

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2024] SC EDIN 32

PIC-PN2881-21

JUDGMENT OF SHERIFF IAIN W NICOL

in the cause

PAUL FRAME

Pursuer

against

ABELLIO SCOTRAIL LIMITED

Defender

Pursuer: Lauder, Solicitor-Advocate; Thompsons, Solicitors, Edinburgh
Defender: Nicholson-White, Advocate; Kennedys, Solicitors, Glasgow

Edinburgh, 11 June 2024

The Sheriff, having resumed consideration of the cause, MAKES the following findings in fact:

[1] The pursuer is Paul Frame. He resides in Carluke. He is employed by the defender as a "Station Grade B" based at Cathcart Railway Station.

[2] The defender is Abellio Scotrail Limited who have their headquarters at 50 Waterloo Street, Glasgow.

[3] The pursuer's line manager in 2016 and 2017 was Joe O'Neill.

[4] Joe O'Neill's manager at all material times was John McBrinn.

[5] Lorraine McGorm is also employed by the defender and at all material times was a work colleague of the pursuer. They became friends.

[6] In 2016 Lorraine McGorm was in a relationship with Joe O'Neill's son and was engaged to be married to him.

[7] In 2016 Lorraine McGorm was also in a relationship with John McBrinn. When that became known to Joe O'Neill, his relationship with Lorraine McGorm deteriorated to the extent that it created a tension in the workplace which persisted for the remaining part of 2016 and most of 2017. The workplace became toxic as a result.

[8] The pursuer tried to stay neutral in the issue between Mr O'Neill and Ms McGorm.

[9] The pursuer attended a meeting with Mr O'Neill, at Mr O'Neill's request, on 14 November 2017. The pursuer's perception of the meeting was that Mr O'Neill was unhappy that the pursuer had a continued friendship with Ms McGorm and was not taking Mr O'Neill's side in the situation between him and Ms McGorm.

[10] The pursuer was absent from work from 15 November 2017. He consulted his General Practitioner on 21 November 2017 and was certified as unfit for work due to stress until 2 January 2018. The pursuer returned to work prior to the expiry of his sick line expiring, on 4th December 2017.

[11] The pursuer did not notify the defender or give them any cause to suspect he was suffering from stress at work which rendered him susceptible to developing a psychological injury until 31st December 2018.

[12] On 16 November 2017 the pursuer lodged a grievance with the defender complaining about Mr O'Neill's attitude towards him when questioning the pursuer's loyalty and commitment to his team. The pursuer raised concerns about being discouraged from applying for a promoted role. The pursuer felt aggrieved partly due to Mr O'Neill's attitude towards him and his team due to the personal issue involving Ms McGorm.

[13] John McBrinn would normally have been the person responsible for handling the grievance. He required to pass the grievance onto another manager as he was conflicted due to the subject matter of the grievance. The grievance was allocated to Phil Campbell, Head of Revenues, to deal with.

[14] The defender's grievance procedure has 3 stages:

Stage 1 - designed to see if matters can be resolved informally;

Stage 2 – where informal resolution has not been possible the grievance is investigated fully;

Stage 3 – if the employee does not accept the findings of the stage 2 investigation he can appeal.

[15] Phil Campbell met the pursuer on 15 January 2018 to discuss the grievance. This was a pre-arranged meeting held at the defender's head office at Atrium Court, Glasgow.

Mr Campbell proposed certain action points with a view to exploring whether a stage 1 informal resolution was possible. This included discussing the pursuer's concerns with Mr O'Neill and briefing Mr McBrinn. It was implicit that having determined Mr O'Neill's attitude to the pursuer's concerns and having formed a view on whether their working relationship was capable of going back to normal, Mr Campbell would report his views to the pursuer in order that he could decide whether to accept a stage 1 resolution or escalate the grievance to stage 2.

[16] Mr Campbell made notes of the meeting on 15 January 2018. The notes were lost or destroyed when Mr Campbell relocated office on an unspecified date at some point after 10 October 2019. On that date Mr Campbell met with Alan Young, Fleet Manager, as part of an investigation by the defender into how the pursuer's original grievance was handled.

Mr Campbell had his notes of the meeting on 15 January 2018 with him when he met Mr Young.

[17] It was agreed at the meeting between Mr Campbell and the pursuer that the pursuer would e-mail John McBrinn if he was content with the course of action which Mr Campbell had proposed. An e-mail was sent by the pursuer to Mr McBrinn on the same day as the meeting i.e. 15 January 2018. The e-mail did not mean that the pursuer was treating the grievance as having been resolved at that stage. It meant that he was happy with what Mr Campbell had proposed in relation to exploring a stage 1 resolution.

[18] Mr McBrinn did not know why he was being e-mailed by the pursuer on 15 January 2018. He did not contact the pursuer to seek any clarification nor did he contact anyone else such as the defender's Human Resources department or Mr Campbell regarding the e-mail.

[19] Mr Campbell went on holiday at some point around the end of January 2018. Mr McBrinn provided holiday cover for Mr Campbell. Upon his return to work Mr Campbell did nothing to take forward the proposed action points. He did not confirm with the pursuer or Mr McBrinn that the pursuer was content for him to proceed in the manner he had proposed at the meeting on 15 January 2018.

[20] Mr Campbell did not contact Mr O'Neill at any point to discuss the pursuer's grievance.

[21] Mr O'Neill, in 2018, was on long term sick leave. No evidence was led to allow the court to determine the dates of his absence. Mr O'Neill returned to work at some point prior to the pursuer forming the view in December 2018 that his grievance had not been progressed.

[22] The pursuer did not chase Mr Campbell for an update on his grievance at any point after 15 January 2018. The reasons for this were 1) that he knew that Mr O'Neill was on long

term sick leave and would have to return to work before Mr Campbell could speak to him, 2) the defender was going through a re-organisation which created additional work for Mr Campbell and 3) he believed the outcome of the re-organisation may be relevant to how his grievance was resolved.

[23] In June 2018 the grievance began to weigh more heavily on the pursuer's mind. He returned to his GP and was signed off work with hypertension between 6 and 12 June 2018. Neither this absence, nor anything else prior to 31 December 2018, could have been expected to alert the defender to any vulnerability on the part of the pursuer that he was susceptible to developing a psychological injury due to his grievance not being handled appropriately.

[24] In December 2018 the pursuer heard rumours that Mr O'Neill was informing members of the defender's staff that a) he had heard nothing about the grievance and b) as far as he was concerned the grievance was resolved. The pursuer raised his concerns in relation to this with the defender's HR department.

[25] On 28 December 2018 the pursuer was signed off work by his GP for an initial 4 week period due to stress at work. He submitted his sick line to George Allan, his then line manager.

[26] On 31 December 2018 the pursuer met with George Allan to discuss the reasons for his absence. During that meeting he made reference to his grievance not having been resolved by Mr Campbell. The pursuer was given appropriate reassurances that he would not be victimised for making the grievance, he was offered an alternative post and mediation with Mr O'Neill. The pursuer declined the offers of an alternative post and mediation.

[27] Regular welfare meetings took place following the pursuer's meeting with Mr Allan on 31 December 2018. In addition the pursuer was referred to Occupational Health Assist who arranged cognitive behavioural therapy.

[28] In February 2019 the pursuer informed HR that he did not wish his grievance to be referred to again until he was fit and well.

[29] George Allan wrote to the pursuer on 15 March 2019 and made reference to the pursuer's grievance being closed. This caused additional upset to the pursuer.

[30] On 20 March 2019 the pursuer informed George Allan that he did not wish for his grievance to be referred to again during their discussions until he was fit and well. The pursuer stated that he would choose if and when to pursue the grievance further. On 9 May 2019, Mr Allan again wrote to the pursuer and referred to his grievance being closed. This caused additional upset to the pursuer.

[31] On 1 August 2019 the pursuer wrote to the defender with a further grievance, complaining that his original grievance had not been handled properly in accordance with the defender's grievance policies and procedures. This prompted a series of investigations by the defender's senior management. The second grievance made reference to Mr Allan referring to the original grievance being closed in the letters of 15 March and 9 May 2019.

[32] At psychological assessments on 17 January 2022 and 8 February 2024, Dr Fraser Morrison, Consultant Clinical Psychologist, diagnosed the pursuer as suffering from an Adjustment Disorder with Mixed Anxiety and Depressed Mood as defined in DSM-5 – Diagnostic and Statistical Manual of Mental Disorders 5th Edition, American Psychiatric Association.

[33] The pursuer was, at various indeterminate stages prior to 1 August 2019, suffering from multiple different stressors in his life. These included concerns over 1) having been

subjected to bullying and harassment in the workplace including concerns over his working relationship with Mr O'Neill, 2) his career development and failure to achieve promotion, 3) an alleged data breach when he believed his confidential personal data had been leaked to a third party, 4) the grievance which he lodged in relation to Mr O'Neill in November 2017 and the factors which formed the basis of that, 5) the lack of progress in dealing with that grievance, 6) the fact that he was told that his grievance had been resolved, 7) the terms of the letters which he had received from Mr Allan in March and May 2019 stating that his grievance was closed, 8) financial concerns and 9) marriage difficulties. It is not possible, based on the evidence led, to determine which, if any, of these stressors caused or materially contributed to the pursuer developing the psychological injury diagnosed by Dr Morrison in 2022 and 2024 or whether that psychological injury was being suffered by the pursuer on or before 1 August 2019. In particular, there is no reliable evidence that the letters sent to the pursuer by Mr Allan in March and May 2019 caused or materially contributed to the pursuer developing the Adjustment Disorder diagnosed by Dr Morrison.

Findings in Fact and Law

[34] The defender did not breach any duty of care owed to the pursuer which created a foreseeable risk of psychological injury to the pursuer prior to 15 March 2019.

[35] The defender breached their duty of care owed to the pursuer when George Allan wrote to the pursuer on 15 March 2019 and 9 May 2019 stating that the pursuer's grievance was closed. Said breaches created a foreseeable risk of psychological injury to the pursuer.

[36] The pursuer has failed to prove, on the balance of probabilities, that the aforesaid breaches of duty have caused, or materially contributed to, the pursuer suffering a psychological injury.

Findings in Law

[37] The defender not being liable to make reparation to the pursuer, is entitled to be assoilzied from the craves of the initial writ.

Witness evidence:*The Pursuer*

[38] The pursuer is an employee of the defender. His core role was "Station Grade B" but worked in a temporary promoted role of Station Team Manager (STM) since 2016 with a view to developing his career. He experienced emotional distress linked to a personal situation involving another employee, Lorraine McGorm and his immediate boss, Joe O'Neill. Ms McGorm was engaged to Joe O'Neill's son in 2016 but was having an affair with John McBrinn who was Joe O'Neill's boss. When this came to light it caused a breakdown in the working relationship between Mr O'Neill and Ms McGorm and created a toxic atmosphere in Mr O'Neill's team, which the pursuer was part of.

[39] The pursuer felt pressured by Mr O'Neill but did not want to take sides.

[40] A meeting was held on 14 November 2017 at the request of Mr O'Neill. It lasted around 10-15 minutes with only Mr O'Neill and the pursuer present. Mr O'Neill expressed feeling unsupported. The pursuer perceived this as related to the pursuer's ongoing friendship with Ms McGorm and nothing to do with the standard of his work. The pursuer made it clear that he would not change anything unless a specific issue about his work was raised.

[41] The pursuer went off work sick on 15 November 2017 due to work-related stress and raised a grievance (the initial grievance) on 16 November 2017. He consulted his GP on 21 November 2017 and was given a sick line to cover the period 21 November 2017 to

2 January 2018. The GP notes indicated work-related stress, with the pursuer having taken out a grievance against his boss. The pursuer, despite trying to remain impartial, felt that he was being undermined in meetings with underhand bullying tactics. He was a year down the line since the problems started and was becoming agitated and upset, the thought never leaving him when asleep, feeling irritable and emotional. The note concluded that a MED 3 was issued and if he needed anything he will return “but may well have everything sorted by then anyway”.

[42] Going over the 6-page grievance letter, dated 16 November 2017, the pursuer blamed Mr O’Neill for bringing personal issues into the work place and questioned:

- i. Why after nearly 5 years development and nearly 3 years in the STM roll with no performance or capability issues, he was discouraged from applying for the STM Motherwell vacancy.
- ii. What he had done to make Mr O’Neill think he was no longer committed to the team.
- iii. Why, if there are no performance or capability issues, or any problems with his working relationships with other team members, should Joe then feel that having him in the team is now an issue?
- iv. Why was Joe claiming that his attitude or commitment had changed when his work rate and obedience was not in question?
- v. If he had no performance or capability issues and had proven to work well on his own and as part of a team, what did he need to do to improve?

[43] The pursuer concluded the grievance letter by stating that in relation to the points made on the STM Motherwell position he had no issues with the outcome, his points were “in relation to some actions surrounding”.

[44] In relation to his application for a permanent role, there were two positions in Motherwell which became available. Abellio had always encouraged staff to apply for promotion. His application for promotion was submitted earlier in 2017, several months before the events in November 2017.

[45] Despite the sick line covering the period 21 November 2017 to 2 January 2018, the pursuer was not off for the full period. After submitting the grievance he was telephoned by John McBrinn who requested a one to one meeting. At the meeting Mr McBrinn said he understood the issues, that things were fraught but did not want the pursuer feeling that he was suffering any consequences. He told the pursuer that he wanted him back and well and "we'll sort it out".

[46] The pursuer therefore returned to work in a different area – a customer service and ticket gates supervisor role at Queen Street station just before Christmas 2017. He subsequently spoke to John McBrinn who said he could not deal with it (because he was involved in the circumstances which gave rise to the grievance) and the pursuer was told to expect to hear from Phil Campbell.

[47] The pursuer had an unplanned meeting with Mr Campbell at Atrium Court in Glasgow on 15 January 2018, where Mr Campbell acknowledged that the pursuer worked well and checked the pursuer was happy for him to deal with matters. Mr Campbell had a copy of the grievance with him and touched it, saying "I'll deal with the issues in here" and suggested the pursuer distance himself from Mr O'Neill. Mr Campbell was going on holiday and asked the pursuer to email John McBrinn confirming his acceptance about his proposal for dealing with the grievance. This meeting occurred several weeks after the pursuer's return from sick leave on 4 December 2017.

[48] The pursuer sent an email to John McBrinn on 15 January 2018, expressing satisfaction with the discussion with Mr Campbell about the submitted grievance, confirming "I am satisfied with what was discussed and proposed in regards to bringing this to a resolution at this stage". The pursuer's understanding was that the company could deal with his grievance informally and, if everyone was happy, then matters would resolve but, if not, it would go to stage 2.

[49] The pursuer did not receive further communication about the grievance from Mr Campbell at any time.

[50] The pursuer then moved to Stirling for a temporary role as Station Team Manager, whilst commuting 45 miles each way from his home in Carluke.

[51] He returned to his GP on 6 June 2018. The GP noted ongoing work difficulties despite the move and that he was suffering from a subconjunctival haemorrhage on waking, poor sleep, nightmares and anxiousness. The pursuer was given a sick line to cover 6 June to 12 June 2018. The diagnosis was hypertension.

[52] The pursuer felt hesitant to press the issue of his grievance due to Mr O'Neill's absence on sick leave and the advice to be patient given by Mr Campbell. He applied for a permanent role in the Stirling job but was unsuccessful. Around this time the grievance began to weigh heavily on his mind. After withdrawing from applying for other jobs due to illness, he decided to return to his substantive role in Glasgow.

[53] The pursuer contacted George Allan, area manager for Stirling and Perth, who advised him not to return to Glasgow. After some discussion, it was agreed the pursuer would return to Glasgow Central to assist a colleague called, Cat. This occurred almost a year after the grievance had been filed. His role at that time was duty manager.

[54] In December 2018, upon his return to Glasgow Central, the pursuer began to hear unofficial reports that Mr O'Neill was saying the grievance had been withdrawn. He heard nothing more about his grievance from Mr Campbell when he returned to Central, despite meeting Mr Campbell during the normal course of work, so he expressed his concerns in writing to HR.

[55] The pursuer worked in proximity to Mr O'Neill and Ms McGorm and saw them regularly, requiring some collaboration, although direct interaction with Mr O'Neill was unnecessary due to Mr O'Neill's change of role. Despite only being at Central for a two week period, the pursuer's health deteriorated. He continued to have concerns regarding Mr O'Neill's behaviour and tone. Mr O'Neill referred to the pursuer as Mr Frame instead of Paul which was a change to the norm.

[56] In December 2018, after realizing that his grievance had not been addressed, the pursuer had a further period of absence due to ill health until Spring 2019 i.e. around 4 ½ to 5 months. On submitting his sick line to George Allan on 28 December 2018, Mr Allan invited the pursuer to a meeting on 31 December 2018. The pursuer was offered but declined a role in a different location due to his illness. He made clear he did not feel his grievance had been given closure. He was reassured in the meeting that he would not be prejudiced by making the grievance and there were discussions about mediation with Mr O'Neill. The pursuer expressed concern about the unresolved issues potentially causing further problems and indicated a desire to return to his substantive post. Ongoing contact and occupational health intervention were planned for the future.

[57] The pursuer expressed concerns about unresolved issues and did not remember declining counselling. The pursuer could not recall having a second meeting with Mr Allan. He was referred to an e-mail dated 7 January 2019 from Mr Allan to Marion Graham,

Phil Campbell, John McBrinn and Laura Fitzsimmons which summarised the terms of a meeting between Mr Allan and the pursuer that day. It records that the pursuer was feeling better and he was given AXA's details and encouraged to contact them. He expressed hope to return to his substantive post at the end of the sick line and wanted to try to return to his area before considering any alternative post.

[58] The pursuer's position was that the failure to deal with his grievance had caused him a significant amount of distress. He was not in a position to consider mediation with Mr O'Neill until he found out what had happened with the original grievance. He stated that he was mentally ill, confused, and frightened, and therefore unfit to return to work.

[59] In January 2019, HR requested a meeting and the pursuer met with Laura Fitzsimmons and Lorraine McGorm. Ms Fitzsimmons said she did not know about the grievance issues and suggested the pursuer take a job announcing trains. He felt frustrated as they had not acknowledged he was ill and had not referred him to OH. He followed up with a request to Craig Barclay and Lorraine McGorm to refer him to OH. That was then done and an interim report was submitted by OH on 1 February 2019. The pursuer at that time remained off work. When interviewed by OH he attributed the trigger for his stress as being work issues. He was deemed as unfit for work at that time.

[60] The pursuer initially couldn't remember any further welfare meetings. He was referred to an email exchange between Lorraine McGorm and George Allan dated 8 February 2019 regarding his stress at work and a follow-up meeting. He also recalled a welfare meeting with Lorraine McGorm and Laura Fitzsimmons on 13 February 2019, stating that the meeting notes did not accurately reflect the situation. Subsequently, he met with an OH doctor in late February 2019 and agreed to a CBT referral.

[61] In a letter dated 15 March 2019, Mr Allan informed the pursuer that the grievance had been concluded at stage one, offering reassurances, mediation, and an alternative post. However, the pursuer disagreed by letter of 20 March 2019, stating that stage 1 had not been concluded and that the letter had caused distress. He mentioned Mr Allan had not been involved in the process. He also mentioned that he had not wished for his grievance to be disregarded or withdrawn and had only agreed to proposed actions to bring it to a conclusion. No one had been in touch with him regarding the grievance since January 2018. Reference was made to his grievance being upheld but no-one had told him that. He concluded the letter by stating that "as for the grievance, I would like to request that no more is said or done on the matter. After my return to health, if I wish to pursue the grievance, I will do so down another route".

[62] The pursuer expressed concern about the offer of mediation, stating that it was inappropriate given the nature of the complaint. This was the pursuer's first grievance in his whole time with the defender, submitted after a build-up over 15 months, with the sole aim of protecting his reputation. He explained that despite being mentally ill, he applied for a post in Stirling, but after being unsuccessful, he became suspicious about the selection process.

[63] On 9 May 2019, Mr Allan sent a letter to the pursuer summarising a meeting the pursuer, supported by Cheryl Linton, had on 30 April 2019 with Ms Fitzsimmons. The meeting was about the pursuer's return to work and the support available. Mr Allan expressed his willingness to be contacted by the pursuer at any time. The pursuer again declined mediation offered in the context of a 'closed grievance' and preferred to focus on getting back to normal.

[64] On 14 May 2019 the pursuer e-mailed Laura Fitzsimmons in relation to Mr Allan's letter. He disputed that any recommendations had been made in relation to the grievance as the grievance was never dealt with. He queried how the grievance could now be closed as a result of a welfare meeting at which the grievance was not and should not have been discussed.

[65] A further meeting was held between the pursuer and Ms Fitzsimmons on 21 May 2019 at which the pursuer again requested that nothing more was said about his grievance and he would decide whether to pursue it when he was fully fit. He reiterated that his grievance was not closed.

[66] On 19 June 2019, the pursuer had a telephone discussion with occupational health and mentioned that CBT sessions were going well. He returned to work on a phased return basis but struggled with working at different locations. He acknowledged that the employer tried to address his work-related issues by basing him in the same location for the previous two weeks, which reduced his stress. He returned as a station grade B at Whitecraigs (which was not the temporary promoted role that he had been doing). There was a vacancy at Cathcart which he discussed with his local manager. It was a fixed rota and he moved there on a temporary basis. This is still his role.

[67] The pursuer filed a further grievance letter, running to 4 pages, dated 1 August 2019, expressing dissatisfaction with the handling of the original grievance. He questioned why it was reported that he withdrew the grievance, why his complaints were not pursued and questioned why Elaine McBrinn knew about his complaint. Additionally, he raised concerns about unsuccessful job applications. He referred to a meeting on 30 (sic – should have said 31) December 2018 with Mr Allan where it was discussed that the deterioration in his health was attributed to ongoing issues with his grievance. He believed that there was a

misunderstanding about the withdrawal of the grievance, as Mr Allan followed up with a letter stating that the grievance was closed, even though he was not involved in it. He was never informed of any “upheld matters”.

[68] Subsequently, he received a letter in May 2019 from Mr Allan, again stating the grievance was concluded. This caused him major distress and prompted a manager, Alan Young, to investigate the handling of the original grievance.

[69] An interview took place on 12 September 2019 between Alan Young (fleet manager), the pursuer, Nicola Whitelaw (HR representative) and Eddie Taylor (Trade Union representative) at Cathcart, during which the pursuer emphasised that his original grievance from 2017 was not resolved. The discussion was noted in a document headed “Meeting Notes – Reason for Meeting – Grievance Investigation”. The pursuer confirmed that he stated at the meeting that his original grievance of 2017 was not dealt with.

[70] Mr Young told the pursuer that from what he had seen from the e-mail sent on 15 Jan 2018 to John McBrinn that he (the pursuer) was happy with the discussion he had had with Phil Campbell. The pursuer’s position was he accepted the proposal from Mr Campbell to deal with the situation as he thought Mr Campbell was taking ownership and would tackle Mr O’Neill’s behaviour including the harassment and bullying which he had faced but it did not happen. He saw this as a new grievance because the one in 2017 was not followed through.

[71] In a meeting on 10 October 2019, Alan Young, Phil Campbell, and Nicola Whitelaw discussed the pursuer's grievance. The terms of the discussion are noted in a document headed “Meeting Notes – Reason for Interview – Grievance Investigation”. Mr Campbell stated that the pursuer was not keen on making the complaint formal so they noted action points for going forward, including having the pursuer cover a temporary supervisor role at

Queen Street Station, with no guarantee of permanency; that the pursuer would be treated as a normal employee in respect of recruitment with applications judged on merit and that John McBrinn would be briefed. The notes record Mr Campbell as saying if the pursuer was content, he was to email JM and move to Queen Street. The pursuer claimed Mr Campbell did not have an accurate recollection of their meeting.

[72] In the grievance procedure, there are three stages. The first stage involves raising the initial complaint and discussing it with the grievance manager to propose a resolution. If both parties are satisfied, the grievance is resolved. If not, it proceeds to stage 2, where a more formal investigatory approach is taken. Stage 3 is the appeal stage if the employee does not accept the outcome of stage 2.

[73] Mr Young issued his report on 30 January 2020. It focused on investigating the handling of the original grievance, fairness of the recruitment of the STM Stirling, and the management of the pursuer's long-term absence. According to the report, Mr Campbell claimed that he received no indication from the pursuer about the impact of work issues on him, and therefore, no formal investigation was to be undertaken.

[74] The pursuer had confirmed to Mr Young he had not followed up on the grievance with Mr Campbell due to being aware of ongoing pressures within the business due to re-organisation and Joe O'Neill having a period of long term illness. Mr Campbell had asked the pursuer to be patient.

[75] In the conclusions and findings section, Mr Young states that the handling of the grievance was inadequate, and there should have been an informal discussion with Joe O'Neill with a view to resolving matters, better communication and follow-up. Understanding was expressed as to why Mr Campbell may have concluded the grievance was closed. Mr Young questioned why the pursuer did not follow up on progress,

particularly when hearing rumours of the grievance being resolved. The pursuer reiterated he did not follow up because he had been asked to be patient and did not have all the information to cause him concern until he returned to Glasgow at which point he raised his concerns with HR.

[76] In relation to the third part of his remit Mr Young indicated the pursuer was absent for six months, during which Mr Allan had three meetings and sent two letters focusing on supporting the pursuer's return to work and resolving work-related issues which he did not feel was excessive although conceded there could have been more open channels of communication. The pursuer felt frustrated because he had insisted on removing himself from the work situation based on doctor's advice, but Mr Allan insisted on weekly welfare meetings, leading to a lack of consistent communication and frustration for the pursuer.

[77] In the early part of 2019, the pursuer expressed a desire to focus on recovery but felt that the grievance was continuously brought up. Mr Young's assessment concluded that mismanagement of the initial grievance led to unintentional misinterpretation and miscommunication and a lack of commitment to resolve the issue, causing strain for the pursuer. The management of the original grievance was upheld in part in that a clear understanding was not provided nor was there "completion of the agreed process." He considered that the pursuer had a responsibility to escalate within a reasonable timeframe. Mr Young's opinion was that there was no benefit in re-investigating the original grievance but he suggested offering mediation to resolve the issues, failing which consideration should be given to whether both parties could continue working in the same area. The grievance regarding the recruitment process and the handling of the pursuer's absence from work was not upheld as there was no basis for criticism of either.

[78] A notice of appeal was submitted by the pursuer on 18 February 2020, leading to a stage 3 appeal decision issued by Dave Smith, Head of Service Planning, on 13 May 2020 following a meeting between him and the pursuer on 10 March 2020. The lack of formal closure from the original grievance was highlighted as a significant factor, with faults alleged on both parts and it was agreed that a full reinvestigation of the bullying and harassment claims should be carried out by an independent investigator. Mr Smith also considered the management of the grievance in relation to the parts about recruitment and the pursuer's absence were satisfactorily dealt with.

[79] The pursuer disagreed that he had contributed to the failures in how the grievance had been handled.

[80] The matter was duly reinvestigated by Andy Miller, and despite the grievance not being upheld, the pursuer considered it at least an outcome. The report is dated 15 December 2020. The report, issued three years after the initial grievance, had a significant impact on the pursuer's life. He felt unheard during this 'tortuous' period as the company controlled the grievance process.

[81] Despite appealing the decision, the final report, prepared by Mark Ilderton, did not uphold the grievance, leaving no further right of appeal. The pursuer, currently on sick leave, fears making mistakes and distrusts Scotrail's policies. Prior to 2017, he was respected at work and enjoyed his job.

[82] Under cross-examination, he mentioned unsuccessful job applications and concerns about promotions. Whilst he did not feel particularly aggrieved about not getting the STM Motherwell job in 2017, he did feel lack of promotion was influenced to some extent by the situation.

[83] An interview with Mr O'Neill on 10 January 2020 revealed positive feedback about the pursuer's work. The pursuer was nervous at interview whereas the successful candidate was not and Mr O'Neill speculated that it might have been the start of the deterioration.

[84] It was suggested to the pursuer that in the lead up to the meeting before the grievance was submitted, Mr O'Neill claimed that the pursuer was not contributing at meetings and made snide remarks. Prior to the meeting, Mr O'Neill had gone on leave and returned to find the pursuer had only done one station visit in six weeks and was behind on paperwork. This led Mr O'Neill to confront the pursuer, who then walked out and went off sick the following day. The pursuer denied that anything had been said about his performance and denied walking out of the meeting.

[85] The pursuer accepted that he had mentioned behavioural issues in the grievance letter but did not specifically mention bullying or harassment.

[86] He disputed some points made in Andy Miller's reinvestigation report, stating that the evidence had deteriorated over time and he was ill at the time of the report. The pursuer also mentioned his unsuccessful job application ten months beforehand that he had not complained about and felt that his move to Queen Street in December 2017 was the lesser of two evils in enabling the grievance to be resolved. He believed the grievance could have been resolved within a few weeks and he would have been back in his normal role.

[87] In relation to Mr Campbell's understanding that the pursuer wanted to deal with the grievance informally, the pursuer did not specifically request an informal resolution to his grievance and did not demand an investigation. Scotrail's procedure was for matters to be considered in terms of Stage 1 first. He disagreed that this did not include speaking to Joe O'Neill and disagreed that there was no deliberate attempt to misinterpret his concerns. He felt there had been bad faith. He acknowledged that Joe O'Neill's absence due to ill-

health would cause a delay in the investigation but Mr Campbell should have approached Mr O'Neill upon his return from sick leave to understand the issues and work towards a resolution, including the possibility of mediation.

[88] In relation to Cheryl Linton's record of her statement on 6 January 2020, the pursuer felt aggrieved by how Mr O'Neill treated him after he had been unsuccessful at interview.

[89] On being referred to the Facebook message from Mrs McBrinn, the pursuer expressed shock when his manager's wife contacted him regarding his ill-health. He had been interviewed again on 3 September 2020. He recalled speaking about Mrs McBrinn's message. He denied having any marital strife at that time. His mental health problems related to his work situation. He acknowledged the impact of Covid on the investigation process and emphasised that his mental health issues were work-related.

[90] In relation to his second interview for the STM job in Stirling, he accepted the interview resulted in an appointment based on performance at the interview. He raised concerns about the fairness of the interview process because questions he was asked could only have been answered by him, so the same questions had not been put to each candidate. Therefore policy had not been followed if everyone was not asked the same questions. He expressed alarm when someone with less experience was appointed to a role he had applied for. He did not make any connection between his failures to get the Stirling and Motherwell jobs

[91] On being unsuccessful for the Stirling job he wanted a role closer to home. He felt he was not wanted in Stirling. On 23 November 2018 he was in touch with Kirsty Marchant regarding his return to his substantive post which would have been working under Joe O'Neill but when he met with Mr Allan he was offered a different promoted role under a different manager, Cat, at Glasgow Central.

[92] The pursuer acknowledged the support he received from certain individuals within the company regarding his grievance but did not accept the employer had tried to do everything to help him as he would have preferred that the company simply followed policies and procedures and respected him as an individual, pausing the grievance process early 2019 as he requested because he was unwell.

[93] He submitted his next grievance on 1 August 2019 and by September an investigation had commenced. He confirmed that there were no delays in relation to the handling of his subsequent grievance and appeal. The pursuer stated he had no confidence in Mr Miller's reinvestigation. He was not disputing the conclusions but had an issue with the process. He emphasised the need for an investigation in accordance with policy and procedure. He also denied that his failure to get the STM role was the catalyst for his grievance.

[94] I found the pursuer to be credible and, in most respects, reliable. There were certain aspects of his evidence where he speculated about things and on occasion I considered his evidence to be unreliable, probably due to some details having been forgotten over the last 6 years or so. Parts of his testimony portrayed a clear distrust of his employer in how they have handled his grievance and that has tainted his views on certain matters which has led me to prefer some evidence which is contrary to the pursuer's position as outlined in the discussion section below. He was however trying his best to tell the truth and provide the court with his honestly held beliefs.

Lorraine McGorm

[95] Lorraine McGorm had known the Pursuer for 10 – 12 years. He joined her team around 2012 or 2013. They were initially colleagues and became friends. By November 2017

her previous relationship with John McBrinn was causing tension within the team, including with the pursuer. Problems started in May 2016 when her relationships with Mr McBrinn and Mr O'Neill's son broke down. She moved to work elsewhere temporarily but thereafter returned to her substantive post. Everyone shunned her when Mr O'Neill was around but the pursuer tried not to take sides. He was the only one to do so. Everything went back to normal when Mr O'Neill left.

[96] She believed that the pursuer was overlooked for promotion because he did not take sides in the conflict. She recalled a team meeting where the pursuer had a folder of work but it was brushed aside because other STMs had not done any work for the meeting.

[97] She did not know the details of the meeting between Mr O'Neill and the pursuer in November 2017 but she believed it was about her and that the pursuer chose to leave the meeting.

[98] In her HR role, she had involvement with the pursuer in 2019 regarding his mental health problems and grievance procedures. When he opened up to her, she was upset as she felt his concerns were being dismissed. There were welfare meetings to assist the employee in returning to work. Mr Allan was seeking weekly updates about the pursuer's issues.

[99] She had been interviewed twice about his grievance but wasn't directly involved in the handling of it.

[100] The pursuer was agitated about being invited to a meeting on 13 February 2019 during his sick leave. It was not normal for employees on sick leave to come into the workplace for such meetings. He reported suffering from depression and anxiety attributed to workplace issues.

[101] The OH appointment was arranged for 1st February 2019. Following that, the pursuer agreed to try CBT. He discussed the outcome of the OH involvement with

Ms McGorm on 27 Feb 19 when he reported still feeling low and felt the meeting at Atrium Court had set him back a bit.

[102] She observed that the pursuer's condition had drastically changed. He was one of the best STMs she had ever worked with but now this had totally consumed him.

[103] She agreed that promotions based on performance at interview were valid.

[104] Ms McGorm presented as credible and, in relation to the factual matters which were within her knowledge, reliable. She speculated to some extent on what had contributed to the pursuer's condition e.g. the failure to be successful at interview. It also has to be said that she clearly had a low opinion of Mr O'Neill's handling of the situation when her relationship with Mr McBrinn came to light. Her evidence did not really assist with the consideration of the issues in the case.

Craig Barclay

[105] He was a former SMT colleague who had worked with the pursuer for ten years. He was vague about past events. He recalled a falling-out between Mr O'Neill and Ms McGorm, which may have affected the atmosphere at work but he could not say if it affected anyone in particular.

[106] During interview on 27 October 2020 as part of Mr Miller's investigation, Mr Barclay mentioned that the relationship between Mr O'Neill and the pursuer was awkward, with Mr O'Neill holding a grudge and the pursuer still being friends with Ms McGorm, creating an uncomfortable atmosphere. However, Mr Barclay could not recall saying this or its meaning due to it being from four years ago. His testimony did not add anything useful to assist the court with the resolution of the dispute.

Cheryl Linton

[107] She is a duty manager at Glasgow Central and has worked with the pursuer since September 2013. She commended the pursuer's work and expressed that she did not want to be involved in personal matters between Mr O'Neill and others. She noted that staying neutral had no implications for her and felt that Mr O'Neill respected her position.

Mr O'Neill was persuasive and would be looking for loyalty from some.

[108] Regarding Mr Frame's relationship with Mr O'Neill, she initially felt everything was fine, but problems arose when the STM role came up, leading to a tense atmosphere.

[109] Under cross, Mrs. Linton discussed a meeting she attended on 6 January 2020, where she mentioned the pursuer feeling aggrieved about not receiving credit for his work when he was unsuccessful for the Motherwell STM role although did not elaborate on why she had formed that view. She felt Mr O'Neill was a good manager and the pursuer was a good employee. She could not recollect hearing or witnessing comments which Mr O'Neill made regarding the pursuer in December 2018. There were "mutterings". During re-examination, she acknowledged that the discord between the pursuer and Mr O'Neill might not be related to the Motherwell job, she basically did not know.

[110] Although a credible witness, Mrs Linton's evidence was not of any assistance in resolving the dispute. The most that could be taken from it is that the pursuer's failure to secure the Motherwell job may have been a factor in him feeling aggrieved. The Motherwell vacancy was, of course, one of the points which formed part of the pursuer's initial grievance in 2017.

Phil Campbell

[111] He was the Customer Operations Manager at Scotrail. He dealt with the pursuer's grievance at stage 1. His aim was to find a resolution and allow both parties to express their concerns. He met with the pursuer to discuss the issues informally, took notes of the meeting, and asked the pursuer to email Mr McBrinn if satisfied. " The pursuer did not want to get into the detail of his grievance and wanted it dealt with informally. He just wanted to make sure he had a career and add value. It was agreed the pursuer would move to another location i.e. Queen Street station. The pursuer was told that promotions had to be based on merit. Mr Campbell denied any other actions were discussed with the pursuer. He denied that the pursuer was keen for him to speak to Mr O'Neill. He believed a resolution was reached on the foregoing basis, confirmed by the pursuer's email to Mr McBrinn on the same day. Mr Campbell assumed the grievance process was complete as the pursuer never raised the issue again.

[112] He was interviewed by Alan Young on October 10, 2019, as part of the investigation into the handling of the grievance. The meeting transcript was accepted as accurate. The notes state that he discussed the pursuer's issues to do with Mr O'Neill's management and also the pursuer's career development. He noted actions to be taken, such as the pursuer temporarily covering a supervisor role at Queen Street Station Express; treating the pursuer as a normal employee in terms of recruitment; considering applications for roles on merit and that John McBrinn was to be briefed.

[113] Under cross, he summarised his understanding of the grievance as the pursuer having some issues with how Mr O'Neill was managing him and some issues with the pursuer's career development. He accepted one aspect of the grievance related to how the breakdown in Mr O'Neill's relationship with Ms McGorm affected the team.

[114] He was aware that the pursuer submitted the grievance while off work due to stress. He expressed uncertainty about the location of the meeting between him and the pursuer on January 15, 2018. He believed it didn't take place at Atrium Court as the pursuer would not have been there for a team meeting, but acknowledged he could be mistaken. It was pre-arranged. He had a copy of the grievance at the meeting.

[115] He dealt with the grievance because Mr McBrinn was conflicted. He did not communicate with the pursuer before the meeting, and he no longer had his meeting notes. He considered the pursuer's email as closure of the grievance and did not see the need to follow up. It was put to Mr Campbell that the pursuer believed that Mr Campbell was taking ownership of the grievance and would deal with it, it was not the pursuer's understanding that it had been resolved informally on the day of the meeting and he was simply e-mailing Mr McBrinn as a courtesy. Mr Campbell denied there was any miscommunication and that the pursuer's e-mail to Mr McBrinn clearly meant the matter was resolved.

[116] It was also noted that the pursuer was already at Queen Street by the time of the meeting on January 15, 2018. His recollection was the pursuer was not in a supervisory capacity on gateline.

[117] He acknowledged that direct follow-up contact with the pursuer could have prevented misunderstandings. He viewed the guidance on grievances as not prescriptive. It allows the grievance manager to use their own judgment. The pursuer did not want the grievance to be escalated to stage 2.

[118] I found Mr Campbell's evidence to be vague in parts and incredible in others. His poor recollection of the meeting on 15 January 2018 is partly attributed to the loss of his notes due to relocating but the problem would have been obviated if he had written to, or e-

mailed, the pursuer to confirm the agreed course of action. I do not accept Mr Campbell's evidence that there was any reasonable basis for concluding that the grievance had been informally resolved based on one discussion. For one thing, one of the action points was to brief John McBrinn. Mr Campbell made no reference to briefing Mr McBrinn. He simply said that he was told at some point after his return from holiday of the e-mail which Mr McBrinn had received from the pursuer, an e-mail that Mr McBrinn didn't even know why he was receiving, had no recollection of discussing with Mr Campbell and did not think any action was required on his part.

[119] Mr Campbell said his notes of the meeting also recorded that he was to discuss matters with Alan Young. He gave no evidence to say that was done either.

[120] Most importantly, the main reason why the pursuer was aggrieved was because of the attitude shown to him by Mr O'Neill. Nothing was said by Mr Campbell in his evidence as to what was agreed with the pursuer in relation to exploring a potential resolution of the breakdown in relationship between the pursuer and Mr O'Neill. It seemed to be Mr Campbell's position that the pursuer did not want to make a big deal out of it and was happy to achieve a Stage 1 resolution despite nothing at all being recorded about Mr O'Neill. This is at direct odds with the pursuer's position. I do not find Mr Campbell to be credible or reliable on this point and prefer the pursuer's evidence. The clear impression I have is that Mr Campbell did nothing in relation to following up on the points which had been agreed with the pursuer. Those included the need to speak to Mr O'Neill. He had a duty as grievance manager to do so. Further, it was a fundamental requirement of Mr Campbell, as grievance manager, to notify the pursuer of the outcome of the action he had agreed to take in order that the pursuer could make an informed decision as to whether to accept a stage 1 resolution or escalate the grievance to stage 2. Good practice dictates that

should have been in writing, but a further discussion would have sufficed. At no point in his evidence did Mr Campbell give any indication that he understood that there were basic minimum legal requirements to ensure that a reasonable and prudent employer required to take positive action for the safety and well-being of the employee who had raised the grievance. He was either ignorant of those duties, which I find to be unlikely due to his senior position, or simply failed to fulfil them for whatever reason. Mr Campbell's involvement, his lack of appropriate action and the consequences thereof, is analysed in some detail in the discussion section below.

John McBrinn

[121] He has been Scotrail's Regional Customer Operations manager for 44 years. He had limited interaction with the pursuer. Mr McBrinn was the manager of the pursuer's line manager, Mr O'Neill, in 2016 and 2017.

[122] McBrinn and Mr O'Neill interviewed the pursuer for the Motherwell job in 2017. The pursuer lost out to another candidate who performed better at interview.

[123] He knew about the grievance with the pursuer's line manager and knew he was off sick. As the grievance was partly to do with the situation with Mr O'Neill, which Mr McBrinn was connected to, he did not deal with the grievance himself. He also thought the grievance may have related to not getting the Motherwell job.

[124] The pursuer's email of 15 January 2018 closed the grievance, based on its content. He discussed it with HR but not until many months later when matters were being looked at afresh. He couldn't recall if he contacted Phil Campbell at any stage.

[125] He was aware the pursuer had only remained at Queen Street for a short period and then went to Stirling for a temporary STM role. Another job application had been submitted

for a role at Bathgate but he did not turn up for interview. Mr McBrinn queried that and was told he had withdrawn the applications on the morning of the interview. He didn't ask why.

[126] He did not know why Mr Campbell did not report the outcome of the grievance to HR. Whilst it would be good practice to do so, given that this was a stage one resolution, as far as he was concerned there was no obligation to do so despite the fact he also said that HR had a policy to log closed grievances.

[127] Scotrail do not get many grievances and he had never encountered a situation before of someone writing to say the grievance is concluded. He didn't think anything was required. He would not necessarily have acknowledged the employee's e-mail. He did not see how the pursuer's e-mail to him on 15 January 2018 could be interpreted as to simply be a courtesy e-mail to inform him that Mr Campbell was dealing with it. He did not give the e-mail much thought as he was clear on what it meant, namely matters were resolved and he did not need to do anything. He didn't even feel the need to inform Mr Campbell that he had received the e-mail.

[128] Mr McBrinn presented as a credible but not entirely reliable witness. The passage of time has hampered Mr McBrinn's recollection of all relevant matters. It is difficult to comprehend how a person in a managerial role would not feel it was incumbent on him to send an acknowledgement e-mail to an employee regarding their grievance or pass on the employee's e-mail to the grievance manager and Human Resources even though they were not directly involved in the handling of the grievance. His failure to do so is not directly relevant to the matters in hand as he was not the one tasked with following through on agreed action points and reporting back to the pursuer.

Dr Fraser Morrison

[129] He is a consultant clinical psychologist who was instructed to prepare a report on the pursuer's condition in November 2021. He conducted a Zoom interview with the pursuer and reviewed records, producing a report in January 2022. To assist him he had the pursuer's precognition, GP and OH records. He produced a supplementary report in February 2024, based on updated GP records. He adopted both reports as part of his evidence.

[130] Dr Morrison's assessment indicated that the pursuer pursued a grievance procedure in the course of his employment, which had caused him stress and anxiety. He had been instructed to offer his opinion on any psychological effects of the grievance procedure on the pursuer. The pursuer met the diagnostic criteria for an Adjustment Disorder with mixed Anxiety and Depressed Mood (309.28 (F43.23)) in DSM 5 at the time of his examinations. Symptoms were reported to fluctuate based on various stressors. His symptoms are likely to persist until the issues relating to his grievance have been dealt with adequately. The prognosis suggested that resolution of symptoms would likely occur within 6 months of the personal injury claim being finalized. Key aspects of the report highlighted the pursuer's symptoms (depressed mood, diminished interest or pleasure in activities, insomnia, psychomotor agitation, fatigue, feelings of worthlessness and diminished ability to concentrate). The report detailed the perceived cause of the symptoms as submitting a grievance about bullying in the workplace and a breach of confidentiality resulting in a mistrust of his employers. The report also details the impact of the work-related stress (marriage break-up, concerns about long term career prospects and financial stress). It lists the pursuer's prescribed medication for anxiety and low mood.

[131] The supplementary report highlights relevant entries between 18/11/22 and 13/12/23. It refers to an additional stress-related absence from work and that the pursuer felt unsupported by his employers. Dr Morrison confirmed the previous diagnosis and indicated that his situation would likely improve once his personal injury claim is concluded. Absence from work is linked to the stress of his personal injury claim and work situation.

[132] Various assertions and documents were put to Dr Morrison which he had not previously considered relating to how the defender dealt with matters. He was asked to comment. He found it difficult to do so. He couched his answers by saying he “would imagine” they had a negative impact on his mental health.

[133] It was likely that if he was being told his grievance had been closed but he was of the view there was no basis for saying it was closed it would lead to a feeling that he wasn't being listened to and he would be frustrated about that. It would probably exacerbate his stress. The stressor arises from the disagreement as to whether his grievance was closed or not – he identified that as the primary source of stress.

[134] He acknowledged the challenges in confirming the pursuer's condition prior to the formal assessment in January 2022. The symptoms had fluctuated over time. The records suggested significant impairment and what he was presenting with to his GP up to the end of June 2019 was similar to what he presented with when Dr Morrison first saw him. However, he acknowledged that he had not carried out an assessment of the pursuer at that time and there was therefore a limit to what he could say. He would likely have formed a similar view if he had carried out an assessment at that point in time.

[135] Under cross he was referred to Occupational Health records and the referral to Nuffield Health for treatment where the pursuer was seen on 25 February 2019. He agreed

it was difficult to offer an opinion of the pursuer's condition in 2019 without having undertaken an assessment at that time. He would defer to any clinician's opinion, based on an assessment at the time. The letter from OH Assist dated 19 June 2019 was prepared by an Occupational Health adviser, who does not possess the same level of qualifications as a psychologist but there was nothing in the OH report that he would challenge. The assessments by OH in April and June 2019 were done on the telephone which is not as good as face to face or video call. He had earlier expressed an opinion that the letter advising the pursuer that his grievance was closed would have caused the pursuer's mental health to deteriorate. He confirmed he had expressed that view when considering the letter in isolation. On seeing the OH documentation relative to the 2019 assessments his view is that the pursuer might have been upset that he was not being listened to but accepted that the OH assessments indicate an improving picture.

[136] The GP medical records, if complete, do not show any signs of instability in the pursuer's mental health from 15/10/21 to 18/11/22. Dr Morrison was unaware of the reasons for the breakdown in the pursuer's relationship with his manager. He could not express a view on bullying or harassment and was not provided with the Record. The pursuer's mental health issues became more significant from December 2018 onwards but he is not in a position to say why.

[137] The pursuer's perception of mistreatment in the job application process is relevant. Referring to the pursuer as Mr Frame instead of Paul was not considered as upsetting compared to other issues, but a data breach would cause significant upset. He agreed that people can feel stressed without fulfilling the diagnostic criteria.

[138] As a clinical psychologist he does not prescribe medication so could not comment on the prescription or lack of prescription of medication at any point in time. When taken

through the diagnostic criteria, the fact the pursuer had returned to work on 5/12/27 and does not return to see his GP until June 2018 with hypertension, in the context of the defender's position which he had now been made aware of, it was difficult for him to offer a view on whether the pursuer had suffered an Adjustment Disorder in 2018 and/or 2019 because he had not assessed him then. He had mentioned the breakup of his marriage. He mentioned the data breach. He did not recall the pursuer telling him that he had been given a temporary promoted role in April 2018. He did not recall the pursuer attributing his problems to not being recruited fairly for jobs.

[139] The pursuer had scored 16 out of 21 for depression and 17 out of 21 for anxiety using the Hospital Anxiety and Depression Scores (HADS). A score of 11 or more indicates significant symptoms. The cause of the symptoms is not relevant in HADS which only considers their severity. Dr Morrison acknowledged that the pursuer's reactions to stressors may be short-lived, and what he considers to be significant factors may differ from the pursuer's perspective. He noted that the pursuer's condition fluctuated over time and causes were multi-factorial, making it challenging to diagnose his condition for the period up to the end of June 2019.

[140] While Doctor Morrison is qualified to provide a skilled person's opinion, he was unable to offer reliable evidence upon which the court could form the view that the pursuer was suffering from a psychological injury prior to August 2019 let alone that it had been foreseeable to the defender that such a condition would develop and was caused, or materially contributed to, by any breach of duty on the part of the defender. He had clearly not been given all the relevant material at the time of his assessments and was being asked to offer "off the cuff" opinions on the fundamental issues in the case, which he was clearly reluctant to do.

The scope of proof

[141] The proof in the case proceeded on 13, 14, 15 and 20 February 2024. A lengthy notice to admit had been served by the defender. Various points were admitted and others denied. By Joint Minute dated 15 February 2024, the scope of the proof was narrowed to any breaches of duty by the defender in the period 16 November 2017 to 1 August 2019, excepting any case against the defender for breach of confidentiality or breach of GDPR. In terms of the Joint Minute, the pursuer also restricted his claim to *solatium*. In so far as relevant to this decision, the admitted facts and terms of the joint minute are reflected in the findings in fact. Written submissions were lodged within two weeks of the evidence concluding.

Submissions:

[142] The court had the benefit of detailed written submissions from each party. In his submissions, the pursuer restricted his case on liability to specific periods when the breaches of duty were said to have happened namely 1) on and after 15 January 2018 and 2) the period between 31 December 2018 and around May 2019. The pursuer sought an award of *solatium* of £35,000.

[143] The submissions for both parties included a detailed analysis of the evidence of each witness and where they ought to be viewed as incredible or unreliable. They also contained proposed findings in fact and an analysis of how the law should be applied to the case.

The Law

[144] There was no real dispute on the applicable law in a stress at work case. It was accepted that the ordinary principles of employer's liability apply to a claim for psychological or psychiatric illness arising from employment i.e. The test was whether the employer had fallen below the standard properly to be expected of a reasonable and prudent employer taking positive steps for the safety of his workers in the light of what he knew or ought to have known: [Stokes v Guest Keen & Nettlefold \(Bolt & Nuts\) Ltd \[1968\] 1 W.L.R. 1776, as followed in](#) Petch v Customs and Excise Comrs [1993] ICR 789 .

[145] In *Barber v Somerset County Council* [2004] UKHL 13, the court unanimously approved 16 statements of legal principle and practical guidance to be found in Hale L.J's judgment when the case was heard in the Court of Appeal. These are set out in the discussion section below. Mr Barber was a schoolteacher. In 1995 there was a restructuring of staffing at the school where he worked, taking effect at the beginning of the autumn term, and he worked long hours in discharging his new responsibilities. He began to feel the strain, and in 1996 began to suffer from stress and depression, about which he consulted his doctor. In May-June he was off work for three weeks. On his return he spoke to his headmistress and her two deputies about his problems, but nothing was done to help him. In November 1996 he suffered a mental breakdown and was unable to work again as a teacher. He brought an action against his employers, the local education authority, for damages for personal injuries caused by their negligence. The trial judge gave judgment in his favour and awarded him substantial damages. The Court of Appeal, however, allowed an appeal by the authority. The House of Lords allowed Mr Barber's appeal, approving the test in *Stokes, supra*, and holding that the defendant authority, through its senior management team, had known of the claimant's problems by June or July 1996 when he

spoke about them to members of the team; that they 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.

[146] The perspective adopted is that of a “reasonable employer acting as a lay person without the benefit of informed psychiatric experience”: *Moncrieff v Cooper* [2013] CSOH 180 at para 75.

[147] Because of the nature of psychiatric disorder, it is bound to be harder to foresee than is physical injury. Foreseeability must relate to a material risk of sustaining a psychiatric disorder. It is not sufficient that the employer is aware that an employee is unhappy or frustrated or anxious, since such emotions are regarded as a “normal part of human experience” even if caused by problems at work: *Rorrison v West Lothian College* 2000 SCLR 245.

[148] Moreover, even where an employer is aware of events that might foreseeably cause stress and anxiety to an employee, it does not necessarily follow that the risk of psychiatric harm is foreseeable: *Piepenbrock v London School of Economics and Political Science* [2018] EWHC 2572 (QB).

[149] Ordinary employers are entitled to assume that employees can withstand the normal pressures of the job in the absence of evidence that it is “objectively likely to be harmful” to the employee’s mental health: *Cross v Highlands and Islands Enterprise* 2001 SLT 1060.

That assumption cannot, however, be made where events in the workplace have patently created abnormal pressure: *McCarthy v Highland Council* 2012 SLT 95. That is particularly so where the employee has put the employer on notice of conditions damaging to the employee’s mental health: *Flood v University Court of the University of Glasgow* 2010 SLT 167.

[150] It is relevant to examine not only whether the employer had actual knowledge of any special vulnerability to harm on the employee's part but also whether there was "any such susceptibility of which the employer (if not actually aware) ought reasonably to have been aware: "Cross" *supra*.

[151] Even if foreseeability of psychiatric injury is established, an employee must show, in addition, that the employer breached its duty of care by unreasonable failure to adopt a course of action that would have prevented the employee succumbing to that injury. The court must "consider what steps the employer could reasonably be expected to take once he was aware of that risk and whether they would have been effective: Barber v Somerset County Council [2004] UKHL 13 per Lord Rodger at para 18.

Discussion:

[152] The first thing to make clear is that this is not a claim for *solatium* for the effects of bullying and harassment in the workplace. It is a claim based on the defender's alleged failures "to follow protocols, procedures and systems relating to grievances raised by the pursuer and the defender's failure to establish adequate protocols, procedures and systems" which have caused the pursuer to suffer a psychological injury. Therefore, on the one hand, the pursuer argues that the grievance protocols, procedures and systems which were in place were not followed and on the other hand there was a failure to establish adequate grievance handling protocols, etc. In considering whether that is the case, I will set out the 16 principles set out by Hale LJ and consider how the facts and circumstances of this case are applied to each. Before doing so, I will set out some general observations to explain some findings in fact.

[153] According to the pursuer, the meeting on 15 January 2018 between the pursuer and Phil Campbell was not pre-arranged. That is difficult to reconcile with the evidence that a) team meetings are not held at Atrium Court and b) Mr Campbell had a copy of the grievance with him during the meeting, which seems unlikely if the meeting had not been pre-arranged. There was no evidence led which would suggest HR had e-mailed those involved to set up a meeting nor was there any evidence to suggest that Mr Campbell had gone to get a copy of the grievance from his office before starting the discussion. It seems unlikely that a grievance meeting would simply take place without any prior arrangement and it seems unlikely that the pursuer was at Atrium Court unless specifically to meet Mr Campbell. On that issue I consider the pursuer's evidence to be unreliable although nothing turns on that. On the balance of probabilities, the meeting had been pre-arranged during the 2 month period between the grievance being submitted and the meeting taking place.

[154] Whilst no skilled person evidence was led on duties incumbent on an employer in dealing with a grievance submitted by an employee, no such evidence was necessary. It is obvious that any employer who operates a grievance procedure gives the aggrieved employee a reasonable expectation that the grievance will be handled appropriately. I did not understand that to be disputed. In the context of this case, any reasonable and prudent grievance manager, tasked with investigating an employee's grievance on behalf of the employer, would have:

- i. discussed the grievance letter with the employee;
- ii. explored what the employee was looking to happen;
- iii. established whether a stage 1 resolution was a realistic option;
- iv. if so, identified an appropriate action plan;

- v. undertaken that action plan;
- vi. followed up with the employee to confirm the outcome of the action plan and determine whether matters could be resolved informally or whether the employee wished to escalate the grievance to stage 2; and
- vii. sent a note of the outcome to HR (not least of all because they keep a log of when grievances are resolved).

[155] There will of course be some grievances which do not lend themselves to a stage 1 resolution, either because of the attitude of the employee or because of the nature of the grievance. In that situation, stage 1 would be omitted and a formal investigation would proceed from the outset but in this case it is clear that the pursuer was content to explore the possibility of matters being resolved at stage 1.

[156] Mr Campbell conceded that confirming the outcome with the employee would have been a reasonable step to take albeit hid behind the fact that the grievance procedures do not specifically say such action is required and he had the discretion to depart from the guidance. In my opinion, he undertook points i to iv above but failed to carry out points v to vii.

[157] Any reasonable and prudent HR department ought to have contacted the grievance manager to find out what the outcome of the grievance meeting was within a reasonable timescale of the grievance meeting if, for whatever reason, the grievance manager failed to notify them.

[158] I am satisfied, based on an acceptance of the pursuer's evidence that it was agreed between him and Mr Campbell that a discussion was to be had with Mr O'Neill when Mr O'Neill had returned from sick leave to check what his position was and obtain assurances that there was no underlying issue. The pursuer had a reasonable expectation

that the grievance manager would undertake what was agreed and report back to him to explain the outcome and provide the pursuer with sufficient information to allow him to make an informed decision as to whether to accept a stage 1 resolution or escalate to stage 2.

[159] Mr Campbell was vague about precisely what was discussed. He was Head of Revenue for a large organisation. He no doubt had many other pressing issues to deal with in that role. He could not recall how the meeting was arranged, when it took place (he initially said December 17 which would not explain why he asked the pursuer to e-mail Mr McBrinn due to Mr Campbell's impending absence on holiday given that he was not going on holiday until around the end of January). He stated that as far as he was concerned the matter was to be treated as resolved informally if the pursuer e-mailed Mr McBrinn to say that he was happy for the matter to be treated as resolved. There was however no evidence to suggest that it was a foregone conclusion that the pursuer would e-mail Mr McBrinn. It begs the question what was he expecting the pursuer to do if, upon reflection, the pursuer was not happy with what had been discussed.

[160] The pursuer's e-mail does not outline what was discussed and proposed to "bring this to a resolution" but the use of the word "proposed" suggests that Mr Campbell had put forward a plan or suggestion for consideration by others. Accordance to what was said to Alan Young during the re-investigation meeting on 10 October 2019, Mr Campbell's notes showed the action points as 1. PF to cover a supervisor role at Queen Street Express, it would be temporary and there would be no guarantee 2. PF would be treated as per normal employees in regards to recruitment 3. Applications for roles on merit and 4. John McBrinn to be briefed. 5. Speak to George Allan. Those points of action do not mention Joe O'Neill so it is not clear how they could adequately deal with all aspects of the grievance. In my opinion the main reason why the grievance was submitted in the first place, based on the

content of the grievance and its timing, was the perceived change in Mr O'Neill's attitude. The actual grievance letter of 16 November 2017 starts off by saying "I would like to raise a grievance against Glasgow Central Stations Manager Mr Joe O'Neill." It seems highly unlikely that the pursuer would have been satisfied with any outcome from the grievance meeting which did not include an undertaking on the part of Mr Campbell to discuss the pursuer's concerns with Mr O'Neill.

[161] In my view, Mr Campbell's evidence about what was agreed at the meeting was incomplete and lacking essential detail. Discussions with Mr O'Neill as well as Messrs McBrinn and Allan were meant to take place. So why would he then ask the pursuer to e-mail Mr McBrinn who had effectively recused himself from being involved in the grievance? What was the point? It certainly could not have been on the basis that nothing more was to be done by Mr Campbell as he had three people he needed to speak to or brief, not to mention the need to notify the pursuer and HR of the outcome. The clear impression was that he did not give the pursuer's grievance the attention it deserved and failed in his duty of care to the pursuer to take reasonable steps to deal with the grievance. However, as discussed below, this did not create a foreseeable risk of psychiatric injury.

[162] It was of some concern that Mr Campbell's notes of the meeting with the pursuer were not available due to having been lost or destroyed at the time of a relocation. It was not established when the relocation took place or when the notes were lost or disposed of. It is not clear whether Alan Young saw what was written in those notes or simply took at face value what Phil Campbell said he noted. What does seem clear is that Alan Young did not ask Phil Campbell for a copy of those notes during his re-investigation. They were germane to the whole basis of the pursuer's grievance and how it was to be handled by Mr Campbell in January 2018. He told Mr Young that he had been asked by Marion Graham to meet the

pursuer “regarding his individual grievance with Joe O’Neill.” It was the pursuer’s grievance. Absent any compelling evidence to the contrary, it is to be expected that an employee who raises a grievance will be in a better position to recall the nature of the discussions with the grievance manager who has many other responsibilities in a large organisation. The absence of the meeting notes and the lack of a paper-trail to confirm what was agreed does not assist the defender in contradicting the pursuer’s evidence.

[163] In short, there is nothing to suggest that all of the points of the grievance were reflected in Mr Campbell’s action plan. At least some action required to be taken by Mr Campbell before he could consider the grievance to have been informally resolved, that there was a positive obligation to take that action and report back to the pursuer in order that the pursuer could make an informed choice about whether to accept a stage 1 resolution or escalate the matter to stage 2. Mr Campbell’s failures deprived the pursuer of that choice.

[164] When Mr McBrinn gave his evidence he was unclear as to why he had received an e-mail from the pursuer. Mr McBrinn could not have been aware of what was discussed between the pursuer and Mr Campbell unless he sought clarification from the pursuer or Mr Campbell. No evidence was led to say if or when HR logged the pursuer’s initial grievance as closed. However Mr McBrinn accepted that HR have a policy of recording on their system that a grievance has been closed. He gave the impression of having no idea what he was meant to do when the pursuer e-mailed him on 15 January 2018. He does not recall contacting HR about the pursuer’s grievance until December 2018. He had no recollection of notifying HR, or indeed Mr Campbell, at the time of receiving the pursuer’s e-mail that he had received correspondence which he interpreted to mean the grievance was closed. He would not have been expecting the e-mail because Mr Campbell had been tasked

with dealing with the grievance. There were therefore several obvious reasons why he needed to take action on receiving that e-mail:

- i. To confirm with the pursuer that he was treating the grievance as resolved and if not to query what it meant and, if he was unsure about why he had been e-mailed, ask why he was receiving it.
- ii. If the grievance was resolved, to notify HR that they could record the grievance as closed
- iii. To notify Mr Campbell, so that he knew how to proceed.

[165] Instead Mr McBrinn did nothing. He didn't even acknowledge the pursuer's e-mail.

He is a part of the collective systems failure on the part of the defender in failing to positively deal with the pursuer's grievance.

[166] When Mr Allan became aware of the pursuer's absence in December 2018 upon receiving the pursuer's sick line, he invited the pursuer to a meeting which took place on 31 December 2018. The position then was complicated by the fact the pursuer was ill at the time of the initial meeting with Mr Allan, having just been signed off work for 4 weeks. The pursuer was not in a position to contemplate mediation. He thought that was premature. He was unclear on why Mr Allan was asking about the grievance when it was Mr Campbell's responsibility to deal with. It seems clear to me that as his line manager, Mr Allan was entitled to consider what needed to be done both in terms of resolving the grievance and positively offering assistance to the pursuer. There was no evidence led to suggest that what Mr Allan did or said at that meeting was wrong in a delictual sense. What is clear is that by this stage the pursuer was presenting as unfit for work due to stress and the defender knew that.

[167] I accept that the pursuer made it clear at his meeting with Mr Allan that the original grievance had not been resolved. Despite telling him this, the pursuer's evidence was that Mr Allan was not involved in the grievance and should not be discussing it with him. It is inexplicable why Mr Allan wrote to the pursuer on 15 March 2019, 2 ½ months after that meeting to say that the grievance had been resolved informally at stage 1. Offers of assurances, mediation and an alternative post were made. No issue was taken with those being appropriate and reasonable offers of support. However, stating that the grievance was resolved was, in my view a further failure to deal with the grievance appropriately. There was no explanation as to how he came to the view that the grievance had been resolved or indeed why he was even offering a view given that he was not the manager tasked with resolving it. It seems clear that such a view could not be formed by anything said by the pursuer during the meeting on 31st December, indeed Mr Allan should have been forming the opposite view. That is supported by the terms of Ms McGorm's e-mail of 8 February 2019 when she informed Mr Allan that "...I know he has a grievance ongoing so didn't want to discuss anything that I shouldn't" in response to him asking her "...what in particular is Paul's stress regarding his work..?"

[168] The pursuer contended that the letter caused him a great deal of upset and anxiety. His response included a statement that he did not want any more said about the grievance and once he returns to health, if he wishes to pursue the grievance, he would do so through other routes. Therefore, from the point of that correspondence on 20 March 2019, any further consideration of the grievance was to be on the pursuer's terms.

[169] Despite that, Mr Allan wrote again to the pursuer on 9 May 2019 following a welfare meeting on 30 April 2019 stating that the grievance was "now closed". Both the March and May letters were sent amidst a backdrop of the pursuer having been off work for lengthy

periods due to stress, having been referred to Occupational Health and having commenced therapy and having made it perfectly clear that his grievance was not closed as it had never been dealt with. If it wasn't obvious to Mr Allan that he should refrain from referring to the pursuer's grievance as closed, it ought to have been. Therefore despite Mr Allan endeavouring to provide all the appropriate assurances and support which the pursuer needed, he succeeded in causing the pursuer significant upset and additional stress by stating twice in correspondence that the grievance was closed. I accept the pursuer spoke positively of the support provided to him by Mr Allan. However, he was also clear as to how upsetting repeated reference to his grievance being closed was for him.

[170] The pursuer returned to work in June 2019 and on 1 August 2019 the pursuer lodged his second grievance, in essence complaining that the first grievance had not been handled properly, reiterating the points in the original grievance but it also included specific grievances relating to the fact Mr Allan had sent the 2 letters stating the grievance was closed.

[171] This in turn led to Mr Young producing a detailed report on his findings on 13 February 2020 on 1) how the original grievance was handled by management 2) whether the roles of STM Stirling were recruited fairly and 3) the management of the pursuer's long term absence from December 2018 to June 2019. Whilst the findings were not accepted and led to an appeal there can be no criticism of the defender's handling of matters once the second grievance was lodged, no doubt reflected in the concession by the pursuer that no breach of duty is alleged after 1 August 2019.

[172] The appeal report prepared by Dave Smith, issued in May 2020, having been delayed to some extent by the onset of the pandemic, acknowledged that much of the problem stemmed from the lack of formal closure of the original grievance. He blamed both the

defender and pursuer for contributing to that although did not specifically say what the pursuer had done to contribute to the delay.

[173] Dr Morrison was unfortunately taken by surprise when an alternative factual background was put to him which he had not been asked to consider prior to giving evidence. It was clear he had not been given the defender's version of events namely that as far as they were concerned the grievance had been resolved informally on 15 January 2018.

[174] In any event Dr Morrison had simply been instructed to prepare a condition and prognosis report. He had not been instructed to offer opinions on causation based on the different factual hypotheses advanced by the defender. He had formed his opinion without knowing the defender's position, taking at face value the pursuer's account of bullying and harassment and the pursuer's statement that he was stressed by putting in a grievance relating to that bullying.

[175] Dr Morrison referred to the "index incident" but it is not entirely clear what he meant by that. He could not, or was at least not willing to, offer an opinion on whether the psychological condition which he found the pursuer to be suffering from in January 2022 and February 2024 was being suffered by the pursuer at the end of July 2019 or before then. Based on the documentation he had seen and the interviews with the pursuer, the pursuer met the diagnostic criteria prior to the assessment in January 2022. He accepted that the records suggested significant impairment and what he was presenting with to his GP up to the end of June 2019 was similar to what he presented with when Dr Morrison first saw him. However, he acknowledged that he had not carried out an assessment of the pursuer at that time and there was therefore a limit to what he could say. He said he would likely have formed a similar view if he had carried out an assessment at that point in time. However, his symptoms have fluctuated and he backtracked to some extent when saying that the lack

of assessment at the relevant time meant he could not offer a view, even on the balance of probabilities as to whether the Adjustment Disorder would have been present in June or July 2019. There were other factors at play such as the data breach, possible marriage difficulties and financial worries, unsuccessful job applications, and the bullying and harassment allegations which had prompted the grievance, none of which had any relevance to the damages claim but were contributing to the pursuer's stress. He was briefly asked about the impact on the pursuer in relation to the terms of Mr Allan's correspondence on 15 March 2019 and said it would be an additional stressor but he was not asked whether it could have materially contributed to the development of his psychological injury. Nor was he asked at all about the letter of 9 May 2019 either in relation to it being a stressor or contributing to the development of the pursuer's injury.

[176] It was clear that his limited remit and the fact he had not been provided with the different hypotheses meant he could only assist the court in determining the pursuer's psychological condition at the time of his assessments in 2022 and 2024. He accepted that an opinion on causation could only be offered based on what facts and circumstances were being relied upon. He understandably was reluctant to be put on the spot and offer an opinion on the cause or causes of the pursuer's psychological condition let alone whether the condition existed in, or prior to July 2019. Therefore his evidence could not be relied upon to allow the court to hold, on the balance of probabilities, that the pursuer was suffering from a recognised psychological condition caused by any breach of duty in the period 15 January 2018 to 1st August 2019 and specifically could not be relied upon in holding that injury was wholly or partly caused by any breach of duty which arose between 31 December 2018 and 1 August 2019.

Principles in Hale LJ's Judgment and their application to this case:

[177] *Principle 1: There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do.*

The ordinary principles of employer's liability apply.

The question for the court in this case is whether the defender has fallen below the standard properly to be expected of a reasonable and prudent employer taking positive steps for the safety of the pursuer in the light of what they knew or ought to have known.

[178] *Principle 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).*

In the context of the present case, the threshold question is whether the mental disorder suffered by the pursuer, diagnosed by Dr Morrison in terms of an Adjustment Disorder with Mixed Anxiety and Depressed Mood DSM-5: 309.28 (F43.23) was reasonably foreseeable. I accept Dr Morrison's evidence that the pursuer's diagnosis of the aforementioned injury to health is an injury distinct from occupational stress and that he was suffering from the condition at the time of his assessments of the pursuer. Whether it was reasonably foreseeable due to being attributable to stress at work (as distinct from other factors), is discussed further below.

[179] *Principle 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.

The pursuer had not exhibited any signs of mental disorder, or at least had not drawn those to the attention of the defender, prior to going on sick leave on 15 November 2017, the day after his meeting with Mr O'Neill. Foreseeability in this case relates to the alleged failure to follow or establish the appropriate grievance handling procedures from 15 January 2018.

No actionable delict is said to have been committed before then. He had been given a sick line from his GP on 21 November 2017 which gave the reason for absence as work related stress but the pursuer had returned to work by 4th December 2017. Nothing was said in evidence by the pursuer or Mr Campbell to suggest the pursuer remained unwell or even stressed at the time of their meeting on 15 January 2018 and no breach of duty is said to have arisen when the pursuer was absent in 2017. I do not consider the absence towards the end of 2017 to have been such as to alert the defender that he was vulnerable or susceptible to developing a psychological injury.

[180] The pursuer made it clear he was keen to see if a stage 1 resolution was possible and was happy to leave it to Mr Campbell to explore that and report back. My impression of the evidence as a whole is that if Mr Campbell had done what he was supposed to have done there was a realistic prospect of a Stage 1 resolution being reached once Mr O'Neill returned to work. The pursuer was not chasing anyone for any updates and therefore was not alerting anyone to the fact that he was stressed let alone setting alarm bells ringing that he was heading for a psychological illness which the employer needed to do something to prevent. His 6 day certified absence from 6 to 12 June 2018 was declared as relating to hypertension. It did not specifically state stress at work or suggest any form of mental vulnerability.

[181] In short, prior to being certified as unfit for work in December 2018 due to stress at work and voicing his concerns that his grievance had not been handled in accordance with proper procedures, there was nothing to alert the defender that a foreseeable psychological injury would befall the pursuer due to not handling his grievance appropriately. That is no doubt partly because the pursuer was accepting of the fact that the grievance would take some time to resolve and was not attributing any blame on the part of the defender for delays in reverting to him until he became aware in December 2018 that the grievance had not been processed. It cannot be said that when the grievance began to weigh on his mind in the middle of 2018 that the defender could foresee that the defender was at risk of developing a psychological injury because the pursuer did not express any concerns until the December.

[182] In my opinion, the position changed in December 2018. The extended period of absence began and the pursuer was making it clear that his grievance had not been resolved. Regardless of what Mr Campbell did or did not do during 2018, it was within the knowledge of the defender by the end of 2018, when Mr Allan met the pursuer to discuss his sick line, that the pursuer was absent from work suffering from stress which he attributed to his grievance not being dealt with. What transpired after 31 December 2018 was in the context of there being a foreseeable risk of the pursuer developing a psychological injury or any such injury being made worse than it already was.

[183] *Principle 4: The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.*

The test applies in the same way to the pursuer's employment with the defender, in whatever role he was performing, as it does to every other occupation.

[184] *Principle 5: Factors likely to be relevant in answering the threshold question include: (a) the nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department? (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?*

In relation to this case, was the condition, diagnosed by Dr Morrison in 2022 and again in 2024, reasonably foreseeable to the defender on or after 15 January 2018? The factors mentioned by Hale LJ as likely to be relevant to answering the threshold question have to be read in the context of the nature of the problem which is causing the pursuer stress at work. In many situations the issue will relate to workload and unreasonable demands being placed on one employee compared to others. Some of the examples of questions which Hale LJ listed have limited relevance to the particular circumstances of this case. It was not his workload that was causing the pursuer the problem – on the contrary, by all accounts he was a high performer, thought of and spoken of highly by his work colleagues. A problematic workload was never a basis for his concerns or absences.

[185] Developing the points in relation to principle 3, to succeed, one of the issues which the pursuer requires to prove is that his Adjustment Disorder was reasonably foreseeable to the defender if they failed to follow their existing grievance procedures and/or failed to

establish adequate procedures for handling grievances. Once the grievance was lodged the pursuer accepted he was in no hurry for Mr Campbell to revert to him. He was working. He was not highlighting any concerns or difficulties at work or in relation to the time it was taking to hear back from Mr Campbell. For long spells during 2018 he was having no contact with Mr O'Neill due to Mr O'Neill's absence and even upon his return there was no need for direct engagement with one another for work reasons. There was no evidence to suggest that during 2018 he was overtly exhibiting any vulnerability which would alert the defender to a problem. It was not until December 2018 that the position changed and the defender knew or ought to have known that the pursuer was suffering from stress attributable to the grievance not having been handled appropriately. Given the extended sick line and the information given to George Allan on 31 December 2018 it was, in my opinion, foreseeable to the defender at that time that they needed to consider what appropriate action to take to prevent the pursuer developing a psychological injury.

[186] *Principle 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 inquiries of the employee or seek permission to make further inquiries of his medical advisers.*

Employers have a clear duty to operate a grievance procedure and to deal with the issues which underpin the grievance. That much is a common sense application of the duty on the part of a reasonable and prudent employer taking positive action for the safety of their employees. Therefore Mr Campbell ought to have followed through with the agreed action plan following the meeting on 15 January 2018. He failed to do so. However, from the defender's perspective, there was nothing being said by the pursuer to suggest he was doing anything other than getting on with his job. Silence on the part of the employee does not

obviate the need for the employer to deal with the grievance but silence does not assist the employee in overcoming the need to prove that breach of duty was creating a foreseeable risk of him developing a psychological injury.

[187] The pursuer voiced his concerns at the lack of proper handling of the grievance in December 2018, firstly to HR and then to Mr Allan on 31 December 2018. From then on, the pursuer was clearly telling the defender that there was a problem and the employer was aware, having received a sick-line, that the absence was, or at least might have been, linked to the issues highlighted in the grievance. It was clear, or ought to have been clear, to Mr Allan on 31 December, and indeed during further discussions when the pursuer repeatedly said that his grievance had not concluded, that the grievance which Mr Campbell was tasked with dealing with was extant.

[188] *Principle 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.*

For the reasons mentioned in the preceding paragraph, it was plain to the defender from 31 December 2018, having received the pursuer's sick line and having had the reasons for the absence explained to them that they had to give consideration to what to do about the situation. In determining what action to take, a reasonable and prudent employer, acting positively, must have regard to the specific and prevailing circumstances at the time the duty to act is triggered. This includes having regard to the health condition of the employee and listening to how the employee wished matters to be progressed. In this case, consideration had to be given to what was appropriate to resolve both the underlying issue i.e. the failure to investigate the grievance, and also to provide assistance to the pursuer in

relation to his health issues, particularly to minimise the risk of him developing a psychological condition or to prevent it from getting worse.

[189] *Principle 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.*

Whilst I am in no doubt that Mr Campbell has failed to do what was required of him following the meeting on 15 January 2018, as the foreseeability of injury question is only answered in the pursuer's favour from December 2018 onwards, the consideration of this principle does not extend back to when Mr Campbell was meant to be taking action. The question is what was the defender obliged to do once they became aware of the pursuer's absence in late December 2018, and the information which he gave to Mr Allan, on 31 December 2018. Mr Allan was not involved in the grievance, a position which the pursuer himself made clear as it was a bone of contention for him when Mr Allan made reference to the grievance including when he told the pursuer that the grievance was resolved. However, Mr Allan did e-mail HR, Mr Campbell, Mr McBrinn and Ms Fitzsimmons on 31 December following his meeting with the pursuer to say the pursuer did not feel that the grievance had been given closure. It does not appear that Mr Campbell was asked at that stage what his view was in relation to the status of the grievance but it is reasonable to assume that he would have said it had been resolved informally.

[190] Mr Allan asked the pursuer what closure would look like to which the pursuer said he had concerns that he would be singled out and the grievance would be held against him. Mr Allan provided appropriate assurances. He offered mediation with Mr O'Neill and asked if a different post would help. The pursuer said he would give both matters

consideration. He was offered but declined AXA counselling at that time. Further meetings were going to take place in the New Year when it was hoped the pursuer would feel better, including to assist him settle into his substantive post if he returned to that. The e-mail concluded by confirming that an Occupational Health Assist medical would be organised.

[191] When the pursuer met with Mr Allan, he had just been signed off for a month with stress. Nothing is recorded to say the pursuer was still looking for Mr O'Neill to be approached to discuss matters raised in the grievance at that time and the pursuer did not suggest there was any discussion about that with Mr Allan. Mr Allan's approach as someone who was not tasked with dealing with the grievance was to offer welfare assistance to an employee who was ill. Some time was being given to the pursuer at that stage to consider options. Working out what to do with the grievance was, understandably in my view, not the priority at that meeting, nor indeed during the currency of the sick line. The focus was on how best to help the pursuer through his health difficulties.

[192] A further meeting was held on 7 January 2019 between the pursuer and Mr Allan where it was recorded that the pursuer was feeling better but yet to start counselling through his GP. He was given AXA's details and Mr Allan asked the pursuer to call them. The pursuer was hoping to return to his post when his 28 day sick line expired later in the month. Arrangements would be made for a welfare meeting with his station manager prior to him returning to work. It was noted that mediation with Mr O'Neill was declined by the pursuer "for now" as was an offer of an alternative post. The above details were e-mailed to the same group including Mr Campbell.

[193] Thereafter, in the first few months of 2019, the focus was on holding welfare meetings with Mr Allan and/or Ms McGorm and / or Ms Fitzsimmons. During those meetings the pursuer expressed a wish that his grievance was not mentioned nor that it was

closed because he was ill and he wanted to focus on getting better. He also did not think it was appropriate for Mr Allan to discuss the grievance with him as it was Mr Campbell's responsibility. He repeatedly reiterated that the grievance was not closed but he would make the decision about pursuing it when he was fully fit. By this stage the pursuer was engaged with Cognitive Behavioural Therapy which he said was helping.

[194] The defender was alert to the fact that the pursuer may still pursue the grievance but their hands were tied throughout the first half of 2019 by the pursuer's expressed wish that nothing more was done with the grievance until he was fit and was ready to pursue it.

Which makes it all the more inexplicable as to why Mr Allan wrote to the pursuer not once but twice, in March 2019 and May 2019, to state that the grievance was closed. In terms of what action was appropriate to take given the prevailing circumstances, telling the pursuer that his grievance was closed was wholly inappropriate and was a clear breach of the duty of care which the defender owed to the pursuer. Mr Allan should have said nothing about the grievance until the pursuer was ready to take it forward. Otherwise, the action which Mr Allan took in arranging support etc. for the pursuer was entirely appropriate and designed to assist him in getting back to health and preventing any deterioration in his condition.

[195] *Principle 9: The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.*

The defender is a national company with a large workforce. Resources are not an issue. They were able to, and indeed did, re-deploy the pursuer in different locations at various stages and made additional offers of re-deployment and medical assistance which were

appropriate to the prevailing circumstances. The issue of what Mr Allan said about the grievance being closed is not relevant to resources.

[196] *Principle 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.*

No expert evidence was led from someone qualified to comment on grievance handling procedures or what they should consist of. For the reasons outlined elsewhere in this opinion, given the specific circumstances of this case, based on the fact that there are basic fundamental requirements of operating a grievance procedure, no expert evidence was required. Had there been any suggestion that Mr Campbell ought to have been doing more than is outlined in paragraph [154] or additional criticisms of Mr Allan were being made beyond him writing to the pursuer to say the grievance was closed, expert evidence would have been required to speak to failings in the existing grievance procedure and to address what the procedure ought to have consisted of.

[197] As already mentioned, the question of what steps ought to have been taken in the context of existing procedures and systems needs to be considered from 31 December 2018 onwards. The pursuer had made it clear he did not want any further reference to be made to the grievance. Therefore whilst no expert evidence was led on what reasonable steps the defender was required to take in terms of their existing grievance handling procedures, it seems fairly obvious that what was required was to focus on offering him welfare support and that is indeed what happened. Ms McGorm made it clear that her focus was on helping the pursuer and providing him with whatever assistance he needed. Appropriate counselling and psychological therapy was arranged. It was reasonable for the defender to conclude that was a course of action which would benefit the pursuer. There was no evidence led to suggest anything else was reasonably required in terms of positive action at

that time. But equally, the principle applies in this case to what the defender ought not to do. In my opinion Mr Allan ought to have refrained from writing to the pursuer to state his grievance was closed in the letters of 14 March and 9 May 2019. He had no basis for saying that. Writing to the pursuer in those terms, or indeed raising the issue of the grievance at all, ran the risk of causing additional stress and upset but whether it ran the risk of causing the pursuer to develop a psychological injury or make an existing condition worse is dependent on expert evidence.

[198] *Principle 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.*

As discussed above, the defender had a number of internal and external services available to their employees. They specifically discussed these with, and made them available to, the pursuer when they became aware that he was ill and that a psychological injury could be suffered by the pursuer. There is no criticising the support that was put in place for the pursuer after 31 December 2018, but this principle cannot preclude a finding of breach of duty if positive action is taken by an employer which is prejudicial, or potentially prejudicial to the pursuer's mental health (bearing in mind the pursuer was already ill when the letters were received by him).

[199] *Principle 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.*

This has no relevance to the present case.

[200] *Principle 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.*

As outlined above the reasonable and effective steps which Mr Campbell could and should have taken pre-dated, by almost a year, the time that it became foreseeable that the pursuer was susceptible to developing a psychological injury. When the foreseeability threshold was crossed, it was incumbent on the defender to offer the pursuer appropriate support and medical interventions. They did so and these were ultimately accepted by the pursuer to assist his recovery. Due to the pursuer's expressed wishes, further consideration of the grievance was not something the defender could progress until receipt of the pursuer's letter of 1 August 2019 which is beyond the time when any alleged breach of duty is said to have occurred. The only criticism of the defender which can be levied from 31 December 2018 to 1 August 2019 is the issuing of the 2 letters referring to his grievance being closed. That should not have happened and was a breach of duty.

[201] *Principle 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.*

It was argued by the defender that due to an absence of averments in the pursuer's pleadings in relation to "material contribution", the pursuer should not be permitted to claim damages if he is unable to prove that his injury was wholly caused by any breach of duty. In other words, he has periled his case on proving that his injury has been solely caused by any breach of duty. I respectfully disagree. This is a Chapter 36 case where abbreviated pleadings apply. I accept entirely that abbreviated pleadings do not remove the requirement on a pursuer to provide the defender with sufficient averments to allow them to ascertain, without due difficulty, the case being made against them. It is however a common part of our system that cases for psychological injury proceed on the

understanding that a pursuer will seek to prove that the injury was caused, failing which materially contributed to, by the breach of duty. The word "cause" encompasses the lesser of the two evils i.e. material contribution and it cannot have come as any surprise to the defender that the pursuer would adopt an argument that his injury was materially contributed to by the defender's breach of duty if he was unable to prove that it was the sole cause. A defender would be expected, as a matter of course, to meet any argument anent material contribution as much as they are required to meet an argument about cause. Indeed it was obvious from the terms of Dr Morrison's initial report where he mentions there were various factors at play which were relevant to the pursuer's psychological condition. The defender, in these circumstances, should expect a material contribution argument.

[202] I have found that there has been one breach of duty which arose at a time when it was foreseeable to the defender that a psychological injury could be sustained by the pursuer. However, the pursuer's case runs into significant difficulty on the issue of causation. Going back to first principles, it is for the pursuer to prove, on the balance of probabilities that, but for the defender's breach of duty, the harm would not have occurred. The "but for" test can be relaxed in cases where there is more than one potential cause of the pursuer's injuries i.e. the defender's breach of duty and some other cause which the defender is not responsible for.

[203] The cases of *Wardlaw v Bonnington Castings Ltd* 1956 SC (HL) 26, *McGhee v National Coal Board* 1973 SC (HL) 37 and *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 are authorities for the proposition that where there are two or more sources of danger, only one of which the defender is delictually liable for, factual causation will be

established if the pursuer can prove on the balance of probabilities either that the defender's breach of duty materially contributed to his injury or that the defender's breach of duty materially increased the risk of the pursuer sustaining injury. It does not matter if the sources of danger operate concurrently or consecutively. In *Sienkiewicz v Grief (UK) Ltd* [2011] UKSC 10, the Supreme Court re-emphasised that the principles in *McGhee* and *Fairchild* only apply when it is impossible to establish scientifically the cause of the pursuer's injury.

[204] In *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871, approved in *Fairchild*, the relaxation of the but for rule was held to only apply where there are two or more sources of the same noxious agent which caused the pursuer's illness or injury. If there are two or more noxious agents which could have caused the pursuer's illness or injuries the "but for" test will not be relaxed.

[205] In this case there were said to be a number of different factors at play, other than the failure to investigate his grievance, which were causing stress, anxiety and upset for the pursuer. These included 1) his failure to secure promotion and progress his career in the way that he had hoped, 2) his perception that his personal data had been released to a third party out with the defender's organisation i.e. he believed his confidentiality must have been breached when he was contacted by Mrs McBrinn, 3) the factors which gave rise to the grievance being submitted such as allegations of bullying and harassment and the change in attitude towards him by Mr O'Neill both at the time of submitting the first grievance and when, for example Mr O'Neill started calling the pursuer Mr Frame instead of Paul, 4) the pursuer's reaction to receiving the two letters in March and May 2019 telling him his grievance was closed, an issue which Dr Morrison was not previously asked about in court

and only briefly in relation to the first letter when giving evidence, 5) marriage problems and 6) financial concerns. The latter two issues, according to the pursuer, only arose after he suffered the psychological injury caused by the defender's failure to deal with his grievance. The data breach issue arose prior to him becoming aware of the defender's failure to deal with his grievance. Dr Morrison considered this to be a significant stressor. The failure to achieve promotion arose a number of months before the issues involving Mr O'Neill and may or may not have played a part in the development of his condition. What is clear is that the pursuer was already signed of work with stress prior to any breach of duty which gave rise to a foreseeable risk of injury.

[206] Dr Morrison was not asked to apply the "but for" test when compiling his reports. He did not attempt to analyse the various factors, when they were affecting the pursuer and determine whether, but for any breach of duty on the defender's part the pursuer would not have developed a psychological condition. He did not offer an opinion that it was impossible to differentiate between the stressors but none-the-less the issuing of the two letters in 2019 materially contributed to the pursuer developing the Adjustment Disorder. He was understandably reluctant to be drawn on whether a diagnosis of Adjustment Disorder would have been made, on the balance of probabilities, in 2019 or before. I accept he did offer a view in Chief that his opinion would probably have been the same but I got the clear impression that as he spent more time in the witness box, and was subjected to cross, he reflected and could not stand by that position. He made clear that he could not confirm any earlier diagnosis. That is an entirely understandable position for him to have taken not least of all because he had never been given details of all the potential contributing factors. He had not been able to properly consider the impact of each in so far as relevant to the development of the Adjustment Disorder, whether there was one sole cause for the

condition or whether, for example the issuing of the letters in March and May 2019 made a material contribution to the development of the Adjustment Disorder.

[207] *Principle 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.*

For the reasons mentioned above this does not arise in the present case.

[208] *Principle 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.*

This does not arise in the present case.

Decision

[209] For the foregoing reasons I have concluded that whilst the defender breached their duty of care owed to the pursuer for failing to investigate his original grievance from 15 January 2018, the threshold question is not met until 31 December 2018. There was no information available to the defender prior to then to alert them to the fact that the pursuer was at risk of developing a psychological injury as a result of any breach of duty on their part.

[210] From 31 December 2018 the defender, in the main, took all appropriate steps except in relation to Mr Allan writing to the pursuer in March and May 2019 to say the grievance was closed. That conduct amounted to a breach of duty on the part of the defender which created a foreseeable risk of injury applying the principles laid down in *Barber*.

[211] However, no medical evidence is available to the court, to allow the court to conclude that the pursuer's psychological condition is wholly or partly attributable to any

breach of duty between 31 December 2018 and 1st August 2019. The medical evidence can only be relied upon to confirm that the pursuer was suffering from a Psychological injury in 2022 and 2024. It does not permit the court to form a view that the breach of duty in 2019 caused or materially contributed to the pursuer developing the Adjustment Disorder.

[212] I therefore assoilzie the defender from the craves of the initial writ. Expenses are reserved. If parties require to have any expenses issues considered by the court they can request a hearing.