



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100143/2021

**Held in Glasgow on 6, 7, 8, 9 and 10 June, 11 July and 13 September 2022
(Members' Meetings)**

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**Employment Judge: Mrs M Kearns
Tribunal Members: Mr G Doherty
Ms L Taylor**

Mr C Ross

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**Claimant
Represented by:
Mr M Cameron -
Solicitor**

**The Board of Management of
Glasgow Clyde College**

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**Respondent
Represented by:
Ms S Monan -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous Judgment of the Employment Tribunal was that the claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant the sum of **£22,043 (Twenty Two Thousand and Forty Three Pounds)** in compensation.
2. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award.

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REASONS

1. The claimant, who is aged 57, was employed by the respondent as a lecturer from 22 August 1996 until his resignation on 5 October 2020. On 9 January 2021, having complied with the early conciliation requirements, he presented an application to the Employment Tribunal in which he claimed constructive unfair dismissal. The respondent resisted the claim.

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Evidence

2. The parties lodged a joint bundle of documents (“J”) and referred to them by page number. The claimant gave evidence on his own behalf. The respondent called the following witnesses: Catherine Hossack, HR Adviser; Margaret Hamilton, former Senior Lecturer; and Nicola Leonard, Senior Lecturer.

Issues

3. The issues for the Tribunal were:
- (1) Whether the claimant was dismissed;
 - (2) If so, whether the dismissal was unfair;
 - (3) If it was unfair what financial award/compensation, if any is due to the claimant.

Findings in Fact

4. The following material facts were admitted or found to be proved:-
5. The respondent is the Board of Management of Glasgow Clyde Further Education College. The claimant began his employment with Langside College on 22 August 1996 and was employed as a lecturer in politics in the school of social sciences (J121). In or about 2014, Langside College merged with Anniesland College and Cardonald College to form Clyde College. Of the three, Langside was the most academic college. The other two colleges were more vocational. At the time of the merger, the Highers programme at Langside had around 1,000 students. Cardonald had been the largest of the three colleges. The Principal of Cardonald College became the Principal of the new Clyde College.
6. All lecturers of the respondent are required to abide by the rules of the Scottish Qualifications Agency (“SQA”) and where applicable, those of the Scottish Government’s ‘Curriculum for Excellence’ (“CfE”). The claimant has thirty years’ experience of teaching. He has an M.A. in Politics from Glasgow University; a post-graduate MA in political philosophy from the University of York; a PhD in political philosophy from Glasgow University; a Masters degree in Education from the Open

University and a PGCE in higher and further education from Strathclyde University. He is a fellow of the Higher Education Academy. The claimant was also an SQA inspector between 2006 and 2014. The claimant's goal was not only to deliver his courses but at the same time to teach his students to read, reason and write well. The claimant taught politics, philosophy, modern studies, communications and criminology to Higher and/or National Certificate 6 ("NC6") level, as well as a number of access courses to Higher National Certificate ("HNC") and Diploma ("HND") standard.

7. Highers are level 6 courses assessed externally, whereas NC6 courses are also level 6 but they are internally assessed, including by open book assessment. Following the merger, the respondent's Highers programme was reduced and Advanced Highers moved to Glasgow Caledonian University. The claimant felt that following the merger there was a much greater focus by the respondent on performance indicators (PIs). Externally assessed courses, such as Highers had lower PIs than vocational courses such as NC6s with continuous assessment and either no exams or open book exams. The claimant believed that a 'spoon-feeding' culture was developing in Scottish further education whereby - in the absence of a final exam - lecturers were encouraged to take the unit specification; reverse engineer it to create the test answers; distribute those answers around the materials and get the students to regurgitate them in assessments with no real understanding of the subject. The claimant considered that this practice amounted to excessive direction of students in relation to assessments, and that it was unethical and a breach of the Scottish Qualifications Agency ("SQA") and Curriculum for Excellence ("CfE") rules. In the courses he taught, the claimant aimed for a bona fide assessment. However, he believed that he and other lecturers - who were both teaching and internally assessing students for courses - were coming under pressure from the respondent and also from the students to engage in 'excessive direction on how to meet national standards'. It was his opinion that this constituted 'centre malpractice' under the SQA rules (J111). CfE requires (J110) that teachers correct students' grammar and spelling and the claimant would do so when marking student work. However the students disliked this and when the

claimant made such corrections they sometimes complained about it on feedback forms.

8. The respondent has a disciplinary procedure (J60 – 75). The claimant had a clean disciplinary record and was never subjected to the respondent's disciplinary procedure. The respondent did not formally appraise lecturer performance. Her Majesty's Inspectorate of Education was the only body to have assessed the claimant's teaching performance and they had done so positively on several occasions.
9. The respondent has a capability procedure (J88). The claimant was never subjected to this. The Capability Procedure (J92) contains informal and formal stages and stipulates: "*The employee will have the right to be accompanied by a trade union representative, or work colleague at all stages of the procedure.*" The informal stage requires that the employee will be given an indication of the matters to be discussed /areas of concern prior to any meeting and that evidence in support of the issues of concern should also be given to the employee.
10. The respondent also has a complaints handling procedure (J76) and a specific procedure for handling complaints made by students about a member of staff (J86).
11. Separately from any of the above procedures, the respondent routinely seeks the following two types of student feedback. Firstly, approximately twice a year, individual lecturers invite student feedback for their own use to inform themselves about the students' learning experience and to enable them to adapt their teaching methods if necessary. Secondly, senior lecturers and course co-ordinators issue standard forms to students to conduct a course review. Students are told not to make comments about individual lecturers on these forms. The forms are to seek comments on courses, not individual lecturers. Student feedback is not treated by the respondent as a reliable indicator of lecturer conduct or performance.
12. From time to time, students complain about members of staff. Between 2015 and 2018 the respondent received five complaints about the claimant. None of them was upheld and one resulted in the student who had complained being reprimanded.

13. On or about 2 March 2016 the claimant emailed Catherine Hossack (J138) in the respondent's HR department ahead of a meeting that he had scheduled with her. In the email the claimant stated that the respondent was in breach of its obligation to provide a safe system of work: *"which includes making it possible for the staff to do their jobs without experiencing extremely high levels of stress and upset."* The claimant said that the alleged breach was affecting his health. In the email he identified IT problems, room temperatures and problems with smart boards. On the subject of assessments the claimant stated: *"At the moment the Quality Unit have been licensed to impose their view of the assessment process on the college. There's an obsession with "prior verification" and ensuring that all assessment procedures are watertight. This, of course, is all that they see from their perspective. The result is that the staff re-use the same assessments year on year, and the fear of becoming the victim of a blame culture means that all of the advantages of the Curriculum for Excellence are lost: we're burning huge amounts of class time on meaningless assessments because nobody in Quality seems willing to actively solicit the opinions of the staff regarding the impact of their procedure on teaching and learning."*
14. On or around 7 March 2016, Ms Hossack asked the claimant to complete a stress risk assessment (J141 – 156) in which he was to summarise each stressor. The claimant described unreliable IT and lack of support from non-teaching staff. He also stated: *"The entire curriculum is a mess because the SQA can't do their jobs, and yet they are the arbiters of whether they've done their jobs and whether we've done ours.... the system is complete gibberish from start to finish. The fact that a student's answer mirrors a marking scheme tells you absolutely nothing about what stands behind that fact, nor about the student's abilities going forward. It's all complete and utter rubbish, and the new Highers and National 5s are worse. The CFE was supposed to be a solution to this boneheaded prescriptivism but has now become an even more detailed and cretinous exercise in ensuring that answers mirror marking schemes, only now the students sit with their books and notes in front of them. I must have conducted 30 or more external verification visits. I could have pink slipped every single centre, because the system is completely meaningless, like all of the SQA's systems. They don't know what they're doing,*

and if you try to do a reasonable job you increase the chance that you'll be found to be at fault." He went on to say that his perception and that of others was that 'Quality' and the college management generally were convinced of the merits of an 'audit, punish and control culture'. He referred to a 'CYA' culture produced by management in which staff in supervisory positions tried to insulate themselves from all criticism. He spoke about his former work as an SQA external verifier going round colleges and said that colleges that work presented a united front to outsiders (including SQA verifiers) whereas failing colleges asked SQA verifiers to feed back to 'Quality units, which were keen to hear criticisms,while the hunted (and often casualised) staff ensure that every sheet (including what we laughingly refer to as the students' work) looks as it should." In the section on risk control measures (J147) it was noted that the claimant's issue was that: "Our system of qualifications is fundamentally flawed." Under 'potential solutions suggested by employee' it was noted: "Make it clear to the SQA that they've failed, express this opinion publicly and consider using non-SQA qualifications. [Never going to happen]." Once the claimant had completed the stress risk assessment, he met with Ms Hossack and his then line manager, Margaret Hamilton. Ms Hamilton emailed the claimant following that meeting (J158) confirming a list of action points she would now take forward. The next day (J160) she emailed the claimant again with an update on the actions she had taken. One of these related to alternative assessment methods the claimant had suggested for modern studies. Almost all the remainder concerned IT problems.

15. In September 2017 the claimant was experiencing insomnia which he felt was affecting his work. Ms Hossack asked him to complete another stress risk assessment (J184 - 98). The claimant reported IT problems and issues with non-teaching staff not fixing things. He did not raise any issue about feeling under pressure to give students excessive direction on how to meet assessments or 'teach to test'. Ms Hossack referred the claimant to Occupational Health (J206). OH reported back on 26 September 2017 (J277) to say that the claimant was having difficulty sleeping but that he was in good physical health with no evidence of underlying mental illness. The OH physician stated: "He describes long-standing intermittent insomnia. He is most likely to experience sleep disturbance when he

has been feeling frustrated or annoyed by issues at work.” Ms Hamilton and Ms Hossack met with the claimant on 2 October 2017 to discuss the OH report. A note was kept (J279).

- 5 16. When Ms Hamilton was the claimant’s line manager she would meet with him around three times a year. The senior lecturer in Anniesland campus, established a practice of giving Ms Hamilton feedback forms that mentioned the claimant and Ms Hamilton told the claimant from time to time that feedback had been given about his teaching. The claimant was not told the source of the feedback or given copies. [It was not recovered in this litigation.] The claimant was unhappy about this use of student feedback and his union informed him that student feedback was not supposed to be used in this way. On 26 March 2018 Ms Hamilton told the claimant: 10 *“if we keep getting negative comments on the feedback forms you’ll be taken down the disciplinary route.”* On one occasion Ms Hamilton discouraged the claimant from discussing tax credits in his class on ‘Social Issues in the UK’ after receiving feedback that some students who were in receipt of tax credits did not like it being 15 discussed.
17. In or around September 2019, Nicola Leonard took over from Margaret Hamilton as the claimant’s line manager. Her approach was the same as Ms Hamilton’s.
18. The academic year 2020/21 started on 28 August 2020. Classes at that time were 20 virtual because of the pandemic. On or about 10 September 2020 the claimant emailed Lynne Dickie, senior lecturer for social sciences (239) alerting her to the misbehaviour of a year 2 HND Criminology student in one of his classes that day.
19. By email later on 10 September 2020 (J240), Ms Dickie received a request from the same year 2 HND Criminology student (about whose behaviour the claimant had complained earlier that day) to change to Geography. The student stated that 25 she was not happy with the claimant’s teaching: *“I just got off my first class with him this year and I am in total disbelief the way he teaches and structures his class...Mainly what he does is complaining about how uneducated most people are and how much he knows.”* The email was passed to Ms Leonard by Ms Dickie.

20. On or about 11 September 2020 Ms Leonard received an email from David Marshall, Vice President for student experience. Mr Marshall told Ms Leonard that a student had tweeted to say she was going to make a formal complaint about the claimant. [The email was not produced to the Tribunal, nor was this put to the claimant. The Tribunal were not told whether the tweet was from the same student who sent the email of 10 September 2020 or a different student.] Mr Marshall had suggested Ms Leonard might want to speak to the student rather than this becoming a formal complaint. Ms Leonard contacted the student and met with her and her student representative. The student told Ms Leonard she had found the claimant's lesson confusing. She said the claimant had told stories during the lesson and that she did not understand their relevance. She mentioned an issue to do with burns victims and triage. She mentioned dyslexia.
21. On Tuesday 15 September 2020, just over two weeks into the new academic year, Ms Leonard requested the claimant to attend a Zoom meeting with her. Her goal for the meeting was to speak to the claimant about the student tweet and the email described in paragraph 19 above but she did not communicate this to him in advance. She notified the claimant about the meeting by sending him a Zoom link a couple of hours beforehand. She did not tell him what the meeting was about.
22. At the meeting, Ms Leonard told the claimant there had been feedback and complaints that students did not like or did not understand his teaching. Ms Leonard said the students did not understand the learning intentions and she told the claimant he must begin his classes by setting out the learning intentions. Ms Leonard also raised a number of specific matters with the claimant at the meeting. She said that the claimant had told his students what political party he supported. On this point, the claimant explained that he had attended staff development training run by the respondent in 2015. On the training course he had selected, they were shown how to use Twitter to teach students how to interact in a public forum and as a powerful tool for literacy. The claimant told Ms Leonard that he had shown the students his Twitter account and had said: 'You can follow me'. When he had shown his Twitter account to the students there had been a picture on it of himself with some political activists in Shettleston. You could see from the picture which political party he supported.

23. Ms Leonard told the claimant that he had inappropriately shared his personal opinions on Covid. The claimant responded that he had no personal opinions on Covid. However, he said that health and wellbeing were part of the CfE curriculum and it had been discussed with students because there had been a news story about the varying vulnerability of people to Covid. He had observed to the students that their own chances of dying of Covid were very low because they were young. He said he was exploring with them what it was about the reporting of these issues that made them think their vulnerability was so much greater than it really was.
24. Ms Leonard told the claimant at the meeting that there had been a complaint in the student feedback that he had wasted students' time with personal stories about his friends. The claimant responded that some students have affective barriers. Many have a set of beliefs about how the world works, their place in it and what might be possible. He said that in order to address this, he had told them about a book written by Jeremy Paxman called 'Friends in High Places'. In the book, Mr Paxman had described how kids who go to Eton get meetings with - for example - the former Secretary General of the United Nations. This changes their view of the world and they see themselves as the kinds of people who are entitled to casually chat with the Secretary General of the UN. The claimant explained to Ms Leonard that he was attempting something similar with his students. If, as well as teaching criminology students about the legal system, he could say to them - for example - that here was a picture of a Sheriff he knew personally, he felt that that helped to break down the barriers and make the subject relatable for them.
25. Ms Leonard said that one feedback form had stated that he had spoken inappropriately to a student with dyslexia. In relation to this, the claimant told Ms Leonard that in a virtual lesson, the students had completed a reading exercise, and he had asked them how it had gone. One student said she had found it quite difficult because she had dyslexia. The claimant told Ms Leonard that he had replied to the student: *"I'm not allowed to speak about dyslexia, but you should look at Durham University's work. They've just won a British Psychological Society prize"*.
26. At the end of the meeting the claimant felt that Ms Leonard was exasperated and unhappy with him but that she had not disputed his explanations and had accepted

that he had done nothing wrong. However, he felt that she was micromanaging him and inappropriately telling him how to teach his classes. He considered she was placing him under pressure to 'teach to test' or 'spoon-feed' students in a manner he considered unethical.

5 27. After the meeting (at 12:49) the claimant sent an email to Catherine Hossack in HR inquiring whether there was any possibility of a severance/redundancy payment (J248). Ms Hossack responded at 14:48 (J247) advising that voluntary severance was not available at that time. (The claimant had, on occasion inquired about voluntary severance before.)

10 28. Around 17:20 on 15 September the claimant had a WhatsApp exchange (J241) with a colleague with whom he is friendly. The colleague said: "*Ha! You looking to bow out?*" The claimant replied: "*Absof'inlutely! But I want a little piece of cheese! Just a little slice of cheese. The Scottish education system has been reduced to, i) describing a rudimentary essay in abstract language (and calling it a "Specification"), ii) having a graduate bang out an essay matching that description (and calling it a "Handout"), iii) contriving "activities" that have no developmental justification, but are designed to create familiarity with the "Handout's" content, and iv) "marking for content": ensuring the student's version is in that wonderful gray zone, a twin of the "Handout" but not an identical twin. It's a total farce...*" He talked about people who "*happily use the expression "learning intention" to mean "the specific thing they'll put on paper so they can be 'moved onto the next level'"*". The claimant went on: "*I'm absolutely sick of it. The Higher exams are bad, but bad as they are they reveal something. [], my former colleague, had 100% passing in the HN, and 51% in the Higher, same content. Loved by the students. I go to Anniesland and I'm hated. But look at my Higher Modies and theirs. This pandering only works if there's no test at all. Copying, even memorising, they're fine. And in subjects with their origin in the colleges the results can be okay. But ask a question that tests deep understanding and literacy to any degree and this happy-clappy bullshit is revealed for what it is. ...We're not changing students. We're collaborating with the students to change bits of paper...."*

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29. On 22 September 2020 the claimant emailed Ms Leonard (J249) to say that he had had difficulties with a student who had complained when the claimant had tried to cajole her to put her camera on in a virtual lesson in accordance with management instructions. The claimant was upset when Ms Leonard emailed him back saying:
5 *“I think this student was just trying to say that they had technical issues this morning.”* The claimant considered that Ms Leonard’s response was disingenuous.
30. By email dated 2 October 2020 (J238) a politics student who was three classes into the claimant’s politics course complained that she and some classmates were struggling with the class.
- 10 31. On 5 October 2020 at 11:12 Ms Leonard sent the claimant an email (J251) in the following terms:
“Hi Craig, please find attached a summary of what we agreed at our previous meeting following informal complaints raised by students from 2 different class groups.
- 15 *As you know SLs [senior lecturers] have been meeting with class reps and class groups over the last two weeks and some of the issues we discussed are still evident. Of the 7 social science groups that you teach all but one has raised issues concerning difficulty in understanding course content because of your delivery style. It is essential that your teaching practices are adapted to maximise student experiences and outcomes. Several students have requested to move out of your*
20 *HN classes into geography with this having an impact on a colleague.*
- Is there any training that you would like? I am happy to look at options that could support you further.*
- Would you like to shadow a colleague for a short period? If this is something that*
25 *you think would benefit you, please let me know.*
- Can we meet at 2:00 PM this afternoon to chat through the above? Zoom link below. If this does not suit just let me know.*
- [Zoom link]*

I would like all SLs to regularly get course feedback (i.e. monthly) in order that we can improve all aspects of delivery. Can we meet again on the 9th November at 2pm to follow up on these issues. Thanks”

32. Attached to the email was Ms Leonard’s summary of the 15 September meeting which was in the following terms:

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“Craig Ross

Following our meeting on 15th September, please find below a summary of what we discussed:

1. *At the beginning of every class students to be told what the learning objectives are. It would be advisable to provide the students with these objectives in written format.*
2. *Rather than long periods of lecture, you should convey information in short bursts e.g. 20 minutes.*
3. *Classes must be interactive. At the end of a period of exposition students should be given an activity e.g. written task, group task.*
4. *In addition to teacher exposition, there should be at least two other types of activity in every class. The type of activities can vary from class to class.*
5. *No personal information should be given to students.*
 - a. *Students should not be told what political party you support.*
 - b. *Personal views on COVID should not be discussed in a class.*
 - c. *Students should not be told stories about your friends.*
6. *Students have indicated that they find it difficult to understand the relevance of your examples particularly when they relate to your friends. Students have said that classes can just feel like a story about your life and thus find it difficult to identify the learning intentions. Students should be taught concepts/ theories and then asked to find examples for themselves. This could be undertaken as a research activity or group task.*

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7. *At the end of the class, students should be asked if they understand all learning objectives. A simple question and answer session could be used to verify their understanding.*
8. *All class environments must be inclusive. Students should not be made to feel uncomfortable. The College recognises dyslexia as a learning need and provides support for those students diagnosed with it. No view that contradicts this should be expressed in a class environment. Dyslexia Awareness training can be provided.”*
33. The claimant read over Ms Leonard's email and attachment and considered that it was a detailed instruction to engage in spoon-feeding or 'teach to test' which would amount to malpractice. It was not correct (as Ms Leonard stated in the email) that the attachment was a summary of what had been agreed at the meeting. On the contrary, the claimant considered that the email and attachment indicated that Ms Leonard had accepted the student complaints against him without investigating them as the procedure (J86) requires. He also felt the email and attachment sent on 5 October contained findings of serious fault on his part and indicated that his teaching was impaired and required remedial action to reach a minimum standard. The claimant considered that this was unjust. He felt he had been effectively accused of gross insensitivity and possibly discrimination toward the student with dyslexia. The claimant's understanding of Ms Leonard's email was that she would be seeking feedback and using this to monitor his performance monthly going forward to ensure he was complying with the eight points in her attachment. However, this appeared to be happening outside the respondent's capability procedure. He had not been provided with any written copies of the student feedback Ms Leonard had referred to. The claimant felt that all negative reactions of students had been assumed to be well founded and treated as complaints and that this was unbearably stressful and he could tolerate it no longer.
34. The claimant went for a walk to try and calm down and decide what to do. However, he decided that he had no alternative but to resign for the reasons set out in paragraph 33 above.

35. On 5 October 2020 at 13:51 the claimant emailed Lorraine McGaw (J255), Assistant Principal Human Resources in the following terms: “*Catherine Hossack appears to be away from the college until the 12th, so I've had to send this to you. I have to inform you that I consider myself to be constructively dismissed by you. The behaviour of your managers is unreasonable, irrational, a breach of my contract of employment, injurious to my health and it makes it impossible for me to do my job. There have been very significant issues for a long time. This has become acute and utterly intolerable recently. I can spell out in detail exactly what has been done, but it might suit your interests if I do not do this at this stage.*”
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36. At 16:09 on Monday 5 October 2020 Ms McGaw replied to the claimant’s email (J254). In the email she stated: “*If there is anything I can do to assist in a discussion which might allow your employment to continue, please let me know within the next 7 days. If I do not hear from you in that regard within the next 7 days then I shall organise for your P45 to be processed with the leaving date of 5 October.*”
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37. On 7 October 2020 the claimant followed up his earlier email with a Further email (j265) in which he set out the discussions he had had with Ms Leonard on 15 September and confirmed the reasons for his resignation. In it he stated inter alia: “*On the 15th September I had a Zoom meeting with Nicola Leonard. She said that there had been complaints. I received an e-mail on the 5th October telling me that this meeting had been about “informal complaints”. I didn't know we had an informal complaints procedure.*
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- To put what follows into some kind of context, I sent an e-mail to Nicola Leonard on 22nd of September titled “Cameras, students, staff stress”, telling her that a student had made a complaint to me, in that she had been “.. made to feel awkward” by my attempts to cajole her into turning on a camera on Zoom. I said that we had a complaints culture, and it causes the staff tremendous stress if they are asked to do something and then the students are able to claim that whatever was done was wrong, because of how it made them feel. Nicola replied “I think that this student was just trying to say that they had technical issues this morning”. Now this is just untenable. In no way is that what the student was doing, and it's plain on the face of the e-mail. They were making a complaint. If that e-mail had been sent to one of*
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the managers or SLs it would have been treated as a serious complaint, particularly when we look at what does get treated as a complaint. But because the context suggested managerial error Nicola chose to add to my stress by imposing a gloss on the e-mail which is completely untenable.”

5 *In her e-mail of the 5th she says, “All class environments must be inclusive. Students should not be made to feel uncomfortable. The College recognises dyslexia as a learning need and provides support for those students diagnosed with it. No view that contradicts this should be expressed in a class environment. Dyslexia Awareness training can be provided”. I am held to have done something*
 10 *seriously wrong, and to be so ignorant I apparently need dyslexia awareness training....*

“A central issue for Nicola was the discontent of two students in an HN Criminology class. I complained to Lynn Dickie about the behaviour of those students at the break in the morning in question. At no point has that been addressed by anyone...

15 *“I’ve tolerated a lot over the years, including serious wrongdoing. But I’ve never been absolutely compelled to personally do something wrong. Nicola Leonard makes it clear in her e-mail of the 5th what’s to happen. The SLs will be giving her monthly feedback, and I’m to be micro-managed into doing what she considers appropriate practice. Her practice isn’t appropriate and I’m not doing it. The*
 20 *relationship of mutual trust and respect that has to exist between the college and me is over. It was ended by your managers.”*

38. At the date of termination of employment the claimant was paid an annual salary of approximately £41,560 gross. His monthly gross pay was £3,458. His monthly net pay was £2,379 ($\text{£2,379} \times 12 / 52 = \text{£549}$ weekly). He had 24 completed years of
 25 employment with the respondent and its predecessors. The employers’ pension contribution (23% of basic pay) in respect of three months’ continued employment would have been £2,386.

Discussion and Decision

39. In a claim for constructive unfair dismissal, it is for a claimant to establish that he has been dismissed. So far as relevant, section 95(1) of the Employment Rights Act 1996 (“ERA”) provides that an employee is dismissed if.....and only if

5 “(c) *the employee terminates the contract under which he is employed.....in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.*”

40. The circumstances in which an employee is entitled to terminate a contract without notice by reason of the employer’s conduct are to be judged according to the
10 common law. The claimant must establish a repudiatory breach of contract by the respondent. In Malik v BCCI [1997] IRLR 462 HL this was described as occurring where the employer’s conduct so impacted upon the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract.

15 41. In this case, the claimant requires to prove that:

(i) There was an actual or anticipatory breach of a contractual term by the respondent;

(ii) The breach was sufficiently serious (fundamental) to justify his resignation;

(iii) He resigned in response to the breach and not for any other reason; and

20 (iv) That he did not delay too long in resigning.

42. The claimant’s case was that the respondent was in breach of the implied term of mutual trust and confidence. That term was described by the House of Lords in Malik v BCCI (supra) as a term that:

25 “*The employer shall not, without reasonable and proper cause conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.*”

43. In order to establish a breach of the implied term the claimant requires to prove that the respondent was guilty of conduct that was so serious as to go to the root of the trust and confidence between employer and employee and destroy it or be calculated or likely to destroy it. Furthermore, there must be no reasonable and proper cause for the conduct.
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44. On behalf of the respondent, Ms Monan submitted that in summary, the claimant had alleged three breaches of the implied term. Rearranged in chronological order these were: (i) the respondent pressurised the claimant to commit teaching malpractice; (ii) the respondent assessed and critiqued the claimant's conduct and performance and required him to change his teaching methods as a result of student feedback and complaints; and (iii) the respondent caused the claimant stress at work which led to him suffering insomnia and failed to act on this. In his final oral submissions for the claimant, Mr Cameron helpfully clarified that his main submission on the basis of the evidence heard was that the breach of the implied term was a 'standalone breach' in relation to the email of 5 October and the events leading up to it. Thus, the claimant's case came to centre on Ms Monan's issues (i) and (ii) only and we have considered it in those terms.
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45. Ms Monan referred the Tribunal to the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 in which the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee has been constructively dismissed:
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- (a) What was the most recent act on the part of the employer which the employee says caused or triggered his resignation?
 - (b) Has he affirmed the contract since that act?
 - (c) If not, was that act by itself a repudiatory breach of contract?
 - (d) If not, was it nevertheless part of a course of conduct comprising several acts which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?
 - (e) Did the employee resign in response or partly in response to that breach?

46. We adopt that approach and first consider (a) and (c) together.

(a) What was the most recent act on the part of the employer which the employee says caused or triggered his resignation?

(c) If the contract was not affirmed, was that act by itself repudiatory?

5 (i) *Has the claimant shown that the respondent pressurised him to commit teaching malpractice?*

47. The email and attachment of 5 October 2020 and the events leading up to it were said to breach the implied term in two ways. The first allegation (i) was that the claimant was being placed under pressure by the respondent to engage in
10 'excessive direction' of students in meeting national standards and that this constituted 'centre malpractice' under the SQA and CfE rules (J1111). This was denied by the respondent. The Tribunal is required to consider objectively whether this aspect of the respondent's alleged conduct took place. The onus of proof is on the claimant. The claimant testified that at the time of his resignation his perspective
15 was that for a long time he had been placed under pressure from his line managers Margaret Hamilton and latterly Nicola Leonard to ignore the SQA and CfE rules about avoiding excessive direction. The claimant argued that whereas previously he had been required to *tolerate* excessive direction of students going on around him, the meeting of 15 September and email of 5 October 2020 were the first time
20 he was being required by the respondent to *participate* in it.

48. The documentary record showed that insofar as the claimant had raised the issue of excessive direction with the respondent prior to September 2020, he had done so in general terms and not really in terms specific to the respondent. The Tribunal noted that for example, the claimant's concern as expressed in his stress risk
25 assessment on 7 March 2016 at J141 – 56, was not that he was being pressured by the respondent to tolerate centre malpractice as defined by the SQA and CfE rules; but that the whole SQA and CfE system was itself producing the result that the answers in student assessments 'mirrored marking schemes'. The claimant voiced a belief - both in the documents and in his testimony - that pressure to
30 engage in excessive direction or 'spoon-feeding' of students was part of a wider

problem in Scottish education generally. Indeed, he testified in cross examination:
“*There is serious wrong-doing everywhere in further education*”. “*Everybody in FE knows there’s a spoon-feeding culture regarding exams*”. With regard to the specific issues the claimant had raised with the respondent prior to 2020, the Tribunal noted
5 that in the main, they concerned problems with IT, Smart Boards, temperature in classrooms etc. (See J157 – 161 and the stress risk assessment in September 2017 at J183 – 98). The exception to this was the email the claimant wrote to Ms Hamilton on 21 September 2017 (J 201 – 2). In the final paragraph of that email the claimant does complain about being pressed by a student to go over what they
10 have to do in the assessment. However, he does not suggest complicity by management in this.

49. The Tribunal considered that the claimant had not established that what he was asked to do by the respondent amounted to ‘excessive direction’ or centre malpractice. In the absence of expert – or at least - authoritative and objective
15 evidence on the dividing line between permissible and excessive direction as applied to the facts of this case, we were uncertain where that line lay. Ms Leonard’s meeting note (J253) did not immediately give the impression that she was instructing the claimant to spoon-feed his students. Indeed, the claimant acknowledged this in his evidence by observing that to an ‘outsider’ the note ‘looked
20 fine’ but an ‘insider’ would see it differently. We accepted that the claimant was sincere in his interpretation. However, we concluded that he had not proved to the Tribunal that the respondent pressurised him to commit teaching malpractice.

(ii) *Has the claimant shown that the respondent assessed and critiqued his conduct and performance and required him to change his teaching methods as a result of student feedback and complaints?*
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50. Mr Cameron submitted on behalf of the claimant that this case was better viewed as a standalone breach explained by previous acts, though it could also be viewed as an accumulation of acts ending with the material last straw breach. Mr Cameron founded his submission principally on Ms Leonard’s conduct of the 15 September meeting and her email and attachment of 5 October 2020. He cited Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 CA
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as authority for the proposition that a sleight to an employee's professional integrity can be a repudiatory breach of the contract of employment. In that case, Professor Buckland, when marking 16 student resit exams had failed 14 of them. His marks were endorsed by a second marker. The results were further checked and confirmed by the board of examiners. However, shortly thereafter, the programme leader on the course had taken it upon himself to re-mark the papers. The University set up an Inquiry which largely vindicated the claimant, but he was not mollified, considered that his integrity as an examiner had been impugned and resigned. Mr Cameron submitted that if the circumstances in Buckland set the standard, then the claimant met it with room to spare because the insult to his professional standing represented by Ms Leonard's conduct of the 15 September meeting and subsequent email of 5 October were a much more serious insult to the claimant than the one incident suffered by Professor Buckland.

51. The test of whether there was a repudiatory breach of contract is an objective one. In his written submissions on behalf of the claimant, Mr Cameron stated: "*the claimant resigned in response to Ms Leonard's comments at the meeting on 15 September and, in particular, the aggravated repudiatory breach committed by her 5 October e-mail. The contents of that communication were a material breach of the contract of employment. They impugned the claimant's professional conduct and integrity. They were predicated on the false, unreasonable and unexplained belief that the claimant had behaved inappropriately in certain of his classes. The e-mail communicated an accusation of at least unfair treatment and possibly even discriminatory treatment of a student with learning difficulties when Ms Leonard had no good reason for assuming such conduct.*" In order to establish a breach of the implied term the claimant requires to prove that (i) the respondent was guilty of conduct that was so serious as to go to the root of the trust and confidence between employer and employee and destroy it or be calculated or likely to destroy it and (ii) that the conduct was without reasonable and proper cause. The Tribunal considered firstly whether the conduct in question was likely to destroy or seriously damage the relationship of trust and confidence.

52. The undisputed evidence before the Tribunal was that the respondent did not formally appraise lecturer performance. The only body to do so was HMIE and they

had assessed the claimant's teaching positively on several occasions. Ms Leonard stated in evidence that she was not familiar with the claimant's subject area and would not be able to give him advice on what he should be teaching. Both Ms Hamilton and Ms Leonard accepted in cross examination that student feedback is not a reliable indicator of lecturer performance. Ms Leonard accepted that there are only two types of student feedback; that which lecturers seek from students directly and course reviews conducted by senior lecturers or course co-ordinators. Ms Leonard confirmed that students are told not to make comments about individual lecturers on these forms and that the purpose of the forms is to seek comments on courses, not individual lecturers. Ms Leonard testified that she had never received any formal complaints about the claimant in her time, that he had never to her knowledge been subject to the competency procedure and that he had a clean disciplinary record. The claimant was highly qualified, had thirty years' experience in teaching and was a fellow of the Higher Education Authority.

53. Against that background, we considered the meeting of 15 September and email of 5 October 2020 with attachment. The email (J251) states: "*Please find attached a summary of what we agreed at our previous meeting following informal complaints raised by students from 2 different class groups.*" Firstly, the claimant did not accept that the attachment reflected an agreement. His view was that at the meeting on 15 September he had given explanations to Ms Leonard and had made clear that he had done nothing wrong and that she had accepted this. In his oral submissions for the claimant Mr Cameron stated that the tone of the attachment (J253) indicates that it is clearly not a list of agreed actions. (It refers to "*what we discussed*" rather than agreed.) He submitted that these were instructions and reprimands made in such a way that a reasonable person would be grossly offended by them. We agreed that on an (as far as possible) objective reading of the attachment (J253) there was some force to this submission. On balance, we accepted Mr Cameron's submission on this point.

54. The email (J251) then goes on to state that senior lecturers have been meeting with class reps from the claimant's 7 social science groups over the last two weeks and that all but one "*has raised issues concerning difficulty in understanding course content because of your delivery style.*" The email goes on: "*It is essential that your*

teaching practices are adapted to maximise student experiences and outcomes. Several students have requested to move out of your HN classes into Geography with this having an impact on a colleague". The email then asks whether the claimant would like training or to shadow a colleague, requests his attendance at a Zoom meeting on less than three hours' notice and finishes by saying that senior lecturers will be getting monthly course feedback "*in order that we can improve all aspects of delivery*". A further meeting is notified in a month's time. We concluded that the language and content of this email, sent as it was to an experienced and highly qualified professional was clearly likely to destroy or seriously damage the relationship of trust and confidence.

55. In her evidence in chief Ms Leonard was asked why she had asked the claimant whether there was any training he would like and also if he would like to shadow a colleague. In relation to training she answered: "*We were in a state of flux because everything had gone to online learning. Training could have been provided for that or any other issue he needed.*" In relation to the suggestion of shadowing a colleague, her answer was: "*Because everything was in a state of flux. Some members of staff adapted better than others. It would have been of benefit to shadow someone copy coping very well with online learning.*" She implied in both answers that these suggestions related to the switch to online learning. We felt that although the switch to online learning during the pandemic was part of the background, that was not the sense her email conveyed. The suggestion of training and shadowing are immediately preceded in the email by a paragraph that implies criticism of the claimant's delivery style and teaching practices. It is quite clear from the terms of the email and attachment that it is not about the switch to online learning but about teaching practices generally.

56. With regard to the attachment, we did think that viewed objectively, the clear implication of Ms Leonard's note on page J253 coupled with the wording of the covering email was that she had accepted the student feedback/ informal complaints as evidence of the claimant's performance; had concluded that the claimant was not currently performing in the respects outlined; and that she was giving him detailed instructions on how to teach his classes. (We consider the issue of whether Ms Leonard had reasonable and proper cause for this below).

Paragraph 5 (on J253) implies that Ms Leonard considers that the claimant has made inappropriate personal disclosures to students. Similarly, the tone and content of paragraph 6 implies that a judgment has been made by Ms Leonard that what the students have said is correct. With regard to paragraph 8, we considered that the wording of this suggested Ms Leonard had concluded that the claimant had inappropriately discomfited a student with dyslexia by contradicting the respondent's policy in a class environment. This impression was compounded by the statement that dyslexia awareness training could be provided. There was an implication that the claimant may have acted in a discriminatory manner. We concluded that the email and attachment suggested that the respondent considered there were fundamental and serious problems with the claimant's teaching performance, making it 'essential that he adapt his teaching practices'. We concluded that the tone and content of the email and attachment of 5 October 2020 were likely to destroy or seriously damage the relationship of trust and confidence between the parties.

57. If an employer identifies fundamental serious problems with the performance of an employee, then articulating those problems to the employee (particularly a highly qualified employee with many years' experience) is likely to seriously damage the relationship of trust and confidence. However, provided the employer has reasonable and proper cause for believing the problems exist and reasonable and proper cause to manage them in the way it does, there would be no breach of the implied term.

58. We therefore turned to consider whether the respondent had reasonable and proper cause for its conduct as described above. Ms Leonard's position in her evidence in chief was that she had received informal student complaints and that she generally tried to deal with these informally to avoid them escalating. If a student raised an issue, she said she would go to the appropriate member of staff, hear what they had to say, agree on an action and then feed back to the student. (We noted that no part of the informal approach she described involved performance managing the member of staff going forward). The sorts of examples she gave of student issues that might be sorted out in this way were problems with the canteen, IT facilities or classroom issues. She said she had never received any

formal complaints about the claimant. Her evidence was that the complaints she had received about the claimant in this instance were informal and she was adopting her usual approach. We considered her evidence on this carefully. Obviously there is much to be said for trying to resolve student concerns informally to avoid them escalating. However, it appeared to the Tribunal that that was not what was happening here. The instructions to the claimant in the attachment (J253) and the nature and content of the email went far beyond resolving informal student concerns in the manner described by Ms Leonard. Her email contained the statement: "*It is essential that your teaching practices are adapted..*" She offered the claimant training and to shadow a colleague. She implied that his delivery would be monitored against monthly student feedback and notified him of the date and time when this would next happen. (Ms Leonard indicated that this process was not particular to the claimant but no cogent evidence was led from any other source to support this). The attachment contained commands and instructions and is framed in the imperative. Paragraph 1 of J253 was an instruction "*At the beginning of every class students to be told...*". Most of the remaining paragraphs told him that he should or should not do certain things. It was said that classes must be 'interactive' or 'inclusive', implying that this was not currently the case and therefore that it needed to be said. It appeared to the Tribunal that the points set out in Ms Leonard's email and attachment went well beyond acknowledging student feedback and offering support and guidance on the back of it as Ms Monan submitted.

59. In the circumstances of this case, where the respondent does not carry out appraisal of lecturer performance and does not view student feedback as a reliable indicator of lecturer performance, the grounds for the assumptions underlying Ms Leonard's instructions are unclear. However, we concluded that even if the respondent did have grounds for managing the claimant's performance, they did not have reasonable and proper cause to manage it in the way they did. The respondent has a Capability Procedure (J92) which contains both an informal and a formal stage. The Procedure provides at 1.5 that: "*The employee will have the right to be accompanied by a trade union representative, or work colleague at all stages of the procedure.*" The informal procedure requires that the employee will

5 be given an indication of the matters to be discussed /areas of concern prior to any meeting and that evidence of the issues of concern should be provided to him. As Mr Cameron submitted, the imposition by Ms Leonard of regular monthly meetings to review the claimant's classroom performance according to student feedback communicated to senior lecturers was an attempt to manage his performance otherwise than in accordance with the respondent's capability procedure. This had the effect of denying the claimant the protections in the Procedure. For all these reasons, we concluded that the claimant had shown that the respondent assessed and critiqued his conduct and performance and required him to change his teaching methods as a result of student feedback and complaints; and that that was a breach of the implied term of trust and confidence for the purposes of (a) and (c) above.

(b) Has he affirmed the contract since that act?

60. Ms Monan accepted in her written submission that the claimant had tendered his resignation shortly after receiving Ms Leonard's email of 5 October 2020 and that he did not affirm his employment contract following receipt of that email. That is clearly correct.

(c) If not, was that act by itself a repudiatory breach of contract?

61. A breach of the implied term is a repudiatory breach and we find this to be so in this case for the reasons given above.

20 (d) If not, was it nevertheless part of a course of conduct comprising several acts which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

62. This question does not arise.

(e) Did the employee resign in response or partly in response to that breach?

25 63. A repudiatory breach need not be the sole cause of an employee's resignation provided it is an effective cause. If the employee leaves both for a reason not proven to be a repudiatory breach (in this case, that he believed the respondent was pressing him to commit malpractice) and in response to a repudiatory breach (the email and attachment of 5 October 2020), the existence of the concurrent non-

repudiatory reason will not prevent a constructive dismissal. (Harvey on Employment Law and Practice 521.04)

5 64. Separately, as Ms Monan submitted, the claimant inquired about voluntary severance during his employment, most recently on 15 September 2020. In addition, on the same date, he had the WhatsApp conversation with his friend set out in the findings in fact above. Ms Monan submitted that it was clear that over the course of many years the claimant had shown his strong dislike of the SQA and that he did not agree with the way in which the respondent approached the assessment of students. On this basis, she submitted that the claimant had always had the intention to resign from his job as his education values did not align with those of the respondent or of the Scottish education system as a whole. Accordingly, Ms Monan submitted that the claimant's resignation was not in response to the alleged breach on 5 October 2020. She suggested that he already intended to resign on 15 September 2020.

15 65. With regard to the claimant's actions on 15 September 2020, the sequence as we understand it was that the claimant came out of his meeting with Ms Leonard and emailed Ms Hossack at 12:49 to inquire about voluntary severance. Later that evening, at around 17:20 he then had the WhatsApp exchange with his colleague. The colleague asked the claimant if he was looking to 'bow out'. The claimant replied: *"Absofinlutely! But I want a little piece of cheese! Just a little slice of cheese."* He then went into some detail about the problems in the Scottish education system and stated: *"I'm absolutely sick of it."*

25 66. Our assessment of the facts before us is that although the claimant investigated the possibility of voluntary severance and expressed his frustration with the Scottish education system generally and the respondent in particular on 15 September and on other occasions and even expressed an intention to 'bow out', he nevertheless remained in the respondent's employment. It was Ms Leonard's correspondence of 5 October that effectively caused him to actually resign. Ms Leonard's email was sent at 11:12am. The claimant communicated his resignation to Ms McGaw by email at 13:51 the same day. We have found that Ms Leonard's email and attachment was a breach of the implied term in the respects set out above and we

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have concluded as a matter of fact that the claimant's resignation was partly in response to it and partly due to his belief that it was part of a larger spoon-feeding culture in Scottish further education and his general frustration with the system. Thus, although Ms Leonard's email and attachment were not the sole cause of the claimant's resignation, they were an effective cause. It follows that the claimant was constructively dismissed as defined in section 95(1)(c) ERA. We do, however, consider that the claimant's inquiries about voluntary severance, his WhatsApp conversation on 15 September and the evidence about his general frustration with the Scottish education system are relevant to assessing loss.

10 Was the dismissal fair?

The reason for dismissal

67. As Ms Monan submitted, having determined that the claimant was entitled to terminate the contract without notice by reason of the respondent's conduct, the Tribunal must go on to consider whether the dismissal was fair or unfair. In doing so, Ms Monan submitted that the Tribunal should make explicit findings on 1. the reason for the dismissal; and 2. whether the employer acted reasonably in all the circumstances.

68. It is for the employer to show the reason for the dismissal. Ms Monan submitted that the reason in this case was: 'capability, misconduct or some other substantial reason with regard to the claimant's unwillingness to adapt his teaching methods and class structure to meet the respondent's and wider Scottish education standards'. The Judgment of Sedley LJ in Buckland sets out the logical difficulty for a Tribunal in applying section 98 ERA in a constructive unfair dismissal case:

25 *"[46] I have mentioned the mismatch between constructive dismissal and the statutory unfairness test. One only reaches s 98(4) through the gateway of s 98(1) and (2). The latter of these includes in the qualifying reasons for dismissal a reason which relates to the capability or conduct of the employee. It may legitimately be said that the reason for the repudiatory conduct of the University in undermining Professor Buckland's position as an examiner related to his capability and conduct*

30 *in the role.*

[47] But how does one decide, pursuant to s 98(4), whether the University acted reasonably in treating this as a sufficient reason for dismissal? Since the University did not consciously either dismiss Professor Buckland or therefore treat anything as a sufficient reason for doing so, the question makes little sense. One has to make sense of it by translating it into the question whether the University behaved reasonably in undermining his status. So posed, the question answers itself, for the University could not intelligibly seek to justify something it said it had not done.

[48] I do not say that this will always be the outcome in a constructive dismissal case – one can construct cases where such a logical block would not necessarily be present – but it is the inexorable outcome in this one.”

69. As in Buckland, it may legitimately be said in this case that the reason for the repudiatory conduct of the respondent in sending the email of 5 October 2020 and attachment to the claimant related to his capability and/or conduct. The question therefore arises as to whether the respondent acted reasonably in treating this as a sufficient reason for dismissal. They clearly did not. They failed to follow their own capability and/or disciplinary policies. They failed to give the claimant a right of representation to which the policies (and the law) entitled him. They failed to give him advance notice of the matters of concern. They inappropriately treated student feedback and informal complaints as indicative of the claimant’s performance when both Ms Hamilton and Ms Leonard testified in cross examination that the respondent does not view student feedback as indicative of lecturer performance. Thus, the grounds for the assumptions underlying Ms Leonard’s instructions to the claimant and proposed ongoing monitoring were unclear. For all these reasons, the respondent did not act fairly in terms of section 98(4) ERA. It follows that the constructive dismissal of the claimant was unfair.

Remedy

Basic Award

70. The claimant is entitled to a basic award. As set out in his Schedule of Loss for the purposes of calculating the basic award, the claimant’s basic gross weekly pay is

capped at £538. The claimant had completed 24 years' employment with the respondent and his age on termination was 55. The length of service is capped at 20 years. The basic award is £14,526.

Compensatory Award

- 5 71. Section 123(1) ERA provides that the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

How long the employment would have continued (Polkey)

- 10 72. In Software 2000 Ltd –v- Andrews [2007] IRLR 568 the EAT said this: “*in determining the loss sustained, it is plainly material for a Tribunal to consider what would have happened had no dismissal occurred. Sometimes that might be a matter of fact, such as where the workplace closed shortly after the dismissal making everyone redundant..... In most cases, however, it involves a prediction by the Tribunal as to what would be likely to have occurred had employment continued*”. The question is “*not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.*”

- 20 73. In the guidance issued, Elias P (as he then was) said that the Tribunal: “*must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*” He went on: “*Having considered the evidence, the Tribunal may determine*

(a)

(b)

(c) *That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.*

(d) *Employment would have continued indefinitely.*

5 *However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."*

74. In this case, as previously discussed, it was clear from the documentary and oral evidence that the claimant was unhappy in his job. As Ms Monan submitted, the claimant strongly disliked the SQA and disapproved of what was happening in the Scottish education system. Indeed, in his own evidence, the claimant stated "*There is serious wrong-doing everywhere in further education*". "*Everybody in FE knows there's a spoon-feeding culture regarding exams*". The evidence showed that the claimant had inquired about voluntary severance on more than one occasion and that he had most recently done so on 15 September 2020. On the same date, a colleague had asked him during a WhatsApp exchange whether he was looking to bow out and the claimant had replied: : "*Absof'inlutely! But I want a little piece of cheese! Just a little slice of cheese.*" He used the following phrases: "*The Scottish education system has been reduced to.....*" "*It's a total farce...*" "*I'm absolutely sick of it.*" "*The Higher exams are bad, but bad as they are they reveal something.*" "*[]*, my former colleague, had 100% passing in the HN, and 51% in the Higher, same content. Loved by the students. I go to Anniesland and I'm hated. But look at my Higher Modies and theirs. This pandering only works if there's no test at all. Copying, even memorising, they're fine." "*....We're not changing students. We're collaborating with the students to change bits of paper....*"

25 75. In considering the evidence before us regarding what would be likely to have occurred had employment continued, the Tribunal considered that the claimant's employment would only have continued for a limited period. The claimant had confirmed to a colleague in emphatic terms on 15 September 2020 that he was looking to bow out. Ms Leonard was clearly losing patience with him and might have managed him according to the Capability Procedure. On the evidence before us, the Tribunal assessed that the relationship was in trouble and using our common sense,

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experience and sense of justice, we assess that on balance, it would only have continued for a further three months. (Our calculation is set out in the table below.)

Section 207A Trade Union and Labour Relations (Consolidation) Act 1992

76. Ms Monan submitted that the compensatory award should be reduced by 25% to
5 reflect the claimant's unreasonable failure to follow the ACAS Code of Practice on
Disciplinary and Grievance Procedures by raising a formal grievance with the
respondent. Section 207A(3) Trade Union and Labour Relations (Consolidation Act
1992 ("TULRCA") provides that if, in the case of proceedings to which that section
10 applies, it appears to the Employment Tribunal that (a) a relevant Code of Practice
applies; (b) the employee has failed to comply with it; and (c) that failure was
unreasonable, the tribunal may if it considers it just and equitable in all the
circumstances reduce any award it makes to the employee by no more than 25%.
Section 207A applies to the compensatory award only (s.124A ERA). The ACAS
Code of Practice on Disciplinary and Grievance Procedures 2015 applies to this
15 case. Paragraph 32 of that Code provides that if it is not possible to resolve a
grievance informally, employees should raise the matter formally and without
unreasonable delay with a manager who is not the subject of the grievance. The
Tribunal noted that the Code was not applied by the claimant to any extent. We
considered that the failure to submit a grievance was unreasonable and that it is
20 accordingly just and equitable to reduce compensation. The claimant failed to
formally raise a grievance about being inappropriately performance managed
accordingly to student complaints and feedback. He also failed to raise matters he
felt were professionally unethical with the respondent in any formal manner. He failed
even to raise a grievance following his dismissal, despite his assertion that he, and
25 other lecturers, were being asked to participate in malpractice. In the circumstances,
we consider it would be just and equitable to reduce the compensatory award by
25%. Remedy is accordingly calculated as follows:

Basic Award:	£14,526
Compensatory Award:	
Weekly net pay: £549	
(2,379 x 12/52 = £549 x 3 = £7,137 = 3 months' net pay)	£7,137
Pension loss: 3 months' employers' contribution estimated at 23% of pensionable pay or £2,386.	£2,386
Loss of statutory rights: £500.	<u>£500</u>
Compensatory award before s207A reduction; £10,023	£10,023
Reduction under section 207A: £10,023 x 0.75 = £7,517	
Compensatory award to nearest whole pound £7,517	£7,517
Total award	<u>£22,043</u>

77. The claimant did not claim benefits and the Recoupment Regulations do not apply.

Employment Judge: Mary Kearns
Date of Judgment: 16 September 2022
Entered in register: 20 September 2022
5 and copied to parties

10 *I confirm that this is the Tribunal's Judgment in the case of Mr C Ross v the Board of Management of Clyde College 4100143/2021 and that I have signed it by electronic signature. M Kearns Employment Judge.*