. Her case was sensitive since it involved her mental health. She thought that the pursuer had to feel she was supported and to that end must have control and knowledge.

[238] She considered that that the pursuer’s GP and the Occupational Health department should have performed a return to work assessment. This would have involved the use of a Stress Management Audit Tool. It was important to rebuild the pursuer’s confidence and her ability to synthesise knowledge.

[239] The defender had failed to follow the advice in its Occupational Health reports over a number of years. The Occupational Health advisors had suggested that the pursuer should go to a different school four times before the defender had acted. It ought to have looked into the pursuer’s situation in May 2013.

[240] She said that there should have been a wellbeing support plan involving a case team. They would implement the stress management policy, the mental health policy and the wellbeing policy. If someone was off it would arrange induction, keep in touch when the individual was off and provide support for the wellbeing of the individual. It could involve the provision of a mentor or buddy. There would be regular reviews by Occupational Health. Any recommendations would be considered by them. There would be regular reviews between the pursuer and her line management and Human Resources. If a mitigation was not possible the position would be explained. This should be done in a supportive and compassionate manner with due respect for the pursuer.

[241] Her impression was that the defender was purely focussed on competence and the pursuer was under pressure to improve her performance without the benefit of any support. The failure to hear her grievance in the time limits prescribed was advanced as an example of this. Stating a grievance is a stressful thing to do. While it gave the employee a voice it often led to a fear of retaliation. If it was drawn out over a period of time it could be stressful.

[242] She felt that the failure to separate the grievance process from the disciplinary process was a mistake. They served different purposes. A grievance process was to give the employee a voice without fear of retaliation. Disciplinary processes are designed to control and manage employees.

[243] She accepted that the grievance raised questions about discipline. She felt that in refusing to separate the two processes the defender was saying to the pursuer that it was not willing to listen to her. She referred to an ACAS booklet (Joint Bundle p4286) and the defender's own policy which she understood to mean that they should be kept separate until it is possible to decide whether they can be heard together. She said that if two processes are to be run concurrently there should be two "teams" running the two processes. She indicated that the copy ACAS booklet lodged post-dated the grievance but was almost identical to the previous copy of the booklet from 2013. I note however that the ACAS booklet does not discuss what to do when a Competence Process and Grievance Procedure are both in simultaneous operation.

[244] She thought that the defender was aware of the pursuer's psychiatric vulnerabilities from May 2013, had failed to heed specialist advice, failed to put in place appropriate support plans and failed to halt a negative downward spiral. She thought the defender had failed to follow its own policies, the GTCS guidance and government sickness absence

protocol. She said the defender had not adhered to its grievance policy time lines, not provided a mentor at the right level and independent of the school, not separated the grievance and disciplinary processes and not accepted the pursuer's "self-certification" when she went off sick. She thought it had acted unreasonably in commencing a disciplinary process, threatening to report the pursuer to the GTCS and by describing her conduct as gross misconduct when her actions did not fit that definition (Report paragraph 8.8; Joint Bundle p4280).

[245] Her understanding of the events of 26 September 2013 were understandably determined by the pursuer's version of events. In her view the mentor was right to say that the pursuer should go home. It was not desirable that she should be upset when with the pupils. She understood NT to have tried to prevent the pursuer leaving the school. She said the decision to start disciplinary process was odd. NT should not have told the pursuer she could not leave. In her view there should have been an informal discussion to establish what had happened. She thought that the delay until May 2014 before bringing the process to an end was too long. Discipline needs to be timely. She noted that it was agreed that the pursuer should be monitored for 6 months. Her "feeling" was that this could only be explained if other "stuff" had happened. She had a "bad feeling". The punishment did not fit the crime. She thought that the decision to monitor the pursuer was designed to monitor her competence rather than her liability to leave the school without sufficient warning. She denied that she was engaging in speculation. She was of the opinion however that the decision to monitor the pursuer for 6 months implied that something else was afoot since 6 months was more than was required by the alleged wrong.

[246] She was referred to the ACAS Stress at Work leaflet (Joint Bundle p4376) and to the defender's Managing Stress at Work Policy (Joint Bundle p2778) and Guidance Note (p2954).

In her view these documents showed that the defender was alive to the risks of stress at work. In her view the pursuer exhibited signs of being under pressure and not coping. She thought that colleagues had commented on her behaviour. The Occupational Health reports indicated that there were issues that had to be addressed. When these factors were taken in the round she thought it was reasonably foreseeable that the pursuer's mental health would be negatively affected. Initially she thought that the danger to the pursuer's health was foreseeable from May 2013 but she accepted that it was difficult for "laymen" to judge so she thought that September 2013 was the point when something had to be done.

[247] She thought that the pursuer's absence from work indicated that she was depressed and was psychologically vulnerable. She thought there were indications that the pursuer was not mentally robust and thought that the triggers leading to her problems should have been explored. She accepted that Human Resources staff were not medically qualified but thought that there should have been some exploration of matters in May 2013 and definitely by September 2013.

[248] She thought that open discussion was essential. Had that taken place the risk of injury could have been avoided and suitable mitigations identified. She thought a multidisciplinary approach was important and that employees should be kept informed. If plans were devised and followed through this was likely to work well. It was possible for employees to lose trust and it could be very difficult if trust was gone. Return to Work processes should not be short term but long term arrangements. Employees should be kept under review and support was important.

[249] She thought that the decision to amalgamate the pursuer's grievance with the disciplinary process would indicate to the pursuer that her voice was not being heard and

show a lack of impartiality. It was better that a different pair of eyes look at her grievance. It would not be seen as a fair process.

[250] She was referred to the Disciplinary Policy for teachers (Joint Bundle p4442) and paragraph 10.1 which indicated that a precautionary suspension was appropriate for gross misconduct. She offered the opinion that the pursuer had not been guilty of gross misconduct. In her opinion the events at L Primary School in 2016 did not involve immediate danger to anyone and the pursuer could have been moved to another school while the investigation took place. In her judgement gross misconduct meant a physical fight, threats or criminal conduct.

[251] When the pursuer returned to work in January 2014 she acknowledged that the pursuer had a return to work interview, met KM and her new head teacher. Reviews were arranged for every 7/14 days and a mentor appointed. She did not think this was adequate. The package should have been discussed beforehand. In her view the defender was focussed on her competence and not her wellbeing. In her view there should have been a separate wellbeing process and the Stress Audit Management Tool should have been used. She should have had another induction process. Counsel drew her attention to the fact that the pursuer was meeting regularly with LG. LL acted as mentor. Counselling had been provided. Her GP notes record that she found LG supportive. Susan Gordon however did not think this was enough. She said that the pursuer needed to feel welcomed. In her view she had stepped straight back into a performance management process. In her view the pursuer had just been brought back to school without any attempt to understand the triggers. She accepted that the pursuer's GP and the Occupational Health advisor had not warned of the risk of psychiatric injury. She accepted this was so but considered that more could have been done.

[252] She accepted that calling “time out” was difficult particularly where the employee was in a public service. There was strong pressure with the likes of doctors and teachers to have them at work. She thought that an employer could be forced to terminate employment on health grounds but before that point was reached she thought everything possible should be done to help. She was critical of the defender’s failure to follow its policies and to utilise a multi-disciplinary group. She acknowledged that the defender’s policy recommended the use of specialist help but not multi-disciplinary meetings. They were referred to in the ACAS code and CIPD for use in complex cases.

[253] She withdrew her criticism that the defender had acted unreasonably in failing to act on JM’s letter.

[254] As regards the grievance procedure she accepted that it was very lengthy and was two years after the events complained of. She accepted that informal resolution was not appropriate in the circumstances. But she thought that beginning a grievance would have the effect of giving the pursuer “a voice”. She acknowledged that, in light of the need to resolve disputed issues of fact, an investigation would be required and facts would have to be established. The ACAS model of grievance did not provide for this. She acknowledged that an investigation was required which would speak to the witnesses involved. She acknowledged that the grievance was started two days before the Competence Process was due to begin Stage 3. She acknowledged the difficulty the grievance would cause and accepted that the defender would have been understandably suspicious about the timing of the grievance. She thought that it was possible to run both processes concurrently provided they were in the hands of separate persons. In her view the process had to be followed and the defender had to accept that it might lead to the Competence Process restarting. She was of the view that the grievance had to be heard and expedited if possible. She acknowledged

that if the grievance had been heard the next step in the Competence Process, namely the Disciplinary Investigation, would have been derailed.

[255] She was asked about the pursuer's suspension and referred to the Minute of the meeting on 11 October 2016 at 8.30am (Joint Bundle p1105). Susan Gordon conceded that it stated that the defender's letter to the pursuer had been read to the pursuer at the meeting. She had no means of knowing whether the Minute was accurate. She thought however that there were differences between the letter that was sent to the pursuer and the terms of the Minute.

Alistair Farquhar

[256] The pursuer led evidence from Mr Alistair Farquhar, a retired local government officer and independent consultant. His report is in the Joint Bundle at p4211 along with his CV.

[257] He explained that a reasonable education authority should have in place policies and procedures designed to deal with work place stress. He thought this should include confidential counselling and access to Occupational Health. The defender's Human Resources staff should be suitably trained to understand and deal with work related stress. In the work place managers should offer suitable support so that if an employee suffered from stress, assistance was available. He thought that stressors should be identified with Occupational Health input and the use of risk assessments. The defender should then address the causes of stress so as to alleviate them.

[258] He thought that a stress audit tool and a risk assessment were essentially the same thing though he would expect a risk assessment to be broader in scope. A stress audit tool is

designed to enable an individual to identify issues that cause stress. They are completed by the employee and then referred to the employer.

[259] He thought that a reasonable employer would be aware of the stress associated with a competence process. By its nature it was liable to create stress and anxiety. If the employee has known mental health issues on entering the competence process the reasonable employer should be aware of the potential for additional stress and its impact on employee. It should be aware that matters such as a competence process, a grievance or disciplinary action have the potential to exacerbate a pre-existing mental health condition. He indicated that he was not able to comment on the medical aspects of stress and anxiety but he thought a reasonable education authority should be alert to changes in behaviour at work and changes in capability as indicative of a possible mental health issue.

[260] In his view the defender had focussed excessively on the competence issues raised by the pursuer's case and paid insufficient heed to supporting the pursuer. He evidenced this by pointing to the defender's failure to implement Occupational Health recommendations. Occupational Health had recommended speedy disposal and this had not occurred; the use of a stress audit tool and this had not been done; and temporary re-deployment. Although this was eventually done it was delayed.

[261] He thought the decision to combine the grievance and disciplinary procedure was wrong. They were separate procedures. He acknowledged that the grievance involved elements that belonged to the Competence Process. Elements such as harassment should have been dealt with under the Bullying and Harassment policy. But the pursuer's complaint about the way the Competence Procedure was handled should have been recognised as a grievance. He thought that the Competence Process should have been paused while these issues were resolved. In such a situation JC should not have got

involved in the grievance. Another senior member of staff should have been brought in. JC was entitled to preside over Stage 3 and determine whether the pursuer had met the standards of registration but he should not have been involved in deciding whether the Competence Process had been operated fairly. The grievance raised issues that were separate from the pursuer's competence as a teacher. If the grievance had upheld any of her complaints then the Competence Process would have to be reset. In other words it would have led to the termination of the Competence Process. Counsel for the defender challenged this and asked him whether he was really saying that the defender would have to ignore two years of unsatisfactory observations? Mr Farquhar appeared to confirm that a reset would mean re-starting the Process. He accepted that it would not mean the end of the Competence Process. Alternatively he said that the defender could "adjust elements of the bits upheld". It is not obvious to me however how the Process could survive and what parts could be adjusted to enable it to continue.

[262] He noted that the defender's Grievance Procedure required a grievance to be started in 10 days. This had not occurred and delay could only serve to deepen the pursuer's stress and prolong her uncertainty. In his view the defender knew that the pursuer had mental health and welfare issues. It had an Occupational Health report urging speedy resolution. It should have progressed the disciplinary matter in 2013 and moved on the grievance raised in February 2015. He noted that it was not addressed until 2016.

[263] He thought the decision to discipline the pursuer in September 2013 was heavy handed. The defender's policy indicated that an informal resolution was necessary. He also questioned the decision to suspend the pursuer in 2016. This was as far as Mr Farquhar went in his oral evidence. He had an unspecified concern over what was said on the day of the suspension and the terms of the letter of suspension.

[264] He was critical of the defender's failure to progress the disciplinary procedure and the grievance within the timescales set by their own policies and their failure to apply their absence management policy. In this connection he thought that the recording of the pursuer's departure as a half day of unauthorised absence was heavy handed. He stated that the defender should have known from May 2013 when she was signed off with "work related stress" that the pursuer had mental health issues. He was asked whether this meant that the defender should have appreciated from that point that there was a foreseeable risk of psychiatric injury. Mr Farquhar found this a difficult question to answer. The pursuer posed it in a number of different forms. Taking his answers together I consider that he thought that the defender should have been aware that the pursuer was suffering from stress and anxiety and that if they did not take steps to address the causes of the pursuer's stress and anxiety she would be at risk of deterioration in her mental health. He was not willing to say that the defender should at that point have reasonably foreseen that the pursuer was at risk of psychiatric injury. He felt that this was a matter for medical opinion. His report states that there was a reasonably foreseeable risk of psychiatric injury to the pursuer due to work-related stress: section 10.1 (Joint Bundle, pp4237-4238).

[265] In relation to the pursuer's absence in May 2013 he would have expected NT and the defender's Human Resources officer to meet the pursuer to discuss the Occupational Health report, along with the pursuer's EIS representative. This would assist with the process of making recommendations and agreeing actions and outcomes. He would have expected such a meeting to be minuted and shared among the participants. He had not seen any minutes. He would also have expected a review date to be agreed. He noted that there was no record of a return to work meeting in January 2014 or in September 2016. Return to work meetings were important since the pursuer would need to know how the children had

progressed in her absence and to decide what her responsibilities would be during her phased return. The defender would have to get an understanding of whether her health had affected her capacity for work.

[266] In September 2016 it would be important to check whether the pursuer had the ability to cope with her work. There were a variety of complicating factors in her case. The Competence Process and her prolonged absence were significant issues. It would be important to make available support eg in the form of counselling. She had raised a grievance and was at Stage 3 of a process that could lead to discipline and dismissal. It was important she have a link with her head teacher and the assurance that she was supported. The pursuer was convinced the defender was out to get her so reassurance was needed.

[267] He acknowledged that the pursuer was responsible to maintain her teaching standards. He acknowledged that normally underperformance was short lived and soluble. The Framework did not envisage pauses but equally did not set timescales. That being so he felt that pauses were permissible. He acknowledged that once a teacher had commenced the procedure the time allocated to each stage is for discussion with the relevant Education Authority. He accepted that it was not possible to end or exit the procedure unless the issue of competence had been resolved. He accepted that if someone had a grievance that would take a week or two to resolve or was unwell a short pause was permissible. In re-examination he accepted it would be possible to pause the Competence Process while the pursuer was temporarily re-deployed to another role but such pauses would have to be strictly limited. It was to be assumed that a teacher was competent to teach to the requisite standard. Since it was important that a teacher be able to teach to the requisite standard the Competence Process should proceed with appropriate dispatch. He was entirely accepting of the idea that a child's education was important and that maintaining teacher competence

was important. He had never heard of a teacher who was fit for work but unfit to participate in a competence process. He thought that a teacher that returned to work should be ready to resume full teaching duties after, if necessary, a phased return of short duration. A teacher who was assessed as fit to return should ordinarily be regarded as fit for all aspects of her work.

[268] He thought that the defender was correct to start the Competence Process. He was aware that the pursuer had underperformed in the past and acknowledged that she had had difficulties before. By 2013 she had gained experience and ought to have been performing to a higher standard. It was concerning that she was having to learn skills she ought to possess already. The areas marked for improvement, Learning Intention, Differentiation and Behaviour Management, were skills she should have possessed. He accepted that the pursuer asked for time to achieve the standards and was in general given more time. He accepted that her standard of teaching was consistently low. It did not drop from 2013 to 2016. It was consistently low. When the pursuer was assessed as “satisfactory” this did not mean that she was performing well. A head teacher would be entitled to be concerned about a member of staff who was just “satisfactory”. It should be understood as a bare pass. A head teacher would wish her teachers to be at least “good”. He acknowledged that the task of supporting the pursuer was time consuming and that the defender was in an invidious position. It carried educational responsibilities and also responsibilities in respect of the pursuer’s health.

[269] He was referred by counsel for the defender to a referral to Occupational Health on 18 March 2015 (Joint Bundle p1073). The document by LG narrates a detailed eleven point action plan (p1078) setting out what was expected of the pursuer and explaining the supports she was to receive. The help includes prompt feedback, agreed dates and times for

feedback meetings, 9 day gaps between observations, fortnightly meetings with her mentor and with her head teacher. He accepted that these represented the sort of support he would expect from a reasonable education authority. He was unable to think of any support the pursuer had asked for that had been refused.

[270] In relation to the pursuer's absence from 7-21 May 2013, he accepted that it was not normal to refer someone to Occupational Health after one absence. Some Councils did it however. He acknowledged that in the period 2013-2016 she had been supported by mentors. They had given her professional and personal support.

[271] He was critical of the decision to issue a disciplinary letter after the events of 26 September 2013. He thought it was an overreaction. He thought that it was inappropriate given her anxieties and mental health issues. He accepted however that if the pursuer had left school before it would be reasonable to investigate the issue rather than refer for counselling. If there had been a low level attempt to deal with such an issue previously it would then be permissible to escalate matters. Despite this concession he maintained the view that the actions of the defender were heavy handed. He accepted that the pursuer's actions were not to be encouraged and that it was not a black and white issue. He would not have expected disciplinary steps without advice or approval from a senior officer. He acknowledged that NT had referred the pursuer to Occupational Health on 1 October shortly after the incident on 26 September 2013 and that this suggested she was aware of the pursuer's difficulties but he nevertheless felt that it was uncaring and unreasonable to issue the disciplinary investigation letter in light of the fact that she was already subject to the Competence Process.

[272] In connection with NT's meeting with the pursuer on 26 September 2013 he accepted that she could not have anticipated how the pursuer would react to the feedback and he did not wish to criticise NT for a failure of preparation.

[273] He thought that the defender had delayed to investigate even though the pursuer was off sick. He referred in this connection to the Disciplinary Policy at paragraph 3.2.5 which anticipates swift action. He thought that despite her absence on sick leave the defender could have investigated the matter in her absence. It would be up to the pursuer whether she participated in or attended meetings. If it had been started this would have given the pursuer some certainty about the time scale of the investigation.

[274] In connection with the statement of the grievance two days before the Review meeting at Stage 2 he thought that the defender should have paused. But he accepted that the defender was given very little notice of the grievance. It had planned the meeting in advance and staff were scheduled to attend. In that situation he did not think it was unreasonable for the defender to hold the meeting. But he was clear that the elements of the grievance that related to the implementation and application of the Competence Process should have been heard separately.

[275] Matters relating to bullying and harassment should have been dealt with under the Bullying and Harassment Policy, matters relating to the commencement of the Competence Process should have proceeded under the pursuer's grievance and the Disciplinary Procedure should have dealt with what was left.

[276] He thought that if the grievance had progressed it would have been rejected and the Competence Process could then have moved on. Having looked at the documents, if he had been the Nominated Officer he would not have upheld the grievance. He thought that her complaints about the commencement of the Competence Process were ill founded and he

also thought her complaints about the conduct of the Competence process were ill founded.

He also thought that the pursuer would not have been able to show that she had reached the standard for registration. As a result he would have expected her to be dismissed.

[277] If the first grievance had been commenced in 10 days there would have had to be a discussion of timescales. He thought that it would have taken 3-4 weeks to address the issue of why the Competence Process was started and a week to complete the hearing. But he accepted it might have taken longer since it would have required witnesses to be assembled and the appointment of an investigating officer. Those involved had employment responsibilities so it might have taken some time.

[278] He thought that the defender had delayed to deal with the pursuer's request for redeployment on 24 June 2016. Although it was close to the end of the summer term it should have been possible to respond. If she was fit to return the defender could have returned her to AW Primary School in August 2016. He did not have any difficulty with a four week phased return to L Primary School involving the pursuer sharing a class with the teacher who was leaving.

[279] In his opinion it was clear that the reason for her precautionary suspension was that the pursuer allowed a dangerous situation to develop in the classroom and that there was a risk to the pupils. He thought that the decision to suspend was justified in view of the head teacher's responsibility to safeguard pupils.

[280] He thought that the pursuer might have been suitable for a Support for Learning role although he acknowledged that most were given specialist training although some were trained on the job.

[281] He considered that had the pursuer not had a mental health breakdown at L Primary School, she would in any event have been dismissed by the defender on competence

grounds having failed to meet the standards expected of a registered teacher. In re-examination he qualified this evidence by saying that since the pursuer had never had a chance to air her grievance no one could say one way or the other. At such a hearing she would have had an opportunity to lead evidence about her mental health and that may have altered the course of events in the Competence Process. The disciplinary hearing at Stage 3 was a slightly different matter since such a hearing was based to a greater degree on documentary evidence. As I understood him this meant that the pursuer had a slightly lesser chance of changing the outcome he thought likely.

[282] He stated that there is no reference to an unauthorised absence on 26 September 2013 in her teacher absence record. In the Sickness Absence history however there is a reference to a half day unauthorised absence (Joint Bundle p4150).

Professor Wood

[283] The defender led evidence from Professor Michael Wood, emeritus Professor of Education at the University of Dundee. His report is in the Joint Bundle p4869. He was a former Inspector of Schools.

[284] He explained that every teacher in Scotland must be registered with the GTCS. A teacher is responsible to maintain appropriate standards of proficiency. If a teacher does not maintain an appropriate level the teacher can be removed from the register. Every five years a teacher must show that he or she is maintaining standards for registration. Although it is for schools to manage staff, each teacher is personally responsible for maintaining their standard of teaching. The head teacher is responsible for the quality of education in a

school. The head teacher has to make sure there is a consistent quality of education across the school. The head teacher is answerable for the school.

[285] The Framework for Competence sets out teaching standards and defines what constitutes effective teaching. It is a national document agreed to ensure consistency across all schools. It sets out the procedure to be followed from the point of time a concern is raised through to Stage 3 and final resolution. The first stage is informal monitoring. Informal monitoring is part of the job. In a typical primary school each teacher may be expected to be observed three times a year by the head teacher. The head teacher will also periodically discuss a teacher's planning. In most cases problems are resolved quickly. He indicated that on average less than ten teachers a year move to Stage 3. There are about fifty thousand registered teachers in Scotland. If they fail at Stage 3 they are presented to the GTC to decide on whether they should remain on the register.

[286] In his view the defender had handled the pursuer appropriately. In particular he drew attention to the work of the pursuer's EIS representatives through the process. When appropriate an EIS representative attended each meeting. Any steps proposed were signed off by the parties. He had not identified any request for support that was not met. The pursuer had been allowed to observe the teaching practices of other teachers. The defender had agreed to give the pursuer a minimum period of 9 days between observations. This was above and beyond what the pursuer could have expected. He thought it could be argued that this decision was counterproductive. A teacher should be observed in normal conditions and should not know in advance that an observation was to occur.

[287] He thought the Disciplinary Investigation in 2013/14 was appropriate. A teacher walking out of a class was an abdication of responsibility and was liable to create significant management issues for the school. In the teacher's absence another qualified teacher would

have to be found to take over. He thought in the circumstances an investigation was appropriate. If it emerged that there was no basis for discipline then the matter could be dropped. He did not accept that the investigation dragged on excessively. The pursuer was off work for 17 weeks after the events of 26 September 2013. In her absence the defender could not engage with her. She had a four week phased return. Only thereafter could the investigation begin. Their resolution thereafter was reasonably swift.

[288] In Stage 2 the pursuer asked LG to pause observations in May 2014. He did not think that the defender could acquiesce in such a request. Pupils had a right to teaching of an appropriate standard. Parents would be swift to complain if they thought their children were not being taught to an appropriate standard. It was not possible to acquiesce to an arrangement that involved the provision of deficient teaching. In his view the process had to be seen through to its conclusion, whatever that proved to be. The Competence Framework made no provision for pauses. It represented a national agreement that governed the defender and other education authorities. In any event it was not practical to suspend the Process for 3-6 months since the pursuer shared her class with another teacher and any such arrangement would require the reallocation of resources and impact on other staff. He was opposed in principle to the idea that removing the pursuer from the classroom would ultimately assist her in achieving the appropriate standard. The only environment in which she was going to learn the requisite teaching skills was in class. She would not learn if taken out of the class environment. The aim was to resolve the issue not prolong the process.

[289] He noted that the pursuer was observed on fourteen occasions by either a head teacher or a Quality Improvement officer or Quality Improvement manager. Three of the pursuer's lessons were "satisfactory". The other 11 were "weak" or "unsatisfactory".

“Satisfactory” meant there were strengths but a number of significant weaknesses. None of her observations were “good”. This indicated that there were significant weaknesses in her teaching. In his view this was a real concern. The aim is to move teachers from “good” to “very good” and then “excellent”. An Inspector of Schools would be bound to report any lesson that was “weak” or “unsatisfactory” and to talk to the head teacher so as to resolve the situation.

[290] In connection with the pursuer’s return to work at L Primary School he noted that the pursuer had been off work for 33 weeks prior to the return. This was a long time. The pursuer was absent for 50 weeks in the period 2013-2016. He accepted that there was a quick turnaround from the pursuer stating her second grievance to her placement. He thought that economic factors probably lay behind the pursuer’s wish to resume work. The pursuer had been off for a long time and he thought that the pursuer was motivated by the risk that her salary would be reduced or stopped. She was probably down to no salary by the time she and her EIS representative sought to persuade the defender that a redeployment would be appropriate. When she returned she was teaching three days a week. It was not a return to full time teaching. He thought that the decision to redeploy her while a Competence Process was underway was unusual. Such a decision could only be justified if the situation in AW Primary School was irretrievable. The defender ran the risk of simply moving the problem from one school to another. He accepted however that if the pursuer’s relationship with her head teacher was broken a move could be justified. There needed to be a link between the teacher and head teacher. But he could not say that the pursuer’s relationship with LG had broken down. The pursuer’s absence was likely to have created a problem in AW Primary School. In her absence replacement teachers would have had to be brought in and this was likely to have disrupted learning.

[291] He did not think that there were alternative teaching options suitable to the pursuer. The role of a Support for Learning teacher was a specialist role. To allocate the pursuer to such a position would undermine the importance of the role and the defender's responsibility to vulnerable pupils.

[292] He thought the defender's decision to suspend the pursuer after the breakdown in discipline in L Primary School was acceptable.

[293] In relation to the decision to refer the pursuer to Occupational Health he observed that where a teacher is complaining of stress it was not standard practice to make an automatic Occupational Health referral. In a situation where a teacher went off work the issue would potentially arise at the return to work interview. Thus when the pursuer was off 7-21 May 2013, the head teacher would need to gauge whether Occupational Health input was required. NT would have appreciated that the competence process was known to be stressful. She directed the pursuer to counselling. The pursuer's own health professionals had a role to play in enabling the head teacher to decide whether the pursuer should be off work or back to work. The MED3 was there to guide the head teacher in such a situation. Thus it was important at the return to work interview to establish whether the pursuer's GP was happy to allow the teacher to resume work and to establish what advice the pursuer had been given. In this case the pursuer was supported by the EIS. The head teacher would have taken into account any representations from the pursuer's representative. If the EIS did not suggest additional support the head teacher would take that into account. He noted that over the piece the defender made 10 Occupational Health referrals in respect of the pursuer. In his experience this was a high number.

[294] He did not accept that stopping the Competence Process was the solution. The defender was bound to keep it going. All it could do was delay the Competence Process.

But in delaying the Competence process, eg by widening the gap between observations, the Process slowed down. Ordinarily a competence process worked to a tight time scale and was quickly resolved. The fact that the pursuer was part time and had secured the defender's agreement to extended periods between observations slowed matters down. In addition she was on sick leave for about one third of the period of time in question. She was absent for about 50 weeks in the three year period. In Professor Wood's view the pursuer needed to be in the classroom and demonstrate that she could sustain an acceptable standard of teaching.

[295] He accepted however that the defender was trying to co-operate with the pursuer and could not be faulted for trying to accommodate her wishes. He noted that this flexibility had been evident from the start. NT had agreed to an extension of the Competence Process. In his view this showed that she was being supportive.

[296] In relation to the three grievances and the pursuer's allegation of delay, he pointed out that after the first grievance was lodged JC had got in touch immediately. The pursuer may not have agreed with his proposal that the grievance could be dealt with through the Competence Process but the defender had acted promptly. He did not accept that combining the processes was the wrong approach. In any event it was for the defender to decide what the correct strategy was. The evidence in each process was largely the same. Combining the processes mean that the pursuer was exposed to the stress of one process rather than two. He was also agreed that the pursuer's concerns were better raised under their Policy on Bullying and Harassment. The grievance was very lengthy and could not have been dealt with swiftly. Although it languished for a period of 33 weeks this in large measure was because the pursuer had not progressed matters and the failure of the parties to agree a way forward.

[297] He did not think that NT should be criticised in light of information that only came to light after the events covered by the action. She had no knowledge of the pursuer's mental health issues. The pursuer's history of depression could not be disclosed to her unless the pursuer had chosen to disclose it. Although C School had been involved in one of the pursuer's prior mental health breakdowns no information would or could have come from that source. It was an independent school and had no connection with the defender.

[298] He thought that there was a question as to whether teaching was the right career for the pursuer. It was not for the defender however to raise that issue. It was for the pursuer to decide. He did not think it was possible to have a separate process or standards for those with mental health issues.

[299] Counsel for the pursuer took Professor Wood to the Framework on Teacher Competence (Joint Bundle pp4945 and 4946) which states *inter alia* that the aim of the Framework is to:

“encourage parties to operate within procedural timescales which are efficient and reasonable, taking into account all the circumstances and complexities of the individual case, as well as the public interest;”

They require a process which is “tailored to the individual circumstances”. The pursuer's counsel also reminded him that the Equality Act 2010 placed a duty on the defender to make reasonable adjustments if the pursuer suffered from a disability. Professor Wood accepted these points. He did not accept however that taking the pursuer away from her classroom duties for a short time to rebuild confidence was appropriate. He thought it would be retrograde step since she would be deprived of opportunities to learn. He felt that teachers needed to be engaged in the craft of teaching and that “time outs” were not useful. He stressed that it was the pursuer's responsibility to maintain the requisite standard of teaching. It was not for the school and the defender to do this for her. He accepted that the

teacher's confidence was important but in his view the way to do this was to have a clear Action Plan that identified which areas needed improvement and by providing safeguards eg EIS support. He did not think that taking a teacher out of a competence process so that the teacher's confidence could be rebuilt was ever an option.

[300] Professor Wood referred to documents made available to him in his report (Joint Bundle p4872). The defender referred him to the defender's policies on Managing Stress at Work, its Guidance Note on Managing Stress and its Policy on Managing Sickness Absence. He was also asked about the defender's Disciplinary Procedure (Joint Bundle p4442) and the Procedure for Hearing Teachers' Grievances (Joint Bundle p478). He confirmed that although these documents were not referred to in his report he had read them, although he was unsure about the Policy on Managing Sickness Absence. He had been given links to the defender's website where he had accessed these documents. He advised that he was given very large amounts of material and if he had left anything out it was inadvertent. He pointed out that he had referred broadly to "initial documentation" (Joint Bundle p4872) which might be thought to cover anything not specifically mentioned. He accepted that the head teachers and managers should have known about these documents and followed them.

[301] Under reference to the Sickness Absence Policy (Joint Bundle p2490) he acknowledged that cases should be dealt with on an individual basis and that a balanced approach should be adopted so as to treat teachers fairly, consistently and sympathetically. He was referred to the Joint Bundle at p2498.

"4.8.1 Line managers are required to have an informal meeting with employees on their return to work following each occasion of sickness absence.

4.8.2 The Return to Work meeting is a key element of the Procedure and should be routinely carried out for all absences..."

[302] He accepted that the pursuer's first two week absence did not trigger the return to work provisions but the following absences amounted to periods of "continuous absence" (paragraph 5.5.1). The pursuer was absent from October 2013 to January 2014 and from November 2015 to September 2016. He accepted that the Policy's provisions would be triggered in January 2014 and September 2016. He was referred to pp2503, 2504 and 2505.

"5.1.1 Line managers must conduct and record that a return to work meeting with employees has taken place following each occasion of sickness absence.

5.1.2 Return to work meetings should be held on the employee's first day back at work but in any event no later than 3 working days following their return to work.

...

Continuing Absence – Employee Returning To work

...

5.7.4 The line manager will discuss the content of the occupational health adviser's report... with the employee and explore possible ways of supporting the employee in improving his/her attendance.

...

5.7.6 Reasonable adjustments to the employee's working environment and/or working arrangements including the possibility of alternative employment will be considered where appropriate. The need for further specialist medical advice or interventions such as ... physiological counselling will also be considered."

He accepted that at the Return to Work interview there should have been a discussion between the pursuer's line manager and the pursuer about her mental health. Such a discussion would give the pursuer an opportunity to explain her position and give the defender the opportunity to listen to her.

[303] Professor Wood was asked about team teaching and the use of a classroom assistant. He accepted these were options but observed that class room assistants had assisted the pursuer from time to time. He did not consider that these were solutions since they

engendered “learned helplessness”. As I understood him the aim was to enable her to teach independently. It was suggested to him that nursery teaching should have been explored. But he observed that the pursuer had bridled when this option had been raised with her before. He would have expected her EIS representative to raise this issue if she wished to pursue it. No such suggestion had been made. He also rejected the possibility of utilising the pursuer in a Support for Learning role. He thought that those pupils were the most vulnerable learners and it would be inappropriate to allocate a failing teacher to pupils who needed good support.

[304] He thought the defender had fulfilled its duty to make reasonable adjustments under the Equality Act 2010. He did not think that temporary redeployment to another job was an option. He did not think it would be sensible to move her to policy role or administrative post. He did not see what benefit this would have. Such a move would mean a shift of pay scale. He pointed out that in phased returns the pursuer’s teaching duties were reduced to the bare minimum and gradually scaled up. Although he did not make the point expressly, I understood him to be saying that in her sickness absences the pursuer was out of front line teaching and that he thought the way to handle the pursuer was to use phased returns as they involved a gradual reintroduction to teaching duties.

[305] Professor Wood pointed out that stress was the lot of many teachers. Some had stressful personal circumstances. Others found their work stressful. In that respect the pursuer was like many others. In this case stress was not the issue. The issue was how to deal with the pursuer’s lack of competence in combination with her stress related illness.

[306] He accepted that although the Competence Process was meant to run its course without interruption, it was possible to be flexible. But he thought that there were limits to its flexibility. The pursuer’s Competence Process had started informally in 2012 and had

still had not concluded in 2016. There was not infinite flexibility. The Process had to be brought to a conclusion. He accepted that the pursuer should not be blamed if the reason for the prolongation was the defender's failure to safeguard the pursuer's mental health.

[307] He observed that the school had relieved her of all additional responsibilities. She had no development work and no responsibility for school activities.

[308] He acknowledged there was a tension between the defender's duty to provide education of an appropriate standard and the risk that in seeking to maintain that standard a teacher might suffer injury to her mental health. In his opinion the tension was recognised and addressed by the Competence Process. It was split into stages that graduated the level of stress for the teacher in question. There was support at every stage along the way. He described it as a "balancing act". The needs of the individual had to be balanced with collective needs. The defender had sought to achieve that balance by engaging with the pursuer and her EIS representative.

[309] The pursuer referred Professor Wood to the defender's Managing Stress at Work Policy December 2013 (Joint Bundle p2778). It emphasises the need to support employees so as to prevent stress at work and manage its causes. It stresses the need to minimise risks to employee's health by preventing the causes and managing the effects of stress at work. He acknowledged that the Policy sought to ensure that suitable and sufficient risk assessments are conducted to prevent, identify and control sources of work-related stress through the use of stress risk assessment tools. Thus at paragraph 7.2 the Policy provides (Joint Bundle p2781).

"7.2 Managers will undertake regular risk assessments to identify the main causes of work-related stress for their employees and take appropriate and prompt action to prevent, manage or treat stress."

He accepted that Risk Assessments had the benefit of providing a structured and systematic approach to risks. He agreed that they were useful in identifying risks with the caveat that in the present case he thought that the defender understood risks. The Competence Process demonstrated an awareness of all known risks. The defender did not demonstrate an awareness of the pursuer's mental health history but that was because the pursuer's personal history had not been disclosed. He accepted that Risk Assessments are useful but he felt that the defender had monitored the pursuer's mental health as the Action Plan unfolded.

[310] Professor Wood was not willing to agree that the pursuer was vulnerable and at increased risk of psychiatric injury. He said that he had many cases where someone was signed off and returned to work without further issues. The fact that someone is stressed did not in his opinion mean that they would stay stressed. Some dealt with stress better than others. Counsel for the pursuer asked him if stress was an indication of increased vulnerability to psychiatric injury (as opposed to being more likely to suffer psychiatric injury). Professor Wood disagreed. He did not think that it could be assumed that someone who had been off work with stress was more vulnerable to psychiatric injury. In particular he did not agree that in May 2013 it was reasonably foreseeable that the pursuer would be at increased vulnerability to work related stress and psychiatric injury. Counsel for the pursuer pressed him to accept that, if after May 2013 there were further indications that the pursuer was suffering from stress and anxiety visible in a pattern of absences, this made it foreseeable that the pursuer was at a heightened risk of psychiatric illness. Professor Wood was implacable. In re-examination he said that he did not know of anyone who had suffered a psychiatric illness as a result of teaching. He thought it was a very rare occurrence.

[311] Professor Wood was directed to handwritten notes of a Stage 2 review meeting in 2014 (Joint Bundle p647) which set out what the pursuer and her EIS representative were saying about her state of mind at that time. He was directed to handwritten notes that read “enormous toll + impact on confidence (shot to pieces)”; “Needs confidence. Pause 12 mths. Stop the process and re-commence, if required”; “JT is going to find it difficult + going over the edge” (Joint Bundle p649). Professor Wood was wary of taking the notes at face value. He thought that they related what the pursuer and her EIS representative were saying to the defender. He would not concede that the notes were a proper basis for drawing conclusions about her psychiatric position. He was challenged about this. It was put to him that the pursuer was best placed to say how she was feeling. He agreed but thought that the context had to be taken into account. If she was upset or under pressure there was the risk of exaggeration. A balanced discussion was necessary. As I understood him he thought that the pursuer was opposed to the Competence Process proceeding and there was a risk that in attempting to stop its progress she may have exaggerated her difficulties. In Professor Wood’s view it was only after the pursuer’s breakdown at L Primary School that it would have become manifest that the pursuer was vulnerable to psychiatric injury.

[312] Professor Wood was referred to various aspects of the defender’s Policy Managing Stress at Work Procedure December 2013 (Joint Bundle pp2946, 2951 and 2952):

“5.1.1 Managers have a responsibility to support their employees whose health and work performance is being adversely affected by the effects of stress ...

5.1.2 Where appropriate, managers should meet employees ... to establish the cause of the problem and to explore possible options to help resolve the matter.

5.1.3 ... managers may wish to seek advice from the council’s occupational health unit ... prior to meeting with employees.

...

5.4.1 A key element of the council's Managing Sickness Absence Policy is the need to establish effective support mechanisms to assist an employee's return to normal work following a period of sickness absence ... Where an employee returns to work following prolonged absence due to work-related stress, a suitable return to work programme should be put in place.

5.4.2 Return to work programmes should be developed by the employee's manager in conjunction with the employee, their GP/specialist as appropriate, and the Occupational Health Unit. Such arrangements should not necessarily be regarded as short-term interventions ... [options include] longer term or permanent adjustments to work patterns and conditions if appropriate."

[313] Counsel for the pursuer focussed on paragraph 5.4.2 and the reference to the use of a GP/specialist and Occupational Health. Professor Wood agreed that in this context the relevant specialism was a mental health specialist. He agreed that it would be appropriate to involve Occupational Health and the Human Resources department. He did not think that addressing the pursuer's return to work needs would necessarily be complicated or take an extended period of time. Professor Wood did not agree that the return to work programme needed to be developed in advance of the pursuer's return. He thought that if she returned on a graduated basis, eg for one day to begin with, the programme could be finalised during this phase. He pointed out that this depended on the usual protections being available in the form of support from a classroom teacher. His understanding was that the pursuer was informed in advance of what had been arranged for her. She met with staff beforehand. She did not begin "blind".

[314] Professor Wood was referred to the following paragraphs of the Policy (Joint Bundle p2952)

"5.4.3 Where evidence suggests that an employee's stress-related absence could potentially be linked to factors in the workplace, it is important that these factors are investigated and addressed before the employee returns. Reasonable adjustments should be made wherever possible so that the employee is not reintroduced into the same working conditions that led to their absence.

5.4.4 ... Managers are required to assess the level of support needed in each individual case based on the results of risk assessments and advice received from Occupational Health and Safety Team... and any other specialist advisers.”

[315] He accepted that no Risk Assessments were performed in 2014-2016. But he thought that if assessments had been performed it would have made no difference. The defender had assessed the level of support needed by the pursuer and taken advice from Occupational Health prior to the pursuer’s return to work. All that a Risk Assessment would have covered was covered by other means. He did not accept that a return to work meeting was necessary in 2016. He saw it as a fresh start in a different workplace. He thought that the preparatory work had been done by the defender in co-operation with the pursuer before she restarted work. An Occupational Health referral had been made and the relative reports received. He did not think this work required to be integrated with a return to work interview.

[316] Counsel for the pursuer asked him what the situation would be if VB had not provided any input in relation to the pursuer’s mental health issues on her return to L Primary School. Professor Wood was not critical of this. He thought it was reasonable to complete the induction process and once the pursuer had settled in deal with the pursuer’s mental health issues. He thought that it was reasonable to anticipate that a new school would de-escalate the pursuer’s stress related issues. He thought the priority was to settle the pursuer in and then deal with the pursuer’s mental health issues.

[317] He considered that for VB to do her job she would have to be informed about the pursuer’s background including the Competence Process and the Disciplinary Investigation.

[318] He agreed that stress can result in deterioration in performance. It was possible that that the pursuer's levels of stress had built up over the stages of the Competence Process but the level of stress was not constant.

[319] He was referred to the defender's Employee Mental Well-Being Policy, May 2016 (Joint Bundle p502):

"7.8 Where an employee is advised by their GP to take some time off as a result of a stress-related health condition, the relevant provisions of the council's ... Policy on Managing Sickness Absence will apply in conjunction with this policy. In these circumstances, managers should adopt a proactive but sensitive approach so that the employee does not feel isolated or guilty. In this regard the manager should establish with the employee whether regular contact would be helpful and how this should be arranged during the period of absence.

7.8 (*sic*) A key element ... is the need to establish effective support mechanisms to assist an employee's return to normal work following a period of sickness absence, particularly after periods of prolonged absence. Where an employee returns to work following prolonged absence due to work-related stress, a suitable return to work programme should be put in place."

[320] Professor Wood's report does not address these policies. Counsel for the pursuer asked him whether he had considered them at all. He said that he had. It seems clear however given that he does not refer to them or interact with their terms that

Professor Wood has focussed on the Competence Process. In a way that is not unexpected given that his expertise is in education not Occupational Health, psychology or psychiatry.

[321] In relation to the decision to discipline the pursuer in September 2013 he advised that he was supportive of the defender's decision. The pursuer was responsible for her children and in leaving the school had walked away from her responsibility. Because of the repercussions for the pupils and school a strict line had to be taken with a matter such as this. He acknowledged that she had left at lunchtime. He acknowledged that the pursuer's father had advised NT of her absence. He acknowledged that the pursuer was very upset.

He was resistant to the suggestion that in this situation she was right to leave the school. He accepted that there was a continuum of distress. He felt it was a matter for the school to decide whether she was sufficiently distressed to leave school. He had experience of teachers becoming very upset but after being given support they were able to carry on.

[322] He did not think there was anything untoward with starting a disciplinary process and then switching to counselling. The matter was by that stage in the hands of the Human Resources department not the head teacher. He could not describe the approach taken as punitive. He accepted that the Disciplinary Procedure policy indicated that matters should be dealt with promptly (Joint Bundle p4445):

“3.2.5 The investigation must be carried out as quickly as possible and should, in most cases, take no longer than 15 working days.”

[323] The episode occurred on 26 September 2013 and the counselling meeting did not take place until May 2014, eight months later. Professor Wood noted however that the pursuer was off from 30 September 2013 to 27 January 2014 and was not back full time until February. Once she had returned it would take time for the investigation to occur. He that statements could have been taken from NT and KD in the interim. He did not accept that it would have been appropriate to take a statement from the pursuer. To attempt that would involve a negotiation with Occupational Health and the EIS. He accepted that the Occupational Report of 9 December 2013 stated the pursuer was fit for work but in his experience it would not have been possible to restart the investigation then as the EIS would not have permitted it until the pursuer was back at work. The investigation would have been perceived as apt to cause stress and in that situation he thought the EIS would have forced the defender to wait.

[324] Counsel for the pursuer referred Professor Wood to the defender's letter of 28 May 2104 (Joint Bundle p4537). It stated that "Mrs G will monitor for 6 months" and it was suggested to him that this was a penalty that was not anticipated in the Disciplinary Procedure policy. He denied that this was punitive and suggested that on the contrary that it was a supportive way of disposing of what was otherwise a serious matter. AW Primary School was a tiny school with five teachers who saw one another all the time. This could not be regarded as anything other than a "light touch" disposal. Counsel for the pursuer? suggested that the letter did not specify what was being monitored. Professor Wood thought that read in context the letter was designed to deal with the pursuer's departure from school so that was what was to be monitored. I accept that.

[325] Professor Wood was asked about the defender's grievance procedure. He accepted that grievance and disciplinary procedures are not determined nationally by collective agreement but at local level. The defender's procedure appears in the Joint Bundle at p478. Discipline is initiated by the employer and grievances by the employee. The pursuer's grievance was dated 9 February 2015. Professor Wood did not consider that the grievance procedure was designed to enable the pursuer to complain about how the defender had conducted the Competence Process. Although disciplinary action had not begun under Stage 3 he thought that the pursuer was using it to interfere with a separate process. He accepted that some of the pursuer's grievances could fall within the procedure, such as bullying, but he did not accept that an attack on the fairness of the Competence Process was a grievance. In hindsight he thought it could have been possible to split the grievance up. He agreed also that it was better to resolve any question about the fairness of the Competence Process before the defender took any disciplinary steps. He accepted that a grievance procedure was meant to be speedy. He did not accept that hearing the grievance

first would have had any impact on the pursuer's stress levels. If there had been delay this was in large measure due to the pursuer's absence from work. He did not accept that trying to deal with the alleged defects of the Competence Process by means of a grievance would have any impact on her stress and anxiety. He accepted that if it was possible to deal with the Competence Process in this way there would have been fewer issues for Mr Thomson to deal with in the Disciplinary Investigation.

[326] Professor Wood was referred to the defender's Occupational Health report of 12 January 2016 (Joint Bundle p1089). It referred to the effect the Investigation Report had on the pursuer's relationship with LG and her fellow teachers at AW Primary School (p1090). Counsel for the pursuer asked if he was aware that her relationship with them broke down. Professor Wood was not aware that this was so. He did not think however that this meant she had to be redeployed. He thought that her relationship with LG was better than her relationship with NT and it might have been possible for her to repair the damage. He could see that in light of the fact that the Investigation Report included statements from colleagues that were critical of the pursuer this would be difficult particularly where she was in need of emotional support but he thought it was possible.

[327] He was then referred to the next Occupational Health report of 1 March 2016. (Joint Bundle p1092). There Dr Kathryn Allan stated that the pursuer would "need some time to regain stamina and resilience" once the Competence Process was over "before resuming a classroom role". Professor Wood sought to suggest that Dr Allan meant that her stamina and resilience could be built up in the classroom. The report is clearly to the contrary effect. Professor Wood however was of the opinion that moving the pursuer would not change things. He thought it would just create fresh problems. He agreed however that on receipt

of such a letter the defender should have convened a multidisciplinary meeting involving the relevant specialisms in order to decide what should be done.

[328] Professor Wood referred to an absence review meeting on 1 June 2016 where LG met the pursuer, her EIS representative and Mark Grierson from Human Resources to discuss her return to work. The meeting was convened in light of the recent Occupational Health report. The Occupational Health physician took the view that the Competence Process was a “roadblock” on the road back to a teaching role and that a return to work would only be possible if there was a temporary redeployment to another role. LG’s position was that the pursuer should return to AW Primary School because the school had “insight into the performance issues” and the “relevant supports” were in place to facilitate such a return. I note that the pursuer accepted that her existing relationship with the staff team would assist such a return. TG explained however that the pursuer was against a return to AW while the Competence Process continued. She wanted a temporary redeployment and a temporary cessation of the Competence Process. TG suggested that such an arrangement could be ended after the phased return. (Joint Bundle p4535-6).

[329] Professor Wood was referred to a MED3 of 18 August 2016 (Joint bundle p1575) in which the GP certified that the pursuer was fit to return to work but on certain conditions. The message is in capital letters. It is not clear to me whether this was deliberate or inadvertent. The GP said she needed “professional and personal support” and should not return to her work location until the “performance issue [was] resolved”.

[330] Professor Wood was referred to an email of 21 July 2016 containing legal advice from Jamie Cameron, a solicitor in the defender’s employment, in connection with the Equality Act. She addressed a number of issues. In her judgement the pursuer had a disability within the Equality Act 2010, and that the Competence Process was a provision, criterion or

practice which put the pursuer at a substantial disadvantage. She addressed the question of whether in failing to offer employment at another school the defender might be regarded as failing to make a reasonable adjustment. She questioned whether that matter had been adequately researched. She pointed out that if the defender did offer alternative employment and the pursuer continued to underperform that would strengthen the defender's position. The email in fact assumes that the pursuer would continue to underperform, but that is of no moment. Professor Wood did not recall reading the document (Joint Bundle p1572).

[331] Professor Wood agreed that when the pursuer returned in September 2016 there should have been a multi-disciplinary approach to managing the pursuer's mental health led by Human Resources with advice from a suitable specialists including Occupational Health, the pursuer's GP and a mental health professional. Professor Wood accepted this but thought that the Occupational Health referral should have been the trigger for the meeting. He pointed out that the vacancy arose late in the day and it had been a rush to get the pursuer into position. The pursuer was referred to Occupational Health on 6 September 2016, a day after she started at L Primary School. The follow up Occupational Health referral did not take place because it was overtaken by events.

[332] Professor Wood agreed that after receipt of the Occupational Health report of 12 January 2016 the defender could have looked around for alternative employment for the pursuer. He agreed this would have had avoided the situation that arose in September. By then classes had been allocated and getting a suitable role was more difficult. If matters had been set in motion in January there was a higher chance a suitable vacancy would have arisen. But he thought that the defender had acted reasonably in seeking to keep the pursuer at AW Primary School. It would appear legal advice (above) had prompted the

defender to change their position. He accepted it would have given more space for a return to work programme.

[333] He thought that a support plan had been discussed and agreed. There had been a discussion with VB. He accepted that it was not a meeting of the kind envisaged in the Mental Wellbeing Policy at paragraph 7.8 and accepted that would have been helpful. He did not consider that a return to work meeting was necessary since in his view the pursuer was not returning to work. She was taking up a new role at a different school. He accepted however that the underlying point of such meetings was to support the pursuer and, whatever the label applied to the meeting, it remained necessary. Counsel for the pursuer suggested that if such a meeting had taken place the pursuer's mental health issues would have been apparent. Professor Wood agreed that such meetings should take place, as they should at any school, but was not clear whether he agreed that the meetings were all about the Competence Process and not her mental health.

[334] Professor Wood was unsure why the pursuer had been suspended. He had no evidence to offer on the matter.

Medical witnesses

Dr Alison Harper

[335] The pursuer called Dr Harper, a Clinical Psychologist. Her CV was produced (Joint Bundle p4487). She gave evidence along with two psychiatrists, Dr Patience, who was called by the pursuer and Professor Lawrie, who was called by the defender. Dr Harper explained that psychiatrists differ from psychologists in that they have medical degrees and can prescribe medication. They deal with more severe and enduring mental health problems. She stated that she would defer to a psychiatrist on issues involving the prescription of

medication or the need for hospitalisation. She thought that a psychiatrist would defer to psychologist in areas such as cognitive behavioural therapies. In identifying a psychiatric injury reference was made to ICD 10 and DSM V. She had produced three reports on the pursuer. The first (Joint Bundle p406) was dated 18 April 2016 and was provided when the pursuer was still in the defender's employment for the purposes of an employment tribunal claim. Her second report (Joint Bundle p426) was dated 31 October 2016 when again the pursuer was still with the defender. At that stage she was instructed by the pursuer to examine whether any mental health issues may have affected the pursuer's performance following her return to work in September 2016. Her third report (Joint Bundle p4463) was dated 7 November 2020 and considered the probable causes of any mental health problems, the pursuer's current mental health, and recommendations for treatment required, and any breaches of duty by the defender which led the pursuer to develop a psychiatric disorder. There is a summary of her opinion in the Joint Bundle at p4481.

[336] In her opinion the pursuer had suffered from anxiety and depression since childhood. She had low self-esteem. She had struggled to achieve her first qualification. She had suffered a fall and had eye problems when she was a trainee teacher. In 2005 and 2009 the pursuer had short term sickness absences. She had an adjustment disorder after she became pregnant. By the end of 2012 she was working at AW Primary School, in the nursery and with the lower Primary School. She was struggling. In cross-examination Dr Harper accepted that that some of these problems were similar to those that were the subject matter of the present action. In the present action the pursuer had attempted suicide after her breakdown in September 2016. In 1997 she had been suicidal because of the stresses of her University course. In 2009 after a parental complaint the pursuer had self-harmed by cutting her finger with a knife. In the present action she had been at odds with

her school management from 2013. She had been at odds with her school management in 2002. Counsel for the defender suggested that the pursuer had been in dispute with her head teacher at Craigclowan School. Dr Harper was unsure about this element of the pursuer's history and said she would need to check the records. She accepted however that before the matters raised in this action, the pursuer had struggled with panic attacks and depression.

[337] In relation to the events of March, May and September 2013, Dr Harper thought that the pursuer was suffering from mixed anxiety and depression, a major depressive disorder. The pursuer was anxious, under scrutiny and suffered from background anxiety. At this time Dr Harper thought that her condition escalated and she became more depressed. She thought that the pursuer's self-doubt also increased. She thought the pursuer was good at presenting a front and that she appeared to be coping when in reality she was struggling. Dr Harper considered this was the position on 26 September 2013.

[338] On her return in January 2014 the pursuer had got herself together. Dr Harper thought that in returning to school she was acting in a way that was characteristic of someone with low self-esteem who was struggling with anxiety and self-doubt. While it was true that some stress was helpful, the pursuer had gone over the Yerkes Dodson "bell curve" (Joint Bundle p4482) to such an extent that she could not concentrate and struggled to make decisions. She withdrew and avoided issues. Although NT had moved on, the Competence Process remained. Dr Harper thought the pursuer quickly became anxious that LG would see her in the same way as NT. Dr Harper accepted that the pursuer was very focussed on the outcomes of her observations.

[339] Dr Harper thought that Occupational Health had recommended the termination of the Competence Process in 2016. Had the defender acted on this recommendation the

pursuer would not have suffered a breakdown in her mental health. She also thought that the pursuer had asked the defender to allocate her to a lower Primary School class or a nursery class. Dr Harper considered that such a move was sensible. Most of the pursuer's experience lay there. In such an environment her anxiety levels would be likely to drop. This would enable her to rebuild her confidence. Instead she was told that if she did not take a P7 class she would have to go back to AW Primary School.

[340] Dr Harper had been told by the pursuer that she received no warning of the job opportunity at L Primary School and had no chance to integrate at the school. As a result she was unable to cope. Her understanding was that the breakdown of class room discipline involved a pupil throwing a fire cracker in the class. As a result of this episode she became very depressed and self-critical. The pursuer thought it was the end of her career. In late 2016 her condition deteriorated and she had to be hospitalised. Dr Harper considered that she should defer to psychiatrists in relation to her treatment in hospital.

[341] In her opinion the depressive disorder that was stirred up in 2013 remained thereafter and continued to 2016/17 but was exacerbated to the extent that the pursuer made suicide attempts. She could not comment on the elements of psychosis reported by the pursuer. She advised that the pursuer was seeing NT in the room.

[342] Dr Harper considered that the way the Competence Process was handled by the defender was the cause of the pursuer's injury. In her opinion the defender knew or ought to have known that the pursuer suffered from depression in March 2013 or at the latest May 2013. She thought the defender should have realised that if the Competence Process was started the pursuer's depression would return. In her view the Competence Process would not provide a true view of the pursuer's competence. Dr Harper thought that the

defender should have arranged team teaching for the pursuer and abandoned weekly observations.

[343] She considered that by September 2013 it should have been obvious to the defender that NT was causing the pursuer difficulties. She thought NT's attempt to get the pursuer to come back into the school after a panic attack on 26 September 2013 was "extraordinary". She attributed NT's maladroit handling of the pursuer to a lack of understanding of mental health issues.

[344] Dr Harper was critical of NT's observations. She thought that they lacked proper structure. To be effective she should have identified difficulties and provided solutions. She thought NT was unsupportive of the pursuer. NT had failed to identify the aspects of the pursuer's teaching that were under scrutiny and failed to explain why they were under scrutiny. In her view Occupational Health should have been involved in May 2013 when the pursuer went off with stress. Occupational Health should have sought psychiatric input to see if the pursuer was on the correct medication and considered a referral to psychology.

[345] Once she was off work, Human Resources should have contacted the pursuer every two weeks so that she felt valued. Human Resources should automatically refer to Occupational Health so that the individual can see that the employer is listening. In her view it was critical that the pursuer realised that the defender cared. In Dr Harper's view emotional support was crucial. The pursuer had suffered injury in September 2013 because she felt increasingly under attack.

[346] She considered the Competence Process should have been conducted within specified timescales although she acknowledged this could be difficult to achieve. By not hearing her grievance separately the pursuer was given the impression that the defender did not want to hear her side of the problem. It was important that the pursuer be heard. If the

pursuer felt that the defender was not listening she would succumb to helplessness and her depression would deepen. Pausing the Competence Process so that the pursuer could recover was necessary. Counselling would have helped the pursuer.

[347] She thought that the letter from JC warning of gross misconduct was capable of having an enormous impact. She thought that the pursuer would have felt she was guilty of something when she was in fact innocent. The pursuer would have felt she was being charged with something she had not done.

[348] She thought that when the defender refused to redeploy the pursuer this would have increased the pursuer's belief that she was not being heard and that this would increase her levels of stress and anxiety. Dr Harper was also critical of the failure to provide a proper return to work interview in September 2016. In her view it was important to assist the pursuer in her return to employment after a long break.

[349] As she understood it the Competence Process was started because she felt intimidated by NT and as a result her relationship with her was poor. Had mediation been used matters might have improved. Dr Harper thought the causes of her injury were largely work related and cumulative. She highlighted the following factors. The defender's failure to refer the pursuer to Occupational Health in May 2013; the accusation that the pursuer had broken the school's child protection policy in September 2013 when in fact there was no policy; the decision to discipline her for leaving school and the continuation of the disciplinary process despite TG raising his concern; the defender's failure to listen to Occupational Health about the proper approach to the grievance procedure; JC's letter alleging gross misconduct; the return to work in 2016 despite the absence of a risk assessment; and the absence of time scales for the Competence Process. Dr Harper

considered that these factors negatively impacted the pursuer's mental health from a clinical psychologist's perspective.

[350] In her opinion the major contributory factors in the breakdown of the pursuer's mental health were the events of 24-26 September 2013 and the disciplinary steps thereafter coupled with the absence of any return to work protocols. The defender's lack of emotional support however was the key issue. A mentor who was actually trying to help the pursuer was crucial.

[351] But for these factors she thought that the pursuer would have been able to go through the Competence Process albeit it would have lowered her mood. But she would not have suffered a major depressive disorder with hospitalisation. She thought that if she had been referred to the GTCS and the decision to end her registration had been made she would have suffered low mood and depression but she would not have had the severe illness she did and would not have been hospitalised.

[352] Dr Harper considered the pursuer had made a good recovery. She had returned to tutoring. She thought that the process of giving evidence would probably cause a dip in her condition and that she still had the question of her registration with the GTCS to deal with. She thought that it was realistic to imagine that the pursuer would be able to continue with tutoring. Her diagnosis at present is a chronic adjustment disorder. She still has nightmares and intrusive thoughts. Her low self-esteem and anxiety would remain. She would always be prone to anxiety and depression. Her current part time work was ideal. The advantage of tutoring was that she had control over her work. In other environments she would be exposed to criticism. Dr Harper did not think she could return to work as a primary school teacher. At present the pursuer was working 18 hours a week. Although she could increase her hours over time this might take up to 10 years. Dr Harper recommended continuing

Cognitive Behavioural Therapy. The pursuer remained vulnerable. That vulnerability had been increased by the events that were the subject of the action. She remained on anti-depressants and other medication.

[353] In cross-examination she initially stated that the pursuer had been under continuous pressure throughout the Competence Process. Counsel for the defender suggested this was not correct and that the pursuer's mental health issues coincided with "pinch" points such as reviews or meetings. Dr Harper accepted this. Thus the panic attack at the meeting on 26 September 2013 occurred because of the pursuer's fear of NT. She accepted this was the case because the pursuer's father had told her that NT had bullied the pursuer. She interpreted NT's behaviour on 26 September 2013 as aggressive. She should not have told the pursuer that she had to come back to the school and then started disciplinary action against her. This was not supportive behaviour. Dr Harper accepted her beliefs were based on what the pursuer had told her. She had no objective account of NT's behaviour. She had accepted what the pursuer told her. She did not find the pursuer difficult to believe because the pursuer's mental health issues meant she was easily intimidated. Counsel for the defender asked Dr Harper how NT should have known that the pursuer was intimidated by her. Dr Harper did not answer the question directly. She said some people will never be aware. I understood her to mean that NT should have known that the pursuer was intimidated by her and that she lacked self-awareness. Dr Harper said it was the first thing that would occur to her. NT however was not a psychologist. The defender's counsel pointed out that the pursuer had just been told that her latest observation had not gone. He suggested that it would have been reasonable for NT to infer that the Pursuer was upset because she had discovered that the observation had gone badly. Dr Harper however insisted that NT should have considered whether her manner or the way she had conveyed

the information had caused the pursuer to become upset. She acknowledged that she did not know NT and did not know whether NT had sufficient insight to grasp the position. Counsel for the defender pressed her on how NT could have appreciated that the pursuer had a history of mental health issues. Dr Harper referred to the fact that she had a history of mental health issues and was prone to catastrophic thinking and had low self-esteem.

Dr Harper appeared to think that NT should have inferred this from the information available to the defender, despite the absence in September 2013 of an Occupational Health report or advice from her GP. Counsel for the defender asked her whether she was aware that her reports of 2016 were never intimated to the defender. Dr Harper did not know this.

[354] Dr Harper thought that NT should have sought expert advice as soon as she became aware that the pursuer had a mental health issue. If she had taken that course she would have been aware that the pursuer had a problem on 26 September 2013. She thought that the pursuer's absence record and her distress signalled that the pursuer lacked confidence and was vulnerable. If NT was not sure she should have asked for help. She thought that the reports from Occupational Health indicated that the way the Competence Process was being carried out was a problem. She thought that the reports should have nudged the defender into investigating whether the deterioration in the pursuer's teaching was due to mental health issues as opposed to performance issues. The defender's counsel pointed out that there was no evidence to suggest that there was deterioration in the pursuer's teaching or that this was linked to mental health issues. He pointed out that the timings of the observations were agreed with the pursuer and her EIS representatives. Dr Harper was not in a position to give evidence about whether the pursuer's teaching skills had deteriorated or whether the timing of observations were agreed with the pursuer beforehand.

[355] In relation to the events of 2016 the pursuer told Dr Harper that she did not know what she was going to be doing until a few days before going to L Primary School and did not get an indication of what was expected of her. The defender's counsel pointed out that contrary to what she had been told the plan had been arranged in co-operation with the pursuer beforehand. Dr Harper thought that even if that was the case the fact that the pursuer had been off work for 10 months meant that a more sophisticated plan was needed. Occupational Health input was insufficient and specialist help was called for. The pursuer should have seen Occupational Health specialists before her return to work. She accepted that the Occupational Health specialists were aware of the defender's plan but did not try to stop it. Counsel for the defender asked her why the Occupational Health experts had not vetoed the defender's proposal if it was inadequate. Dr Harper stated that she could not speak for them.

Dr Douglas Patience

[356] Dr Douglas Patience was led by the pursuer. He was a consultant psychiatrist. His report sets out his professional qualifications and experience (Joint Bundle p4558).

[357] He stated that the pursuer had suffered from personality issues in adolescence and that she had struggled to cope in adult life. She was prescribed anti-depressants when a student. In Dr Patience's view her problems intensified in about 2009 and 2011.

[358] He considered that the pursuer had a mood disorder but not of such severity that she was unable to function at a high level. She had obtained a degree, married, and pursued a teaching career. His conclusion at paragraph 47 of his report (Joint Bundle page 4610) was that the pursuer suffered from a severe depressive disorder with psychotic symptoms.

[359] In 2012 the symptoms of her mood disorder were in remission. Remission was the appropriate way to describe the situation where symptoms are beneath the threshold of diagnosis for a sustained period, usually of three months or more. Her episodes of depression prior to 2012 were mild to moderate in nature. A diagnosis was based on the number of symptoms present when the condition was at its worse. Practice was to rate each episode separately according to the number of symptoms present. In 2013 there was a sudden worsening in her condition. He reached this conclusion based on her account of her symptoms and the treatment prescribed in response to her condition. In April 2014 the pursuer was prescribed sertraline (Joint Bundle p2990 and 4590) and this was doubled on 19 September 2014. She then had a psychiatric admission in late 2016. In his opinion the 2016 episode was a sudden change. It was an escalation with a clear onset date that deteriorated until November 2016. Her depressive episodes became more severe and were accompanied by visual hallucinations and the voices of people criticising her. The pursuer had made a good recovery and no longer had this diagnosis. That said he thought she should remain on psychotropic medication for rest of her life. If she came off her medication she would relapse. In his opinion her condition was the same as it was prior to 2013 but what had altered was the severity of her symptoms and the fact she was in receipt of a complex regime of medication. She would have to remain on these medications or her severe illness would be likely to recur. The pursuer was at an increased risk of a further episode of severe depressive illness with psychotic symptoms. An episode might be triggered by her subjective perception of stress. Her chance of coping was much improved because of her medications. While managing stress was important as were coping skills. Her medications were her primary protective factor

[360] In relation to stress at work the subject's subjective perception of the stressor and the availability of support were critical factors. If the subject came to feel hopeless this was a key predictor of mental illness. He, like Dr Harper, referred to the Yerkes Dodson curve. Stress was good but not in excessive quantities. Everyone has a threshold. Once the symptoms of stress emerged and there is a loss of sleep depressive symptoms will supervene. He thought the pursuer was unable to cope in 2013.

[361] In his view the cause of her problems was how the Competence Process was managed. She had a bad relationship with NT and was not supported adequately. From the pursuer's point of view she felt "put upon" and unjustly criticised. While her prior history showed that she had struggled to cope in the past, the events of 2013 represented a major change. He considered that the GP notes before the Competence Process began showed that the pursuer knew that the Competence Process was coming and that she had accepted this. Had the Competence Process been to blame he would have expected a breakdown before the Process began. Instead the breakdown came after the Process was started. He added however that the Competence Process on its own would have caused depression similar in gravity to that experienced previously. So the mishandling of the Competence Process did not cause but exacerbated her symptoms. In that situation she would have gone to her GP and had time off but would have been able to function.

[362] The pursuer told him that the episode that led to the GP increasing her fluoxetine involved an observation at school when "she did not realise a formal observation was being undertaken" (report para 19, p8). He thought that the trigger event occurred in March 2013 and led up to the episode in 2016. He was unable however to say this with confidence.

[363] If the defender had not mishandled the Competence Process she would have completed the Competence Process even though he accepted it would have ended with her

dismissal and referral to the GTCS. The pursuer would have struggled but would probably have reacted as she had done when she began working as a Primary School teacher. He thought the defender's failure to give her dates for her observations, and the absence of supportive meetings with the head teacher were critical. There had been a lack of communication, a lack of support and conflict with NT.

[364] Dr Patience accepted he had no knowledge of Competence Procedures and could not comment on the defender's policies. He thought that the best person to deal with the issues raised by this case was an Occupational Health physician since they had the most experience of workplace health. That said Occupational Health practitioners did at times seek his advice.

[365] In his view the key was to keep channels of communication between the pursuer and defender clear. The defender should make clear what it was seeking to achieve.

Communication was the key. This had to be done alongside a package of support. He accepted that support could take the form of a "heart to heart" with a manager. The key was to avoid escalating the pursuer's anxiety levels. This was best achieved by supplying her with suitable information in a supportive environment and reviewing matters regularly.

[366] Dr Patience was directed to an email relating a conversation he had with the pursuer. The pursuer told him that she had no symptoms in March 2013 when she was told that the Competence Process was going ahead. She told him that she only began to develop symptoms in September 2013 when "the assessment was changed for unknown reasons from satisfactory to weak". The email states "it was interpersonal/process issues which were the source of distress for her". She told Dr Patience that she was not concerned by the Competence Process and that it was inconsistencies in the process that she found problematic (Joint Bundle page 4613). Dr Patience accepted that the pursuer was wrong to

say that her symptoms only began in September 2013. He did not consider however that her error affected his opinion.

[367] Dr Patience considered that the defender should have foreseen the risk that the pursuer would develop a psychiatric injury because a medical certificate referring to depression had gone to Occupational Health. He did not specify which MED3 he had in mind.

[368] He thought that the pursuer was back to her level of functioning prior to 2013 and could go back to teaching provided it was with a different employer and a different school and she was suitably supported. His understanding was that the pursuer did not want to return to teaching. He thought that further Cognitive Behavioural Therapy with Dr Harper would be helpful.

[369] His diagnosis was the same as Professor Lawrie. It was the same disorder. He did not think it was appropriate to describe her present condition as a chronic adjustment disorder.

[370] He agreed that the pursuer had difficulties in C School in July 2003 (Joint Bundle page 3300) that resembled her present difficulties. Her suitability for registration was an issue and she was in conflict with the school management. He accepted that she had long term medication for managing anxiety. He accepted that she had a crisis in November 2009 and was suffering from depression. She was referred in 2010 to psychiatry for post-natal depression. In August 2010 she was in receipt of Cognitive Behavioural Therapy (Joint Bundle page 3076) and was worried about her performance as a teacher and a parental complaint. In May 2012 her GP notes indicate that she had a child protection issue at work. Fluoxetine was commenced in December 2012 and this prescription was continued when she went to her GP on 18 March 2013 in connection with depression. He acknowledged that the

GP notes were detailed and none of the entries referred to the Competence Process. The pursuer's complaints were of parental complaints and an unsupportive head teacher. In respect of the trigger event in March 2013 he acknowledged that the GP records did not refer to the Competence Process. The GP notes (Joint Bundle page 2992) referred to "problems at school". He thought that this was a reference to the Competence Process as he did not think the pursuer would go to her GP if it was just a reference to parents complaining.

[371] As befits the confidential nature of counselling Dr Patience was not aware that the pursuer was supplied with counselling and attended sessions in 2013 and 2015. He had no insight into why she had not availed herself of the service at other times. He thought counselling was of little benefit in general although it was a supportive service.

[372] Counsel for the defender asked whether the GP records supported the pursuer's account of the severity of her symptoms. He pointed out that her GP did not refer the pursuer to psychiatry or psychology in the period 2013-2016 despite encountering employment and domestic difficulties and having a baby. Dr Patience was not persuaded however that this necessarily meant that she was not having significant symptoms. He said that GPs were experienced in managing depression and so the GPs might have thought they could manage it themselves. He noted they had changed her medication. He also thought it possible that the GP did not appreciate the extent of the problem. They may not have referred to secondary care because of budgetary considerations. He acknowledged however that in the period 2012-2016 there were gaps in the GP records that indicated the pursuer was not attending the GP regularly. He was not persuaded however that this indicated that her symptoms had resolved. He accepted that they were not worsening. He conceded that the symptoms may have returned to 2012 levels.

[373] Counsel for the defender referred Dr Patience to the GP entry for 8 April 2013 and pointed out that the pursuer had not gone to her GP after the observations in February 2013. But she had gone to her GP after the review meeting. He suggested that that this showed that the process that was her problem and not the manner it was being performed. Dr Patience did not agree.

[374] Dr Patience was unaware that anything had occurred in May 2013. The pursuer had made no reference to the events of May 2013 when they consulted. He did not know that the pursuer was aware that she was failing the Competence Process in September 2013. He accepted that the knowledge that she was failing might trigger a depressive reaction. He was referred to the entry in the GP notes for 9 May 2014 (Joint Bundle p2990) which states "... headteacher last year commenced a competency process which is ongoing. new headteacher is more supportive, works 3 days per week. not sleeping well, worrying about outcome..." Dr Patience accepted that this note suggested that the pursuer was worried about the outcome. He was also referred to the GP note for 6 November 2013 where the GP had set out the pursuer's concerns. It referred to a "problem at work". He accepted that this might well refer to the Competence Process. Although initially Dr Patience did not accept that the pursuer knew she was failing to meet the standards set by the Competence Process after being directed to medical notes he came to accept that she was aware that her teaching was not considered of the requisite standard (see GP notes for 15 December 2015 and 7 January 2016; Joint Bundle p2987).

[375] He accepted that between November 2014 and January 2015 (Joint Bundle p2988) her GP appointments were spaced out and in June she was "on an even keel" and that in September 2015 it was recorded "mood normal". He agreed that this was a stable period. He was referred to the entry for 16 November 2015 (Joint Bundle p2987) where she was

reporting stress levels rising because an important meeting was coming up. He accepted that her stress levels were coincidental with the “pinch points”.

[376] Dr Patience was not aware that the defender had agreed to pause Stage 3 and that the observations in L Primary School were conducted on an informal basis rather than under the Competence Process. He accepted that if that was so then it was more likely that the breakdown in classroom discipline and the suspension was the cause of her psychiatric illness. He accepted that the cause of her breakdown could have been the threat the incident and the suspension posed to the pursuer’s career and self-esteem.

Professor Lawrie

[377] The defender called Professor Lawrie as an expert witness. He is a consultant psychiatrist. His reports are in the Joint Bundle at pages 5041 and 5047.

[378] In his opinion employment factors accounted for about 60-70% of the pursuer’s psychiatric injury. He did not think it was easy however to ascribe the pursuer’s problems to either the Competence Process itself or the way it was conducted. He accepted that the Competence Process exacerbated the situation. He thought that it was an inherently stressful process and that the best that the defender could hope to achieve was to conduct it in such a way as to keep stress to a minimum. Other factors were at work. She had an underlying depressive illness that predated the Competence Process and was sensitive to stress. On top of that she had domestic problems with E and found teaching a challenge.

[379] She was very aware of how others saw her. Over the period of time in question there was a steady trickle of criticism of her competence. This came to a head on 5 October 2016. The loss of control in the class and subsequent suspension appeared to confirm those criticisms. Professor Lawrie thought that she doubted herself and the incident confirmed

her doubts. For this reason he considered the probable explanation of her major depressive episode in 2016 was the classroom incident. In cross-examination he was asked whether this approach took too little account of other factors. Professor Lawrie did not think it was possible to say that her difficulties with the defender contributed to the severity of her injury. In his judgement the classroom incident taken with her personal circumstances were the key contributory factors. 2016 was a bad year for the pursuer. Her relationship with E who was now about 5 was under strain. Had the incident on 5 October 2016 never occurred she would not have had a major break down and would have continued to cope as she had before.

[380] Professor Lawrie was agnostic on the question of whether the Competence Process was handled in an unsympathetic way. He did not think he could say. He was not in a position to give an objective view of what was a subjective matter. He pointed out that the pursuer had reacted adversely to criticism when she was a trainee teacher. This might suggest that her reaction was not to do with the way the Competence Process was handled.

[381] If employment factors accounted for 60-70% of the pursuer's psychiatric illness he attributed 50% of that proportion to the Competence Process itself. He accepted that his assessment was not scientific.

[382] In cross-examination he accepted that her injury had come about because an accumulation of factors. He accepted that among these factors were her depressive illness, her perception that the defender did not care about her, and that she felt undermined or under attack. He was asked whether it was possible to separate out the causal factors and say to what extent each caused to the pursuer's injury. He accepted that there was no medical or scientific basis for such an exercise. He agreed that each cause made a material contribution.

[383] He was in broad agreement with the other experts on diagnosis and prognosis. He agreed she remained vulnerable but the longer she remained well the stronger she would get. The pursuer was capable of doing tutoring. He accepted she could return to part time employment in a supported environment. The pursuer told him that in lockdown she had worked 26-28 hours a week. He felt that with this experience behind her she could go full time. He agreed with Dr Patience that she could return to work as a Primary School teacher provided she was given the right class and had appropriate support and the right school. He thought that it was probable she would be able to return to teaching.

The Legislation

[384] The Education (Scotland) Act 1980 section 1(1) provides as follows:

“... it shall be the duty of every education authority to secure that there is made for their area adequate and efficient provision of school education and further education.”

[385] Section 2 provides:

“The Secretary of State may make regulations prescribing the standards and requirements to which every education authority shall conform in discharging their functions under section 1 of this Act...”

See also the Standards in Scotland’s Schools etc. (Scotland) Act 2000, sections 1 and 2.

[386] The Requirements for Teachers (Scotland) Regulations 2005/355, regulation 4(1) provides:

“Every education authority shall, in discharging their functions under section 1 of the 1980 Act and section 2(1) of the 2000 Act employ only a registered teacher as a teacher.”

[387] Regulation 4(2) provides:

“‘Registered teacher’ in these Regulations means a teacher whose particulars are recorded in the register maintained by the General Teaching Council for

Scotland under the Public Services Reform (General Teaching Council for Scotland) Order 2011 ...”

[388] The General Teaching Council for Scotland (the GTCS) is a corporate body established under the Public Services Reform (General Teaching Council for Scotland) Order 2011/215. It provides at article 5:

“The GTCS's principal aims are—

- (a) to contribute to improving the quality of teaching and learning; and
- (b) to maintain and improve teachers' professional standards.

[389] Article 18 provides:

“(1) The GTCS—

- (a) must investigate the fitness to teach of any individual seeking registration; and
- (b) may investigate any registered teacher's fitness to teach where it becomes aware of circumstances which it considers justify such an investigation.

(2) The GTCS must—

- (a) refuse to register any individual seeking registration whom it considers to be unfit to teach; and
- (b) remove from the register any registered teacher whom it subsequently considers to be unfit to teach.

(3) An individual is ‘unfit to teach’ for the purposes of this Order if the GTCS considers that the individual's conduct or professional competence falls significantly short of the standards expected of a registered teacher (and ‘fitness to teach’ is to be construed accordingly).”

The legal duties

[390] The parties are agreed that the defender’s legal duties towards the pursuer are as follows (see paragraphs 19-21 of the Joint Minute).

“19. That the defenders had a duty to take reasonable care to avoid causing the pursuer unnecessary risk of harm, including unnecessary risk of psychiatric injury.

20. That the defenders had a duty to take reasonable care to eliminate any unnecessary risks, namely, risks which could, with reasonable care, have been avoided.

21. That the defenders had a duty to take reasonable care not to, without reasonable and proper cause, engage in conduct likely to destroy or seriously damage the relationship of trust and confidence between the pursuer and the defenders.”

[391] The leading English case on workplace stress is *Barber v Somerset County*

Council [2004] 1 WLR 1089. In *Barber* a schoolteacher sought damages for a mental

breakdown as a result of stress at work. The teacher had, like the pursuer in this case, been

off work because of mental health issues. The school managers were aware of that he had

mental health problems. No adjustments were made on his return to school and he suffered

a mental breakdown. The House of Lords held that the Council ought then to have taken

the initiative in inquiring about the claimant's problems and attempting to ease them and

that their failure to do so had been a continuing breach of the authority's duty towards the

claimant. The law is stated as follows by Lord Walker in the House of Lords:

“the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know ... He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.”

[392] These words echo those of Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and*

Nuts) Ltd [1968] 1 WLR 1776 at 1783.

[393] In *Barber*, the House of Lords approved a set of guidelines formulated by Hale LJ (as she then was) when *Barber* and three other similar cases were before the court of Appeal

(*Hatton v Sutherland, Barber v Somerset CC, Jones v Sandwell MBC, Bishop v Baker Refractories Ltd* [2002] 2 All ER 1 at p19).

[394] Lady Hale's judgement at paragraph 43 sets out a series of "practical propositions".

Hereunder I refer to those that are apposite to the present case:

"... (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable ... this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) ...

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large ... An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability ...

(5) Factors likely to be relevant in answering the threshold question include: ...
 (b) Signs from the employee of impending harm to health ... Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

(6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers ...

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it ...

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk ...

(10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this ...

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty ...

(12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job ...

(13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care ...

(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm ...

(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment...

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event..."

[395] The employer's duty in the context of workplace stress has recently been considered in *K v Chief Constable of Police Scotland* [2020] CSIH 18. The Lord President stated as follows, at paragraphs 66-72:

"[66] The employer's duty extends to taking reasonable care to safeguard an employee's mental, as well as physical, health from unnecessary risk. This involves not protecting him or her from the normal vicissitudes of employment as they can intermittently create anger, resentment, depression and anxiety (*Fraser v State Hospitals Board* 2001 SLT 1051, Lord Carloway at 1052), but from developing a mental illness (including clinical depression) which could have been prevented by taking reasonable care. The most common complaint in the employment sphere is the existence of a system of work which is likely to create mental illness, through the imposition of excessive stress, or one which permits bullying or harassment in the workplace (cf *Rorrison v West Lothian College* 2000 SCLR 245) ...

[68] ... [T]he fundamental principle [is] that the duty on the employers, and ... a co-employee, is restricted to taking reasonable care to avoid unnecessary risk of psychiatric harm.

[69] ... If it is the unfair [disciplinary] process, as distinct from the result, which causes foreseeable psychiatric harm, that may sound in damages. If it is the outcome of any such process which has caused harm, no damages will be due if that result (eg dismissal or demotion) would have followed in any event.

...

[71] In all of this, whether or not a duty of fair treatment arises, a claim can only succeed against an employer if the employer, or in a vicarious case the employee taking the action, knew or ought to have known that the action would be likely to cause psychiatric harm to the affected employee. That must depend upon what the employer, or the employee taking the action, knew, or ought to have known, about the employee who is to be 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. In this area, the summary produced by Underhill LJ in his comprehensive analysis of the case law in *Yapp v Foreign and Commonwealth Office* (2015) 44 IRLR 112 (at para 119(1)) is correct. Although each case will depend on its particular facts and circumstances, unless there are indications of vulnerability on the part of the affected employee, of which the employer or the acting employee was, or ought to have been, aware, no breach of the duty to take reasonable care will arise.

[72] Even if the employer or the acting employee is aware of an employee's vulnerability, that does not mean that he or she is precluded from taking action which may trigger psychiatric harm. For example, an employer may require to institute disciplinary proceedings in a given set of circumstances or to take other action which is needed to protect the interests of others. Provided that the action taken does not amount to a lack of reasonable care, having regard to all of the circumstances (and not just those of the affected employee), no fault will arise."

[396] In deciding whether injury was reasonably foreseeable the court must adopt a case by case approach. The question is whether the employer should have foreseen the risk to the individual employee (*Paris v Stepney Borough Council* [1951] AC 367). Thus while the risk of harm may not be foreseeable to an employee of ordinary phlegm, if the employer knows that the employee has a pre-existing vulnerability then more is expected of the employer. In *Hatton v Sutherland* [2002] ICR 613 at para 43(5), Lady Hale noted that whether an employee

has already suffered from stress at work is likely to be relevant to the question of reasonable foreseeability.

[397] The pursuer submitted that she did not need to show that the defender ought to have foreseen that she would suffer psychiatric injury. All that it required to foresee was that she was at an increased risk of such an injury. In support of this she relied on *Rorrison v W*

[2000] SCLR 245:

“[U]nless the employers ought to have known that the risk to the plaintiff was materially higher than the ordinary level of risk, their duty of care did not require them, as a matter of reasonable conduct, to take any special steps in respect of the plaintiff. (per Lord Reed at pp253E-F).

...

I can find nothing in these matters (or elsewhere in the pursuer’s pleadings) which, if proved, could establish that Andrews and Henning ought to have foreseen that the pursuer was under a material risk of sustaining a psychiatric disorder in consequence of their behaviour towards her (per Lord Reed, at p254D).”

and *Garrett v Camden London Borough Council* [2001] EWCA Civ 395 per Simon Brown

LJ at para 63:

“Unless, however, there was a real risk of breakdown which the claimant’s employers ought reasonably to have foreseen and which they ought properly to have averted, there can be no liability.”

[398] I do not accept that the defender is liable if all it could foresee was an increased risk of injury. Lord Reed refers to the need for a “material” risk. Simon Brown LJ (as he then was) refers to a “real” risk. Mere elevation of risk is insufficient. Whether the employer should foresee a material elevation of risk of psychiatric injury depends on the information known to the employer and whether the employer has safeguards in place to alleviate the risk of psychiatric injury.

[399] In relation to causation the pursuer submitted that she did not have to show that the defender's breach of duty was the whole cause of her injury provided it made a material contribution (see *Hatton v Sutherland* per Lady Hale at para 35). I was referred to *Andrews v Greater Glasgow Health Board* [2019] CSOH 31. There Lord Pentland noted that "but for" causation was the normal means of establishing liability. Where however medical science was helpless to determine whether on the balance of probabilities an act of negligence had caused injury but could say that its contribution was more than negligible, liability could be established (para 168).

[400] The pursuer submitted that if I was satisfied that the pursuer's injury was not just caused by the defender it would be appropriate to apportion damages unless the harm was indivisible. I did not understand the pursuer to submit that the harm was indivisible. The pursuer submitted that although she raised the issue, it was for the defender to move the court to apportion damages to take account of any pre-existing vulnerability or to acknowledge that the illness would have occurred apart from any negligence by the employer (*Hatton v Sutherland* per Lady Hale at para 43).

[401] Subject to the qualification mentioned above, I accept these submissions.

Discussion and analysis

What was the cause of the pursuer's breakdown in 2013?

[402] I begin by considering the circumstances that surrounded the pursuer's absence from work on 5 May 2013. The pursuer made it clear that the reason she left school was because she thought that NT and to a lesser extent KD of the Human Resources department were using the Competence Process to force her out of teaching. As I understood it she thought they did not want her to be a teacher and used the Competence Process to bring about her

removal from teaching. She did not make it clear whether she thought they were trying to stop her being a teacher entirely or whether they simply wanted to stop her teaching in primary school. This upset her and created stress and anxiety. This evidence is confirmed by the contemporaneous GP notes. The pursuer went to her GP on 18 March 2013 (Joint Bundle p2992; see entries for 18 March, 8 April and 7 May 2013). The pursuer told her GP, “feels headteacher is the major factor contributing to current emotional state” (GP notes 7 May 2013). I consider that the GP visit on 18 March 2013 was precipitated by another issue. Immediately before reporting that NT was “the major factor contributing to (her) current emotional state” there had been a disagreement with NT about the way in which the pursuer had dealt with a visually impaired child at the end of a school day. NT thought she had mishandled the incident. The pursuer thought that NT was wrong to criticise her. It does not matter for present purposes who was right or wrong. The announcement that a competence process was to start did not lead to a visit to the GP nor were the informal observations that followed immediately thereafter the trigger for a visit to the GP. In my opinion the GP notes infer that it was this incident that led the pursuer to think that NT was opposed to her. The pursuer had no complaints about NT in the period January to March 2013. The terms of Anne Young’s report of 17 October 2013 indicate that the pursuer blamed NT for the breakdown in her mental health in May 2013 and thereafter.

[403] The pursuer’s belief that the Competence Process was used to force her out of teaching was not in my opinion justified. The pursuer’s previous head teacher, RM also thought that the pursuer’s teaching was deficient. I accept that RM did not initiate a competence process but it is clear from KM’s evidence that RM shared NT’s concerns. The head teachers that succeeded NT – LG and VB – likewise had serious concerns with the standard of the pursuer’s teaching. I accept that the views of LG and VB were formed after

the Competence Process had begun. But it seems to me that there is continuity between the views of RM, NT, LG and VB. This suggests that NT's decision to begin the Competence Process was based on objective educational considerations and not a desire to "get" the pursuer.

[404] I acknowledge the possibility that NT was both justified in her decision but also motivated by antagonism to the pursuer. It is possible that the pursuer picked up on this. I note however that the decision to start the Competence Process was taken not long after NT was appointed head teacher and at the beginning of NT's professional relationship with the pursuer. There is no evidence of any personal issues between the pursuer and NT at this stage in their relationship. The pursuer's evidence was that in the early days of their relationship NT was supportive. I consider therefore that it was the incident involving the visually impaired child led to a change in the pursuer's perception of NT. From that point on there is evidence that she lost trust in NT. I do not consider that there was a corresponding change of attitude on the part of NT. I accept that she would have been conscious of the pursuer's resistance to the Action Plan. After March 2013 the pursuer began to complain about the draft Action Plan and NT's observations. But I cannot detect any indication that NT reacted adversely to the pursuer's complaints. She thought the pursuer was not responding to the Action Plan. To address this she introduced reflective questions to help the pursuer focus on improving her skills. I consider that this indicates that she was motivated by a desire to help the pursuer succeed. It required NT to do more work and spend time assisting the pursuer. In my opinion this demonstrates that NT was not deflected by the incident over the visually impaired child.

[405] In the pursuer's view the defender's Human Resources department co-operated with NT in her desire to remove the pursuer. It was difficult to see what evidence could have

supported the pursuer's belief. Although the Human Resources department were aware of NT's concerns and helped create and implement the Action Plan it does not follow that its staff members were misusing the Competence Process. I do not consider the pursuer's suspicions were well founded.

[406] Dr Patience gave evidence that it was the manner in which the Competence Process was handled that caused the pursuer problems. He deduced this from the sequence of events. He noted that the pursuer did not go to her GP complaining of stress and anxiety in January 2013. That was when the pursuer learned that the Competence Process was to be started. He noted that it was not until March that she went to her GP. He concluded that had the Competence Process been the issue she would have gone to her GP in January 2013. It should be noted that the Competence Process did not formally begin until in May 2013. The pursuer's first public breakdown in May 2013 took place at or about the time when the Action Plan was being finalised with a view to commencing the Competence Process. It may be that Dr Patience has conflated the announcement that there was to be a Competence Process with the actual commencement. In May 2013 the pursuer could have no complaint about the manner in which the Competence Process was being handled since it had not actually begun. That may however be a superficial point. Dr Patience's point was that if it was the Competence Process as opposed to the way it was delivered that caused the pursuer distress the pursuer would have been expected to become distressed and anxious straight away and she did not. I am satisfied however that the pursuer's distress and anxiety was not triggered by the knowledge that she was about to begin a competence process but by her loss of trust in NT. Her complaints to the GP began shortly after the incident with the visually impaired pupil. I consider that her dispute with NT was what caused her loss of confidence in NT and she then began to question her motives for starting a competence

process. The GP notes indicate that it was at this point she blamed NT for her state. I am therefore of opinion that the absence of symptoms after January 2013 is not significant. What is significant is the manifestation of symptoms after the incident with the visually impaired pupil. In addition I consider that Dr Patience has focused on a part of the evidence that cannot be considered apart from other evidence. The defender acknowledged that the process could be distressing not just the knowledge that a competence process had or was about to begin. Thus observations and grading are intrinsic to a competence process and are expected to be to varying degrees difficult to cope with. Dr Patience's observation that there was no distress in January 2013 ignores the possibility that a properly structured and supportive competence process can be expected to be stressful and that signs of stress and anxiety can be expected to emerge over time and not just at the outset. In addition I did not consider that there was any satisfactory evidence that she was "set up to fail". In addition I should acknowledge that whatever NT's motives the Competence Process or the informal observations that occurred before the Action Plan commenced could nevertheless be shown to be defective. The pursuer had a number of complaints about the period prior to May 2013. But I am not satisfied that it has been shown on the evidence that the informal observations in the period January to May were manipulated to result in failure. There was no satisfactory evidence that she was given difficult classes or that NT and the Human Resources department intrigued against her. The only evidence was the pursuer's assertion

[407] More generally I should observe at this stage that it is not possible to criticise the defender for initiating steps designed to improve the pursuer's skills. The defender had a statutory duty under the Education (Scotland) Act 1980 section 1(1) to provide teachers of the requisite standard. The Framework on Teacher Competence, the Action Plan and the Competence Process were designed to assist the defender fulfil its duty. As a generality an

employee may be dismissed if he or she lacks capability (Employment Rights Act 1996 s98(1)). If the pursuer did not respond to the Competence Process, the defender would have been obliged to consider whether the pursuer had the necessary capability for her teaching post. Where the incapability is a result of ill health, and the employer is responsible for that ill health, the employee may be able to show that the dismissal was nevertheless unfair.

Likewise where the employer has not given an employee an adequate opportunity to improve his or her performance there will be no the right to dismiss (see *Harvey on Industrial Relations and Employment Law* at paragraph 1106).

[408] The question therefore is not whether the defenders were entitled to begin the Competence Process and to dismiss her if she was not of the requisite standard. The question is whether the way the defender went about the Competence Process was in breach of its duty of care to the pursuer.

The events leading up to 24-26 September 2013

[409] In May 2013 the pursuer's father drove to AW Primary School. He entered the school and took his daughter home. Before he left he spoke to NT. He told her he was taking the pursuer away from school. She asked him why. He replied, "you know why she's ill". NT received a MED3 shortly thereafter (see entry in GP notes for 7 May 2013; Joint Bundle p2992). It referred to depression and work related stress. The pursuer accepted that prior to this point nothing had been said or done that would have alerted NT to the fact that she was under stress. NT thought RP was upset with her because she was about to commence the Competence Process and the pursuer was stressed and anxious because of this. I accept her evidence that at that stage she did not realise that the pursuer thought she was "out to get her". I do not consider that she should have understood RP's complaint as

an indication that the pursuer was suffering from clinical depression. The defender's Policy documents acknowledge that stress may have physical side effects. It by no means follows that all cases of stress and anxiety infer clinical depression or any of the other conditions recognised by DSM IV or ICD 10. I explain hereunder what I consider NT should have deduced from the MED3.

[410] After the new term started in August 2013 NT arranged to meet the pursuer. It would appear that it was a meeting to discuss timetabling. The pursuer walked out of the meeting. I am not clear what the pursuer was upset about. Since NT said it was in August/September that she realised that the pursuer was upset with her, it would appear to have been this meeting that made it clear.

[411] The observation on 24 September 2013 was followed by the feedback session on 26 September 2013. At the meeting on 26 September 2013 NT is alleged to have said that the lesson of 24 September was "weak" like the lesson of 5 September 2013. The pursuer's position is that she challenged NT's assertion that the lesson of 5 September 2013 was weak. The pursuer stated that NT produced a document that supported her assertion. The pursuer claimed that she had never seen it before and that NT had concocted it so as to downgrade the pursuer.

[412] I was shown a number of documents that related to the observation on 5 September 2013. One was on a form entitled Classroom Observation (Joint Bundle p554-559). It contains a record of the pursuer's comments and NT's comments. It is partially typed and partly completed in handwriting. The pursuer said she had received the typed feedback before the meeting. It would appear she was also given the typed reflective questions on page 5. As I understood it reflective questions were sent to the pursuer in advance of the meeting and the meeting involved a discussion of the questions. Page 6 consists of

handwritten notes. The handwritten comments were according to NT added at the time of the feedback meeting or shortly afterwards. The pursuer thought that page 6 was added afterwards. She denied that it was an accurate account of the feedback given.

[413] I do not consider that the handwritten notes alter the pursuer's grades nor do I accept that they were added surreptitiously so as to bolster NT's decision to rescind or override the three "satisfactory" grades that appear on the front sheet. The handwritten notes do not refer to the grades on page 1 and are concerned with the pursuer's overall teaching as opposed to the three areas of improvement. It is not evident to me that these handwritten notes had any role in the Competence Process. The Competence Process was focussed on the three points for improvement agreed in the Action Plan. The notes relate to NT's reflective questions.

[414] The notes have the appearance of a contemporaneous note. They are scribbled between typed questions on page 5. NT recognised the notes as her "hurried" handwriting. The part that states that the pursuer's performance was "weak" is on page 6. It is on a blank sheet and appears to be on the rear of the reflective questions. It is one of a series of notes. The notes state that NT discussed a series of points with the pursuer. The pursuer did not say that all of them had been concocted. The difficulty with the pursuer's hypothesis is that the point that she believes to have been added after the event to undermine her position is one of a number of points noted by NT. She does not suggest the other points were concocted. If the other notes are genuine, it is difficult to see how the note that her overall teaching was "weak" could have been added at a later stage unless NT left a gap in the handwritten notes and slotted the comment in after the notes were taken.

[415] I accept that something must have been said at the meeting that made the pursuer upset. NT thought that the pursuer became upset because she discovered that the

observation had not gone well. Given the severity of the pursuer's reaction I consider that it must have been more than that. The pursuer was used to disappointing feedback. It is unlikely that this caused her extreme upset.

[416] The pursuer said NT told her the observation was "weak" like the previous one. The pursuer interpreted this as cancelling her "satisfactory" observation of 5 September 2013. I accept that this would have been very upsetting. The pursuer was, I am sure, pleased that her teaching had been rated as "satisfactory". Even if this meant that there was still room for improvement it was a step in the right direction. But this was a misunderstanding. At that time NT had not completed the form used in the Action Plan for the lesson of 24 September 2013. She had not graded the areas of improvement. In my opinion the word "weak" indicates that she was referring to her overall view of the lesson. In the handwritten notes she had described the previous lesson as overall weak. Her comment was not about the three areas for improvement.

[417] The pursuer said she had not been told the previous lesson was weak. But the contemporaneous notes suggest otherwise. The pursuer first saw the handwritten note in the run up to the Disciplinary Investigation. The pursuer gave evidence that NT had falsified the notes. She thought that the contemporaneous notes had been added or altered at a later stage so as to change the pursuer's grade. This is difficult to accept. If that was NT's intention I would have expected her to use the section of the form for Teacher Competence and downgrade the areas for improvement. NT need not have given the pursuer "satisfactory" grades. The handwritten notes do not appear to have any direct link with the goals of the Action Plan. I am doubtful whether it would have been proper to take the handwritten notes into account when the pursuer's progress under the Action Plan was reviewed and a decision made about her performance. The pursuer's evidence in this

connection was contradictory. She said that she did not see the handwritten notes (Joint Bundle pp558-9) until the Investigation process at Stage 3. As I understood her this was the first time she became aware of the handwritten notes. But she also said that she had seen them in NT's hands at the meeting on 26 September 2013 when she challenged NT's use of the term "weak." The pursuer gave evidence that she saw the section which states that they had discussed her overall performance.

[418] I am not satisfied that NT altered the record of the observation of 5 September 2013. The meeting on the morning of 26 September 2013 was not about the Action Plan. The pursuer hitherto had been given written feedback in a typed form. NT had not yet prepared or sent the form to the pursuer. The discussion that morning was about the pursuer's overall performance. The pursuer knew that feedback under the Action Plan and the overall assessment NT had been giving were different things. That being so, it is hard to understand why she interpreted NT's comment as overriding her grades under the Action Plan. I accept that misunderstandings happen. I accept that the pursuer was stressed. I consider that NT's decision to create her own system of overall assessment created a risk of confusion. Whether she should have adopted the strategy is not for me to judge. I do not consider however that the pursuer has any basis for accusing NT of changing her score retrospectively. I do not consider that there is any basis for impugning the integrity of NT. I consider that the handwritten notes are an accurate record and were not fabricated or altered after the event.

[419] I have considered EA's evidence about the meeting on 26 September 2013. EA was not present. Her knowledge of what NT said to the pursuer was based on what the pursuer told her. As I have indicated I consider the grades for the three areas of improvement under the Action Plan were recorded in the feedback form and had been issued. The reference to

an overall assessment of “weak” was NT’s verdict on the pursuer’s teaching overall. What EA was told was based on the pursuer’s misunderstanding of NT.

[420] In considering the competing accounts of the meetings later in the morning between the pursuer and NT I have come to the conclusion that NT’s account is to be preferred. Her evidence was corroborated by KM. KM did not accept that NT had stopped her from speaking for the pursuer. She did not accept that NT had given the pursuer four minutes to contact her EIS representative or tell her as she left the meeting that she would report her for refusing feedback. In my opinion KM gave her evidence in a balanced and careful way. There was no indication that she was taking NT’s side or that she was antagonistic to the pursuer. I accepted her evidence. I consider therefore that NT’s account was corroborated by KM.

[421] By contrast some of the pursuer’s evidence was improbable. She said that NT gave her four minutes to secure EIS representation. EA, as they all knew, was at another school. Such a demand was an impossibility. I am not blind to the possibility that NT may have spoken out of anger or emotion. But it is hard to believe that NT would do so in front of KM, one of her colleagues. KM had no memory of NT making such a demand. I am not therefore inclined to accept the pursuer’s evidence in this connection.

[422] In summary therefore the dramatic events of 26 September 2013 have nothing to do with the Competence Process as such. They are part of the background. Nor is there any hint that the support mechanisms operated under the Competence Process were not working or were deficient. KM’s role as a mentor seems to have been working. She offered support on 26 September 2013. The difficulty was the relationship between the pursuer and her head teacher. Her upset on 26 September 2013 came about because she thought NT had overridden her “satisfactory” grades. As I have sought to show this is an untenable view. It

was a misunderstanding of the position. The pursuer's suspicion of NT and her underlying anxiety about the Competence Process was the soil in which her depressive illness took root.

The disciplinary investigation

[423] In the aftermath of the pursuer's departure from school on 26 September 2013, the defender launched a Disciplinary Investigation. I accept that the defender was entitled to take some form of action to address the circumstances in which the pursuer had left the school. The pursuer had left the school in similar circumstances in May 2013. On the first occasion it was an "in service day". Her departure does not appear to have caused much disruption. NT had spoken to the pursuer informally about her departure. On this occasion however the pursuer's actions created a more serious problem. She had a class that morning. Her departure necessitated the provision of emergency teaching cover. I accept that the defender could not ignore the fact that this was the second time she had left the school because of her upset with the Competence Process. Given that the Competence Process was to continue, the defender had to address the possibility that such a situation would re-occur. I accept that disciplinary action was one of the options that the defender was entitled to pursue. I do not consider that it is for me to assess whether the decision was right or wrong. I am however required to consider whether the way it was handled was "extraordinary" as Dr Harper described it and indicative of a breach of the defender's duty of care.

[424] NT said that when RP phoned her, she asked to speak to the pursuer. RP would not pass his mobile phone to the pursuer. She wished to speak to the pursuer personally. RP said that she wanted the pursuer to leave his car and return to her office in the school. NT denied this. I consider that NT's evidence on this issue is to be preferred. I am unable to see

why NT would have wished the pursuer to come back to school. All she needed to know could be established by means of a phone conversation. There was no need to ask her to return. KM had spent most of the morning trying to settle the pursuer down. She had witnessed NT's interactions with the pursuer. She did not comment adversely on NT's behaviour. She did not think that NT had acted in an aggressive or high handed way. I accept that had NT tried to force the pursuer to return to school in the circumstances that could have been perceived as aggressive or high handed. But KM did not accept that NT was behaving in such a fashion and NT denied trying to force the pursuer back to the school. I consider that I should be cautious of the pursuer's evidence in this connection. She did not speak directly to NT on the phone. It was her father that spoke to NT. I consider that RP misunderstood NT's request. KM said that NT did things "by the book". The Sickness Absence Policy did not require the pursuer to speak to the head teacher in person. I therefore conclude on balance that the pursuer was not asked to return to school.

[425] The decision to follow the disciplinary route was taken after a dialogue between NT and the defender's Human Resources department. Although FT provided advice during the crisis on 26 September 2013, KD appears to have taken over thereafter. The defender was advised by NT that the pursuer had left school because she was upset by the Competence Process and had done so without notifying her. NT did not advise the department that the pursuer was in a state of distress. I was advised that the records of the Disciplinary Investigation were destroyed and there is no record of why the defender decided not to start a disciplinary process. I did not hear from AD who decided not to discipline the pursuer. I think it is probable that AD came to the conclusion that the pursuer was in no state to remain in school on 26 September 2013 and there was nothing to be gained from disciplining her.

[426] I am conscious of the fact that NT omitted to tell Human Resources that the pursuer was very upset. I consider that this was a regrettable failure on her part. Given the degree of the pursuer's upset and RP's phone call I consider that she should have advised the Human Resources department that the pursuer was upset when she left the school. She should also have explained that although the pursuer had not told her why she was leaving, RP had phoned and told her the situation. I can see that she might have taken the view that this was not consistent with the Disciplinary Policy. I can also see that she may have thought that the real problem was that the pursuer was not happy with the Competence Process. NT struck me as a no nonsense person. I consider it probable that by this stage she had formed a negative view of the pursuer. It should be remembered that she had already been subjected to unfair treatment by RP. A few months before he had entered the school and made comments that had upset her. These comments were unjust. RP should not have been in the school far less directed critical comments at NT. The pursuer had walked out of a meeting with her. She had formed the impression that the pursuer was resistant to her help. The pursuer had now left school again and left her with an organisational "headache". It would be surprising if these events did not affect NT. I appreciate the Human Resources department supported her decision to refer the pursuer for discipline but they lacked important information. NT said in evidence that she dealt with the pursuer calmly and professionally. On balance I conclude that in referring the pursuer for discipline NT did not behave calmly and professionally. In omitting reference to the pursuer's emotional state and by failing to explain that she knew why the pursuer left the school, she omitted information that would have lessened the pursuer's culpability and was relevant to the Human Resources department's response. I consider that she probably did so because she did not believe that the pursuer's emotional state was justified or that it was proper for the pursuer's

father to be in communication with her. I do not consider however she was seeking to engineer a false disciplinary complaint. In my view the terms of her report were influenced by her negative perception of the pursuer and her inability or unwillingness to acknowledge points that mitigated the pursuer's culpability

The phone call

[427] The pursuer described NT's phone call the following day as confrontational and unpleasant. Her husband, who was beside her, gave evidence that he overheard the call and confirmed that from what he could hear the phone call was confrontational and unpleasant. NT did not accept that she was confrontational or unpleasant. The pursuer had no criticism of the content of NT's call. The pursuer accepted that NT, for example, asked after her health. NT explained that the Human Resources department had given her a list of questions to ask and that she went through them. The pursuer's acknowledgement that NT asked after her health tends to confirm NT's evidence. If that is so the content of her call was determined beforehand. In assessing this aspect of the case I had the advantage of hearing NT give evidence. I noticed that NT spoke quite loudly by the standards of ordinary speech. I also noticed that she presented as a forthright individual. If her questions followed the script given by the Human Resources department the only way in which the call could have been unpleasant or confrontational was if the questions were asked in an unsympathetic way. I consider that she asked the questions she was required to ask but nothing more. The milk of human kindness was absent. Given the sensitivity of the situation and the sense of grievance felt by the pursuer and CT I consider it likely that NT came over badly. But I am not satisfied that the call was confrontational or unpleasant. It was probably not sympathetic in tone but that was because of the issues that had arisen. I

cannot accept that it was confrontational if it followed the list of questions supplied by the Human Resources department. The pursuer and her husband may have found it an unpleasant call but I am not persuaded that this was because of its content. If they found its tone unpleasant I consider that this was because they expected sympathy. Instead the call was detached and unsympathetic in tone. In light of the Pursuer and RP's conduct towards her I do not consider that NT however was not entirely to blame for the cool tone of the call.

Credibility and reliability

[428] In forming these opinions I have had regard to my impression of the credibility and reliability of the pursuer and NT. LG said that the pursuer was inclined to misunderstand things. I consider that the evidence bears this out. Her beliefs about why she was put into the Competence Process were, as I have sought to explain, seriously astray. Nor was her memory of events always accurate. The following are some examples of this. The pursuer told Dr Patience that she had no symptoms of depression in March 2013 when she was told that the Competence Process was about to start. She told him that she only began to develop symptoms in September 2013 when "the assessment was changed for unknown reasons from satisfactory to weak". This is contrary to the pursuer's evidence to the court and the GP notes. The pursuer also told Dr Patience that the episode in May 2013 that led to the GP increasing her fluoxetine involved an observation at school when "she didn't realise a formal observation was being undertaken". I find it highly improbable that an observation was arranged without her knowledge. No evidence was led in support of this. She told her GP on 8 April 2013 that her union had advised her to "make a grievance against head teacher". This was untrue. EA, the EIS representative, did not advise the pursuer to state a grievance against NT.

[429] The pursuer's evidence about the handwritten notes of the feedback meeting on 10 September 2013 is also significant. The pursuer's explanation for her panic attack on 26 September 2013 was that NT had changed her grades and had falsely represented to her that the lesson of 5 September 2013 was "weak". She took the position that NT had not given her feedback after the 5 September 2013 lesson that her lesson was weak. The handwritten notes however contradict the pursuer. The words "also discussed" appear. This suggests that NT had told her that her lesson was weak. If that is so the reason the pursuer gave for her panic attack on 26 September 2013 lacks plausibility. The pursuer however maintained that there had been no discussion of her overall grade and that NT had falsified the record of the feedback meeting on 10 September 2013. I do not consider that this is a reasonable view. The pursuer stated that the handwritten notes were in NT's possession at the review meeting on 26 September 2013. If that is so NT's decision to alter the record was taken after 10 September but before 26 September 2013. But I am unable to discern any reason why she would have done so. There is no indication that the notes formed part of the Competence Process. The notes are part of the reflective questions section. That was not part of the Action Plan. I was not given any evidence to show that when the defender reviewed the Action Plan, it would be permitted to examine matters outside the areas for improvement. The notes have all the appearance of informal notes. They contain reference to a variety of matters that appear to have been discussed with the pursuer. The pursuer did not allege that they were all falsified. If they were not falsified then NT would have had to insert the offending comments into a page which had already been filled with scribbled comments. The offending comment is the first in a series of bullet points. If the others are genuine NT would have had to leave space to add further material.

I consider this to be highly unlikely. I find it troubling that the pursuer did not accept that her memory may have been faulty.

[430] The pursuer also said that the minute of a meeting of 25 April 2013 was a “secret document” because she had not seen it beforehand. I do not consider that it was a secret document just because the pursuer had not seen it. It would appear to me that the pursuer thought there was a conspiracy against her when in truth there was none. Thus while I accept that the pursuer was a credible witness in that she sought to tell the truth as she saw it, I am not satisfied she was a reliable witness. Her evidence lacked objectivity. As a result I was not in a position to rely on her evidence when it was in conflict with evidence that I accepted as credible and reliable.

[431] In connection with NT I acknowledge that she, like other witnesses, did not have good recall of all the matters she was asked about. She was the head teacher at AW Primary School in 2013. She gave evidence about 8 years after the events under scrutiny. At times she hesitated to answer difficult questions about, for example, her lack of awareness of the pursuer’s mental state. I consider she downplayed the degree to which she was upset with the pursuer’s behaviour in September 2013. But on the whole I am satisfied that I could rely on her testimony. She gave her evidence in a forthright manner. I did not detect any inconsistencies between her evidence and the school records or other sources of objective evidence. I considered that I could accept her evidence as credible and in general terms as reliable.

[432] I consider that Susan Gordon’s and Dr Harper’s evidence that the defender should have commenced mediation between the pursuer and NT is wide of the mark. The pursuer did not share her concerns about NT with the defender. She spoke to her family and EA, her EIS representative. Although RP told NT in May 2013 that she had made the pursuer “ill”,

EA told NT that the Competence Process was the cause of the pursuer's problems. This fitted with NT's understanding of the situation. I do not consider that NT should have alerted the Human Resources department to this information nor do I consider that it would have justified the commencement of mediation. I accept that the pursuer walked out on NT at the start of the new school term at a meeting designed to deal with planning issues. I accept that thereafter NT's perception of the pursuer became increasingly negative and that by 26 September 2013 she had lost sympathy with the pursuer. I think this is the proper inference to be drawn from her failure to convey factors favourable to the pursuer's position in her disciplinary report to the Human Resources department. But I do not think she was aware of the depth of the pursuer's feelings towards her until she read Ann Young's report. I accept that once the pursuer had disclosed her difficulty with NT the defender would have been obliged to consider how this source of stress and anxiety should be dealt with. I accept that mediation was an option. But NT had moved on and the defender did not have to address the issue.

Conclusion

[433] There is little indication that the pursuer's stress and anxiety in Period 1 was materially affected by the Competence Process or the arrangements made in that connection. I consider that it was the pursuer's beliefs about NT that caused stress and anxiety. The pursuer's belief that the Human Resources department was opposed to her also fuelled her stress and anxiety. I am satisfied that NT was justified in commencing the Competence Process and did not do so for improper motives. I accept that once NT learned that the pursuer had formed an adverse view of her, the relationship between them began to deteriorate. The pursuer's extreme upset on 26 September 2013 was due to the pursuer's

misunderstanding of what NT meant when she said the lesson as “weak like the last one”. I consider that the misunderstanding is partly explained by NT’s decision to give feedback of her own. Had she confined herself to the three areas for improvement provided in the Action Plan, the scope for confusion would have been reduced. I am satisfied that she introduced a system of overall rating out of a desire to help the pursuer. LG thought the pursuer was prone to misunderstand things. NT thought that she was resistant to constructive criticism. I accept this evidence. NT did not cancel the pursuer’s “satisfactory” grading. Three grades were required by the Action Plan. The “satisfactory” grades remained intact. NT’s feedback could not alter that. I am satisfied that the overall grading was discussed in the feedback session. It may be that because she was upset and stressed she forgot this was so. I do not consider NT altered her grade retrospectively. I accept that NT was not sympathetic to the pursuer on 26 September 2013 and thereafter. The lack of sympathy was probably due to the pursuer’s walk out in August 2013 and NT’s belief that the pursuer was not able or willing to learn. The intervention of the pursuer’s father did not help. Although NT was not sympathetic on 26 September 2013 and in the conduct of the phone call thereafter, I do not consider that this had any causal role in the exacerbation of the pursuer’s clinical depression. The causes were the pursuer’s erroneous beliefs as described above and the misunderstanding of NT’s remark in the early morning meeting on 26 September 2013. It provoked a major breakdown in the pursuer’s mental state. No event of similar proportions occurred again until the breakdown in 2016. Dr Harper thought the pursuer suffered a panic attack on 26 September 2013 and I accept her evidence. The indication in the medical notes is that this was the cause of the pursuer’s distress. The subsequent phone call and the commencement of the Disciplinary Investigation do not

appear on the evidence to have had any discernible role in the exacerbation of the pursuer's clinical depression.

[434] In light of these conclusions it follows that the pursuer's experts were not given a fair and balanced account of the relationship between the pursuer and NT. Their criticism of her role in the Competence Process was to a significant degree dependant on the pursuer's account of events. It follows that their evidence in support of the pursuer's case of fault in relation to the events in Period 1 must be treated with caution.

[435] I note that it was only after NT left AW Primary School and the pursuer returned to work that the pursuer began to raise concerns about the structure of the Action Plan eg the spacing of observations and the clarity of the goals in the Action Plan. I do not consider that these sort of considerations had any effect on her mental state in Period 1.

The pursuer's mental state

[436] At this point I turn to examine the defender's knowledge of the pursuer's mental state in the various periods. The first indication given to the defender that the pursuer had suffered from clinical depression came in 2009 shortly after the pursuer joined the defender. The pursuer was off work from 9 November to 1 December 2009. The MED3s were not in the GP records or in the defender's records. The defender's records contain a "summary of absences". The entry for that period refers to a "neurological" problem (Joint Bundle p4150) causing a 17 day absence. The GP notes for this period (Joint Bundle p2999) do not refer to a neurological difficulty. They indicate that a MED3 was sent on 9 November 2009. The "doctor's statement" reflects on the content of the MED3. It referred to "anxiety". Another MED3 on 24 November 2009 referred to "anx/dep" which I take it means anxiety/depression. The GP notes for 2 November 2009 state:

“Feels unable to relax. Mood 5/10. Factors - 1. Started a new job as primary school teacher in August. 2. Parent of pupil has made 2 complaints against her. 3. Due to be assessed mane. 4. Recent visitor to class told her **her** class was a ‘handful’. 5. Miscarriage 1 year ago, desperate to be pregnant. Just had period. 6. Sister-in-law recently had baby (her own baby would have been due around same time). 7. Feels not enough time spent with husband and worries about marriage – she feels she spends most of her time doing school-related work. Feels she is letting everyone down. Previously cut fingers with knife – years ago. Has had thoughts that would be better if not here but no active plans. Poor sleep – EMW, 2 hours sleep/night, feels tired. Reduced appetite. Plan – HADS, short course temazepam, advised to d/w husband. R/V 1/52.”

The GP note for 9 November 2009 states:

“Attends with sister (GP). HADS A16 D14. Sister feels main problem is anxiety. Feels unable to go to work now. Keen to try medication and talking therapy. Plan - Fluoxetine (recognises pregnancy not good idea at this stage). Refer Psych triage meeting. R/V 2/52. “

The GP notes for 19 November 2009 state:

“Mood and sleep pattern better but not back to normal. Keen to return to work before Christmas. Spending time with family. Plan- C/t fluoxetine, r/v 1/12, will d/w school and let me know re: return to work date.”

The GP notes for 15 December 2009 state:

“Mood better. Back at work. Looks brighter and reactive. Awaiting Psychology. Plan – Continue fluoxetine. R/V 2/12. 2nd HADS.”

[437] The MED3s supplied for the pursuer went to the defender’s Human Resources department and were copied to the relevant head teacher. The head teacher in 2009 was RM. If that is so the defender should have had a note in its records that the pursuer had been diagnosed as having “anx./dep.” in 2009. There was no evidence that the defender consulted its records to see if they referred to any health issues before starting the Competence Process. There was no system for passing on this sort of information to succeeding head teachers such as NT. It would appear to me that the defender should have considered the pursuer’s personnel file and any medical information it possessed before beginning the Competence Process. This follows from the fact that the Competence Process

was known to cause stress and anxiety. It would be reasonable to check the personnel file to see if any step required to be taken. Although the information on the MED3 had been mis-recorded I must proceed on the basis that it ought to have been accurately recorded. I accept that when the Competence Process began the defender must be treated as being aware of the information on the MED3 communicated in 2009. Obviously the defender could not know about the information on the GP notes

[438] I do not accept however that the meagre information on the MED3s in November 2009 was sufficient to give the defender notice that the pursuer had suffered clinical depression or was at risk of suffering an exacerbation of her clinical depression if she began the Competence Process. The term used in the MED3 for 24 November 2009 was "anx./dep. The slash indicates two possible diagnoses. Evidently the GP was not in a position to say whether the pursuer was suffering from anxiety or depression. Anxiety is not a psychiatric injury. It is a loose term that may signify the sort of stress that can cause depression or to a state of anxiety. Likewise depression has no fixed meaning. It may signify clinical depression. It may signify sub-clinical depression. It does not seem to me that this information would entitle me to hold that the defender should reasonably have foreseen that the Competence Process would expose the pursuer to the risk of injury. It knew nothing about the pursuer's circumstances in 2009 or the relevance of the information on the MED3 for her situation in 2013. Had it considered the matter, the defender would have been entitled to take account of the fact that the Competence Process incorporated psychological support in the form of a mentor. This was a standard support measure. I do not consider that it had any information to suggest that this was inadequate. If I am wrong about that and if a more sophisticated package of support measures should have been considered in 2013, these could not have been devised in the abstract. In my view a

suitable package would have to be based on a clear understanding of the pursuer's needs. I consider that the defender would have had to liaise with the pursuer so that measures suitable to her condition could be devised. But that would have meant the pursuer co-operating with the defender so that a full evaluation of her mental health could take place. The pursuer was not obliged to give information about the circumstances of her sickness absence in 2009 or her medical history more generally. I do not consider on balance that the pursuer would have co-operated with the defender had it asked for more information about her specific psychological difficulties. Although the pursuer had an extensive history of mental health issues these were never disclosed to the defender. The Occupational Health practitioners who were seeking to assess whether she was fit for work do not exhibit any awareness of the pursuer's history. She did not disclose Dr Harper's psychology reports to the defender in 2016. She did not co-operate with the defender when it offered the Stress Audit Management Tool. I acknowledge that these records contain sensitive personal information. The pursuer was entitled to maintain the confidentiality of her medical. But this approach meant that her history of clinical depression, her medication, the issues of self-harm, suicidal ideation and her problems after her baby was born were unknown. The only occasion when the pursuer disclosed that she was suffering from clinical depression was when she told KM. KM did not say when this disclosure occurred. But KM regarded this information as confidential and did not pass it on. I do not consider that it would be proper to impute that knowledge to the defender given the confidential circumstance in which it was obtained.

[439] After the events in May 2013 the defender received a MED3 that referred to depression, stress and anxiety. I accept that NT did not appreciate that this information might indicate that the pursuer was clinically depressed. She was aware of the possibility of

clinical depression but thought that if the pursuer was clinically depressed the pursuer's GP would have recommended a phased return to work. I note that the pursuer was given restricted teaching duties in her first week on returning to work but this does not appear to have been on medical advice. The MED3s that follow were seen by NT and the Human Resources department of the defender. After the episode on 26 September 2013 the word "depression" disappears from the MED3s. The MED3 of 27 September 2013 refers to "stress at work". The MED3s for 30 September, 14 October 2013, and 11 December 2013 refer to "work related stress and anxiety". The MED3 of 7 January 2014 refers to "work related stress". The letter of 29 November 2013 does not advise that the pursuer was clinically depressed. Looked at as a whole and in the absence of any knowledge that the pursuer was being treated for depression I do not consider that this information should have been interpreted by NT or the Human Resources department as showing or indicating that the pursuer was clinically depressed. At the time the pursuer was participating in a stressful process. The Competence Process was an obvious explanation for her stress and anxiety. The staff at the school that dealt with the pursuer every day were not trained to discern the symptoms of clinical depression. The staff in the Human Resources department were not medically qualified. I do not consider that the defender had the means of knowing that the pursuer was suffering from clinical depression or that it was foreseeable that she might develop or suffer an exacerbation of clinical depression.

[440] The defender's policies acknowledge that clinical depression is a possible consequence of stress and anxiety. I do not consider that a knowledge of the policies should have led to the defender following a different course in this case. Thus while the defender's staff saw conduct that was capable of being interpreted as clinical depression they did not have the skills or knowledge to interpret the symptoms. I do not consider that they should

have known that the conduct they witnessed indicated that the pursuer was clinically depressed. They could not have determined whether the pursuer had sufficient symptoms over a sufficient period to meet the diagnostic criteria of clinical depression under DSM IV or ICD 10. Nor do I consider that they should have foreseen the possibility of clinical depression. The defender had made general provision for the risk in the form of a mentor. Counselling and referrals to Occupational Health were available. In this case the pursuer was given access to counselling and referred on a number of occasions to Occupational Health.

[441] Counsel for the pursuer emphasised that the defender knew that the pursuer was suffering from anxiety and stress. That is true up to a point. But the staff of AW Primary School said she for the most part the pursuer did not appear to be stressed or anxious. Dr Alison Harper thought that the pursuer was good at putting on a front and giving the impression she was coping. There were occasions when her problems broke through. NT observed the pursuer's breakdown on 26 September 2013. The pursuer gave an account of her symptoms at a meeting with LG on 20 November 2014 that made it explicit that she was struggling to cope. I do not consider however that their awareness of these symptoms demonstrated that they knew she was suffering from clinical depression or that they ought to have been aware she was suffering from clinical depression. The policy documents indicate that negative physical and mental side effects accompany stress and anxiety (Managing Stress at Work Policy, Joint Bundle p2781; Managing Stress at Work Guidance Note, Joint Bundle p2956). It is clear that NT and LG understood this. NT encouraged the pursuer to go to her GP in 2013. Both NT and LG referred the pursuer to Occupational Health. It does not appear to me however that they were in a position to interpret what they saw as amounting to clinical depression.

[442] Mr Farquhar and Professor Wood did not think that a teacher or member of the defender's staff should have realised the true position. I consider that Mr Farquhar was correct to qualify his report and accept that the defender's staff were not in a position to form such a judgement. Given that the symptoms were intermittent and capable of arising from stress and anxiety, it is asking too much of a teacher or Human Resources officer to appreciate that the pursuer was clinically depressed or foresee the risk of clinical depression. As NT and LG made clear, they were guided by medical opinion. The nurse and consultants from Occupational Health saw the pursuer and did not advise the defender that the pursuer was clinically depressed. Although the medical experts who gave evidence at proof were clear that she was suffering from clinical depression, they had read the pursuer's medical records and were able to examine things with the benefit of hindsight. It may be that Anne Young would not have been able to make a diagnosis of clinical depression. But if she saw signs of the condition she did not raise the issue. If she did not do so it is difficult to criticise the defender's staff for failing to raise the issue. The consultants Dr Kathryn Allan and Dr Fraser Watt could have made a diagnosis. I accept that their reports were not designed to establish whether the pursuer was suffering from clinical depression or was at risk of clinical depression. They were focussed on whether the pursuer was fit to return to work. No doubt the two issues are inter-related. As this case shows clinical depression does not necessarily prevent someone from working. It may vary in severity. Those that suffer from clinical depression can be given suitable medication and manage their illness. Whatever the explanation for the position, the defender was not advised that the pursuer was clinically depressed and the head teachers and Human Resources staff were not equipped to form a view as to whether the pursuer's symptoms were indicative of a psychiatric injury.

[443] Professor Wood said that he had never heard of a teacher suffering psychiatric injury as a result of the stresses of teaching. He had heard of many cases of stress and anxiety but he was not aware of a teacher who had become clinically depressed. I have to say I found this evidence surprising. But no evidence was led to indicate that Professor Wood's anecdotal evidence was contrary to the experience of other education experts or contradicted by published research or medical literature. Whatever the position, I take from both experts the broad proposition that while the defender ought to have been alive to the risk of stress and anxiety particularly when it was known that competence processes are liable to cause stress and anxiety, the head teacher or a representative of the Human Resources department should not be expected to know that the pursuer was exhibiting signs of clinical depression. In their view that was a medical judgment. I accept this is so. I consider that such a judgement is a sophisticated one that requires suitable expertise. It would appear to me that the symptoms of clinical depression are on a continuum. In order to make a judgement someone with appropriate knowledge and expertise is required to diagnose clinical depression.

[444] In my opinion, Dr Alison Harper failed to take account of how matters might have appeared to the head teacher and Human Resources department. While a psychologist or psychiatrist might have discerned that the pursuer was not just stressed but was also clinically depressed, it does not follow that the defender should have. Dr Harper made the mistake of contrasting how she would have interpreted the pursuer's distress on 26 September 2013 with NT's interpretation. NT interpreted the pursuer's reaction as a response to negative feedback. Neither NT nor KM were conscious of the possibility of other factors. In the absence of any background knowledge about the pursuer and training or experience, I do not consider that they can be criticised. Dr Harper also suggested that

NT lacked powers of self-reflection. While such a criticism might have been justified if all that the pursuer said about NT was true. I do not consider that the pursuer's account of NT's conduct was accurate. Susan Gordon thought that the staff should have recognised that the pursuer was struggling and fed back information to the defender. But the staff in Period 1 all thought the pursuer was fine until the breakdown occurred. If they saw any sign of anxiety and stress they attributed it to the stress of the Competence Process.

Dr Harper explained that the pursuer was able to keep up a "front". In this situation I do not consider that the defender knew or ought to have known or could reasonably have foreseen that the pursuer was suffering or was liable to suffer from clinical depression.

[445] A person may be stressed, anxious, and depressed but not have an injury sounding in damages (*Fraser v State Hospitals Board* [2001] SLT 1051, Lord Carloway at 1052).

Although a competence process is not a routine feature of employment I do not consider that it differs in principle from the disciplinary process considered in *K v Chief Constable of Police Scotland (supra)*. Just as it is necessary to have disciplinary processes so it is necessary to have competence processes. Both are recognised to be stressful. Had the defender done nothing to support the pursuer she would have been in a strong position. But the defender had supports in place. A variety of steps were taken to commute the level of stress caused by the Competence Process and measures were available that were designed to address her stress and anxiety.

The disciplinary investigation

[446] I have accepted that NT failed to give the defender's Human Resources department full information about the incident on 26 September 2013 and that but for that failure the Disciplinary Investigation would probably not have been launched. If it is assumed that the

phone call and letter added to the pursuer's stress and anxiety the defender had no reason to think that it would cause or contribute to clinical depression. The letter was issued by the defender without any appreciation that the pursuer had suffered clinical depression or that the commencement of Disciplinary Investigation was capable of causing clinical depression. I accept that the defender could have foreseen it would cause a degree of stress and anxiety but I do not accept that it should have foreseen anything more than that. NT thought that the pursuer had walked out of school because she was upset with the outcome of the observation in the Competence Process. The Human Resources department depended on the information supplied by NT. It was unaware that RP had notified NT that the pursuer was leaving and it did not know that the pursuer was in a highly distressed state. There is no evidence however that, in recommending the start of the investigation or in beginning the investigation, NT or the Human Resources department had any idea that their decision might cause or contribute to psychiatric injury. Although I accept that fuller information would probably have led the Human Resources department to take a more moderate approach, the question I require to deal with is not whether it was the correct decision. I accept that the defender had to perform a balancing act and that there were factors that favoured starting an investigation and factors that did not. The question is not whether the letter was heavy handed or intimidatory, as Mr Farquhar described it, but whether the defender foresaw or ought reasonably to have foreseen that the pursuer was at risk of psychiatric injury. I do not consider that it was in such a position. I have nothing to enable me to know or be satisfied that it had any role in her psychiatric injury. It would appear the exacerbation had already occurred because of events on 26 September 2013.

Was the pursuer supported?

[447] The pursuer said that she was not supported by NT. This general allegation is not borne out by the evidence. No support was sought and refused. No support that might properly have been supplied, but wasn't, was identified. The pursuer's EIS representative confirmed this (Joint Bundle p1982). The pursuer's position in essence was that by starting and continuing the Competence Process NT was not supporting the pursuer. On one level the pursuer was correct. The pursuer did not wish to be under scrutiny and made this plain. NT thought her teaching did need to be scrutinised. She did not support the pursuer in her wish to be free of the Competence Process. While the pursuer may have found the decision to start the Competence Process difficult to accept I have no reason to think that the supports provided were deficient in the circumstances. KM did her job as mentor. KM and, in reference to Period 2, LG said that the other teachers in the small teaching staff at AW Primary School sought to help the pursuer. I found them both to be credible and reliable witnesses. I am satisfied that the pursuer had ample emotional support in AW Primary School. The behaviour exhibited by the pursuer and her father towards NT could not have helped personal relations between the pursuer and NT. As I have indicated, NT struck me as a "no nonsense" character. The pursuer saw NT as her nemesis. Dr Harper stressed the need for emotional support and human sympathy. I infer that this may have been in short supply from NT after August 2013. But I do not think it was in short supply from other colleagues.

NT's lack of planning

[448] The pursuer sought to argue that the meeting on 24 September 2013 would have taken a different course had it been planned by NT. If NT had prepared, it was argued, she

would have imparted her feedback in such a way as to avoid the risk that the pursuer would be upset. I reject this criticism. It appears to have been an informal meeting arranged at the start of the day. NT had not yet written her report on the observation. It would appear to have been a meeting similar to the previous meeting when the reflective questions were discussed. The absence of written feedback does not mean to say that NT was unprepared. NT had obviously thought about the lesson and had prepared oral feedback. It would appear that the nub of the pursuer's criticism is that if NT had planned beforehand she would not have said that the lesson was "weak like the last one". I cannot accept this. As noted above she had told the pursuer that the last lesson was weak. So this was not an inaccuracy based on a lack of preparation. The new lesson was also weak. Although the words "weak like the last one" appear brusque, the pursuer did not complain about the way NT spoke to her. There was no evidence that the meeting's tone was unsympathetic or confrontational. The pursuer was concerned with the content of the communication. On top of this I do not consider that NT was aware that the pursuer was clinically depressed. Thus while it might be argued that NT's words show that she had not given any thought how she should approach the task of conveying information to someone who was depressed, this assumes that NT spoke roughly or unfeelingly. There is no evidence to support that. It also assumes that the pursuer's mental state was known or ought to have been known beforehand.

Conclusion - Period 1

[449] In light of the foregoing I do not consider that the defender was under a duty to seek advice in 2013 from Human Resources specialists with expertise in psychiatrically vulnerable employees, or from senior education managers or Occupational Health

specialists with a view to reducing the risk of psychiatric injury or the other legal duties pleaded by the pursuer.

Period 2

[450] After the crisis of September 2013 the pursuer was off work for a period of time. This break, coupled with the departure of NT, cleared the way for a return to work. She was passed fit to return to work in January 2014. The pursuer was able to work through 2014 and most of 2015 without further sickness absences. The GP notes (Joint Bundle p2990) indicate that she saw the new head teacher as “more supportive” and it would appear that the difficulties she had experienced with NT receded. That is not to say that she was not having mental health issues. She went back to her GP in May 2014. The note records “ongoing anxiety”. The GP note for 26 May 2014 states:

“Really emotional, not coping without support. Husband arguing. Cannot take further time off work would result in disciplinary. Sister GP in South Queensferry interestingly had suggested sertraline which is what I have suggested also today. Stop as discussed and start in week or so time. Review in 3-4 w. Try and (*sic*) contact OT for assistance regarding work, stressful environment sounds like she has been wrongfully put through disciplinary process. Anxiety as a result... Sertraline 50mg tablets... Cut Fluoxetine down to 20mg as of 27/5/14 then STOP after 4 days...”

[451] In the period 2014-2015 there were no major incidents. The pursuer continued to get low grades in the Competence Process. Her domestic life appears to have been in turmoil although this does not surface in the GP notes and was not communicated to the staff responsible for managing the pursuer or the defender’s Education Department. RP’s evidence of events in 2014 make her difficulties plain. The pursuer did not refer to these issues in her evidence. It is evident from the GP notes that the Competence Process and her complaints about the Competence Process were continuing to cause difficulties. On

19 September 2014 they say “High anxiety... Still ongoing assessments of teaching abilities and union involved”. On 6 November 2014 she reports anxiety and a “problem” at work. The Competence Process “is taking along (*sic*) time to resolve and appears to be no clear plan at present about when it will end”. On 25 November 2014 she told her GP that a formal grievance was now underway. That was not true. It was not communicated until February 2015. On 21 January 2015 the GP notes state:

“feeling she is coping a bit better at present – appears more relaxed, says work matters being dealt with, problems are going to ‘a grievance’, finding sertraline helping...”

[452] The pursuer was aware that she might lose her employment and registration. I have no doubt that this placed her under increasing stress. LG and RP confirmed that she disengaged from school colleagues. At a meeting on 24 November 2014 it was minuted that the pursuer was “not coping in the process” (Joint Bundle p644). The pursuer was evidently “in a bad place”. LG was aware of the position and referred her to Occupational Health. Shortly afterwards she was signed off work. A MED3 was supplied on 20 November 2015 (Joint Bundle p2987).

LG’s change to the Action Plan

[453] The pursuer submitted that the goals she had been set in the Action Plan were changed during LG’s period as head teacher. It is true that they were changed. The reason for the change was an alteration in the Framework document. The defender’s modifications were designed to bring the Action Plan into line with a new Framework that had been promulgated. The changes were made in co-operation with the pursuer and her EIS representative. No evidence was provided to justify the pursuer’s complaint that the changes to the Action Plan were confusing. The reverse was in fact true. The new goals

were a simplified version of the original set of goals. In making these changes the defender was in reality fulfilling the pursuer's wishes. Although the pursuer said that the changes were confusing she did not specify in what respect they were confusing or in what way she was confused. I was unable to locate any possible source of confusion.

The lack of support

[454] One of the key points made by Dr Harper and Dr Patience was that someone in the pursuer's position needed emotional and professional support. Dr Harper in particular considered that the pursuer had not been offered adequate support. This absence of support was said to be evident in the treatment handed out to the pursuer by NT and in the lack of support thereafter.

[455] When the Competence Process began the defender provided the support that would ordinarily be provided to persons who were asked to submit to the Competence Process. There was a mentor who would give the pursuer emotional and professional help. In a small school like AW there were not any other options. I notice that the pursuer had little adverse to say about KM. When the crisis of September 2013 erupted she was on hand to support the pursuer. Susan Gordon's view was that the mentor should come from outside the Competence Process. KM met that requirement. She was not part of the Process. In order to provide help "on the ground" I consider that it was sensible to use a fellow teacher. In addition, counselling and Occupational Health services were available. This was not a case where the defender made no provision for the risk that stress and anxiety might adversely affect the pursuer.

[456] LG was the most impressive of the witnesses led by the pursuer. She struck me as calm and methodical. She evidently cared for the pursuer. On one occasion she

encountered the pursuer in a state of distress. The pursuer was on the floor rummaging through her bag. It would seem she had lost her keys. LG sat down beside her and did her best to calm her down. The pursuer accepted that she could not say that LG was “out to get her”. I consider she was a significant source of emotional support to the pursuer.

[457] The pursuer did have some criticisms of LG. She said that when LG took over as head teacher, she told the pursuer that she should consider going back to nursery school. The pursuer thought this demeaned her. LG denied making the remark. I prefer LG’s evidence. I had no difficulty accepting her as credible and reliable whereas the pursuer was not always reliable. I have no reason to doubt that she decided to give the pursuer an opportunity to prove herself. If so it would have been surprising if she said anything that suggested that she had made up her mind that the pursuer should go back to nursery teaching. She is also alleged to have undermined the pursuer towards the end of Stage 2. The pursuer thought she was wrong to continue the Competence Process. But LG had no alternative but to continue the Competence Process and I do not consider that it is fair to treat her unwillingness to recommend the termination of the Competence Process as a failure. The Action Plan constructed by LG in August 2014 (Joint Bundle p857) was a comprehensive measure. It was constructed in conjunction with the pursuer and her EIS representative. It gave the pursuer recovery time between observations. It offered team teaching and other learning opportunities. Its comprehensive character demonstrates that the pursuer was supported by LG.

Protective measures

[458] The pursuer submitted that a multi-disciplinary team should have been set up to support her. I do not think that the defender knew enough about the pursuer’s

circumstances to foresee the need for additional measures at the commencement of Period 1 or thereafter in Period 2. JC thought that such a measure was an exceptional step. He had never heard of a multi-disciplinary team being set up although he accepted that it was an option. Such a decision was not one he could have made. It was a medical decision. It was for Occupational Health to make such a recommendation. No recommendation was made. The Competence Process supplied a mentor, made available counselling and Occupational Health support. I accept that the defender had no reason to think that the standard measures were inadequate. The defender pointed out the pursuer's stress and anxiety symptoms coincided with "pinch points" such as review meetings. Both Dr Harper and Dr Patience accepted this was so. The defender expected the pursuer to be stressed and anxious because of the Competence Process and expected her to be stressed and anxious as her performance failed to improve. The defender was not conscious of the background. The pursuer submitted that her case was complex and difficult. I am not satisfied that in Period 2 the defender should have appreciated this was the case. I do not consider that it should have been aware of the pursuer's underlying vulnerabilities.

[459] It would appear to me that in any event a multi-disciplinary meeting would only have been effective if those participating in it had full information about the pursuer's condition. Given that the defender was at no stage apprised of the pursuer's medical background or the difficulties in her private life I am not persuaded that a multi-disciplinary meeting would have been possible or if it was attempted would have been effective. Patient confidentiality would have hampered the degree to which the GP, if permitted by the pursuer to attend, could co-operate with a team set up by the defender and designed to enable it to fulfil its duties to the pursuer. An expert psychologist or psychiatrist could only have participated effectively if the pursuer had consented to liaise with the defender and

disclose her medical records. I do not consider that the pursuer trusted the defender sufficiently to do that. She refused to co-operate when the defender offered a Stress Audit Management Tool. According to Susan Gordon, the pursuer was suspicious about what the defender might do with any information supplied to them in the completion of the Stress Audit. The psychological reports obtained in 2016 prior to her placement at L Primary School were not disclosed to the defender. The pursuer was reviewed by Dr Fraser Watt and Dr Kathryn Allan, both consultant Occupational Health physicians. They brought a high level of expertise to their task. Neither gave evidence. It seems that they did not diagnose the existence of clinical depression. This may be because of the absence of full background information. Even if their reports are read as including a tacit acknowledgement of the presence of clinical depression they did not consider that this prevented her return to work or recommend the provision of a package of support analogous to that recommended by Susan Gordon or Dr Harper. This suggests that a multi-disciplinary meeting or the involvement of expert assistance would not have resulted in a different course of action. This was quintessentially an Occupational Health problem. Had there been a full disclosure I consider that the defender would have been obliged to consider dismissal on health grounds. Although no evidence was led from the defender as to what it would have done had it known the pursuer's background I consider that given what is now known it would at least have had to consider whether her teaching career posed an unacceptable risk to her health.

[460] I sympathise with the pursuer's position. I can see that full disclosure of her circumstances medically and psychologically might have made her vulnerable to dismissal on health grounds. But the consequence of the limited information supplied to the defender was that it continued to see the pursuer as someone struggling with the stress of the

Competence Process. It did not know the nature and extent of her depression and carried the responsibility of providing teaching of the requisite standard. It had to take account of the possibility that her teaching deficits were not caused by her ill health and that the stress and anxiety she was under were due to the knowledge that she might lose her employment.

[461] Susan Gordon thought that the measures taken by the defender should have split the support designed to improve competence and the support designed to assist the pursuer personally. Thus she thought that the mentor should only have offered personal support and had no role to play in helping with competence issues. I accept that the measures taken by the defender combined both aspects. In providing a mentor from the teaching staff, the pursuer was given personal support but that person had also a role in the Competence Process. While I can see the theoretical advantages of Susan Gordon's approach, I was not satisfied that Susan Gordon's evidence made sense in the context of a small primary school with limited staff and resources. KM was not the head teacher. She was not responsible for the Competence Process. But she provided observations and worked in co-operation with the head teacher. VB gave evidence that in her opinion the ideal mentor was from the management of a school since such a mentor would have time to devote to mentoring. As I understand it she thought that an ordinary teacher would have insufficient time. VB also considered the experience of a member of school management was necessary for effective feedback. It seems to me that these were important practical points and that Susan Gordon was not in a position to rebut them. She accepted she had no experience in the education sector. I am wary therefore of accepting her evidence of what would be conserved normal or proper practice. It would appear to me that schools may not a typical working environment. I am not willing in these circumstances to accept that the support provided was deficient. More broadly I consider that separating steps designed to assist the pursuer's

wellbeing from those designed to promote competence is a false dichotomy. Thus for example the gaps between observations were designed to give the pursuer the space to recover. That was a step designed to improve the pursuer's wellbeing. But equally they were designed to improve the pursuer's competence since in these gaps she had opportunity to practise her skills.

The first grievance

[462] The pursuer delivered a grievance to the defender in February 2015 just before Stage 3 began. There was a very sharp divergence of evidence in relation to the events of 10 February 2015. The pursuer said KD phoned her and accused her of trying to stop the Competence Process. KD denied having done so. If such a phone call took place it would have been a departure from ordinary practice. I heard un-contradicted evidence that liaison should be through the pursuer's EIS representative. If the pursuer is correct, KD phoned her at home. In view of the fact that I have formed an adverse view of the pursuer's reliability and have no reservations about KD's credibility and reliability I accept KD's account of matters.

[463] The pursuer mounted a detailed attack on the defender's refusal to hold a Grievance Procedure in 2015. The attack challenged the propriety of JC's decision to wrap up the Disciplinary Investigation at Stage 3 with the grievance. I accept that JC's decision to combine the two processes can be seen in hindsight to have been the wrong decision. The Disciplinary Investigation and the Grievance Procedure serve diverse purposes and have distinct procedural requirements. Combining the two was never going to work. It does not follow that the defender was bound to hold a hearing in February 2015 within 10 days. There is no rule of law that bound the defender to do so. The defender could have refused

to hold a grievance procedure because the pursuer had delayed to bring the grievance timeously. Whether the pursuer had delayed excessively was a matter for the defender to judge. Speaking generally excessive delay may be a lawful reason to deny access to a procedure. While Employment Law takes account of grievance procedures for some purposes, they are not creatures of statute nor do they entail legally enforceable time limits. If the defender had refused to entertain the Grievance as stated it would then have fallen to the pursuer to decide whether she wished to challenge such a decision and consider what remedies the law afforded her. The defender might have taken a discriminating approach and offered to hear the grievance insofar as it fell outside the Stage 3 Disciplinary Investigation or the Bullying and Harassment Policy. Thus it might have agreed to hear a grievance on eg the way in which NT and the Human Resources department had conducted the disciplinary investigation into the pursuer's departure from school in 2013. If the pursuer disagreed with the defender's approach, a hearing could have been arranged and the matter resolved. I can understand that the defender would not have wished to stop the Competence Process because of the use of a grievance.

[464] There is no basis for the proposition that the defender's decision to combine the grievance with the Disciplinary Investigation caused psychiatric injury or materially increased the risk of psychiatric injury. The defender did not know the pursuer was suffering from clinical depression nor in my opinion should it have known. No doubt it could see that refusing her requests might cause upset and anxiety but these are not matters that give rise to liability in damages. All forms of conflict resolution are stressful to some degree but that is not a reason for stopping them. If anxiety and stress did accrue from this procedural farrago, the pursuer was largely responsible for that state of affairs.

[465] Susan Gordon indicated that in refusing to hear her grievance the pursuer was being denied a "voice". No doubt that is one of the goals of grievance procedure. I readily accept that employees benefit from an opportunity to air grievances in the workplace. I can also see the benefit of letting them state their grievance on their terms. I do not accept that this means that the pursuer was entitled to begin her grievance when she wanted. The pursuer could have stated her grievance earlier. In delaying to state the grievance she weakened her right to be heard. The defender was entitled in my opinion to weigh the benefit of the grievance procedure to the pursuer against its duty to perform its statutory duties. I also note that the pursuer had a very clear voice in Stages 1 and 2 of the Competence Process. Stages 1 and 2 should not be seen as analogous to disciplinary proceedings. The process was to a great degree co-operative. While matters changed at Stage 3 there is no indication that her voice was heard any less clearly because she was responding to allegations rather than making allegations. I do not accept therefore that the pursuer had no "voice" or that her voice was stifled by the defender's decision. More to the point I do not accept that the defender in combining the two procedures can be said to have breached its duty of care to the pursuer. It was unaware of the true state of her health and had no means of foreseeing that an administrative decision of this nature might be capable of causing or contributing to the pursuer's clinical depression.

[466] When JC relented and permitted the Grievance Procedure to start, further difficulties arose. There were substantial delays. In June 2016 the pursuer refused to participate in a hearing because she, along with her EIS representative, thought that the defender had "ambushed" her. The pursuer had thought the purpose of the hearing was to present submissions on the issue of fairness, not to lead evidence. The defender by contrast had brought witnesses. As a result the pursuer withdrew from the hearing and a stalemate

ensued. Had it proceeded I have no basis for thinking that the chair DM would have allowed the hearing to be conducted unfairly. She said she would have acted independently and fairly. It would appear that she too thought that the hearing was designed to hear submissions on the fairness of the Competence Process. The indication is that DM would have been sympathetic to the pursuer's position. It seems unlikely she would have permitted oral evidence to be led if it was submitted to her that the pursuer was not in a position to cross examine the witnesses or lead evidence of her own. The hearing went off and was never restarted.

[467] I am satisfied that the pursuer was largely responsible for the protracted nature of the Grievance Procedure. It was her grievance. Although it is perhaps wrong to speak of an onus in connection with an apparatus provided by an employer to assist employees, in the circumstances of this case there was a measure of responsibility on the pursuer to engage with the defender. In the events that happened, the pursuer cancelled a number of meetings at short notice. Her EIS representative conceded he had not progressed the grievance and for a prolonged period in 2015 was out of contact with the pursuer. It seems that he thought that because the pursuer was unwell he should take no action. She may well have been on sick leave but he made no attempts to contact the pursuer or to establish whether it was not possible to progress the grievance.

Conclusion – Period 2

[468] I do not consider that in this period of time the defender should have realised that it needed expert Human Resources support or the assistance of senior education managers or Occupational Health specialists with expertise in psychiatric injury, or any of the other duties pleaded by the pursuer. I consider that the defender did refer the pursuer to

Occupational Health, meet with the pursuer and her EIS representative to discuss the impact of the Competence Process on the pursuer's mental health and the adjustments and support that might alleviate her stress and anxiety. The defender did not have the means of knowing that the pursuer was suffering from a depressive illness nor that the level of psychiatric injury was at risk of deteriorating. The defender provided support, counselling, and a suitable mentor. The defender gave the pursuer the opportunity to observe other teachers. It did not provide a stress audit or stress risk assessment because the pursuer had already refused to co-operate with such an intervention and I consider would have continued to refuse. The pursuer's duties were amended and reduced. The pursuer was aware of the timescales of the Competence Process. The defender obtained detailed and specific advice from Occupational Health and implemented any measure suggested that was consistent with the need to maintain the Competence Process. I consider that LG was an outstanding source of support to the pursuer. The defender was not in a position to enlist the help of the pursuer's GP or ask the pursuer to submit to any form of medical examination. It was unaware of any speciality or peculiarity in the pursuer's position and therefore did not take advice from any specialist. It was sufficient that it referred the pursuer to Occupational Health who were the experts in the relevant field.

[469] The defender did not follow the Managing Stress at Work Procedure or Guidance (Joint Bundle pp. 2949 and 2959) and risk assess the pursuer formally. But in the absence of full information I do not think that it would have made any difference.

[470] I accept that risk assessments should be followed if prescribed. I accept that in general terms they offer a structured means by which the causes of stress can be identified and the steps that can be taken to avoid or reduce stress, thereby minimising the risk of injury. I accept that records should be kept so as to facilitate the management of cases and

to help to determine whether all causes of stress and all control measures have been properly identified and implemented.

Period 3

[471] Counsel for the pursuer submitted that the pursuer's mental health broke down in 2016 because the defender had failed to make appropriate arrangements for the pursuer's return to class. As I shall relate I accept that in a number of respects the defender's arrangements were deficient. I consider however that the pursuer has been unable to demonstrate a link between these failures and the dramatic deterioration in the pursuer's mental health that occurred after 5 October 2016. In my opinion a proper return to work interview or a better organised induction would not have enabled the pursuer to meet the challenges she encountered on 5 October 2016. The events of that day were a product of the indiscipline of the pupils and the pursuer's inability to control the class. Her primary protection against the challenges that day brought would have been a greater ability to control her class and maintain discipline. The pursuer's inability in that connection predated the start of the Competence Process. The Competence Process was designed in part to address this weakness in her skill set. As the observations and grades show, the Competence Process had not improved her ability to deal with disruptive pupils. LG pointed out that the pursuer's performance did not deteriorate over the course of the Competence Process. EA agreed (Joint Bundle p1980). Her performance was consistently poor. Had the Competence Process or the way it was handled been sapping her ability to teach, a downwards trend would have been discernible. The observations do not bear that out. Her ability to control a disruptive class was much the same on 5 October 2016 as it was in 2012. LG and NT both thought that the pursuer was resistant to the Competence Process.

It would appear this and her lack of capacity for change was the reason the pursuer was not equipped to deal with the challenge that arose on 5 October 2016.

[472] I consider that the defender was alive to the possibility that the pursuer's stress was related to work factors (Managing Stress at Work Policy, paragraph 5.4.3). The policy recommends that the factors are "investigated and addressed before the employee returns. Reasonable adjustments should be made wherever possible so that the employee is not reintroduced into the same working conditions that led to their absence" (Joint Bundle p2952). I consider the defender investigated the position. The defender met with the pursuer and her EIS representative. The defender took up a series of Occupational Health reports. I accept no risk assessment was done but as I have indicated any risk assessment would have lacked important information. Had the defender or its Occupational Health advisors been aware of the pursuer's episodes of self-harm, her domestic difficulties and the longstanding nature of her depressive illness, it would probably have adopted a different approach. But there is no sign Occupational Health had any awareness of these issues.

[473] In my view the pursuer was supported by VB and her staff at L Primary School even although the support may not have been as anticipated in the defender's policies. In the first two weeks she was in effect team teaching with the teacher she was to replace and had little personal responsibility. She had a *de facto* mentor. VB met with the pursuer, observations took place and meetings were convened. The Competence Process itself which had contributed so much to her stress and anxiety was in practice suspended. The formal observations under the Action Plan were replaced by a more informal process. In this situation I am not persuaded that the various defects identified in the management of the pursuer's return to work made any material contribution to the breakdown in the pursuer's mental health. I accept she was not given a formal return to work interview. I accept that a

formal risk assessment was not carried out. But I do not consider that the benefits these measures would have afforded the pursuer have any connection with the issues that arose on 5 October 2016. I considered that Professor Lawrie's approach in examination in chief was correct. The cause of the pursuer's mental health breakdown was the psychological damage caused by the classroom disruption the pursuer encountered and her subsequent precautionary suspension. Professor Lawrie accepted in cross examination that the Competence Process made a material contribution to her subsequent breakdown after 5 October 2016. But I consider he was correct to say that it did not materially affect the events of 5 October 2016 and the precautionary suspension. LG and EA thought the pursuer's classroom management skills were unaffected by the Competence Process. Both were well placed to make that judgement. LG managed the pursuer for longer than NT or VB. EA was an experienced teacher and was her EIS representative for a lengthy period. It would appear to me that her inability to control the class on 5 October 2016 was the cause of her breakdown. This inability was not caused or contributed to by the Competence Process or through the fault of the defender. I accept that she the Competence Process had made her more vulnerable to the sort of insult to which she was exposed on 5 October 2016. She had over a prolonged period been exposed to stress and anxiety and the GP notes demonstrate that her condition was exacerbated from time to time by events in the period 2013-2016. But the vulnerability cruelly exposed by the events in the classroom on 5 October 2016 was not caused by the fault and negligence of the defender.

Occupational Health reports

[474] The first set of reports by Anne Young were in Period 1. They came after the pursuer had gone off sick in 2013. They identify NT as the source of the pursuer's stress and anxiety.

NT moved on and the pursuer was able to return to work. These reports do not indicate that the Competence Process or the way in which it was conducted was a source of concern. Anne Young also reported in Period 2. LG referred the pursuer in October 2014 as the toll of the Competence Process began to be felt. Anne Young was supplied with the detailed Action Plan that LG had created for the pursuer in co-operation with the EIS. Anne Young's report contains erroneous information supplied by the pursuer. The pursuer told Anne Young that the Competence Process had to be restarted. This was not true. This does not however appear to undermine Anne Young's conclusions. Anne Young pronounced her fit for work. The only specific recommendation was that the observations should be spaced out. This request however had already been addressed and had been the subject of extensive discussion between the pursuer, her EIS representative and the defender. Although the report notes that the pursuer was suffering from "depression/stress" and while that was capable of being interpreted as referring to clinical depression, Anne Young does not advise any change of approach. The defender was not advised to take the steps desiderated by Susan Gordon or Dr Harper. A further such report was provided in April 2015.

[475] In the run up to her period at L Primary School the pursuer was seen on a number of occasions by two Occupational Health consultants, Dr Fraser Watt and Dr Kathryn Allan. It is plain that they did not have a working knowledge of the significance of the Competence Process and did not appreciate that it could not simply be stopped. The critical report is Dr Fraser Watt's report of 6 September 2016. In it he specifically addresses the proposed return to L Primary School. He makes a number of recommendations but he does not suggest that the placement was inappropriate or that he required further information before

he could approve the pursuer's return to work. I consider that the defender complied with his suggestions.

[476] I consider that these reports ought to be regarded as providing authoritative guidance to the defender. Lady Hale in *Hatton* (paragraph 43 (supra)) considered that "an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty." The defender did this. I have no reason to think that the Occupational Health physicians were unduly focused on the pursuer's fitness to teach as opposed to her health and wellbeing.

The medical evidence

[477] The experts were largely in agreement with one another. They thought that the pursuer had suffered an exacerbation of her pre-existing Recurrent Depressive Disorder from 2013 onwards and underwent a serious deterioration in November 2016 when she developed a Serious Depressive Disorder with psychotic symptoms. In relation to the events of 5 October 2016 what distinguished the experts was a difference in emphasis. Professor Lawrie was of the opinion that the events of 5 October 2016 and thereafter were the main reason the pursuer suffered further psychiatric injury. He accepted that it was difficult to be sure what role the events of September 2013 and the stress of the Competence Process had in the development of her illness in 2016. In re-examination he stated that the classroom disruption followed by her precautionary suspension were the precipitants of her acute deterioration. It was the largest single reason why she ended up in hospital. Professor Lawrie thought it represented a major blow to the pursuer's self-esteem. The injury was more severe than those that had gone before because the insult was more severe. While he thought that the Competence Process was causally connected to the breakdown in

October 2016 he did not think the pursuer would have suffered a breakdown had it not been for the events of 5 October 2016. If nothing had happened that day she would have struggled on and continued to suffer from clinical depression. This would have continued through to the denouement of the Competence Process.

[478] Dr Patience and Dr Harper thought the Competence Process had a more prominent role to play in the pursuer's breakdown in October 2016. Their opinions however relied to a significant extent on the account the pursuer had given them of the Competence Process. She had painted quite a black picture. In that circumstance it would be natural for them to perceive the Competence Process as having features that had the potential to cause injury to the pursuer's mental health and correspondingly undermine the pursuer's ability to cope with the events of 5 October 2016. Dr Patience accepted that if the pursuer was not being subjected to the rigours of the Competence Process on her return to teaching at L Primary School but was in a more informal process that would tend to suggest that it was the events of 5 October 2016 and thereafter that caused the pursuer's breakdown. Professor Lawrie was less focused on the events of the Competence Process. He thought there was a danger of placing too much stress on the pursuer's subjective view of matters. In light of my conclusions above Professor Lawrie's opinion was more closely aligned to the facts I have found established. In that circumstance I am inclined to place greater weight on his opinion.

[479] While it is true that the defender's decision to allocate the pursuer to a P6/7 in L Primary School was a *causa sine qua non* of the psychiatric injury, I do not consider that the defender was at fault in placing the pursuer in L Primary School. The offer was made in an attempt to comply with the defender's legal obligations. A solicitor for the defender warned that its unwillingness to switch the pursuer from AW Primary School might be seen as a failure to make a "reasonable adjustment", the pursuer being a protected person under the

Equality Act 2010. That appears to have led to a review of the options available and a reconsideration of the perceived advantages of the pursuer remaining at AW Primary School. I do not have any evidence that would enable me to hold that an earlier decision by the defender was likely to have resulted in another placement elsewhere and the provision of a class that was more to the pursuer's liking. The evidence indicated that the defender was not one of the large Scottish Local Councils and job opportunities in education were not plentiful. A P6/7 class was offered to the pursuer and despite her misgivings she accepted the offer. The defender was doing what the pursuer had asked it to do and give her a job away from AW Primary School. She took advice from her EIS representative. He advised her to take the job. As I understand it her misgivings about a P6/7 class were based on the fact that she had more experience of younger pupils. She was conscious of her difficulties with class management and knew that classroom management issues are more prevalent with older classes. Such a placement would not play to her strengths. There was no evidence however that the class she was offered was problematic. It had pupils with difficulties but at the material time it was being taught successfully without any cause for concern. The EIS representative acknowledged that the pursuer was qualified to teach a P6/7 class. It would not appear to me that the defender should have foreseen that the pursuer would not be able to cope with the class and that this would lead to classroom disruption let alone a serious incident. The defender did not know the pursuer was suffering from clinical depression and could not have foreseen that a disruptive class might result in her suffering a psychiatric injury.

The defender's Policy Documents

[480] The defender's Policy Documents show that the defender was aware of the risk posed by stress at work. The 2013 Managing Stress at Work Policy, Procedure and Guidance Note at p2781 and p2956 shows this:

"... intense and prolonged stress can have a negative effect on a person's physical and mental health. The effect can vary considerably depending upon the individual..." (Joint Bundle p2781)

"Failure to deal with work-related stress can have negative effects on the health of employees..." (Joint Bundle p2956)

[481] The Policy acknowledges that stress is not evidence of "ill health" but that prolonged stress can have a "negative effect on a person's physical and mental health." See also the 2016 Employee Mental Well-Being Policy 2016 at p496.

[482] I do not consider that these documents assist the pursuer. They do not demonstrate why the defender should have known that the pursuer was clinically depressed or was at risk of psychiatric injury. While no doubt stress and anxiety can cause psychiatric injury there was no evidence that the defender should have appreciated that the symptoms displayed by the pursuer signified clinical depression as opposed to the negative effects of stress and anxiety. Although the pursuer and no doubt her family knew that she was suffering from clinical depression, this information was not conveyed to the defender. In order for the defender to grasp the position and to assess the risks, the pursuer would have had to disclose her medical history and current condition, or an event analogous to that in October 2016 would have had to occur. But nothing occurred that exposed the underlying problem. There is no evidence that the pursuer's colleagues realised the true position. The defender had adopted measures that were meant to prevent the physical and mental side effects of stress morphing into a recognised psychiatric injury.

[483] The pursuer was correct however to submit that the defender had not adhered to their policy documents. NT, LG and VB were unaware of the need to carry out risk assessments under the Management of Stress at Work Policy. Only JC acknowledged that a risk assessment was necessary. VB did not think that the pursuer's arrival at L Primary School after a prolonged period of absence was a return to work. I agree with the pursuer that it was a return to work even though it was at a new school. VB did not implement the return to work procedure set out in the Management of Stress at Work Procedure, paragraph 5.4.1. I do not have any evidence however that had the defender acted on these policies that it would have altered the course of events. If a risk assessment had been formulated in acknowledgement of the fact that competence processes were likely to be stressful, I have no reason to think that it would not have reflected the measures that had already been identified as suitable to competence processes. Thus the risks would have been identified and a mentor designated. Reference would have been made to counselling and the possibility of Occupational Health referral. The defender would not have made any provision for her underlying clinical depression. It was unaware of the risks associated with her condition. As I have explained I consider that the pursuer would have had to disclose her mental health issues or would have needed to find out by some other route before a risk assessment could have made any difference. It strikes me as unlikely given the pursuer's historic issues and the issues that arose when the Competence Process was started, that a risk assessment could have been devised to deal with her specific set of risk factors. More probably the defender would have concluded that the risks of pressing on with the Competence Process were too great and given its duty as an Education Authority to provide teaching staff of the requisite standard, would have had to address the question of whether

it should terminate the pursuer's employment under section 78 of the Employment Rights Act 1996.

Factual disputes in Period 3

The decision to send the pursuer to L Primary School

[484] The pursuer stated that JI promised her a junior class during the discussions between the pursuer, her EIS representative, and the defender in 2016. JI denied making such a promise. The pursuer's EIS representative was present at the relative meetings. He did not agree with the pursuer. I accept JI's evidence. It would appear to me unlikely that she would make such a promise when she did not know the exact nature of the vacancy. Her evidence was corroborated by Drew Morris, the EIS representative.

At the head teacher's door

[485] The notes of the Occupational Health physician indicate that the pursuer overheard VB discussing her situation with FT. The pursuer said in evidence that she overheard them talk about the Investigation Report. VB denied that such a conversation took place. The letter of 5 September 2016 confirms that the defender explained to the pursuer that VB was to be informed of the position under the Competence Process. If that was what happened I do not consider there was any impropriety in using FT to convey the position. He was involved in the process and was in a position to inform VB of what it had concluded. But VB did not think that there was a discussion of the Investigation Report. She thought that the discussion was about other matters.

[486] I have come to the view that VB's account is to be preferred. The contemporaneous note does not say that the pursuer overheard a discussion about the Investigation Report.

The notes indicate that the pursuer thought she should have been told that the meeting was to take place and that she thought the door should have been kept closed. The pursuer said her trust and confidence had been damaged. In my view the absence of any reference to the Investigation Report supports VB's recollection.

[487] I accept that there was a more relaxed environment at L Primary School. VB did not attempt to operate the Competence Procedure even though the pursuer remained subject to its conditions. VB operated a scaled back regime where although observations took place there was not the same emphasis on whether she was hitting the target set under the Action Plan. It is true that VB had not appointed a mentor in the period before her suspension. She said however that she linked the pursuer up to Mrs W, the deputy head of L Primary School, for support. I accept that although she was not designated as a mentor she performed the same function. The pursuer said that VB did not inform her of the presence of disruptive pupils in her class. VB said that the pursuer was made aware of the position. In her opinion the pursuer was bound in any event to have observed the class during the handover period and learnt the position. It would seem that information about the pupils was available to the pursuer in the classroom. Even if the pursuer is correct in saying that VB did not formally alert her to the situation, I accept VB's evidence that she was in practice aware of the position. If it is necessary to decide whether she was told about the potentially disruptive pupils I am inclined to accept VB's evidence. I considered her to be a credible and reliable witness. I did not consider that the pursuer's memory was reliable.

The precautionary suspension

[488] I accept that the pursuer was told why she was being suspended at the meeting convened by the defender and that at the meeting the pursuer was given a letter that

rehearsed the reasons for her precautionary suspension. I accept that the defender was entitled to regard the breakdown in classroom discipline as conduct capable of being regarded as gross misconduct. The misbehaviour involved a risk to the health and safety of pupils. I also consider that it was entitled to suspend her employment while it investigated matters in view of its duty of care to the children. The outbreak of indiscipline involved the risk of harm to the pupils and the defender was not in a position to let the pursuer continue teaching until it had a clearer understanding of what happened.

The contribution of the Competence Process to the pursuer's psychiatric injury

[489] The pursuer's mental health issues did not begin in 2013. The pursuer's position was that her pre-existing mental health disorder was exacerbated by the conduct of the Competence Process. I was not asked to divide the pursuer's psychiatric injury after 2013 into separate episodes or hold that the injury in 2016 was distinct from that suffered in 2013. I was invited to follow the guidance provided by Lady Hale in *Hatton (supra)* where the psychiatric injury was in part due to an underlying or pre-existing mental health disorder or vulnerability and in part by work related breaches of duty. In this case I consider that the Competence Process itself, irrespective of how it was handled by the defender, contributed a measure of stress and anxiety and that its contribution to the pursuer's psychiatric injury should be deducted from any liability attributed to the defender.

[490] I was in a better position to assess these matters than the medical experts for the simple reason that I had an overview of all the evidence. Professor Lawrie thought that 60-70% of the pursuer's condition was caused by employment factors. I agree with this broad assessment and have come to the conclusion that the contribution caused by the pursuer's pre-existing vulnerability should be fixed at 40%. In my opinion employment

factors accounted for 60% of the pursuer's condition over the period 2013-2016. I do not consider that these employment factors were all attributable to the alleged breaches of duty. In my judgement the Competence Process itself was a prominent factor in her depressive illness. As I understood Professor Lawrie's evidence he attributed about half of the employment factors to the elements that were said to have been defective by virtue of breaches of the defender's duty. Assuming I have understood his evidence correctly this coincides with my view. Thus if the pursuer had succeeded in establishing the various breaches of duty alleged by her I would have reduced the figure of 60% to 30% as representing the defender's contribution to the total liability.

Was the defender's approach unbalanced?

[491] The pursuer submitted that the defender favoured its statutory duty as an Education Authority over its duty to protect the pursuer's mental health. I do not accept this. The defender was aware that the pursuer was under stress. At times it was aware that she was under acute stress. But short of stopping the Competence Process entirely and allowing the pursuer to teach on despite her deficiencies, I consider the defender did all that it could. It met regularly with the pursuer and her EIS representatives to hear their objections and agreed to such measures as they reasonably suggested. It agreed to breaks in the Competence Process. It spaced out observations. It agreed to make the Competence Process less "formal" in 2016, which in practice meant that the Competence Process was handled in a way similar to that which occurred in Stage 1. The pursuer's head teachers took personal initiatives. LG provided rapid feedback because the pursuer found that waiting for her grades was stressful. NT introduced reflective questions so as to help the pursuer derive greater benefit from the Competence Process.

Was the defender's approach inadequate?

[492] Counsel for the pursuer submitted that the defender's approach was piecemeal, reactive and insufficient. This criticism contains three elements. The submission that it was piecemeal suggests that the defender's approach lacked cohesion and was implemented sporadically. The submission that the defender's approach was reactive suggests that the defender did not take "positive thought" for the pursuer's safety. The third criticism suggests that the defender should have done more.

[493] I have come to the view that the pursuer's submissions in this connection are not well founded. The defender's support of the pursuer was it seems to me coherent and consistent. The Action Plan was agreed at the outset. Although it was focussed on improving the pursuer's competence as a teacher, it provided a mentor. Thereafter, with the exception mentioned above, this pattern was maintained throughout the Competence Process. Mentors were drawn from the teaching staff at the pursuer's schools. They were intended to provide a confidential source of advice and support to employees. As I understand it this is a normal feature of the Competence Process and was not provided specifically for the pursuer in recognition of her vulnerability to stress and anxiety. The provision of a mentor is a recognition that the Competence Process is a stressful process and is designed to alleviate that stress and anxiety by providing an independent source of advice and assistance. The defender provided counselling to the pursuer from time to time. I have no indication that she should have received more counselling or that it was inadequate in any way. I am satisfied that the defender made this resource known to the pursuer and had the pursuer asked for counselling at any stage it would have been provided. I am satisfied that the head teachers referred the pursuer to Occupational Health at appropriate junctures.

NT did not refer the pursuer straight away but she encouraged the pursuer to go to her GP. The MED3 in May 2013 indicated that the pursuer was either suffering from stress and anxiety or from depression. The MED3s were designed to give the pursuer time off work to recover. The pursuer never returned to work contrary to the advice of her GP. Phased returns were suggested by the pursuer's GPs and were accommodated. Latterly the pursuer's GP suggested that the Competence Process should stop unless she was moved to another school. As I have explained that was an impossibility. It could only stop if the pursuer had decided she did not wish to return to teaching or if the defender was satisfied that she was teaching to the requisite standard. What in fact happened was that after initially refusing to move the pursuer, the defender acceded to this request. The decision to move was made in co-operation with the pursuer and her EIS representative. There was extensive Occupational Health involvement. The reports supplied to the defender came from consultants. The pursuer and her EIS representative were fully involved in the proposed return and knew the terms of the Occupational Health reports. The pursuer did not take issue with the Occupational Health reports. Unlike the defender she was in a position to instruct a medical report based on her confidential medical records.

[494] The referrals to Occupational Health cluster round the points where the defender was conscious that there was a significant concern about the pursuer's mental health. The first cluster was around the time of the pursuer's breakdown in September 2013. The second was when the pursuer's stress levels began to mount as Stage 2 came to an end. The third was when the move to L Primary School was in contemplation. I do not accept that this suggests a piecemeal approach.

[495] The criticism that the defender was reactive is misplaced. The mentoring under the Action Plan was a pre-planned feature of the Action Plan and was designed to head off

problems caused by the Competence Process before they took root. The Action Plan involved regular meetings to which the pursuer and her EIS representative were invited. They were not reactive in the sense that they were only convened in response to complaints of stress or anxiety. They provided a forum at which the pursuer or her EIS representative could advocate changes conducive to the pursuer's mental health. There were reactive elements in the support provided. Thus referral to counselling and the provision of Occupational Health reports came in response to particular issues. But that was as it should have been. I am satisfied that the defender's policies and actions indicate that "positive thought" was given to the pursuer's mental health needs.

[496] The defender was not in a position to instruct medical intervention. Short of medical intervention I am unable to see what more could have been done. The pursuer refused to use a Stress Audit Management Tool. She objected to it in 2013 because it involved meeting NT and she did not want to do that. There was no evidence to indicate that she changed her mind about the Stress Audit Management Tool or that she would have co-operated had the defender tried again. Although it would have been possible to convene a multi-disciplinary meeting, no evidence was led that enabled me to understand how that would have resulted in a different strategy that in turn was capable of influencing the outcome. The pursuer did not pin point any decision that would have been made differently had it been taken in the context of a multi-disciplinary meeting. The Competence Process could not stop unless either the pursuer gave up teaching or her gradings improved. It would no doubt have been desirable had the Competence Process moved more swiftly but its slow progress was due to factors outside the defender's control. The defender had agreed to space out observations to assist the pursuer. The pursuer's sickness absences delayed the Competence Process. Because the pursuer was part time the process took longer to progress.

The letter of 25 November 2016

[497] The letter sent by DM on 25 November 2016 was a serious error on the part of the defender. At that time the staff in the defender's Education Department knew the pursuer was in a psychiatric ward of a hospital. DM explained that it was sent out in conformity with the defender's policy in such matters. Presumably they are routinely referred to Deputy Chief Executive. She acknowledged that it should not have been sent. The defender's failure to appreciate that such a letter was wholly inappropriate given the pursuer's circumstances was reprehensible. If the letter was due to a system failure, I would suggest that the defender reviews its system so that it does not happen again. The failure in this connection however is not connected to the injury for which the pursuer seeks damages.

Conclusion – Period 3

[498] I accept that the defender only partially complied with its return to work policy. I consider that it took Occupational Health advice and that it did so after the pursuer had commenced her return to work. I consider however that it was not at fault in this connection since the defender was working at speed so as to comply with the pursuer's wish to take up the placement and with the knowledge and approval of the pursuer and her EIS representative. I do not consider that the delay in arranging her Occupational Health report made any difference to the outcome. I am satisfied she had sufficient time to familiarise herself with the staff, pupils and surroundings at L Primary School and to plan her teaching. I accept that it did not risk assess the pursuer on or around her first day back at work or address the issues arising from that assessment before she resumed her full teaching duties. I accept this was a breach of duty. I do not consider however that such a risk assessment

would have prevented or reduced the risk of psychiatric injury which the pursuer sustained. I am satisfied that Mrs W, was in substance a mentor albeit she was not designated a mentor under the Competence Process. I consider that the defender provided her with opportunities to teach with other teachers. I do not accept that the defender was under a duty to place her with a class younger than P6.

[499] I do not consider that the pursuer has established liability against the defender. I should briefly indicate my view on quantum should I be shown to be wrong.

Quantum

Solutium

[500] I consider that the pursuer developed clinical depression in 2013 after the Competence Process began. The pursuer suffered from active symptoms of clinical depression for a period of time. The symptoms settled and the pursuer resumed her teaching career. After a short period she became symptomatic again. Ultimately she suffered a Severe Depressive Disorder with psychotic symptoms in 2016. The Severe Depressive Disorder with psychotic symptoms led to a major health breakdown, a number of attempts at suicide, self-harm and hospitalisation. I am advised that the pursuer has made a good recovery but remains symptomatic with residual symptoms and is likely to remain anxious in the longer term. The pursuer is at increased risk of a further episode of Severe Depressive Disorder. If she were to stop taking her medication then her severe psychiatric illness would likely recur. I accept that the pursuer has suffered a major psychiatric injury, with a major impact on her health, her family and her work. I accept that she was very unwell. She was suicidal and suffered psychotic symptoms (around February 2017), namely, seeing NT in her room and hearing voices in her head (Joint

Bundle pp3518-3519 and 4569-4570). She was hospitalised on five occasions. It was while she was an inpatient at Lochgilphead that her current psychotropic medication was commenced (see Dr Patience's report, p4567). I have had regard to the *Judicial College Guidelines*, 15th ed. (2019). I consider that the pursuer's case falls within the "Moderately Severe" bracket of the category "Psychiatric Damage Generally", (£16,270-£46,780). The injury has significantly impaired the pursuer's ability to cope with life and work; it has had serious effects on her relationships with family and others; the treatment that the pursuer has received, while beneficial, will have to continue in the long term; she has significant future vulnerability; the prognosis is uncertain; and the pursuer has received significant medical help, including five inpatient hospital admissions. I was referred to *Collins v First Quench Retailing* [2003] SLT 1220; *Jones v Majid*, Kemp & Kemp, *Quantum of Damages*, C1-006; *Young v The Post Office*, Kemp & Kemp, C1-009; *Cowley v Mersey Regional Ambulance Service NHS Trust*, Kemp & Kemp, C1-011; *Marsh v Ministry of Justice*, Kemp & Kemp, C1-011.1; *Lyon v Ministry of Defence*, Kemp & Kemp, C1-012; *Garrod v North Devon NHS Primary Care Trust*, Kemp & Kemp, C1-051.

[501] I would have valued solatium at £30,000 with two thirds of that figure apportioned to the past for the purpose of assessing interest. Interest at the rate of 4% a year from 26 September 2013 would have been appropriate.

Past wage loss

[502] The parties' education experts, Professor Wood and Mr Farquhar, both gave evidence that had the first Grievance proceeded to a conclusion it would have been rejected and the pursuer would thereafter have been dismissed on the ground of capability.

Mr Farquhar in re-examination qualified his evidence by observing that since the outcome of

the first Grievance was never known it was not possible to say for certain that the pursuer would be dismissed. While that is true I am satisfied that he was correct to anticipate that her employment would have been terminated on competence grounds had the first Grievance been heard. He also qualified his evidence in re-examination by saying that if the defender had fulfilled its duties she would not have failed the Competence Process. My impression was that this represented a modification in his position. As I understood his evidence in cross examination he accepted that the pursuer would have been dismissed at the end of the Competence Process because she lacked the requisite skills. I did not understand him to say that but for the defender's fault she would have completed the Competence Process successfully. I may have mis-understood his evidence however. If his position was that but for the defender's fault and negligence the pursuer would have completed the Competence Process successfully I reject his evidence. The pursuer's deficits were addressed in the Action Plan. They did not alter as a result of the Competence Process. As LG and EA pointed out her gradings before the Competence Process paralleled her gradings during the Competence Process. Had the Competence Process been having a deleterious effect on the pursuer one would expect a further diminution in competence. It is difficult therefore to accept that the defects the pursuer complained of had any impact on her competence to teach.

[503] The pursuer supplied detailed calculations of future loss based on the hypothesis that but for the defender's negligence the pursuer would not have been dismissed. Given the state of the evidence and the undesirability of dealing with multiple hypotheses of loss, I have confined myself to explaining what I would have awarded had the pursuer continued in employment to the conclusion of the first Grievance where her complaints about the Competence Process would have been determined.

[504] The pursuer's employment was terminated on 12 May 2017. The defender submitted that had the Grievance Procedure been completed her employment would have ended in March 2018. I consider that the defender's estimate is reasonable. The defender advised that the pursuer would have earned £16,625 between May 2017 and March 2018. Interest at 4% is applicable to this figure from March 2018 to date.

[505] The pursuer advises that in the period before the termination of her employment, the pursuer lost pay in May, June and July 2016, as a result of her absence from November 2015 onwards due to stress at work. The normal average monthly net pay which the pursuer should have received during the three affected months was £1,469.28, (see net pay August 2016 onwards, Joint Bundle p440). For the three affected months her net pay should therefore have been £4,407.84. In the event her actual total net pay for those months was £3,637.32. Her net loss was therefore £770.52. Interest thereon should be awarded at the rate of 4% a year from 31 May 2016 to date.

Pension Loss

I was not given any indication of the pension loss the pursuer would have suffered had her employment been terminated in March 2018. In the absence of any evidence in that connection I am unable to state a putative award.

Handicap on the labour market

[506] The pursuer has made a good recovery and is pursuing employment of a type that is amenable to her. It would appear to me that leaving aside the matters with which this action is concerned, the pursuer would probably have left primary school teaching behind and pursued a career similar to that in which she is now engaged. She is self-employed.

The indications are that her mental health is stable. Thus if I was to assume that she would have been successful in this action but that in any event she would not have continued in employment as a primary school teacher, a modest handicap on the labour market award is appropriate. I would have awarded £5000 inclusive of interest.

Services

[507] The pursuer claims for the necessary services that she has received from her husband and her parents and for the services that she has been unable to render to her family, in terms of sections 8 and 9 of the Administration of Justice Act 1982. As to her family's services, the pursuer's husband has had to support the pursuer throughout her psychiatric illness. He took on an increased level of care for their daughter. Her parents had to look after the pursuer's daughter for a period between about June and August 2017, owing to her psychiatric condition. As to the pursuer's lost services, she has been unable to look after her daughter from time to time as a result of her illness, including during her hospital admissions and during the period when her daughter was temporarily fostered by her parents. I accept the pursuer's submission that £2,500 would have been appropriate to cover all aspects of the claim, including interest.

Cost of treatment

[508] The pursuer claims for the costs of psychological therapy, as recommended by Dr Harper. The therapy recommended was cognitive behavioural therapy. The cost of each session would be in the region of £110-£130 (Joint Bundle p4484). In her oral evidence she expressed the view that the pursuer needed 50 sessions of cognitive behavioural therapy, in two blocks, of 20 and 30 sessions respectively. At an average of £120, the total cost of the

50 sessions required would be £6,000. It would appear this treatment and the need for it would have been unaffected by the loss of employment described above.

[509] The defender submitted that damages fell to be reduced by 65%, the mid-point in Professor Lawrie's range of 60-70%. I consider I should fix the proportion at 60%, the lower end of his range. In other words I accept that 40% of her psychiatric injury arose from her pre-existing medical difficulties. Professor Lawrie thought that 50% of the pursuer's psychiatric injury was attributable to the Competence Process as opposed to her employment in general. In other words he attributed a percentage to the Competence Process itself irrespective of other factors. Having regard to Lady Hale's guidance in *Hatton* and the factors discussed above, any award of damages would in my opinion fall therefore to be reduced by 70%.

[510] The total award for solatium would have been £30,000 together with interest of £6800. The pursuer's past wage loss is approximately £19,544.62 inclusive of interest. The loss of employability award was £5,000 and services were assessed at £2,500. The cost of future treatment was assessed at £6,000. Had I awarded damages I would have reduced this figure by 70%. This would have yielded a figure of £20,953.40.

Reserved objection to Professor Wood's evidence

[511] The pursuer objected to Professor Wood's evidence because he had not identified and supplied copies of the precognitions on which it was said his opinion was based. His report referred to precognitions from LG, EC, DM and JC (Joint Bundle p4872). The pursuer submitted his evidence was inadmissible on this account. The pursuer had sought their disclosure prior to the proof before answer. The motion was refused. The pursuer did not appeal the decision. The pursuer relied on *Kennedy v Cordia (Services) LLP* [2016] SC (UKSC)

59 at paragraph 52 and 57 where it is stated “An expert witness should state the facts or assumption on which his opinion is based” and “the relevant factual evidence so provided”. Ordinarily precognitions taken up in contemplation of litigation are not discloseable. That no doubt is why the motion prior to proof was refused. Professor Wood acknowledged that he had been supplied with precognitions. As I understand it the factual information disclosed in his report is based on these precognitions. That would appear to comply with his duty as described in *Kennedy v Cordia*. Had there been any hint that he had been supplied with information other than that set out in his report I would have been more sympathetic. But there is nothing in the report that betrays the existence of evidence that was not adduced at proof. Professor Wood’s factual premises were disclosed in his report and scrutinised in evidence. In this situation I repel the objection to his evidence.

Reserved objection to evidence about the pursuer’s absence in May 2013

[512] The pursuer objected to evidence that the defender’s decision to begin a disciplinary investigation was influenced by the pursuer’s unauthorised absence from school in May 2013. Evidence in relation to the absence in May 2013 was given by the pursuer. NT also gave evidence about that absence. Given that the pursuer’s departure from school is on record I consider that it was appropriate to lead evidence about the role her prior absence had on the decision to pursue disciplinary proceedings in September 2013. The underlying facts are pleaded and are not in dispute. The evidence in question explains the influence of these facts on the decision to begin disciplinary action in September. I do not consider this is a significant deviation from the pleadings. In any event I consider that the pursuer put the matter in issue by giving evidence that she had NT’s implied authority to leave the school in

May 2013 because the defender had failed to take disciplinary steps against her on that occasion.

Conclusion

[513] In these circumstances I shall pronounce decree of absolvitor in terms of pleas in law 4 and 5 for the defender and reserve meanwhile all questions of expenses.