

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 6,7 August 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

DUMFRIES & GALLOWAY COUNCIL

APPELLANT

MR GEORGE CARROLL

RESPONDENT

GENERAL TEACHING COUNCIL OF SCOTLAND

INTERVENOR

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

Mr Stephen Miller
Solicitor
Clyde & Co (Scotland) LLP
144 West George Street
Glasgow
G2 2HG

For the Respondent

Ms Sarah Shiels
(Solicitor)
Balfour & Manson LLP
56-66 Frederick Street
Edinburgh
EH2 1LS

For the Intervener

Mr Mark Lindsay QC
Instructed by
Anderson Strathern LLP
George House
50 George Square
Glasgow
G2 1EH

SUMMARY

TOPIC NUMBER(S): 11C, 11H

Regulation 4 of the **Requirements for Teachers (Scotland) Regulations 2005** (“the 2005 Regulations”), provides that a local education authority can employ only registered teachers. The issue in this appeal (brought by the local education authority) is whether the term “registered teacher” in that provision simply means a teacher whose details have been entered on to the register (“the Register”) maintained by the General Teaching Council of Scotland (“GTCS”) (intervening), or whether it requires that the teacher is registered in that part of the Register that is relevant to the type of teaching work undertaken, i.e. whether registration is in the part of the Register dealing with primary schools, secondary schools or further education institutions or which deals with a particular subject matter which the teacher is engaged to teach. The Claimant in this matter was dismissed by the Respondent from his role as a secondary school teacher once it emerged that he was only registered as a Further Education teacher. In a claim of unfair dismissal brought by the Claimant, the Respondent asserted that the dismissal was by reason of there being a statutory bar on continued employment within the meaning of s.98(2)(d) of the **Employment Rights Act 1996**. The Employment Tribunal rejected the Respondent’s reason for dismissal on the basis that there was no statutory bar to continued employment

Held: Dismissing the appeal, that on a proper interpretation of the 2005 Regulations, the only restriction on a local education authority was against employing an unregistered teacher. Thus, there was no statutory restriction on continuing to employ the Claimant and the Tribunal was correct to so conclude. Appeals against the Tribunal’s findings on the levels of compensation and pension loss were also dismissed.

A **THE HONOURABLE MR JUSTICE CHOUDHURY**

B **Introduction**

B 1. Regulation 4 of the **Requirements for Teachers (Scotland) Regulations 2005** (“the 2005 Regulations”), provides that a local education authority can employ only registered teachers. The issue in this appeal is whether the term “registered teacher” in that provision
C simply means a teacher whose details have been entered on to the register (“the Register”) maintained by the General Teaching Council of Scotland (“GTCS”), or whether it requires that
D the teacher is registered in that part of the Register that is relevant to the type of teaching work undertaken, i.e. whether registration is in the part of the Register dealing with primary schools,
E secondary schools or further education institutions or which deals with a particular subject matter which the teacher is engaged to teach.

E 2. I shall refer to the parties as they were below.

F **Background**

F 3. The Respondent, which is the appellant in this matter, is a local authority having responsibility for the provision of education services in Dumfries and Galloway. The Claimant was employed by the Respondent as a Principal Teacher of Pupil Support at St Joseph’s
G College in Dumfries. His employment commenced on 7 January 2013 until his dismissal on 10 May 2016.

H 4. The GTCS has been given permission to intervene in this appeal. Part of its function is to maintain a Register of teachers. The GTCS has chosen to arrange the Register such that it

A identifies whether a teacher is registered as a teacher in a primary school, secondary school, or a further education institution, amongst other matters.

B 5. The Claimant had obtained a teaching qualification in further education (TQFE) from Jordanhill College of Education in 1990. Pursuant to that qualification, the Claimant obtained registration as a Further Education Teacher. Whilst the Claimant commenced various other courses of study, he did not complete a full undergraduate degree at any time. The GTCS Rules provide that a teacher seeking registration as a secondary school teacher must have a degree.

C 6. Prior to commencing at St Joseph's College, the Claimant had worked at Springboig St John's Residential Secondary School, an independent school providing additional support for pupils with learning, social, emotional and behavioural needs, guidance teaching and teaching horticultural and agricultural science. The Claimant was made redundant when that school closed in 2010.

D 7. In 2010, the Claimant sought access to the City of Edinburgh Council's teacher supply list for special schools and entered into email correspondence with Edinburgh City Council and the GTCS about his registration. The upshot of that correspondence was that the Claimant was told by a Mr Adams of the GTCS that the Register maintained by the GTCS shows what sector or sectors a person is registered in, that in the Claimant's case it showed him to be fully registered in respect of further education and that it recorded him as having been employed at Sprinboig St John's School which was an independent provider. Mr Adams went on to state:

E

F

G

H

"There is no legal requirement to be registered for employment in the independent sector before employment at that school would be totally acceptable. You will be aware that there is a legal requirement to be registered to work in a local authority school in Scotland and that registration should be in the sector in which employment is being sought. I can only reiterate that it would be the decision of the local authority whether or not to employ you in a special school."

A 8. The Tribunal found that the Claimant was aware, by at the latest 2010 when he received these emails, that the GTCS's view was that in order to teach in a secondary school, he had to be secondary-registered with the GTCS.

B 9. In January 2011, following a period of employment as a specialist supply teacher with Glasgow City Council, the Claimant obtained employment with the Scottish Borders Council where he worked at Elston High School as a Principal Teacher of behavioural support. In April
C 2011, an anonymous complaint was made in relation to the Claimant's qualifications and GTCS registration for the post of Principal Teacher. Although an investigation was conducted by the Scottish Borders Council, no action was taken against the Claimant in respect of his registration.

D 10. On 21 September 2012, the Claimant applied for a post as Principal Teacher at St Joseph's College with the Respondent. The specifications for the post did not state what type of
E GTCS registration the applicant required. The Claimant was interviewed by a panel of three, including the headteacher, and was successful in his application.

11. On 1 October 2013, the Claimant applied to the GTCS to become secondary-registered. He provided some details of his career up to that point. The GTCS refused his application
F because the requirements to be a secondary-registered teacher included that he had a degree.

12. The Claimant did not pursue matters any further at that stage. Whilst in post at St Joseph's, the Claimant did apply for a number of other posts with the Respondent, including a
G number of deputy head posts and the post of Principal Teacher at Maxwell Town High School. The application for the Maxwell Town post specifically stated that secondary registration was a
H requirement.

A 13. At some point in March 2015, the Respondent queried the category in which the
Claimant was GTCS registered. The Claimant was informed that, upon checking his
registration, it was discovered that it was for further education and not secondary education.
B An explanation was sought from the Claimant. The Claimant provided the Respondent with a
print-out from the GTCS website dated 21 October 2013, which showed his voting category
with the GTCS was as a 'secondary'. The Tribunal found that while a voting category is
relevant in the context of electing GTCS officials it did not demonstrate the sector in which an
C individual was registered to teach.

D 14. In June 2015, the Respondent commenced an investigation into the matter and
appointed Mr Keith Miller, a retired educational officer, to conduct the investigation. The
investigation was commenced on 18 June 2015 and Mr Keith Miller delivered his report on 18
December 2015. Mr Keith Miller identified several allegations that were to be put to the
Claimant. These included an allegation that the Claimant did not hold a teaching qualification
E allowing him to teach school aged pupils, that he had knowingly applied for posts with the
Respondent for which he was not qualified and that the Claimant had been untruthful in his
communications with senior staff at the Respondent at a meeting on 19 March 2015.

F 15. The matter was referred for a disciplinary hearing. The disciplinary hearing was
conducted by a Mrs Elizabeth Baxter.

G 16. In the meantime, the Claimant was not permitted to teach his classes although he had
not been formally suspended from work. The Claimant found the process highly stressful. He
became ill and was subsequently certified as unfit to attend work. The hearing eventually took
place on 25 April 2016. The Claimant was represented by his trade union representative.

H 17. In the course of the hearing, Mr Keith Miller was asked the basis on which he had
concluded that it was a legal requirement to be registered in primary or secondary education in

A order for the Respondent to be able to employ the Claimant. Mr Keith Miller responded that it was based on legal advice given to him and on his reading of the Regulations.

B 18. Following the disciplinary hearing, Mrs Baxter undertook some further investigation. This involved correspondence with the GTCS as to its registration requirements. Mrs Baxter concluded that the need for registration was not a legal requirement. The Tribunal found that Mrs Baxter did not conclude that the Claimant was statutorily barred from continuing in his post or that it was unlawful for the Respondent to continue to employ him. Mrs Baxter did not find that there was misconduct on the part of the Claimant in respect of his communications with the school notwithstanding the fact that there were a number of inaccuracies in his applications for some of the posts. She concluded that the Claimant could not be redeployed as a secondary or primary school teacher as he did not have the requisite registration. Having considered whether there were any other vacancies available, and finding that there were no suitable ones, Mrs Baxter decided to dismiss the Claimant. In a letter dated 9th of May 2016, she said as follows:

C

D

E

F **“... After careful consideration of this matter, and all evidence provided, I have considered my options very carefully and have decided to terminate your employment on the grounds that you do not have the required registration as prescribed by the GTCS to teach in a Dumfries and Galloway Council Secondary school, nor are you eligible to obtain such registration. The termination will be effective from 10th of May 2016...”**

G 19. The Claimant’s appeal against dismissal was unsuccessful.

H 20. On 23 February 2017, the Claimant, assisted by his solicitors, made an application for registration in Additional Support Needs (3 to 18 years) (“ASN”). That application for ASN registration was granted by the GTCS in March 2017. This registration meant that the Claimant could carry out an ASN role in a primary and secondary school setting. The Claimant’s current certificate of registration (as at the date of the Tribunal’s decision) states that he has full

A registration and the qualifications are “Secondary Education, Support for learning; ASN 3 to 18 years, Additional Support needs; Further Education Land-based industries”.

B 21. The Claimant lodged proceedings for unfair dismissal and wrongful dismissal. The Tribunal hearing was held over 7 days in March, May and June 2017 and an additional day in May 2018. The judgment was promulgated on 4 May 2018.

C 22. The Respondent contended that the reason for dismissal was the potentially fair reason of a statutory bar under s.98(2)(d) of the **Employment Rights Act 1996** (“the 1996 Act”), i.e. that the employee could not continue to work in the position which he held without contravention (either on his part or the part of his employer) of a duty or restriction imposed by or under an enactment.”

D 23. The enactment relied upon was **the 2005 Regulations**, Regulation 4 of which provided that an education authority shall employ only a registered teacher as a teacher. A registered teacher for these purposes is defined as a teacher whose particulars are recorded in the Register maintained by the General Teaching Council under the **Public Services Reform (General Teaching Council for Scotland) Order 2011** (“the 2011 Order”). I shall come back to that definition when dealing with the grounds of appeal below.

E 24. The Respondent contended that, as at the date of dismissal, the Claimant was not qualified and not GTCS registered to teach in the sector in which he was working, namely secondary education. The Respondent contended that continued employment would have placed the Respondent in continuing breach of Regulation 4 of **the 2005 Regulations**.

F 25. The Tribunal considered first whether the Respondent had established that the reason for the dismissal was the statutory bar as asserted. The Tribunal was referred to Regulation 4 of **the 2005 Regulations** and to Article 14 of **the 2011 Order**. After setting out those provisions and

A Articles 29 and 30 of **the 2011 Order** which deal with the setting of teaching qualifications for primary and secondary education and further education respectively, the Tribunal held as follows:

B “302. The Tribunal concluded that the statutory requirement imposed by Regulation 4 of the Regulations on the Respondents is that they only employ individuals registered as a teacher as defined by that Regulation.

303. A registered teacher, as defined by Regulation 4(2), is a teacher whose particulars are recorded in the register maintained by the GTS under Section 6 of the Teaching Council (Scotland) Act.

C 304. In terms of Regulation 14 of the Order the GTS have power to sub-divide, or otherwise organise entries in the Register in such a manner as it thinks fit.

305. There is no dispute that the GTC Register is sub-divided into individuals registered to teach in primary schools, individuals registered to teach in secondary schools, and individuals registered to teach in further education institutions.

D 306. The power of the GTC to sub-divide the registers in this way, cannot however be said to render unlawful the employment of a teacher so long as that teacher meets the criteria in Regulation 4(2) of the Regulations. The only requirement of 4(2) is that particulars are recorded in the Register maintained by the GTC. There is no qualification of that definition based on the sector in which the individual holds registration.

E 307. The Tribunal took into account Mr Miller’s submission to the effect that Regulation 29 provides that it is for the GTC to determine what constitutes a recognised teaching qualification for individuals seeking registration as a school teacher, and Regulation 30 provides that is for Scottish Ministers to determine what constitutes a recognised teaching qualification for individuals seeking registration as a Further Education Teacher.

F 308. Those provisions however, cannot operate to interfere with the plain wording of Regulation 4, which imposes a statutory obligation on the Respondents only to employ registered teachers, and defines registered teachers as set out in Regulation 4(2) above.

309. The interpretation of the Regulations is a matter of law for the Tribunal.”

G 26. The Tribunal went on to note that its interpretation of the Regulations appeared not to be inconsistent with the position adopted by the GTCS in that it was for the local authority to determine whether a teacher must be GTCS registered and has the appropriate professional skills and knowledge necessary to enable him to undertake teaching duties allocated.

H

A 27. The Tribunal concluded that as a matter of law, the Claimant's continued employment was not in breach of **the 2005 Regulations**. For that reason, it concluded that the Respondent had not made out that the reason for dismissal was one falling within s.98(2)(d) of **the 1996 Act**: see [311].

B
C 28. Having reached that conclusion, the Tribunal went on to consider whether the reason for dismissal was nevertheless some other substantial reason in that the Respondent genuinely believed that the Claimant's continued employment would contravene a statutory enactment. As to that issue, the Tribunal held as follows:

D "314. Section 98(1)(b) provides a residual category of potential fair reasons for dismissal, which can be relied upon if the reason for dismissal does not fall within those specified under subsection 98(2).

315. A genuine belief that the employee's continued employment would be illegal on reasonable grounds and after a reasonable investigation, may amount to some other substantial reason (an SOSR) and constitute a fair reason for dismissal.

E 316. In order to qualify as an SOSR, the reason must be of a kind which would justify the dismissal of an employee holding the job in question, and it cannot be a frivolous or trivial reason. In this case the SOSR which the Respondents rely upon is Mrs Baxter's genuine belief that the Claimant's continued employment would have been in contravention of an enactment.

F 317. The Tribunal however was not satisfied that Mrs Baxter formed the belief that the Claimant's continued employment would have been in contravention a statutory provision or illegal. The Tribunal's reasons for this conclusion are set out above under the Note on Evidence.

G 318. Mrs Baxter stated on a number of occasions in the cross-examination, that it was not a statutory bar, but a matter of registration. Mrs Baxter said that the Respondents felt they had to follow the advice of the GTC as their regulatory body and the GTC required the Claimant to be secondary registered, however the Tribunal was not satisfied that she concluded that this meant that the Respondents would be in breach of an enactment if the Claimant continued to be employed by them as a secondary school teacher.

H 319. The Tribunal was therefore not satisfied that Mrs Baxter at the point where she took the decision to dismiss the Claimant concluded that there was an enactment which prevented the Respondents continuing to employ the Claimant, or that the Claimant was statutorily barred from continuing to be employed by the Respondents.

320. The effect of this conclusion is that the Tribunal was not satisfied the Respondents had established a potentially fair reason for dismissal.

A **321. In circumstances where the Respondents failed to establish a potentially fair reason for dismissal, the Tribunal concluded the dismissal was unfair, and the claim for unfair dismissal succeeds.”**

B 29. Accordingly, the claim for unfair dismissal succeeded. The Tribunal also found that the Claimant’s claim for wrongful dismissal succeeded. The Claimant was not in material breach of his contract of employment when he was dismissed and was therefore entitled to receive his full notice pay.

C 30. The Tribunal then dealt with remedy. There are various strands to the remedy decision. For present purposes it is sufficient to refer briefly to the remedy for unfair dismissal compensation and to the pension loss.

D 31. The Tribunal assessed the compensatory award on the basis of the Claimant’s net weekly pay. It found that the net weekly pay for these purposes was £628.84. The starting point for the date of assessment of the compensatory award was found to be 2 August 2016, which was the date upon which the Claimant’s employment could have been lawfully terminated. The Tribunal rejected a submission on the part of the Respondent that the Claimant’s loss was attributable to his ill-health which amounted to supervening incapacity. It found that the stress from which the Claimant was suffering was brought about by the actions of the Respondent. Taking account of the Claimant’s evidence, evidence contained within the Claimant’s GP’s report and in a report from occupational health, the Tribunal was satisfied that it had sufficient evidence on which to conclude that the Claimant’s ill-health was as a result of the actions of the Respondent. It therefore made no reduction on the basis that there had been a supervening cause of loss. The Tribunal made a compensatory award from 2 August to the date of the hearing, of £50,315.20. As to future loss, the Tribunal held as follows:

H **“369. The Tribunal also considered future loss.**

A 370. The Tribunal took into account the Claimant's evidence to the effect that he considered that he would be unable to make a recovery until such times as this matter had been resolved; the issue of this Judgment will hopefully bring this matter to a conclusion.

B 371. The Tribunal also took into account that the Claimant has now obtained secondary registration with the GTC, which is likely to enhance his employment prospects. Both of these factors suggest that the Claimant might be able to obtain work relatively quickly.

372. The Tribunal also took into account the fact that there is an outstanding referral from the Respondents to the GTC; which potentially weighed against the Claimant finding work quickly.

C 373. Balancing these elements the Tribunal was prepared to assess that it was likely that the Claimant would obtain employment within 6 months, and made an award of future loss on that basis. The Tribunal therefore made an award for future loss of $26 \times \pounds 628.94 = \pounds 16,352.44$."

D 32. The Tribunal then went on to consider pension loss. As to that, the Tribunal said as follows:

E "375. There was no agreement in relation to pension loss. Ms Shiels supplied an assessment of the total pension loss value, which amounted to $\pounds 144,214.17$, based on the value of prospective final salary pension rights up to normal retirement age rights of $\pounds 425,402.24$ less the value of accrued final salary pension rights at the date of dismissal of $\pounds 281,188.07$.

F 376. The Respondents agreed these figures in respect of the pension rights but submitted that if retirement age was 60, then value of prospective final salary pension rights up to normal retirement age is $\pounds 454,278.47$ and value of accrued of pension rights at the date of dismissal should be assessed at $\pounds 364,056.16$ and giving a total loss of $\pounds 90,122.31$.

G 377. Mrs Shield's figures were assessed on the basis of normal retirement age of 65. The Claimant gave evidence to the effect that had he not been dismissed, he might have worked until he was 65. The Tribunal was prepared to speculate on the basis of this statement that it was likely he would have done so. There was nothing to suggest that the Claimant intended to retire at 60 years. The Tribunal therefore preferred the calculation of pension loss advanced by Ms Shiels and assessed the Claimant's pension loss at $\pounds 144,214.17$.

H 378. The Claimant's total compensatory award is therefore:

Loss of earnings to date of Hearing	£50,315.20
Future loss	£16,352.44
Loss of statutory rights	£ 500.00
Pension Loss	£144,214.17
Total	£211,383.81"

A 33. The Tribunal went on to conclude that if the Respondent had followed a fair procedure, a potentially fair reason for dismissal may have emerged having regard to the fact that the Claimant had made misleading and inaccurate statements to the Respondent about his employment history and qualifications. The Tribunal was prepared to speculate there was a 50% chance that the Claimant would have been dismissed for such reason. Accordingly, it applied a 50% **Polkey** reduction to the award. There was also a finding of 25% contributory conduct based on the Claimant's failure to take steps to obtain secondary registration.

B

C 34. The eventual total award made to the Claimant, after the application of the statutory cap, was £50,321.75.

D 35. The Respondent made an application for reconsideration of the judgment. The first basis on which reconsideration was sought was that the Tribunal did not deal with the argument that the calculation of compensation should reflect the fact that had he not been dismissed he would have been on long-term sickness absence and in receipt only of contractual sick pay. The Tribunal found that, as the Claimant's ill health was the result of actions taken by the employer there was no need to assess loss on the basis of contractual sick pay.

E

F 36. The second basis on which reconsideration was sought was that the pension loss figure adopted by the Tribunal was predicated on the premise that the Claimant suffered pension loss until the age of 65, but that this conflicted with the loss period identified in the judgment which was 6 months from the date of the last day of the hearing. The Tribunal rejected the Respondent's contention, finding that the Tribunal was not bound to conclude that both types of loss – compensatory and pension – had to end at the same time.

G

H 37. The original decision was therefore confirmed upon reconsideration.

A Legal Framework

38. Regulation 3 of **the 2005 Regulations** provides:

B “Every education authority and managers of every grant aided school shall employ adequate numbers of teachers in the schools under their management, with the appropriate professional skills and knowledge necessary to enable those teachers to undertake the teaching duties allocated to them.”

C 39. This imposes a duty on education authorities to ensure adequate teaching provision in their schools. It would appear also to suggest that it is for the education authority to ensure that those teachers have the “*appropriate professional skills and knowledge*” to enable them to undertake their allocated duties.

D 40. Regulation 4 of **the 2005 Regulations** provides as follows:

 “4.1 Every education authority shall, in discharging their functions under Section 1 of the 1980 act and 2 (one) of the 2000 act employ only a registered teacher... as a teacher.

E ...

(2) “Registered teacher” in these Regulations means a teacher whose particulars are recorded in the Register maintained by the General Teaching Council for Scotland under the Public Services Reform (General Teaching Council for Scotland) Order 2011 and includes a teacher whose registration has been marked as restricted on the basis however that, for the duration of that teacher’s registration being marked as restricted such a teacher may only be employed as a teacher –

F (a) by his or her existing employer, and
 (b) in his or her existing teaching post.”

G 41. **The 2011 Order** referred to there, makes provision for the continuation of the GTCS. The GTCS was originally formed as the Teaching Council under the **Schools Scotland Code 1956/894** (“the 1956 Code”), which is now repealed. **The 2011 Order** sets out in Articles 5 and 6 the principal aims and general functions of the GTCS.

H “Principal aims

5. The GTCS's principal aims are-

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

General functions

6. The GTCS's general functions are-

- B
- (a) to keep the register;
 - (b) to establish (and to review and change as necessary)-
 - (i) the standards of education and training appropriate to school teachers;
 - (ii) the standards of conduct and professional competence expected of a registered teacher;
 - (c) to investigate the fitness to teach of individuals who are, or who are seeking to be, registered;
 - (d) to keep itself informed of the education and training of individuals undertaking courses for the education and training of teachers;

C

 - (e) to consider, and to make recommendations to the Scottish Ministers about, matters relating to-
 - (i) teachers' education, training, career development and fitness to teach; and
 - (ii) the supply of teachers (except matters of remuneration or conditions of service); and
 - (f) to keep such other registers of other individuals working in educational settings as it thinks fit."

D

42. Part 3 of the 2011 Order deals with the Register of teachers. Article 14 the 2011 Order provides:

E

"14 The Register of teachers

- (1) It is for the GTS to subdivide or otherwise organise entries in the Register in such manner as it thinks fit.

F

- (2) For example, the Register may have separate parts for –
 - a) individuals registered to teach in primary schools;
 - b) individuals registered to teach in secondary schools; and
 - c) individuals registered to teach in further education institutions.

G

- (3) The GTCS must make the Register available for inspection by the public." (Emphasis added)

43. The underlined words emphasise that the subdivision in each part for primary, secondary and further education is a matter of discretion for the GTCS and that it is not required in any

H

A sense to divide up the Register in that or in any other way. The remaining provisions of **the 2011 Order** relevant to these proceedings are as follows:

“GTCS rules

B 15.-(1) **The GTCS must make and publish rules ("the GTCS rules")-**

(a) **setting out the procedure for inclusion in the register;**

(b) **setting out registration criteria; and**

(c) **otherwise governing the operation of the register.**

C (2) **The GTCS rules may set different procedures, or different registration criteria, for different types of teacher or otherwise for different purposes.**

(3) **The GTCS rules may, in particular, make provision about-**

(a) **the form and keeping of the register;**

D (b) **the making of entries in the Register and alterations to those entries;**

(c) **the keeping of different categories of registration;**

(d) **the charging of fees in relation to registration;**

(e) **making entries provisional on the GTCS being satisfied that conditions are met;**

E (f) **the provision of information to the GTCS by or about individuals who are registered or who are seeking registration;**

(g) **removing individuals from the register;**

(h) **restricting and cancelling entries in the register;**

F (i) **circumstances in which registration may lapse;**

(j) **re-registering individuals or otherwise restoring entries to the register;**

(k) **the issuing of registration certificates; and**

(l) **such other matters relating to registration as the GTCS thinks fit.**

G (4) **Before making or varying the GTCS rules, the GTCS must-**

(a) **consult-**

(i) **teachers or their representatives;**

(ii) **employers of teachers or their representatives; and**

H (iii) **such other persons appearing to it to have an interest; and**

(b) **have regard to any views expressed by those consulted.**

A

Entry in the Register of teachers

16.-(1) The GTCS must include an individual in the Register if-

(a)it is satisfied-

B

(i)that the registration criteria are met in relation to the individual;

(ii)that the individual is not unfit to teach; and

(iii)that the GTCS rules do not otherwise prevent the individual from being registered; and

C

(b)Article 19 does not prevent the GTCS from registering the individual.

(2) The Register must contain an entry for each individual included in it setting out-

(a)the individual's name and address; and

(b)such other information about the individual's qualifications and other particulars as may be specified in the GTCS rules.

D

Recognised teaching qualifications

17. The registration criteria set out in the GTCS rules must provide that an individual may be registered only if-

E

(a)the individual has obtained a recognised teaching qualification; or

(b)the GTCS is otherwise satisfied that the individual's education, training or experience warrants the individual's registration.

F

Fitness to teach

18.-(1) The GTCS-

(a)must investigate the fitness to teach of any individual seeking registration; and

G

(b)may investigate any registered teacher's fitness to teach where it becomes aware of circumstances which it considers justify such an investigation.

(2) The GTCS must-

(a)refuse to Register any individual seeking registration whom it considers to be unfit to teach; and

H

(b)remove from the Register any registered teacher whom it subsequently considers to be unfit to teach.

...

A

Removal from register

22.-(1) The GTCS rules may set out circumstances (other than those mentioned in Articles 18 and 19) in which it may remove an individual from the register.

(2) Those circumstances may, in particular, include-

B

(a) failure to pay any fee due in respect of the individual's registration;

(b) failure to notify the GTCS of any change of information recorded in the individual's entry.

...

Notices

C

23.-(1) The GTCS must notify an individual of a decision-

(a) to refuse to Register the individual because the GTCS considers that the individual-

(i) is unfit to teach;

D

(ii) is barred from regulated work with children by virtue of the Protection of Vulnerable Groups (Scotland) Act 2007; or

(iii) does not otherwise meet the registration criteria;

...

Employers: duty to report misconduct or incompetence

E

25.-(1) A person who employs a registered teacher to work in an educational establishment must immediately notify the GTCS if-

(a) they dismiss the registered teacher on grounds of misconduct or incompetence; or

F

(b) the registered teacher resigns or otherwise stops working for the person in circumstances in which the person, but for that fact, would have or might have dismissed the registered teacher on such grounds.

(2) Such a notice to the GTCS must explain the circumstances which caused the person to dismiss, or to conclude that they would have or might have dismissed, the registered teacher.

...

G

Teaching qualifications: primary and secondary education

29.-(1) It is for the GTCS to determine what constitutes a recognised teaching qualification for individuals seeking registration as a school teacher.

(2) A determination may make such provision about the education and training required to attain such a qualification as the GTCS thinks fit.

H

(3) A determination may, in particular, make provision about-

(a) institutions providing courses of education and training for teachers;

- A**
- (b)the qualifications of persons employed by institutions providing courses of education and training for teachers;
 - (c)the admission of individuals to such courses;
 - (d)the content, nature and duration of such courses;
 - (e)the assessment of individuals undertaking such courses;
- B**
- (f)the functions of the governing bodies, principals and members of staff of institutions providing those courses.

(4) A determination may make different provision for different types of school teachers or institutions or otherwise for different purposes.

(5) Before making or varying a determination, the GTCS must-

- C**
- (a)consult-
 - (i)institutions providing courses of education and training for teachers or their representatives;
 - (ii)the Scottish Ministers; and
 - (iii)such other persons appearing to it to have an interest; and
- D**

- (b)have regard to any views expressed by those consulted.

(6) The GTCS must publish determinations.

E

Teaching qualifications: further education

30.-(1) It is for the Scottish Ministers to determine what constitutes a recognised teaching qualification for individuals seeking registration as a Further Education Teacher.

F

(2) A determination may make such provision about the education and training required to attain such a qualification as the Scottish Ministers think fit.

(3) A determination may, in particular, make provision about-

- (a)institutions providing courses of education and training for teachers;
 - (b)the admission of individuals to such courses;
 - (c)the content, nature and duration of such courses;
 - (d)the assessment of individuals undertaking such courses;
 - (e)the functions of the governing bodies, principals and members of staff of institutions providing those courses.
- G**

(4) A determination may make different provision for different types of Further Education Teachers or institutions or otherwise for different purposes.

H

(5) Before making or varying a determination, the Scottish Ministers must-

- A**
- (a)consult-
 - (i)further education institutions or their representatives;
 - (ii)the GTCS; and
 - (iii)such other persons appearing to them to have an interest; and
 - B** (b)have regard to any views expressed by those consulted.
- (6) The Scottish Ministers must publish determinations.”**

C 44. I should also refer to the provisions of **the 1996 Act** relevant for the purposes of compensation. Section 123 of **the 1996 Act** provides:

“123 Compensatory award

D (1) Subject to the provisions of this section and sections 124 and 126, the amount of 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 complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include–

E (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of–

F (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b) any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under s.122) in respect of the same dismissal.

G (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

H (5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by–

(a) calling, organising, procuring or financing a strike or other industrial action, or

A (b) threatening to do so, was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

B (7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for s.122(4), that excess goes to reduce the amount of the compensatory award.”

C
Grounds of Appeal

D 45. Permission to appeal was granted on the sift by HHJ Auerbach in respect of three out of four grounds of appeal relied upon, Ground 2 having been rejected as unarguable (“the rejected ground”). The three permitted grounds are as follows:

E 46. Ground 1 - The Tribunal erred in law in that it misinterpreted Regulation 4 of **the 2005 Regulations** by considering that a registered teacher was merely one whose particulars are recorded in the Register and without taking into account the provisions of **the 2011 Order** and
F the subdivision of the Register into parts dealing with primary, secondary and further education.

G 47. Ground 3 - The Tribunal erred in law by failing to address the submission made on behalf of the Respondent that compensation should be assessed on the basis of contractual sick pay and not full pay.

H 48. Ground 4 - The Tribunal erred in law in that the pension loss was calculated on the premise that the Claimant suffered pension loss until retirement at the age of 65 whereas the

A period of loss identified by the Tribunal was just six months from the date of the last day of the hearing.

49. I shall deal with each of these grounds in turn.

B

Ground 1 - Misapplication of Regulation 4 of The Regulations

C *Submissions*

50. Mr Stephen Miller, who appears on behalf of the Respondent as he did below, submits that whilst **the 2005 Regulations** define the registered teacher as a teacher whose particulars are recorded in the Register maintained by the GTCS, those Regulations must be read in conjunction with **the 2011 Order**. **The 2005 Regulations** and **the 2011 Order** are *in pari materia* and must be interpreted with reference to each other. Taking that approach to interpretation leads to the conclusion, submits Mr Miller, that the requirement under Regulation 4 that a local authority shall employ only a registered teacher means a teacher who is registered in the appropriate part of the Register relevant to the job which they undertake. That is to say that a teacher registered as a primary school teacher cannot be employed as a secondary teacher and vice versa. Mr Miller submits that, as the Claimant's registration at the material time was that of a Further Education Teacher, the Respondent was not permitted, on a proper construction of the legislation, to employ him as a teacher in a secondary school.

G

51. Mr Miller submits that to construe the Regulations as did the Tribunal would undermine the ability of the GTCS to carry out its principal aims and general functions as set out in Articles 5 and 6 of **the 2011 Order**. He highlights the need for secondary-registered teachers to have a degree and the fact that registration by further education lecturers was not mandatory.

H

A 52. Mr Lindsay QC, who appears on behalf the GTCS, supports that submission and adds
that the cumulative effect of reading Regulation 4 together with Article 14 is that individuals
B may only be employed in accordance with their registration category. He submits that it is an
obvious and inescapable interpretation, once it is accepted that the two sets of provisions are *in*
pari materia, that employment must be limited to the registration category. He notes that the
C Scottish Government issued a Circular (Number 4 of 2005) on 10 October 2005 providing
guidance on the Regulations and that the GTCS also issued guidance entitled ‘Curriculum for
Excellence’. He submits that there is nothing in either of those documents which contradicts or
D casts doubt upon the correctness of the interpretation for which he contends. Although those
documents appear to indicate that the final decision as to whether a teacher is suitably qualified
for a particular role is one for the local authority, Mr Lindsay highlights the fact that the
Circular notes that “*It is not anticipated however, that teachers trained in one sector will have*
the requisite skills and knowledge without additional training”. In any event, it is submitted
E that the terms of the Circular and guidance cannot prevail over the terms of the applicable
legislation.

53. I was also referred to a number of other provisions in the Regulations and the Order.
F These included Regulation 3, to which I have referred above. It is said that restricting
employment to the registration categories adopted by the GTCS would help local authorities to
ensure that teachers have the “appropriate professional skills and knowledge” within the
G meaning of that Regulation. I was also referred to Articles 15 and 29 of **the 2011 Order**. These
Articles empower the GTCS to set different registration criteria for different types of teacher
and to determine what constitutes a recognised teaching qualification for individuals seeking
H registration as a schoolteacher. It is submitted these powers would be rendered wholly
ineffective if no limitations were thereby placed on employment by reference to these
registration categories and/or the different requirements for teaching qualifications.

A 54. Ms Shiels, whilst initially in apparent agreement with Mr Miller and Mr Lindsay that the
two sets of provisions are *in pari materia*, submitted that although the provisions have a similar
subject matter they regulate different things and that it does not necessarily follow that the
B terms used in one piece of legislation will be explanatory of the other.

55. Ms Ms Shiels took me through the history of the legislation establishing and governing the
GTCS and predecessor. It was submitted that it is clear from that history, including the
C consultation documents that preceded the two pieces of legislation under consideration, that the
explicit purpose of the current regime when enacted was to remove the previous detailed
prescribed rules as to who could teach what and where, in favour of a more flexible
D environment in which the local authority would make decisions as to recruitment and
deployment in accordance with the educational needs of children. She submits that the GTCS
has a power to regulate admission to the Register and to determine whether a teacher is
E competent and fit to teach. However, none of the powers conferred on the GTCS expressly
enable it to restrict the local authority's freedom to employ the teachers of its choice and that
includes, where appropriate, teachers that may be registered with the GTCS under a different
F sector. She submits that the effect of the Respondent's interpretation would be that **the 2011
Order** renders illegal that which was entirely legal prior to its introduction and any such change
to the legality of teachers' employed status should not have effect unless it is the subject of
clear and unambiguous wording in the new provision. There is nothing of that description
G within **the 2011 Order**. Reliance is placed in this regard on the decision of the first division in
Malloch and Aberdeen Corporation 1973 SC227. Ms Shiels also referred to the decision of
the Inner House of the Court of Session Extra Division in **Educational Institute of Scotland**
(EIS) [2014] CSIH 13 in which it was held that Regulation 3 of **the 2005 Regulations**, which
H entitles local authorities to employ teachers with the appropriate professional skills and
knowledge, meant that the head teacher of a nursery school was no longer required to be

A registered as was the case prior to the introduction of the Schools (Scotland) Code Amendment
Regulations 2003 which repealed, amongst other matters, Regulation 5 of **the 1956 Code**. (The
remainder of the 1956 code was repealed with the coming into force of **the 2005 Regulations**).
B Ms Shiels relied upon that authority as lending support to her argument that the effect of **the**
2005 Regulations was to liberalise the regime in respect of registration rather than to introduce
further restrictions.

C
Ground 1 – Discussion

D 56. There is no dispute that education authorities may only employ registered teachers as
teachers. The question is what is meant by a “registered teacher” for these purposes. Regulation
4(2) of **the 2005 Regulations** provides a definition. It states that:

E **“Registered teacher” in these Regulations means a teacher whose particulars
are recorded in the Register maintained by the General Teaching Council for
Scotland under the Public Services Reform (General Teaching Council for
Scotland) Order 2011 ...”**

F 57. That would appear to provide a complete answer to the question of what is a registered
teacher. Any teacher whose particulars are recorded in the Register maintained by the GTCS
would be a registered teacher for the purposes of the Regulations. The question is whether it is
necessary to consider the specific provisions of **the 2011 Order** in order to determine whether
G any further requirements need to be met before a person could be said to be registered teacher.
As a matter of statutory construction, in my judgment, it is not necessary to look further than
the definition in **the 2005 Regulations**. I say that for a number of reasons:

H a. The only requirement in Regulation 4(2) is that the teacher is one whose particulars
are recorded in the register. Any teacher who is duly registered will be one falling

A within that description. A registered teacher is not defined by reference to any particular categories or subdivisions within the Register; mere inclusion in the Register is sufficient.

B b. That interpretation follows from the use of the words “*whose particulars are recorded in the register*”. That is the operative part of the definition. “Particulars” are not defined. It is an ordinary word of the English language, the natural and ordinary meaning of which would be the details relating to the individual concerned.

C Furthermore, the natural and ordinary meaning of the term “are recorded” is that those particulars are written down or entered by some means on to the Register.

D There are no additional requirements under Regulation 4(2) in order to be a Registered Teacher.

E c. The definition is on its face self-contained save for the fact that the “Register” is one maintained by the GTCS under **the 2011 Order**. However, the reference to **the 2011 Order** does no more than identify the Register in question. One knows from reading the definition that the Register in which the particulars are to be recorded is the one maintained by the GTCS and not some other register. Nothing more than that is required. In particular, there is nothing to suggest that registration has to be in respect of a particular part of the Register. Had the intention been for employment to be limited to teachers within a particular category in the Register, then Regulation 4 could have so provided. It could have done so by, for example, stating in sub-Regulation (1), that an education authority shall employ only a registered teacher as a teacher in a position to which that teacher’s registration on the Register relates.

F Alternatively, the definition under sub-Regulation (2) could have provided that a registered teacher is a teacher that is registered on the Register maintained by the

G

H

A GTCS to teach in the subject or in the sector in which the education authority wishes
to employ that teacher.

B d. It is relevant in this regard to note that **the 1956 Code**, which was the predecessor
legislation to **the 2005 Regulations**, expressly provided that “*every teacher*
C *employed by an education authority shall be a registered teacher holding the*
qualifications required by this Code for the post in which he is employed”. **The 1956**
code thus contained specific requirements for teachers employed in primary
D departments and secondary departments which had to be met before employment
was permitted. The repeal of any such requirement and its replacement with a
provision merely requiring that particulars be recorded on the register, would appear
to indicate that the intention was to enact a more liberal regime in which education
E authorities had more freedom to employ teachers whom they regarded as having the
appropriate skills and knowledge to meet the education demands within their area.

E e. In the absence of such further specificity in the definition, it is my judgment that the
natural and ordinary meaning of the definition is simply that education authorities
cannot employ unregistered teachers but are not precluded from employing any
F registered teacher regardless of the sector and/or subject in respect of which they
might have registered.

G 58. The Respondent and the GTCS rely heavily on the terms of Article 14 of **the 2011**
Order which they say must be read in conjunction with the Regulations in order to understand
properly what is meant by a registered teacher. Although Mr Miller and Mr Lindsay were in
agreement that the two pieces of legislation are *in pari materia*, I remain somewhat doubtful
H that they are. In **Augean Plc v HMRC** [2009] Env LR 6, David Richards J (as he then was),
held as follows:

A “34. It is well-established that Acts which are *in pari materia* are to be read together. It is stated in Halsburys Laws (4th edition reissue) (1) para 1220:

B “Acts are said to be *in pari materia* if they are (1) Acts which have been given a collective title; or (2) Acts as to which it is stated in the latest of the Acts that they are to be construed as one; or (3) Acts having short titles that (apart from the calendar year) are identical or (4) other Acts which deal with the same subject matter on the same lines. Acts *in pari materia* are to be taken together as forming one system, and as interpreting and enforcing each other.” (Emphasis added)

C 59. Only the fourth category therein identified is relevant for present purposes. **The 2005 Regulations** and **the 2011 Order** do overlap to some extent in that the general subject matter is the teaching profession. However, **the 2005 Regulations**, as the full title of the Regulations and the explanatory note suggest, concern the requirements to be met by education authorities

D employing teachers in the course of discharging their duty under s.1 of the **Education Scotland Act 1980** as amended and s.2(1) of the **Standards in Scotland’s Schools etc. Act 2000**;

E whereas **the 2011 Order** repeals earlier legislation establishing and governing the predecessor Teaching Council to the GTCS and provides for the continuation of the GTCS with some amendments to its functions, constitution and governance arrangements. Whilst there is thus

F some overlap between the subject matter of the two legislative provisions, it cannot be said in my judgment that they deal with the ‘same subject matter on the same lines’. The purposes, ambit and targets of the two enactments are entirely different. The mere fact that **the 2011 Order** is referred to in Regulation 4(2) of **the 2005 Regulations** does not mean, as Mr Lindsay submitted, that both are necessarily *in pari materia*. I was not taken to any authority to suggest

G that a mere cross-reference in one piece of legislation to another should mean that both are *in pari materia*. Cross-references arise for many purposes, one of which is to define or identify the use of a particular term in one piece of legislation which might already have been defined

H elsewhere. However, that does not mean that the two pieces of legislation, which are otherwise

A quite different in purpose, scope and subject matter, should be treated as one for the purposes of interpretation.

B 60. However, even if I am wrong about that, and the two pieces of legislation are to be treated as *in pari materia*, I still do not consider that there is anything in **the 2011 Order** which undermines and/or contradicts the interpretation of **the 2005 Regulations** which I have set out above.

C 61. The first matter to note is that Article 3 of **the 2011 Order** contains two definitions that are of relevance. The first is that “the Register” means “the Register of teachers kept by the GTS in accordance with this Order” and “registered” and “registration” are to be construed **D** accordingly. There is no specific definition for a registered teacher, although it is clear that the registered teacher would be a teacher, (as defined: see Article 3) who was registered, i.e. whose name had been entered onto the register. The definitions in **the 2011 Order** do not cross-refer to **the 2005 Regulations**. These definitions do not contradict anything in **the 2005 Regulations** **E** or required them to be differently interpreted.

62. Article 14 deals with the Register of teachers. It provides:

F “(1) it is for the GTCS to subdivide or otherwise organise entries in the Register in such manner as it thinks fit.

(2) For example, the Register may have separate parts for –

(a) individuals registered to teach in primary schools:

G (b) individuals registered to teach in secondary schools; and

(c) individuals registered to teach in further education institutions.”

H 63. The reference to having ‘separate parts’ for the Register may be considered to be somewhat outmoded given that any such Register is likely to comprise a searchable database (as, I am told, is the case here) containing all the information relevant to particular registrant

A against that registrant's entry. In any case, it does not appear that the Register is divided into
separate parts dealing with different sectors. A substantial part of Mr Miller's submission was
B predicated on the division of the Register into separate parts with a strict demarcation between
each such that a teacher registered in the part dealing with further education is ineligible for
employment at a secondary school. The absence of any separate part of the Register as such
seems to me to undermine the basis of that submission.

C 64. The underlined words make it clear in my judgment that the GTCS has a power to adopt
any reasonable categories or subdivisions that it may wish in respect of the register, but it is not
required to do so. The references to the three sectors identified in sub-Articles (a), (b) and (c)
D are no more than examples of the kind of sub-division that may be adopted. There is nothing on
the face of Article 14 to indicate that a teacher may only be employed by an authority in a
particular sector if registered with the GTCS in that sector. Indeed, there is nothing in Article 14
E to suggest that the three sectors identified therein have any more importance for the purposes of
the Register than any other subdivisions or organisational categories that may reasonably be
adopted by the GTCS.

F 65. It appears from the information available that the Register is not in fact divided into
separate parts for different types of schools. Instead, there is an entry for each registrant which
includes certain particulars. I have been referred to Schedule 2 to the GTCS's Registration and
Standards Rules (the GTCS rules), which contains a template of the information contained in a
G registrant's entry. This includes a person's name, gender, details of current employer (if
provided), the GTCS Council election voting category, registration status (including whether
such status is temporary), registration subject and/or sectors, details of any order/measure
H imposed by a fitness to teach panel and details in relation to the achievement of any standards
or any GTCS awards. Those details are contained in part A of the entry, which is available to

A the public. Part B of the entry contains details which are not in the public domain. This part includes matters such as contact details, date of birth, the details of the school/establishment at which a person is employed, any fitness to teach/conviction information or disciplinary details.

B 66. Given that one of the particulars in a registrant's entry may be the subject which he is registered to teach, it follows that, on the Respondent's interpretation of Regulation 4 of **the 2005 Regulations**, a local authority is precluded from employing a teacher to teach in a different subject from that contained in the register. That would mean for example that a teacher registered to teach physics in a secondary school could not lawfully be deployed to teach mathematics unless and until the Register was amended to include mathematics as one of the registration subjects. Not only does that strike me as being a highly impractical outcome, it also goes against the terms of Regulation 3 of **the 2005 Regulations** which clearly provides that every education authority is under a duty to employ adequate numbers of teachers and schools under their management "*with the appropriate professional skills and knowledge necessary to enable teachers to undertaking teaching duties allocated to them*". The implication of that provision is that it is for education authorities to ensure that appropriately skilled and qualified teaching staff are engaged and that that flexibility afforded to the education authority is not to be restricted by whatever subdivisions or categories the GTCS might decide to fix upon at any given time.

C

D

E

F

67. Indeed, given that, on the Respondent's case, each and every category of information contained in a registrant's entry is in effect a separate part of the Register within the meaning of Article 14, the same would apply to any of the particulars which the GTCS might require in respect of a particular registrant. Thus, if a registrant were to change employer such that the details in part B of his entry were rendered obsolete then it could be said, if the Respondent's interpretation is correct, that he is no longer properly registered in accordance with the terms of

A the Register, and it would no longer be lawful to continue that teacher's employment unless and
until the Register was amended. That absurd outcome is a consequence of the Respondent's
B interpretation which does not seek to draw any distinction between any of the categories or
subdivisions which the GTCS might fix upon. It cannot be said that the sector divisions
identified in Article 14(2) have a special elevated status such that registration in accordance
with such a sector gives rise to a restriction on employment that other categorisations adopted
C by the GTCS might not. That is for the simple reason that the sector divisions in Article 14(2)
are given merely by way of example and do not have any special status over and above other
categories in the Register which the GTCS considers appropriate.

D 68. In the absence of any specific prescribed categories which the GTCS must adopt, and
given the absurd consequences which might follow if all of the categories which the GTCS has
adopted were to be given equal importance, the appropriate construction of Regulation 4 of **the**
2005 Regulations, in my judgment, is that only teachers who are unregistered (i.e those whose
E particulars are not recorded in the Register) are precluded from being employed by education
authorities.

F 69. That interpretation is not undermined by the other provisions referred to by Mr Lindsay.
a. It is said that restricting employment to the registration category will ensure that
teachers have "*the appropriate professional skills and knowledge*" within the
G meaning of Regulation 3 of **the 2005 Regulations** to enable them "*to undertake the*
teaching duties allocated to them", and that the Respondent's interpretation of
Regulation 4 and Article 14 of **the 2011 Order** helps to achieve the aims and
objectives of Regulation 3. I accept that an authority which ensured that it only
H engaged teachers in the sector in which they are registered would assist in ensuring
that a person with the appropriate professional skills and knowledge is being

A recruited. However, registration would not be enough in and of itself; the authority
would still need to satisfy itself that the teacher was appropriately qualified given
that the GTCS would have no direct or up-to-date knowledge of the particular needs
B of the educational establishment or indeed the pupils in question, or of the actual
skills and knowledge of the teacher. Equally, the authority would be entitled to
consider that, notwithstanding the registration category, a particular teacher did not
have the appropriate skills or knowledge for the role in question. In my judgment, a
C proper interpretation of Regulation 3 in fact militates against the Respondent's
interpretation. If it is for the authority to ensure that the teacher has the professional
skills and qualifications to meet the demands of a particular role then the authority
D should be permitted to recruit to the role irrespective of the particular sector in
which the teacher is registered. I do not consider that this freedom would undermine
the role of the GTCS. As stated above, the registration status would assist education
E authorities in assessing suitability but such status is not determinative of that
question.

b. Article 15 of **the 2011 Order** provides that the GTCS rules may set different
F procedures for different registration criteria for different types of teacher or
otherwise for different purposes. Mr Lindsay says that there would be no point in
setting such different registration criteria for different types of teacher if the
subsequent registration category placed no limits on employment. However, it is not
G one of the GTCS's principal aims or general functions under Articles 5 and 6 to
control or regulate who may be employed by education authorities, save to the
extent that refusing to Register a person or removing them from the Register would
H mean that that person cannot be employed by an education authority as a teacher.
The decision as to who may be employed is one for the education authority.

A Moreover, if a person does not satisfy registration criteria then he will not be entered
onto the register: see Article 16 (1) of **the 2011 Order**. To that extent, setting the
B registration could have the effect of restricting employment. In any case, setting the
criteria for registration of different types of teachers does serve the purpose of
contributing to the improvement of the quality of teaching and learning, which is
one of the GTCS's principal aims: see Article 5. It cannot be said, therefore, that
registration is rendered valueless or futile just because it does not limit employment
C in a non-registered category or sector.

c. The same applies in respect of Article 29 of **the 2011 Order** which gives the GTCS
the power to determine what constitutes a recognised teaching qualification. Only a
D person who has obtained a recognised teaching qualification may be registered
unless the GTCS is otherwise satisfied that the individual's education, training or
experience warrants the individual's registration: see Article 17 of **the 2011 Order**.
E It can be seen, therefore, that the GTCS's role in this regard has the effect of
controlling who can be entered on the Register and therefore be eligible for
employment by an education authority.

F **d.** I note in passing that Article 16(2) provides that the Register must contain an entry
for each individual included in it setting out the individual's name and address and
such other information about the individual's qualification and other particulars as
G may be specified in the GTCS rules. It is noteworthy that there is nothing in this
Article that mandates the inclusion of an individual's subject or the sector in which
they work in the Register (unless that is provided for in the GTCS Rules). Had it
H been the intention that a person's entitlement to be employed by an education
authority was dictated by the sector and/or subject in which they were registered, it

A might have been expected that the details of a person's registration in that regard would also be mandatory.

B 70. Other provisions to which the parties have not specifically referred include Article 18
C (fitness to teach), Article 19 (barred individuals), Article 22 (removal from register), Article 23
D (which provides, *inter alia*, that the GTCS must notify an individual of a decision to refuse to
E register him because it considers that the individual is unfit to teach, or does not otherwise meet
F the registration criteria), and Article 25 (duty to report misconduct or incompetence). In my
judgment, all of these provisions are consistent with the notion that registration is the gateway
to employment by an education authority but that the specifics of the registration do not further
restrict the authority's freedom to employ. The reporting provisions under Article 26 of **the**
2011 Order require employers of registered teachers to immediately notify the GTCS if they
dismiss the registered teacher on grounds of misconduct or incompetence or if the registered
teacher resigns or stops working in circumstances where, but for that fact, they would have
been dismissed on such grounds. Misconduct and incompetence go to a person's fitness to teach
and therefore their eligibility to remain on the register. Article 26 does not, however, require an
authority to report any change in the sector in which a teacher is employed or the subject being
taught. Once again, had it been the intention that such changes could automatically render
continued employment unlawful, one might have expected that there would have been an
obligation to report such changes to the GTCS.

G 71. The non-statutory material to which I have been referred also supports the interpretation
above. The guidance produced by the GTCS, entitled "Curriculum for Excellence", and which I
am told remains current, contains the following passage:

H **"It is important to state at the outset that we remain committed to the notion of
secondary teachers being qualified in specific subjects and primarily teaching
those subjects. While it is the responsibility of the Local Authority to decide on
the deployment of its staff, we would like to give some guidance on this issue."**

A

72. Mr Lindsay did not dispute that the language used in this guidance is permissive and supportive of the position that it is for the local authority to determine which staff to deploy, albeit that registration in a particular subject will provide some further assurance that a person has the appropriate professional skills and knowledge. There is certainly nothing in the guidance which comes anywhere near to suggesting that it would be unlawful or wholly impermissible for an employer to employ a teacher in a sector or to teach a subject for which he or she is not registered.

B

C

73. Shortly after the coming into force of **the 2005 Regulations**, the Scottish Education Department issued a Circular (Circular number 4/2005) addressed to all directors of education. It provides further guidance on Regulation 3:

D

“3.2 The qualifications required to teach in primary and secondary schools were previously set out in Regulations 5(1) and 6(1) of the Schools (Scotland) Code 1956 Regulation 5(1) permitted teachers with teaching qualifications in primary or secondary education to teach in primary schools. Regulation 6(1) required teachers in secondary schools to have an appropriate secondary qualification which was defined as a qualification in one of the subjects they were required to teach or a primary qualification if teaching in the area of learning support.

E

3.3 The repeal of both of these Regulations will allow education authorities and schools to deploy teachers according to the educational needs of children, rather than on the basis of their teaching qualification. From 30 September 2005, the appropriateness of a teacher for a particular post will be a matter for education authorities as employers. Prior to the placement of a teacher in a particular post, an employing local authority must be assured that the teacher has the appropriate professional skills and knowledge required for the post to which they are appointed.

F

3.4 In the vast majority of cases a teaching qualification in the subject or sector concerned will provide the evidence required. Where a teacher is being asked to teach in a sector other than the one for which they were trained education authorities will need to satisfy themselves that the teacher has the appropriate professional skills and knowledge. This may have been obtained through continuous professional development that has been taken or recognition by the General Teaching Council through its Framework for Professional Recognition.

G

3.5 It is not anticipated however, that teachers trained in one sector will have the requisite skills and knowledge without additional training. Through continuous professional development, teachers will have the opportunity to develop skills not required in their original teaching qualification and allow them to teach across sectoral boundaries. Recognition by the GTCS under its

H

A Framework will provide the necessary assurance for authorities that such training is sufficient. Further details about the Framework and the process to be undertaken by teachers wishing to gain supplementary professional recognition should be obtained directly from the GTCS. Further details about the Framework and the process to be undertaken by teachers wishing to gain supplementary professional recognition should be obtained directly from the GTCS.”

B

74. Once again, it is clear that the language used is permissive. In my judgment, it is explicit that education authorities do have the flexibility to determine the appropriateness of teacher for a particular post irrespective of the details contained in the register. Mr Lindsay submitted that

C the underlined passages in paragraph 3.5 demonstrate that registration remains paramount and the best means of ensuring that appropriate standards are maintained. Whilst it may be correct to state that the Circular does not seek to undermine the role to be played by the GTCS, there is

D absolutely nothing in the Circular which comes anywhere close to suggesting that it would be unlawful to employ a teacher registered in a different sector or subject than that which the role requires.

E 75. The Circular also deals with Regulation 4. The relevant part provides:

F “4. This Regulation requires education authorities to only employ teachers registered with the GTCS in line with the original commitment by Ministers when consultation on the future of the Code was undertaken in 2000. The Standards in Scotland’s Schools etc Act 2000 however provides the GTCS with the power of suspension (section 11A of the General Teaching Council (Scotland) Act 1965 refers). The Explanatory Note to the 2000 Act indicated that the requirement in the 1956 Code for teachers to be registered would need to be amended to cover the suspension of teachers by the GTCS. Now that the 1956 Code is repealed, the definition of ‘registered teacher’ in this Regulation has been amended to ensure that education authorities are not required to dismiss a teacher while they are suspended from the register. The intention here has been to amend the requirement of registration to ensure that such teachers can remain in employment while their case is being considered. However, a suspended teacher can only be employed as a teacher by their existing employer and will be unable to enter into a new contract of employment as a teacher until the GTCS consideration of his or her case is completed.”

G

H 76. It is noteworthy that prior to the expanded definition of registered teacher introduced by **the 2005 Regulations**, education authorities were required to dismiss a teacher whilst they were

A suspended from the Register. Had it been thought that a change in subject or sector from the
registered subject or sector meant that continued employment was unlawful then it might have
B been expected that such a consequence would be expressly set out in the provisions. The fact
that it is not so set out further supports the notion that that was not the intended effect of **the
2005 Regulations** and/or **the 2011 Order**.

77. Ms Shiels, in her comprehensive submissions, referred me to the statutory history
C leading up to the enactment of **the 2005 Regulations** and **the 2011 code**. I have referred to **the
1956 Code** already. The other material to which I was referred included the consultation that
preceded those enactments. Mr Miller and Mr Lindsay objected to Ms Shiels' reliance upon
D such material on the basis that this was not a case where there is any ambiguity in the statutory
provision that would entitle recourse to such extrinsic material, and that, in any event, one
cannot look to consultation material in particular to divine the Parliamentary intention. I do
E agree with Mr Miller and Mr Lindsay that the relevant provisions are not ambiguous so as to
entitle any recourse to Parliamentary materials or extrinsic aids to construction in accordance
with the rule in **Pepper v Hart** [1992] 3 WLR 1032. However, the materials to which Ms
Shiels referred me did not all fall into that category. It is certainly appropriate, in my judgment,
F to consider the context and legislative history in order to understand the meaning of particular
provisions. It is well-established that legislation should be read in its legal, social and historical
context and that the language of a statute or statutory instrument is to be given an informed
rather than a literal meaning: see paragraph 23 of **Secretary of State for Work and Pensions v
Goulding** [2019] EWCA Civ 839 per David Richards LJ.

78. In this case, the legislative history shows that the more restrictive measures under **the
H 1956 Code** were dispensed with and that a more flexible regime was ushered in by **the 2005
Regulations**. The flexibility afforded to education authorities is consistent with a reading of **the**

A **2005 Regulations** which leads to the result that only unregistered teachers are excluded from employment.

B 79. I was not greatly assisted by the **Malloch** case or the **EIS** case to which I was referred by Ms Shiels. This is not a case where vested rights are involved, and in the **EIS** case there was a particular provision dealing with nursery teachers that had been repealed. The position here is somewhat different. Finally, I did not consider it to be of particular significance that registration as a Further Education Teacher is voluntary or that secondary registration requires having a degree. If an FE teacher chooses not to be registered, then no question of being employed arises. If he seeks registration he will have to satisfy the relevant criteria. If he then applies for a job with an educational authority and a secondary school teacher it will be for the educational authority to be satisfied that he has the appropriate skills and qualifications. Mere registration as an FE teacher would not necessarily suffice. The education authority could lawfully stipulate that registration as a secondary teacher is a requirement. That is a matter for the education authority. These are all means of controlling access to a particular role. However none of that sheds any light on whether the absence of registration in a particular sector or subject acts as a statutory bar to employment in a different sector or subject.

D

E

F 80. For all of these reasons, it is my view that the Tribunal did not err in law in reaching the conclusion that there was no statutory bar to the Claimant's continued employment. Accordingly, Ground 1 of this appeal fails and is dismissed.

G

Ground 3 - Error in assessment of compensation

H *Submissions*

A 81. Mr Miller submits that the Tribunal erred in law that it failed to address a submission
made on behalf of the Respondent which was to the effect that had he not been unfairly
dismissed, the Claimant would only have been entitled to contractual sick pay and not full pay
B due to an ongoing illness. Mr Miller submits that the Tribunal erred in assessing compensation
on the basis of full pay for the period to September 2018 in circumstances where it had not
clearly found that the Claimant's illness had been either caused or exacerbated by the dismissal.
C Mr Miller submits that as this was a case where there was a pre-existing illness even prior to
dismissal, the Tribunal ought to have made specific and express findings as to whether or not
the dismissal caused or exacerbated the illness in order to found liability on the basis of full
contractual pay.

D 82. Ms Shiels submitted that this ground was essentially the flip side of the rejected ground.
Insofar as the Respondent sought to rely upon the decision of HHJ Richardson in **Wood v**
Mitchell Ltd UKEAT/0018/10, such reliance was misplaced because that was a case involving
E a supervening event (i.e. illness arising after dismissal itself) unlike the present case where the
Tribunal expressly found that there was no supervening event.

F
Ground 3 - Discussion and Conclusions

G 83. It is right to note that the rejected ground sought expressly to argue that the Tribunal
erred in its conclusion that the Claimant should be compensated for loss of income following
dismissal. The matters relied upon in the rejected ground included the fact that the evidence
pointed to the Claimant's medical problems predating the dismissal and challenged the
H Tribunal's conclusion that the Claimant's loss was attributable to action taken by the employer.

A 84. Mr Miller’s submissions did to some extent seem to stray into territory covered by the
rejected ground. In particular, his reliance upon the Acetrip v Dogra case
B (UKEAT/0238/19/BA), appeared to be directly in support of an argument that the Tribunal
failed properly to assess whether or not the illness from which the Claimant suffered was a
consequence of or had been exacerbated by the dismissal. As stated by HHJ Auerbach on the
sift:

C **“Ground 2 is not arguable. In paragraph 357 to 367 of its decision the Tribunal
clearly identified and showed that it understood the appellant’s argument
about causation on the Claimant’s ill-health. It carefully reviewed the medical
evidence and the Claimant’s own evidence on this point, decided what weight
or significance to attach, and came to a clear overall finding with which the
EAT should not interfere.”**

D 85. The Respondent did not seek to renew its application for permission to appeal on the
rejected ground at a Rule 3(10) hearing. In those circumstances, I consider it inappropriate for
E these matters to be raised again before this Tribunal. Even if those matters had not formed part
of the rejected ground, I would have rejected them myself. That is because the findings as to
causation which are being challenged are findings of fact with which this Appeal Tribunal
would be slow to interfere. The Tribunal reached a very clear conclusion at paragraph 367 that
F taking the various strands of evidence together the Tribunal had a sufficient basis on which to
conclude that the ill-health was as a result of actions taken by the employer and that Claimant’s
loss should not be reduced on the basis that it was occasioned by a supervening event. I note
here that the wording used by the Tribunal in that paragraph reflects the wording in s.123 of **the**
G **1996 Act**. That was a finding that the Tribunal was entitled to reach. Mr Miller’s argument is
that the Tribunal’s finding in this regard amounted to a gloss on the proper exercise to be
carried out, which was to ascertain precisely the extent to which the dismissal caused and/or
H exacerbated the illness question. I reject that contention. The Tribunal carefully considered the
evidence, accepted the evidence of the Claimant and had regard to medical evidence that was

A produced, limited though it was, and reached conclusions that it was entitled to reach based on that evidence.

B 86. The Respondent acknowledges that its argument that the Tribunal erred in its assessment of compensation was one that was raised before the Tribunal at the reconsideration hearing. The Tribunal rejected the argument that it should have applied the approach in **Wood** on the basis that it did not find that there was any supervening illness following dismissal as was the case in **Wood**. I agree with the Tribunal that the absence of any supervening event following the dismissal means that any analysis of the type carried out in the **Wood** case was not required here.

C

D 87. In my judgment, the Tribunal was entitled to assess loss on the basis of full pay given its findings as to causation. In circumstances where, as in this case, the ill-health was the result of the employer's conduct, the Tribunal was not required to assess loss on the basis of anything other than full pay. The Tribunal's assessment of loss is based on what would have happened had there not been an unfair dismissal. It can be inferred from the Tribunal's decision that in those circumstances the Claimant would not have been absent for any significant length of time and would have resumed full-time working. That, it seems to me, was an adequate application

E

F of s.123 of **the 1996 Act** under which the Tribunal was entitled to award by way of compensation such amount as it considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to actions taken by the employer.

G

88. Ground 3 is therefore dismissed.

H

Ground 4 – Pension Loss

A *Submissions*

89. The Respondent’s argument under this ground is that, having found that the Claimant would have found alternative employment by September 2018, the Tribunal erred in law in nevertheless assessing pension loss on the basis that the Claimant would retire at the age of 65. Mr Miller contends that the pension losses would have crystallised as at the projected date of future employment and that pension losses should have been calculated up to that point, that is to say up to the point at which the Claimant reached the age of 57. Reliance is placed upon the decision of the Court of Appeal in **Aegon UK Corp Services Ltd v Roberts** [2010] ICR 596. In that case, the employee was a member of a final salary pension scheme at the time of her dismissal, which was found to be unfair. She subsequently found new employment which provided her with an overall package of remuneration and benefits more favourable than her previous employment, although the pension scheme was significantly less favourable. The employment tribunal found that the Claimant’s future earnings would broadly reflect those which she had enjoyed with the Respondent apart from the benefit of a final salary pension scheme. In assessing her compensation pursuant to s.123 (1) of **the 1996 Act**, the Tribunal held that the new employment had broken the chain of causation in respect of her lost remuneration but not in terms of her lost pension. The Court of Appeal allowed an appeal against that decision. The Court of Appeal referred to the principle stated in **Dench v Flynn and Partners** [1998] IRLR 653, that it does not necessarily follow that loss consequent upon an unfair dismissal must be deemed to have ceased once someone has obtained permanent employment on the same or more favourable terms: see **Aegon** at [8]. Elias LJ, giving the judgment of the court in **Aegon**, then held as follows:

H “17. The starting point for a tribunal when assessing what compensation should be awarded under Section 123 is to determine what financial loss flows from the dismissal. In the context of this case, this required the tribunal to determine whether Aegon should continue to be liable for losses occurring after the dismissal by Just Retirement. After carefully considering the facts in the light

A of the Dench decision, they concluded that the new employment had broken the chain of causation. They accepted that the consequence was that as far as all aspects of remuneration other than pensions were concerned, Aegon's liability was crystallised at that stage. Of course, Aegon will have remained liable for any shortfall in Ms Roberts' remuneration package with Just Retirement when compared with her Aegon package and that would have continued until the age of 50, which is when the tribunal found that she would have left Aegon in any event. But in this case there was no shortfall and therefore no loss. The tribunal's finding on causation meant that Aegon were not to be liable for the loss of remuneration continuing after the contract with Just Retirement came to an end.

B
C
D 18. The tribunal chose not to apply this same principle to the pension loss. I do not think that they could legitimately fail to do so by carving out pensions for this special treatment. With all due respect to the Employment Tribunal and the EAT, I do not accept that pensions have some special status in this calculation. The pension is simply part of the overall remuneration package- in essence deferred remuneration- albeit an important part, and must be assessed accordingly. Nor do I accept the observation of the EAT that having the benefit of a final salary pension scheme is an unquantifiable benefit which justified pension loss being treated differently. The tribunal cannot avoid translating pension values into money terms. It is not possible to make any assessment of loss otherwise. That is admittedly often a difficult and highly speculative exercise, but it is one that must be undertaken nonetheless.”

E 90. Mr Miller submits that, similarly, the pension loss crystallised in the present case as at the date when the Tribunal expected the Claimant to obtain new employment.

F
G
H 91. Ms Shiels submits that Aegon was a case principally about causation and the consequences of a subsequent event breaking the chain of causation. She submits that it is not authority for the proposition that the periods of compensatory loss and pension loss must always necessarily coincide. She referred me to the judgment of the Court of Appeal in Brentwood Bros (Manchester) Ltd v Shepherd [2003] IRLR 364 where the Court of Appeal upheld an award of compensation which included 2 ½ years' future loss of earnings and 10 years' pension loss on the basis that the tribunal considered it unlikely that the Claimant would find pensionable employment again. The Court of Appeal, Peter Gibson LJ giving the lead judgment, reiterated that the appellate court would only rarely interfere with an assessment of damages by the tribunal and held as follows:

A “12. I own to a feeling of some surprise that the Tribunal have found that
Mrs Shepherd, who from a fairly youthful age has held down a responsible and
well-remunerated position for a number of years, should receive two and a half
years loss of earnings but 10 years loss of pension, and in particular I am
surprised by the Tribunal's finding that she would never obtain pensionable
B employment again. Mrs Shepherd was, of course, working in the textile
industry, and it is notorious that that industry has been in decline for a number
of years. However, the Tribunal had to do what it could with the evidence put
before it. It is significant that Bentwood chose not to put in any evidence or
challenge the facts presented by Mrs Shepherd. The Tribunal had the evidence
which she gave of the difficulties which she had encountered when trying to
find a job, that is to say she had applied for 50 jobs but had only obtained a
short fixed term contract. She had in her schedule drawn attention to the fact
C that the textile industry is a tight-knit industry, and that as soon as the
circumstances of her dismissal and subsequent tribunal claim had become
known to prospective employers, they did not wish to continue their interest in
her. The Tribunal Chairman, when invited to provide notes of evidence, had
said that no evidence on oath was taken and had referred to the parties'
schedules of loss on which the representatives of the parties had made
submissions. The Tribunal Chairman had added:

"The findings as to pension loss were made in the light of the
evidence that the applicant had only been able to find one job in a
year and that a temporary job without a pension."

D 13. Mr White suggested that it was significant that the Chairman had not
referred to the Tribunal's knowledge of local conditions or to any special
factors which the Tribunal may properly have taken into account in arriving at
their conclusion. But, in my judgment, it goes without saying that a tribunal
will make use of their knowledge of local conditions and will reach their
assessment in the light of what they know. There was some evidence before the
Tribunal from which they were able properly in my judgment to reach the
E conclusion which they did on this point. It is only a rare case when perversity
can be established. In the particular circumstances, given Mrs Shepherd's
evidence in the form of the schedule of loss, which was not criticised, and the
absence of evidence from Bentwood, I cannot go so far as to say that this
Tribunal's decision on pension law was perverse. Accordingly I would dismiss
the appeal on that point."

F 92. Ms Shiels also makes the point that the likelihood is that the difference in pension loss is
unlikely to make any significant difference to the overall award given the application of the
statutory cap. She reminds me of the Presidential Guidance for employment tribunals as to
G pension loss and the need to bear in mind the proportionality of engaging in a complex analysis
of pension loss where the existence of the statutory cap means that it may not make a great deal
of difference: see paragraph 5.35 of the Presidential Guidance.

H
Ground 4 – Discussion

A 93. The Judgment of the Court of Appeal in Aegon does not establish that in all cases the
B periods for future loss of earnings and future pension loss must be coterminous. The decision in
C Aegon was specifically based on the fact that the tribunal had concluded that there had been an
D express break in the chain of causation. The tribunal in that case was not engaging in a
E speculative exercise based on projections of future events, but was able to ascertain losses more
precisely because the employee had in fact obtained, and subsequently lost, further employment
by the time of the hearing. It was in those circumstances that the tribunal was able to reach clear
conclusions of fact as to the break in the chain of causation. However, as the Court of Appeal
stated (at para 18) it would have been open to the tribunal to find that the employee's
subsequent employment did not break the chain of causation and that if that had been its
conclusion, the loss, both as to loss of earnings and loss of pension, might well have been
different. The main principle to be drawn from the Aegon decision is that where there is a break
in the chain of causation it is not open to the tribunal to apply a different principle of causation
to pension loss than it does to other elements of the remuneration package.

F 94. In the present case, there was no break in the chain of causation in the Aegon sense. The
Tribunal was engaging in the speculative exercise of determining when the Claimant would be
likely to obtain future employment. They found that he would do so within 6 months of the
hearing. However, that finding does not involve any conclusion that there was or would be a
break in the chain of causation at that stage. It was no more than an assessment of the chance
that further employment at a similar level of salary might be obtained by that stage. That
assessment as to likely future loss of earnings did not preclude the Tribunal from coming to a
separate conclusion that pension loss was likely to continue for far longer. The question is
whether there was some evidence on which the Tribunal could come to that conclusion: see
H Brentwood at [13]. Unlike the position in the Aegon case, the Tribunal here had no precise

A figures or information as to the remuneration package of any future employment. As pointed out in the reconsideration decision:

B **“[63]...There was no evidence upon which the Tribunal could reach a conclusion as to the likelihood of the Claimant securing employment within 6 months where he would enjoy the same pension benefits as he had enjoyed with Respondents or a more or less favourable pension entitlement, or if less favourable, what the differential might be between the pension he enjoyed with the Respondents and any new pension entitlement he might enjoy.”**

C 95. In those circumstances, in my judgment, it was open to the Tribunal, doing the best that it could with the available material, to assess pension loss for which the employer continued to be liable, on the basis that the Claimant would retire at the age of 65. The Respondent had argued that losses should be assessed on the basis of retirement at the age of 60. The Tribunal expressly considered that argument but stated that on the basis of the Claimant’s evidence, it was prepared to speculate that it was likely that he would have worked until he was 65. Having reached that conclusion, the Tribunal was in the fortunate position of having agreed figures with which to work, and it assessed the future pension loss accordingly. In my judgment, that was a perfectly legitimate exercise undertaken by the Tribunal in assessing loss and is one that does not disclose any error of law on its part.

F 96. I also bear in mind that the analysis of pension loss will often necessarily be fairly broad brush in nature. That is inevitable when one is dealing with future events and the exercise is speculative in nature. However, if there is, as in this case, some credible evidence on which to base the assessments of future loss then, absent perversity, this aAppeal Tribunal should be slow to interfere.

G 97. For these reasons, Ground 4 of the Grounds of Appeal fails and is also dismissed.

H

A Conclusions

98. It follows that, for all of those reasons, this appeal must be dismissed.

B 99. It just remains for me to thank all the representatives for their extremely helpful and
thorough submissions in this matter.

C

D

E

F

G

H