SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 42
XA115/19

Lord Justice Clerk
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

LM

Appellant

against

A DECISION OF THE GENERAL TEACHING COUNCIL FOR SCOTLAND

Appellant: Party
Respondent: Lindsay QC; Anderson Strathern

14 July 2020

Introduction

[1] This is a statutory appeal against a decision of the Fitness to Teach Panel ("the panel") of the General Teaching Council for Scotland ("GTCS"). The decision, dated 22 July 2019, was intimated to the appellant on 8 October 2019. The panel considered 15 allegations of misconduct against the appellant from her probationary year as a primary teacher. The panel also considered a separate recommendation from the appellant's employer that her provisional registration as a teacher be removed on grounds of lack of competency.

[2] In respect of the conduct complaint the panel found certain facts of the allegations to be established and concluded that the appellant had acted in breach of specified paragraphs of the GTCS's Code of Professionalism and Conduct ("COPAC"). It concluded that her conduct fell significantly short of the standards of a teacher and was sufficiently serious to constitute misconduct.

[3] In respect of the competence recommendation the panel concluded separately that the appellant: (i) currently fell significantly short of the Standards expected of a Fully Registered Teacher; (ii) had failed to maintain the baseline of the Standards for Provisional Registration; and (iii) presented a risk of educational harm.

[4] The panel held that the appellant was unfit to teach and ordered the removal of her name from the Register, with a prohibition on reapplying for a period of 2 years.

[5] The appellant challenged the panel's decision on three broad grounds.

(1) That significant procedural irregularities and delay had occurred in the course of the investigation. These resulted in both issues being considered at one hearing, as a consequence of a rule change in the interim. The delays and the composite hearing caused unfairness and prejudice to her. More than 3 years elapsed from referral of the issues to the panel's decision. This significant delay was due to the respondent's actings, and had caused the appellant financial loss and serious mental health problems.

(2) That the decisions reached in respect of conduct, and separately competence, were irrational, contained errors in law and fact, and were decisions that no reasonable panel provided with all the facts could have reached. In particular the panel failed to apply and/or ignored rules and key authorities on the use of hearsay evidence, the admissibility and assessment of evidence generally, and in some instances made findings based solely on uncorroborated evidence and/or hearsay evidence.

(3) That *esto* such a decision could have been reached, the sanction imposed was harsh, excessive and disproportionate. The appellant should have been given further time to meet the standards.

[6] The appeal was resisted on the basis that the appellant had failed to identify any material error of law, irrational exercise of discretion, or procedural irregularity.

Background

[7] The issues considered by the panel derive largely from the appellant's time as a probationary teacher at a primary school in the academic year 2015/2016.

[8] By way of background, on seeking entry to the teaching profession an individual must, as a minimum, meet the Standard for Provisional Registration ("SPR"). Following provisional registration, a period of probationary service must be completed. During that period continuing adherence to the SPR must be demonstrated, and, at its end, the teacher must show that the Standards expected of a Fully Registered teacher ("SFR") are also met.

[9] The relevant standards are set out in the GTCS Standards for Registration 2012. In summary these consist of three parts:

1. Professional values and personal commitment.
2. Professional knowledge and understanding, with reference to the curriculum, education systems and professional responsibilities; and pedagogical theories and practice.
3. Professional skills and abilities, with reference to teaching and learning; classroom organisation and management; and professional reflection and communication.

The employer of a probationary teacher can make a recommendation to the respondent for registration to be cancelled due to lack of compliance; or for the period for completion to be extended to allow competence to be met.

[10] The appellant took up a position as a probationary teacher under the Scottish Government's then Teacher Induction Scheme in August 2015, teaching a primary 5 class. She was employed by the local authority at the school in question, having obtained provisional registration. The appellant completed 169 days of probationary service and applied for full registration in July 2016. She stopped teaching at the school in June 2016 and has not taught since.

Rules and Guidance

[11] Of the General Teaching Council for Scotland Fitness to Teach Rules 2017 ("2017 Rules"), the following are of particular relevance:

> "1.7.17 Subject to the requirements of relevance and fairness, a Panel may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil or criminal proceedings in the United Kingdom.
>
> 1.7.23 Subject to a Convener or Panel ordering otherwise, any fact which needs to be proved by the evidence of a witness at a hearing may be proved by his/her evidence being provided in writing in the form of a written statement signed by him/her which contains the evidence that he/she would be permitted to provide orally at a hearing."

[12] In addition, rule 1.3.4 provides that:

> "Guidance may be published by GTC Scotland as to matters of practice and as to how the powers conferred by these Rules may be exercised. Panels and parties must have regard to any such guidance but will not be bound by it."

GTC Scotland has published *Professional Competence Cases Practice Statement* (2017), which gives guidance on matters such as the evaluation of evidence, the assessment of professional competence and the relevance and meaning of the public interest. A panel is advised to determine what evidence it accepts, what weight to attach to that evidence and to address each section of the relevant standards in turn. In respect of professional competence, the panel should apply the fitness to teach tests at the time the case is being considered and for

the foreseeable future, taking account of: (i) the way in which the teacher performed; (ii) any information as to current professional competence and how he/she is likely to perform in future; and (iii) the wider public interest. At this stage, character evidence may be relevant if it relates to what the teacher has done to remedy any concerns and the insight he/she has demonstrated as a result; how he/she is currently performing; and the absence or presence of similar events in the teacher's history.

[13] Guidance is also available in the *Fact-finding in Fitness to Teach Conduct Cases Practice Statemen*t (2017). This describes a 3 stage process, by which the panel decides, in turn:

1 Whether it finds the facts alleged proved;

2 Whether, on the basis of the facts found proved, the teacher's fitness to teach is impaired or he/she is unfit to teach; and

3 If it finds that fitness to teach is impaired, what action should be taken or sanction imposed in view of that identified impairment.

[14] The guidance notes that facts are to be determined on a balance of probabilities, and that evidence does not require to be corroborated. There are reminders to consider the totality of the evidence, of the distinction between those matters which constitute evidence and those which do not, (for example submissions), the need to assess credibility and reliability, and how to deal with inconsistencies. There is also a list of indicative questions which the panel might find useful to ask itself in assessing evidence such as how well placed was the witness to offer the evidence in question, is the evidence probable or improbable, does the witness have a vested interest in the outcome and so on. A separate section is devoted to hearsay evidence, explaining what it is, that it may be admitted in Fitness to Teach ("FTT") proceedings and that a panel requires to think carefully about what weight to attach to it. Reference is made to the fact that such evidence is not given on oath, and that

the panel has not had the same opportunity to assess the witness as where live evidence has been given.

[15] Similar guidance is contained within the *Fitness to Teach Conduct Cases - Indicative Outcomes Guidance Practice Statement* (2018), which assists in determining the appropriate course of action should a panel determine that a teacher's conduct impinges upon fitness to teach. Where misconduct has been established, relevant considerations for the panel to consider include: whether the shortfalls identified are remediable; whether they have been remedied; and whether there is a likelihood of reoccurrence. The public interest and the interests of the teacher both have to be taken into account.

The competence issue

[16] In July 2016 the respondent received a recommendation from the local authority that the appellant's provisional registration be cancelled because her fitness to teach was impaired by a lack of professional competence. Included within the recommendation, as required by the rules, was a case overview report dated 16 July 2016 ("COR") and supporting documentation. The COR alleged that the appellant lacked competence because she had failed to meet and maintain SPR and SFR standards. In particular she had failed to meet certain standards of Part 1 that were common to both SPR and SFR, including: 1.1 social justice; 1.2 integrity; and 1.3 trust and respect. The COR also considered that she had failed to meet all the standards at SFR level in parts 2 and 3. Under part 2 the areas listed were: 2.1.1 knowledge and understanding of the nature of the curriculum and its development; 2.1.2 knowledge and understanding of the relevant areas of the curriculum; 2.1.3 knowledge and understanding of planning coherent and progressive teaching programmes; 2.1.4 knowledge and understanding of contexts for learning to fulfil

responsibilities in relation to literacy, numeracy, health and wellbeing and inter-disciplinary learning; and 2.1.5 knowledge and understanding of the principles of assessment, recording and reporting. Under part 3, the areas were 3.1.1 plan coherent, progressive, and stimulating teaching programmes which match learners' needs and abilities; 3.1.2 communicate effectively and interact productively with learners, individually and collectively; 3.1.3 employ a range of teaching strategies and resources to meet the needs and abilities of learners; 3.1.4 have high expectations of all learners; 3.1.5 work effectively in partnership in order to promote learning and well-being; 3.2.1 create a safe, caring and purposeful learning environment; 3.2.2 develop positive relationships and positive behaviour strategies; 3.3 use assessment, recording and reporting as an integral part of the teaching process to support and enhance learning; 3.4.1 read and critically engage with professional literature, educational research and policy; and 3.4.2 engage in reflective practice to develop and enhance career-long learning and expertise. In each case, reasons were given for the assertion that the appellant failed to meet the requisite standards.

[17] The COR and associated documentation was provided to the appellant. In a written response, dated 13 October 2017 and completed by her solicitor, she disputed the recommendation. She did not admit the facts founded upon and gave a point by point answer to each issue. She admitted that "I have maintained the SPR but have failed to achieve the standards for full registration" by ticking the box for this option. Furthermore the form stated "I accept that I will not be able to present evidence to the panel that I have achieved the standards for full registration". Her position was that she had not received adequate support but was capable of achieving the requisite standards if given a further opportunity at a different school. She alleged a course of bullying, harassment and lack of support with a complete breakdown of relationship between herself and the senior

management, for which they were to blame. She drew attention to testimonials from the parents of pupils, and character references. These, together with detailed statements from her, were submitted with the response. The form indicated that she did not challenge the admissibility of evidence intimated to date and did not seek to argue any preliminary issue or issue of law. In the summer of 2016 the appellant was advised that the recommendation would be investigated and proceed to a Probationary Service Hearing.

Conduct allegations

[18] Separately, during the appellant's probationary year the school received a number of allegations in respect of her conduct which it referred to the local authority. Broadly they alleged, from around January 2016, (1) that on a number of occasions she had made inappropriate comments regarding her relationship with the head teacher to parents and pupils of the school, suggesting that she was being bullied; (2) that she disclosed confidential information regarding a child to another parent; (3) that she inappropriately allowed a child of her class to take and return jotters for the whole class to the school while she was absent; (4) that she acted in an inappropriate manner in a public place towards a member of the public; and (5) she disclosed information in relation to a child to another party- in this instance the child's father's new partner.

[19] On 20 July 2016, following internal investigation, the local authority referred the conduct issues to GTCS. At that time conduct allegations, like the recommendation, also fell to be considered and addressed under the *Fitness to Teach and Appeal Rules* 2012 ("2012 Rules"), Part 3. In accordance with the 2012 Rules the convener of an Investigating Panel considered the complaint, concluded that it was not frivolous or irrelevant and should be considered further by an Investigating Panel. Notice to this effect was given to the appellant

on 28 July 2016. The panel considered the complaint, and any accompanying documentation, and the appellant's response. It sought further information from the local authority in July, October and November 2016. Where an Investigating Panel concludes that there is a case to answer, it has the option to refer the matter to a hearing before a Fitness to Teach Panel. In the present case, it did so in March 2017, notice to that effect being given to the appellant's agent on 16 March 2017.

[20] The appellant denied the facts and allegations against her.

Alleged delays

[21] The appellant contends that significant delay occurred regarding consideration of both the competency and conduct issues, for which she blames the respondent. The respondent suggests that any delay was caused by changes in the appellant's representation. One aspect of the appellant's case relates to a change wrought by the 2017 Rules, enabling both conduct and competence cases to be determined at the same hearing.

[22] From the limited papers available on this aspect the following key steps in the timeline for the purposes of this appeal have been identified:

- From July 2016 to March 2017 the respondent's Investigation Panel and associated staff sought additional information primarily from the local authority and carried out investigation into the conduct allegations in particular. There was some delay in obtaining all the necessary information from the local authority, despite reminders. An Investigation Panel consideration scheduled for January 2017 was postponed at the appellant's request.
- On 16 March 2017 the appellant's representative received confirmation of the decision to remit matters to a Fitness to Teach Panel.

- During the first half of 2017 there was a degree of uncertainty over the appellant's representation. She had formerly been represented by Mr M, solicitor, but was then represented by Mr JJ. Efforts to arrange a case management hearing in May and June failed, since Mr JJ did not answer correspondence. Meanwhile, Mr M re-entered the picture. Clarification was repeatedly sought on whether he held instructions from her. Eventually, on 4 July 2017, a mandate confirming Mr M's reappointment was submitted. He represented the appellant at a case management hearing on 27 July. It was anticipated that a full hearing would take place in October, with a prior case management hearing once a further full response from the appellant had been provided. The case management hearing could not proceed, as Mr M did not respond to correspondence, and on 15 November 2017 he again withdrew from acting. The appellant then intimated that she had instructed Mr JM. The appellant was asked (22 November) to clarify the position, but did not respond. A separate firm of solicitors had contacted the respondents, apparently on the appellant's behalf, and were in turn asked (8 December) for a mandate. No response having been received by mid-January 2018, intimation was made to both the appellant and the solicitors that arrangements to hold the hearing would be put in place. On 18 January agents intimated that their mandate must have been lost in the post. They were invited to respond by forwarding a copy by e-mail but did not respond. Meanwhile, a hearing was fixed for 17, 18, 19 and 20 April 2018. On 2 February the agents indicated that the lack of reply had resulted from sickness absence. A formal notice of the hearing was sent to the agent on 20 March 2018, and directly to the appellant by letter of 26 March. On 3 April the agents withdrew from acting. At this

stage, Mr JJ re-entered the proceedings and sought a postponement of the hearing which was granted on 11 April.

- In May 2017 the respondent identified that while under the 2012 Rules each matter would have to be dealt with separately, new rules coming into force in August would permit both to be addressed at the one hearing. The respondent was in favour of adopting a single hearing for a number of reasons including efficiency and convenience of parties given *inter alia* the significant cross over of the evidence in respect of each matter to be determined.
- A number of procedural applications for the appellant were dealt with at a procedural hearing on 6 July 2018. On 14 August 2018, intimation was received that the appellant was now represented by Mr F. The 30 October 2018 and 4 subsequent working days was assigned as a date for the full hearing to determine both matters. Shortly before the full hearing, fresh conduct allegations came to light. The respondent sought a discharge of the hearing to allow investigation of these, and if appropriate for them to be included within the matters to be determined by the panel. These allegations formed item 4 within the conduct complaints.
- A temporary restriction order was placed on the appellant in November 2018.
- A fresh 9 day hearing to consider all of the allegations made against the appellant was fixed for 30 April 2019.

The Panel Decision

[23] In the course of a 9 day hearing on 30 April, 3 May, 28 May, 31 May, 3-4 June, 24 June, 22 July and 26 July 2019 the panel heard evidence in respect of the conduct allegations and the recommendation concerning competency. It considered statements and

other documentation lodged and submissions made on behalf of both parties. The appellant was represented by Mr F.

Conduct allegations

[24] The conduct allegations against the appellant which were found established by the panel, and to constitute breaches of the conduct rules were as follows:

> *"1. Between January 2016 and February 2016, whilst employed by [local authority] as a teacher at School 1… [the appellant did]:*
>
> > *a) make inappropriate comments about your relationship with the Head Teacher (Teacher D) at School 1 in that:*
> >
> > > *(i) on or around 27 January 2016, you said to a parent words to the effect of 'I am being bullied by [Teacher D]';*
> >
> > *(b) on or around January 2016, whilst on a period of sickness absence, you did discuss a LAC pupil in your class with a parent of another pupil, and in doing so did breach confidentiality;*
>
> *...*
>
> *4. Between May and September 2018, you did engage in a course of intimidating behaviour towards members of staff at School 1…, including:*
>
> > *(a) in or around May 2018, you did make a rude hand gesture to Teacher A and Teacher B when a vehicle that they were driving passed by a vehicle that you were in;*
> >
> > *…*
> >
> > *(c) on or around 31 May 2018, you were in a vehicle which approached a vehicle that was being driven by Teacher C and you did so slowly and stared into Teacher's C car window for a prolonged period causing Teacher C to be fearful and feel intimated;*
> >
> > *...*
> >
> > *(e) on or around 26 June 2018, at [a supermarket] you did walk past Teacher A and shout words to the effect of 'oh look who it is, it's the bully from School 1. It's Teacher A the fucking bully from [School 1]' in the presence of other members of the public;*
> >
> > *…*

> *(g) on or around 22 September 2018, when walking past Teacher A in a shop you did loudly say words to the effect of 'look at the fucking state of that'."*

[25] The panel found the facts underlying certain other allegations, namely 1(c) and 3 established, but did not consider that they breached the code of conduct. Further allegations - 2, 4(b), (d), and (f) – were found not to be proven.

[26] The panel gave separate consideration to (a) whether the facts were established; (b) were capable of constituting a breach of conduct; and (c) whether they did in fact do so.

[27] The panel gave consideration to all of the evidence presented, the submissions (including those relating to hearsay), the Legal Assessor's advice, and the GTCS' Indicative Outcomes Guidance. It concluded that the appellant's conduct at the time of the incidents fell short of the expected professional standards. In particular it held that the appellant had breached the following paragraphs of the COPAC: 1.2, 1.3, 1.4, 1.6, (professionalism and maintaining trust in the profession); 2.1 (professional responsibilities towards pupils); and 4.1, 4.4 and 4.5, (professionalism towards colleagues, parents and carers). The panel considered that the appellant's actions and behaviour were sufficiently serious as to amount to misconduct.

[28] The panel then considered whether the shortfalls identified were remediable; whether they had been remedied and if there was a likelihood of recurrence. While the behaviour was in general remediable, the panel considered that the appellant had not demonstrated that she had taken sufficient steps to address her failings, and had expressed little or no remorse to those who had been affected by her behaviour. While it accepted that her position was one of denial, she had not shown any insight or real understanding into her conduct and the impact it had had on the individuals involved. As a result the panel

considered that there was a high risk of recurrence. The panel considered that the appellant was unfit to teach, having regard to the serious and wide ranging nature of the breaches.

Competence findings

[29] The panel considered the competence recommendation separately. It heard evidence from the appellant.

[30] In addition to the evidence submitted by the local authority within the COR, the panel heard evidence from Teacher D and Teacher C. Given that Teacher A had attended the hearing to speak to the conduct allegations the panel also took the opportunity to ask her some questions regarding the appellant's professional competence.

[31] In reaching its decision it had regard to the Professional Competence Cases Practice Statement and the Standards for Registration (relating to both SPR and SFR). The panel concluded that the appellant had fallen short of the standards expected of a Registered Teacher and in particular Parts 1, 2 and 3 of the Standards for Registration. Professional competence in relation to planning, assessment and reflection were key concerns. The panel accepted Teacher D's oral evidence that the pupils in the appellant's class were two years behind where they should have been and that their education had regressed. In light of this, the panel concluded that the appellant had caused harm to pupils because of her lack of professional competence.

[32] In reaching its conclusions the panel took into account the various explanations the appellant gave for her lack of professional competence including the alleged bullying she suffered, and the fact that she had been a victim of stalking during the time period in question. In the panel's view no bullying had taken place.

[33] While the panel considered that professional shortfalls in competence were capable of remediation, it chose not to give the appellant additional time to meet the standards. In doing this it acknowledged that a significant time had elapsed since the recommendation had been made and that the appellant had not been working as a teacher since then and the recommendation would have hindered such work. It also acknowledged that competence could regress due to periods away from the classroom if appropriate steps to maintain knowledge and understanding were not taken. There were, nevertheless, ways in its view in which a teacher could maintain professional standards away from the classroom.

[34] In the panel's view, however, the appellant: (i) demonstrated a lack of insight in relation to the shortfalls in her professional competence; (ii) provided no evidence that she had reflected on her professional competence during her probationary period and linked it to the Standards for Registration; (iii) had not acknowledged the impact her lack of professional competence had had on the progress of pupils; (iv) had failed to provide any detailed evidence of her research or reading to support keeping her practice up to date; (v) had failed to demonstrate that she had considered how she would move forward if she retained her registration and was given more time to achieve the SFR; and (vi) she did not provide any oral or documentary evidence detailing any current professional development action plan.

[35] Taking all of this in to account the panel concluded that the appellant currently fell significantly short of the standards expected of a registered teacher. She had failed to maintain the baseline SPR and presented a risk of educational harm. Accordingly the public interest required a finding of unfit to teach.

Sanction

[36] Based on the finding of unfitness, the appellant fell to be removed from the Register. The panel decided to impose the maximum 2 year prohibition on reapplying. A shorter period was inappropriate given the extent of her failings and the lack of confidence in her ability to remedy such failings within a shorter timeframe.

Submissions

[37] Detailed written submissions were made by both parties and taken account of by the court; what follows is a summary of the key issues.

Submissions for the appellant

Ground of appeal 1- procedural irregularity and delay

Single hearing

[38] The 2012 Rules required the conduct complaint to be adjudicated separately from the recommendation. By June 2017 neither had been adjudicated upon. This delay was beyond what might reasonably be envisaged, either generally or under article 6 of ECHR. The respondent took advantage by applying the 2017 Rules which, unlike the 2012 Rules, allowed both complaints to be addressed at the same hearing. Dealing with both complaints together, some 3 years after they were made, disadvantaged the appellant.

[39] Whilst it was correct to say there was an overlap in the evidence of the matters arising, which might justify a joint hearing, it was unfair to the appellant to proceed on this basis, and put the impartiality of the panel and witnesses into question. It was wrong for witnesses who spoke of alleged misconduct to give evidence on the appellant's competence. It would appear that the alleged conduct was taken into account by the panel when determining competency.

Delay

[40] Delay was caused by the respondent failing to respond to emails, giving the local authority more time to provide information, panel availability, changes requiring to be made to the panel constitution, investigation of the new allegations, two postponements and vulnerable witness applications.

[41] If the complaints, particularly the competency complaint, had been dealt with in a reasonable time, which the appellant suggested would have been one year, she would have been better placed to respond to the issues and address any questions posed by the panel. The delay caused her disadvantage, because she was unable fully to answer questions relating to situations from 3 or more years ago. The panel's decision reflected, for example, concerns relating to a lack of detail in her answers and her inability to remember a task completed in May 2016. At an earlier hearing, the appellant would have been likely to recall particular situations and the panel would not have had such concerns or criticisms of her evidence.

[42] Had the original conduct complaints been heard under the 2012 rules, allegation 4 would not have existed. Thus the delay had led to further disadvantage.

[43] The appellant did not accept that any delay in the proceedings was caused by changes in agency.

[44] The panel also failed to consider how the more recent serious allegations (item 4) and the impact they had on the appellant's mental health, as confirmed by medical evidence, might affect her ability properly to engage with the hearing. It failed to give sufficient consideration to the bullying and stalking she had suffered. It had not been entitled to conclude that there had been no bullying.

[45] The lengthy proceedings, delay and the panel's incorrect consideration had resulted in her developing serious mental health problems.

Ground 2- the decision was irrational, wrong in law, vitiated by error, and lacked valid or cogent reasoning

[46] The decision was incomplete and failed to give full details and reasoning for the panel's conclusions. A transcript of the proceedings was required to allow the court to assess the panel's reasoning.

[47] The appellant questioned the panel's ability to make its decisions given the time period that had elapsed between complaint, investigation and determination (this argument was not advanced any further).

Competency

[47] The panel assessed the appellant's competency as at the date of the hearing, which was wrong and prejudicial to the appellant. The panel relied upon an alleged admission by the appellant that she had not met the SFR. That admission did not reflect the up to date position, and was made without her knowledge. The panel did not hear oral evidence to support a lack of competence in relation to all parts of the SFR, nor did it give proper scrutiny to the voluminous documentary evidence which showed no lack of competence. Instead, it accepted the documentation as a whole and failed to seek further clarification from the appellant in respect of any evidence which was at odds/or contradictory to it.

[48] The finding of educational harm to pupils was made on the mere opinion evidence of Teachers D and C without due regard to credibility and reliability. Teacher D's evidence should have been ignored. The panel did not refer to the COR in support of its own findings.

Weighing of factors

[49] In addition to the bullying, stalking, mental health problems and delay the panel appeared not to have given any consideration or weight to important matters such as that: (1) the appellant had never been suspended due to the allegations, (2) her class had never required to be passed to another member of staff nor had any monitoring of her lessons been introduced; (3) the breakdown in her relationship (as a probationer) with the head teacher; (4) she had volunteered for classroom assistance between 2011-2014 in order to enhance her PGDE application; (5) positive references were given by teachers at schools pre-probation; (6) the local authority had failed to offer her an extension to meet the SFR in more supported circumstances; and (6) teachers A, B, or C hadn't reported alleged incompetence to the local authority, something which also called into question their credibility.

Errors and incorrect conclusions

[50] On a number of occasions the panel had arrived at a conclusion unsupported by the evidence. For example, that:

- The appellant had failed to engage with support.
- There was evidence to support a finding that the school had experience of successful probationers; the panel was not in a position to determine whether the expectations of those in the school in relation to probationer teachers were realistic.
- The panel said that no explanation was given as to how being involved in her nephew's learning/tutoring in mathematics would link to improving her own practice in future, but they did not ask for any explanation.
- If planning was an area of concern, the panel failed to consider why the plans had been accepted each term at planning meetings, the reasons provided by the appellant, and the positive reference evidence provided.

- The panel did not record the full extent of the appellant's evidence on aspects of lessons of which it was critical and failed to reference documentary evidence to support it.
- The statement that the appellant "had not acknowledged the impact of her lack of professional competence on the progress of learners" failed to take into consideration the appellant's principal position that her teaching abilities impacted positively on the progress of learners, as evidenced in testimonials and the lack of any parental complaints.

Conduct

[51] In respect of complaint 1(a)(i), the panel failed to consider the lack of testing of the credibility and reliability of witnesses whose evidence it relied on. It erred in finding that teacher C's hearsay evidence of what Parent 1 had said to her was corroborative of the allegation. Parent 1 did not give evidence, thus her evidence and in particular her credibility and reliability could not be tested or assessed by the panel nor was there a suggestion the panel had considered this. The panel had failed to question why the witness had not attended. Her statement should not have been admitted.

Decision on para 1(b)

[52] The panel incorrectly applied the law on hearsay particularly *El Karout* v *NMC* [2019] EWHC 28 (Admin) and *Thorneycroft* v *Nursing and Midwifery Council* [2014] EWHC 1565 (Admin). It failed to apply the principles applicable to admission of such evidence and incorrectly relied upon it in support of its conclusions.

[53] The evidence of parent 3 and a witness, AM was fundamental to the panel's reasoning, but no mention was made of their credibility or reliability. Neither witness gave evidence. AM did not produce a signed formal statement, denying the panel confirmation that the letter relied upon by it had been written by her. The panel erred in admitting the

evidence and failed to take in to account other evidence which put into question the veracity of AM's letter, such as it being sent 5 months after the alleged incident.

Decision on allegations under heading 4

[54] The panel failed to recognise that more cogent evidence was required to prove more serious charges *(El Karout)*. It failed to take into consideration that the appellant had not been the subject of criminal proceedings, nor was there clear evidence of police involvement.

[55] In respect of complaints 4(c), (d) and (g) the only evidence which supported the allegations was uncorroborated and the panel should not have proceeded on the basis of such evidence. The credibility and reliability of the witness in (c) and (g) was questionable and evidence which could have been produced in support of these witnesses was not led.

[56] In respect of complaint 4(a) the panel misdirected itself, as irrespective of whether teacher A was credible or reliable there was no corroboration: teacher B contradicted teacher A's evidence as to who had made the gesture.

[57] At page 15 of the decision, it said it would look at each allegation separately and consider the evidence presented in relation to each allegation separately. However, in respect of 4(g) the panel referred to a "similar pattern" in the written decision, showing that it clearly used the evidence in complaints 4(a) and (e) as being supportive of 4(g).

The panel's conclusion as to unfitness to teach

[58] The panel should not have assessed the appellant's competency as at the date of the hearing, and that was prejudicial to her. The panel did not carefully consider whether each finding made in relation to conduct had a genuine bearing on her fitness to teach.

[59] Making allegedly unfounded accusations against colleagues did not relate directly to conduct towards pupils at the school. Matters which did not relate directly to conduct in relation to pupils would not generally bear on fitness to teach - *AD* v *The General Teaching*

Council for Scotland [2019] CSIH 18 at [61]. The conduct in question 1(b) did not fit within any of the exemplars listed in the GTCS's Threshold Policy of what would amount to behaviours that may raise a concern about a teacher's fitness to teach. The conduct in question was historic, and did not amount to evidence that the appellant represented any risk of harm to children or young people.

[60] Public protection considerations did not justify a finding of unfitness in the present case. The panel failed to bear in mind that the standard referred to the informed public. It should have been guided by the fact that neither the GTCS nor the local authority saw fit to restrict or temporarily remove or impede the appellant's freedom to practise at any point prior to the end of 2018. A member of the public aware of the nature and context of the conduct reflected in the panel's findings would not consider a finding of unfitness to teach to be necessary, given the whole circumstances.

Ground 3- disproportionate sanction

[61] It could not be suggested that the panel treated the matters before it lightly. That in itself was a sanction. The appellant had participated and engaged actively in the process throughout. She had persevered and shown a continuing commitment to the profession. The public's confidence in the profession and the regulator would not have been undermined by permitting her to continue to practise.

Submissions for the respondent

Ground of Appeal 1

Combined hearing

[62] A combined hearing complied with the 2017 Rules. The conduct and competence issues were considered separately by the panel. It made separate findings and provided

separate reasons in respect of conduct and competence. At each stage the panel had regard only to the evidence which was relevant to the particular issue being considered, and did not take into account any irrelevant considerations. A teacher's professional values and personal commitment were at the core of membership of the profession, and the panel was entitled to conclude that there was an inevitable overlap between conduct and competence. Certain breaches of COPAC were relevant to both and therefore could lawfully be taken into account by the panel when considering each issue.

[63] The panel considered that the appellant had not, by her actions and in her evidence, demonstrated the necessary values of openness, honesty and courage expected of a teacher. These findings were reasonably open to the panel. The panel also noted that she had breached parts of COPAC which included breaches of trust and confidentiality. These were relevant and material considerations which could lawfully be taken into account when assessing the appellant's professional competence. Accordingly, the combined nature of the hearing did not cause prejudice.

[64] Even the appellant acknowledged that there was considerable "overlap" between the conduct and competency issues, with many of the witnesses being relevant to both. Also there was an overlap between areas of the Standards for Registration and separately areas of COPAC. A single hearing enabled both issues to be dealt with fairly and justly in accordance with the general objectives of the 2017 Rules.

Delay

[65] The passage of time between receipt of the initial allegations and the commencement of the hearing was the result of frequent changes in the appellant's legal representation and their repeated failure to respond timeously to correspondence from the respondent. During

the investigation stage, the local authority had taken some time to provide the requested documentation. However, this was not a material delay and did not prejudice the appellant.

[66] The 2012 Rules had required conduct and competence issues to be dealt with separately, meaning that the respondent required to decide which matter to progress first. After careful consideration it was decided that it was necessary, from a public interest point of view, to progress the conduct matter first. Addressing the conduct first was considered to be the most appropriate sequence to deal with this case. This decision was a reasonable one. As a result, the competence matter was not progressed until after the 2012 Rules had been revoked. Any alleged delay would only be a potentially relevant ground of appeal if it materially prejudiced the appellant's ability to present her case at the hearing or otherwise resulted in a procedurally unfair hearing, neither of which was established. She was legally represented at the hearing by an experienced solicitor with a specialism in representing teachers at regulatory hearings. He did not submit that the passage of time rendered a fair hearing impossible, prevented her from preparing fully, or made it difficult to obtain instructions. In any event, the panel made due allowance for the passage of time. The averments relating to financial loss and to mental health problems were irrelevant.

Date of assessment

[67] The appellant submitted that she was prejudiced because her knowledge and skills were assessed at the present day in relation to matters that had been raised three years previously. The COR reported on her professional competence during her 169 days of probationary service during academic year 2015/16. In her notice of teacher's case form the appellant had admitted that she had failed to meet the SFR, so the panel was not in a position to grant full registration to her. The panel expressly recognised and took into account (at page 28 of the decision) that she had not been working as a teacher for a

significant period of time; and that a teacher's professional competence could regress during an extended period away from the classroom where appropriate steps are not taken to maintain knowledge and understanding; and that there were a number of steps an individual could take to maintain and improve their professional competence away from the classroom. At the hearing, the appellant had recognised that she had not continued to keep her knowledge up to date and could not say how she would do that if she was returned to the register. The respondent had not erred in assessing it at the present date.

Ground 2

General issues raised by the appellant

[68] It was for the panel to decide what evidence to accept, what weight to give to it and to make findings in fact based upon it. Deference should be paid to a specialist tribunal, dealing with professional matters and which had heard the evidence first hand. The court was not in as good a position to assess professional competence: *Fyfe* v *Council of the Law Society of Scotland* 2017 SC 283 at paragraphs [21] & [31]. The test for overturning findings in fact was a high one- Lord President Carloway, at [85] in *McLennan* v *GMC* [2020] CSIH 12. This court could not interfere with the panel's findings in fact, in the absence of a serious flaw in the process or the reasoning, unless it can be shown to have been "plainly wrong". This high test had not been met. The sanction imposed was not excessive or disproportionate. There were no grounds upon which this court could interfere with the decision of the panel: *Dad* v *General Dental Council Professional Conduct Committee* [2010] CSIH 75 at paragraph [13].

[69] The appellant sought a rehearing of the merits of the evidence and a *de novo* consideration.

Conduct

[70] The panel took into account all relevant and material considerations and did not misunderstand any of the evidence or submissions which were advanced on behalf of the appellant. None of the? findings in fact was perverse or irrational. The panel gave adequate and comprehensible reasons for its conclusions.

Hearsay

[71] The panel's approach to the admission of hearsay evidence disclosed no error of law. It was in accordance with both the terms of the 2017 Rules and with the guidance given in the leading authorities - *Thorneycroft* and *El Karout*. The panel considered whether evidence was hearsay, whether there was only a single source of evidence and whether the witness, who could have given direct primary evidence, had been called to give evidence.

Balanced assessment of evidence

[72] The panel gave very careful attention to all of the evidence and submissions. It adopted a thorough and forensic approach, assessing the evidence in respect of each individual allegation. It did not adopt a blanket approach, finding several of the allegations not established. Corroboration was not required in order to find an allegation proved. The giving of evidence under oath by video link was in accordance with the rules, not objected to by the appellant and did not result in any procedural or substantive unfairness to the appellant. Her legal representative was able to cross-examine these witnesses without difficulty.

Competence

[73] The appellant's criticisms of the panel were immaterial and irrelevant. She admitted that she had failed to meet the SFR and so the panel could not grant full registration to her. The issue to be determined by the panel was whether to give her further time to meet the

standard required for full registration or to remove her name from the Register. It began its consideration by finding that her professional competences were capable of remediation. However, it decided not to give her more time to demonstrate that she met the standard of professional competence for a number of reasons which it detailed, and which were reasonable.

Ground 3- sanction

[74] The panel determined that the appellant was unfit to teach, in accordance with Article 18(2)(b) of the Public Services Reform (General Teaching Council for Scotland) Order 2011, rendering removal from the Register mandatory. The panel considered that a period of prohibition shorter than 2 years was inappropriate given the extent of her failings and the lack of confidence that the panel had in her being able to remedy such failings within a shorter timeframe.

Analysis and decision

[75] In presenting her submissions the appellant did not address the test to be applied in an appeal from the decision of a first instance tribunal. Instead much of her submission consisted of a disagreement with the conclusions of the panel. She was in effect seeking a complete reassessment of the case, asserting that this court should overturn the findings of the panel as to facts, credibility, reliability and fitness to teach. It is therefore worth setting out briefly the scope of an appeal such as this, and the relevant test for the court to apply. In *M* v *Nursing and Midwifery Council* [2016] CSIH 95 at para 16, the court observed that:

> "It is well settled that the court must afford respect to the decisions of specialist professional tribunals, whose primary concern is the public interest, not the individual circumstances of the person concerned, nor with notions of punishment. As was observed in *Dad* v *General Dental Council* [Professional Conduct Committee] [2010] CSIH 75: 'The court should be slow to interfere with a decision of a professional conduct tribunal as to what is necessary for the protection of the

reputation of the profession' (paragraph 13). The court will only act in cases of clear error, or where an order is excessive or disproportionate. It is sometimes said that the decision must be 'plainly wrong'."

[76] In *Fyfe* v *Council of the Law Society of Scotland* 2017 SC 283, para 21, it was noted that, following *Ghosh* v *General Medical Council* [2001] 1 WLR 1915 the court's power may be less inhibited than it once was, at least in relation to sanction and decisions which did not relate to professional performance – a substantial aspect of the present case does of course relate to professional performance. In *El Karout* v *Nursing and Midwifery Council* [2019] EWHC 28 (Admin), a case referred to by the appellant in relation to hearsay evidence, the court adopted a summary of the position thus:

> "(a) The appeal is not confined to points of law but neither is it a de novo hearing.
>
> (b) The court's function is not limited to a review of the panel's decision, and in relation to findings of fact the court is entitled to exercise its own primary judgement on whether the evidence supported such findings. However, the court will not interfere with a decision unless persuaded it was wrong.
>
> (c) In relation to findings which reflect a professional judgement concerning standards of professional practice and conduct, the court will exercise distinctly secondary judgement and give special place to the judgement of the professional body as the specialist tribunal entrusted with the maintenance of the standards of the profession."

For this court to interfere with the decision at first instance there must be a clear error, indicating that the tribunal has plainly gone wrong in its determination.

[77] Turning to the key issues raised by the appellant.

Delay

[78] The appellant referred to the GTCS consultation document which led to the 2017 Rules. It proposed that conduct and competence issues for probationers should be heard together, as they were in cases involving fully qualified teachers. It was suggested that by doing so the resolution of these cases might be reduced from 12 months to 3 months. The

appellant took this as an indicative period for resolution of complaints. She made reference to the reasonable time requirement of Article 6, ECHR, without advancing further submissions on the point.

[79] What is a reasonable period for resolution depends entirely on the specific circumstances of any given case. Here, the initial period for inquiry by the local authority before referring the matter to the respondent in July 2016 seems reasonable. Although the Investigating Panel did not refer the case to a FTT panel until March 2017, it is clear that, but for the appellant's request for a postponement, the Investigating Panel would have done so in January 2017. After the referral in March 2017, delays resulted from the considerable uncertainty over the appellant's legal representation, and changes of agency which continued for most of that year. But for this, a full hearing would have taken place in October 2017. Once the agency matter was resolved, a hearing was fixed for April 2018 but this was discharged at the appellant's request. A fresh hearing was fixed for October 2018 but in the meantime the fresh allegations came to light and it was not unreasonable for that hearing to be adjourned for consideration of these new matters. The period which then elapsed, until the full hearing in April 2019?was not unreasonable. The appellant cannot rely on a delay which was caused at her own hands.

[80] In any event, there was no material before us to indicate that the appellant was prejudiced in the conduct of the hearing as a result of the passage of time. It is apparent that in relation to the conduct issues she was able to dispute the allegations without impaired memory as to where she had been, and so on. On the competency issue, she could not recall, in relation to one exercise, whether the pupils were rotated between groups; and on another matter she could not recall the methodology used or the academic sources referred to. However, the main point was not what sources she had used, but that she had not

referenced them properly in the first place. The panel's criticisms of the appellant's evidence relating to competence essentially centred on a lack of knowledge and understanding, rather than recall. We can find no basis upon which it can be said that the appellant was prejudiced by the delay.

[81] The proceedings would have been resolved prior to the spring of 2018 but for the delays which were largely attributable to the appellant and her agents. In any event, the additional allegations would have to have been dealt with at some stage, and there was no prejudice in dealing with them as the panel did.

One Hearing

[82] Similarly, it cannot be said that the panel erred in proceeding to deal with matters at one hearing or that the appellant was prejudiced by this course of action. The 2017 Rules apply to any proceedings which had not concluded by 21 August 2017 and the panel had to apply these rules to her case. Rule 1.7.33 makes it clear that a panel may consider more than one allegation and/or recommendation at the same hearing. There were obvious reasons why addressing both competency and conduct at one hearing made sense in the present case, as even the appellant recognises.

[83] The panel addressed the issues of competency and conduct separately. The fact that some evidence might have been relevant to both issues does not mean that they were not treated separately by the panel. In our view there was no blurring of the lines by the panel and they did not confuse or conflate the two issues.

Transcript

[84] The absence of a transcript of evidence does not mean that a court cannot examine the findings of the panel, reach a determination on whether it had fallen into error and, if so,

correct that error: see *McLennan* v *General Medical Council* [2020] CSIH 12 para 84. Appeals of this type are customarily conducted with reliance on the detailed narrative given by the panel and the written material. In this case that included the written statements of numerous witnesses, and all the material before the panel, running to hundreds of pages. The court does not consider itself at a disadvantage in addressing the grounds advanced.

Hearsay

[85] Hearsay evidence is admissible in proceedings before the panel (Rule 1.7.17). The *Fact Finding in the FTT Conduct Cases Practice Statement* gives guidance about the admission of such evidence and the use to which it may be put. The panel was addressed in detail by the appellant's agent, under reference to *Thorneycroft* and *El Karout* in particular. The panel decision includes a separate section dealing with hearsay evidence and specifically states that it took account of all the following factors:

- whether the hearsay was the sole or decisive evidence
- the extent to which it was challenged
- whether there was a reason for the witness to fabricate
- the seriousness of the allegations; and the effect an adverse finding may have on the teacher's career
- whether there was a good reason for the non-attendance of a witness
- whether reasonable steps had been taken to secure the attendance of a witness

[86] The significance to be attached to all or any of this non-exclusive list of considerations was a matter for the panel. It considered, in respect of each piece of evidence, whether it was hearsay; and if so, whether it would be fair to admit it; and what weight to attach to it. In some cases – 1(a)(iii) and (iv) for example – the panel considered that the

hearsay evidence could not be relied upon. In others, especially where there was some degree of support, whether in the form of corroboration or because it was inherently probable or fitted in with other evidence which the panel accepted, the hearsay was held to be admissible and of sufficient weight that the panel felt able to rely on it. We do not find any error in law in the panel's treatment of hearsay evidence.

Assessing competence at the date of the hearing

[87] The panel did not err in this regard. The date for assessing fitness to teach is the date of determination. The Professional Competence Cases Practice Statement, states:

> "It is important that the Panel bears in mind that it should apply the fitness to teach tests described above to the Teacher currently (i.e. at the time the case is being considered and for the foreseeable future rather than, for example, at the time that the professional competence issues arose). This is consistent with the principle that professional regulation is about looking forward in order to protect rather than about looking back in order to punish and also aligns with relevant case law (a summary of which is provided in Appendix 2). Assessing fitness to teach should be approached holistically, taking account of: (i) the way in which the Teacher performed with regard to his/her professional competence; (ii) any information available as to where the Teacher is now with regards to his/her professional competence".

[88] A similar approach applies to fitness to teach assessments based on conduct complaints: Fitness to Teach Conduct Cases - Indicative Outcomes Guidance Practice Statement. The panel had before it the historical evidence, and the evidence of the appellant herself. The panel sought, as recommended by the guidance, to ascertain where she stood at the time of the decision, regarding her fitness to teach. It nevertheless made allowance for the fact that she had not been teaching in the interim, and that skills could regress in such a situation, but they correctly and reasonably noted that there were other ways in which skills could be maintained. They concluded that the appellant had not taken steps to do so, based on the lack of understanding and knowledge which she continued to demonstrate.

Assessment of evidence generally

[89] There was disputed evidence before the panel on the question of whether the appellant had, as she asserted, been bullied. The panel was entitled to reject her evidence and conclude that no bullying had taken place. The panel cannot be criticised for not taking into account something they concluded had not taken place. The appellant maintained that the admission in the teacher response that she had not met the SFR was no longer the position at the time of the hearing, and in the course of the appeal even appeared to suggest that the admission had been made without her instructions.

[90] The level of detail contained in the response was such that it must have been completed with detailed instruction from the appellant, and it cannot be accepted that the admission that she had maintained SPR but not achieved SFR was not made on instruction. At the hearing, the following submission was made on her behalf:

> "It is a matter ultimately for the panel to judge whether they accept the position as set out by the teacher in her annotated version of the SFR which is produced at pages 348 through to 365 of the hearing papers, or whether it is the document at pages 46 through to 62 which they accept."

[91] The former is the teacher's response document, containing the admission in question, and commencing at page 511 of the appendix; the latter is the assessment which formed the main part of the COR and which can be seen starting at page 211 of the appendix. In her evidence the appellant stated that she would like the opportunity to complete the SFR if she were given an extension, the clear inference being an acceptance that she had not met the requisite standard. In these circumstances we do not see that the panel can be criticised for having regard to the admission, which was in any event supported by evidence.

[92] The panel had before it comprehensive written submissions from the appellant's agent in which the evidence was analysed by reference to reasons for rejecting evidence

contrary to the appellant's position. The appellant's approach was to select individual aspects of these criticisms and assert that the panel should have accepted them. But the assessment of evidence, its weight, and credibility and reliability are above all a matter for adjudication by the first instance tribunal. It is only if it is apparent that the panel reached decisions which were not legitimate or justified that an appeal court would be entitled to interfere. The panel clearly considered carefully the written submissions for the appellant which addressed all the issues of the kind advanced by her under this head of appeal in forensic detail: they rejected them, as they were entitled to do.

[93] It is not the case that the panel failed to take account of evidence favourable to the panel, such as a positive report from her student placement at another school, or the history of stalking to which she had referred. The panel gave sound reasons why it did not accord great weight to these matters as supporting competence or mitigating failure to meet it.

Reasons

[94] In our view the panel gave clear and specific reasons for its findings, both for and against the appellant, in relation to each allegation and in relation to each significant piece of evidence. It gave reasons for accepting or rejecting evidence and these reasons are sustainable in the circumstances of the case, and supported by evidence. The appellant approached matters on the basis that if a piece of evidence or a submission was not specifically mentioned by the panel it meant the panel had not taken it into account. That is not the case. What a panel provides is a summary of the submissions and evidence provided to it; greater detail is available in either the written submissions or in some cases in the written statements. If a matter is mentioned, even by reference, it can be assumed that account was taken of it. The panel did not require to restate the guidance from *Thorneycroft*,

or Practice Statements, each time it was considering, for example a piece of hearsay evidence. It is apparent from the fact that it addressed each piece of hearsay evidence separately that it did so. The panel throughout gave its reasons for accepting the hearsay evidence. Equally, when the panel said that it would consider the credibility and reliability of each witness it did not require to repeat that it was doing so each time. We can assume that a consistent approach was taken.

Fitness to teach

[95] The assessment of the appellant's fitness to teach was a matter for the panel. So far as her competence is concerned, this is an area peculiarly within its expertise. The panel conducted a thorough review of the evidence and spent a considerable part of its decision assessing her evidence.

[96] The appellant contended that her conduct did not come within the bulleted list of exemplars in the GTCS Threshold Policy relating to conduct, and, under reference to *AD* v *The General Teaching Council for Scotland* [2019] CSIH 18 paragraph 61, submitted that as it did not relate to professional competence or conduct in relation to pupils it was not conduct which affected fitness to teach. In our view, that takes far too narrow a view of the matter. In the first place, the issue is one of conduct, not professional competence. Although the two may overlap, and conduct itself may reflect upon competence, as it clearly did in the present case, it is not necessary for conduct to do so before it impinges upon fitness. Second, we note that some of the exemplars themselves do not relate to interaction with pupils, for example substance abuse or misuse of social media. Third, conduct which affects fitness may be any action that raises a concern that the teacher presents a risk or could undermine public confidence in the teaching profession. Finally, in the present case, the behaviour did involve

matters relating to pupils, in the form of breach of confidentiality. The panel considered this to be a serious matter, going to the heart of the pupil/teacher relationship of trust. The appellant, whilst denying the behaviour, acknowledged that such behaviour would be unprofessional and unacceptable. The panel took care to look at all the evidence, including that in favour of the appellant. We can find no flaw in its approach.

Sanction

[97] Having concluded that the appellant failed the requirement of fitness to teach the panel had no alternative but to remove the appellant from the register. As to the period to elapse before re-registration could be sought, the panel explained this by reference to the multiple instances of misconduct, covering several distinct areas of COPAC, the lack of insight, and the apparent lack of personal commitment shown by the appellant. We can detect no error in the way it went about this task, and we cannot say that the result was disproportionate to the findings.

Conclusion

[98] For all these reasons, we refuse the appeal.