



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 17
XA33/20

Lord Justice Clerk
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

MS

Appellant

against

GENERAL TEACHING COUNCIL OF SCOTLAND

Respondent

Appellant: MacNeil QC; Drummond Miller LLP
Respondent: Lindsay QC; Anderson Strathern LLP

2 March 2021

Introduction

[1] This is an appeal under article 24 of the Public Services Reform (General Teaching Council for Scotland) Order 2011 against a decision of the General Teaching Council for Scotland's Fitness to Teach Panel ("the panel") dated 17 April 2020. 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. At its end, the teacher must show that the standards expected of a fully registered teacher (the Standard for Full Registration (“SFR”)) are also met.

[2] The appellant embarked upon his probationary period at the beginning of the academic year 2017-2018 at the first school. In March 2018 he became ill and could not complete the year there. As a result he was granted an extension of his probationary period to the end of December 2018, and he was placed in the second school at the beginning of the academic year 2018-2019.

[3] The panel was convened following a recommendation dated 19 December 2018 from the local authority employing the appellant, that his provisional registration should be cancelled because his fitness to teach was impaired by lack of professional competence. A case overview report (“COR”) and supporting documentation was provided. The COR alleged that the appellant had failed to meet expected standards. He had failed to meet certain standards common to both the SPR and the SFR, and others specifically required for the SFR.

[4] The appellant, who was legally represented at the hearing accepted that he had not met the standards for full registration. He believed he continued to meet the standards expected of a probationer. He maintained that key factors in his failure were the effects of, and the failure of the schools where he worked to make sufficient reasonable adjustments to assist him with, his Asperger’s syndrome. If, contrary to his view, he had not maintained the SPR standards, then the failure was attributable to the same cause. He asked for a further probationary year to seek to meet the relevant standards.

[5] The panel found that the appellant had not only failed to meet the standards for the SFR, he had not continued to meet the probationary standards for the SPR. It removed his

name from the register of teachers maintained by the General Teaching Council for Scotland (“GTCS”). It also prohibited him from applying for re-registration for a period of one year from the date of removal.

The issues

[6] The appellant challenges the panel’s determination on the basis that it failed to take account of the effect of his Asperger’s and the absence of reasonable adjustments to accommodate the same. All four grounds of appeal reflected that one underlying issue. It is said that by proceeding to determine his fitness to teach without having regard to that essential issue the panel’s decision was vitiated.

[7] The grounds of appeal appeared to raise a number of procedural issues relating to the responsibility of the panel. In the course of submissions senior counsel for the appellant clarified his position as follows:

- (i) He did not assert that the panel should have conducted its own research into Asperger’s and its effects, or the nature and extent of any reasonable adjustments.
- (ii) The appellant’s case was that insufficient reasonable adjustments had been made in both of the schools where he was a probationer. In the first school very little was done by way of adjustment. In the second school certain reasonable adjustments had been discussed and agreed with the appellant at the outset, but they had not been sufficient and they had not been fully and properly implemented. These failures either caused, or made a material contribution to, his failure to meet the SFR, and any deficits in relation to the SPR.
- (iii) The fact that the appellant had Asperger’s and the need to make reasonable adjustments had been undisputed matters of fact at the hearing. There was a factual dispute about whether the adjustments which had been agreed at the second school had been

implemented. The panel required to resolve that issue. It had not done so. Nor had it either accepted or rejected the appellant's evidence about how his Asperger's affected him; that reasonable adjustments had been necessary in the first school and further reasonable adjustments had been needed in the second school; and that had such adjustments been made he is likely to have met the standards. These issues were relevant both to the question whether the appellant had maintained the SPR, and to whether he ought to be allowed a further opportunity to satisfy the standards. It was not open to the panel to decline to engage with the issues and proceed as if they did not exist, which was in effect what it had done. In consequence the procedure had not been fair and just, as required by the General Teaching Council for Scotland Fitness to Teach Rules 2017 ("the 2017 Rules").

(iv) Under rule 3.6.4 the panel could ask for any information that it considered relevant. Where it considered that it had been left with an absence of information on a key matter, it was incumbent upon the panel to ask for such information to be provided. This would not have imperilled the independence of the panel or the fairness of proceedings; it would merely have assisted to put the panel in a position to determine the central issue.

[8] The respondent submitted that the appellant had failed to identify any material error of law, irrational exercise of discretion, or procedural irregularity. In support of that contention senior counsel argued that:

(i) The issue of what reasonable adjustments, if any, could or should be made to the appellant's terms and conditions of employment was a matter for the local authority, not the panel.

(ii) The panel required to make its decision based on the evidence, without speculation, guesswork, or making its own inquiries into Asperger's and its effects.

(iii) To have invited the appellant to lead further evidence in respect of his claimed condition would have shown partiality. It was not in any event necessary, there being sufficient evidence available to enable the panel to determine the appellant's fitness to teach. The appellant's solicitor had made the decision not to lead any medical or other expert evidence. He had also elected not to make any detailed submissions on the nature of any reasonable adjustments and why they would have enabled the appellant to meet the required standards for registration as a teacher. It was not for the panel to second guess that approach.

(iv) In advance of the hearing, the panel had provided written questions asking (i) when the appellant advised both schools about his Asperger's, and (ii) what adjustments were made by both schools. This focussed the issues relating to his condition and provided an opportunity of leading all the evidence or making the submissions that they considered necessary.

Analysis and decision

[9] It is not disputed that at all relevant times the appellant had Asperger's syndrome. The schools maintained that they had made some adjustments but their extent and implementation were both contested. It is clear that there was evidence about how Asperger's affected the appellant, and the reasonable adjustments which had been considered appropriate and whether they had been implemented. We understand that the appellant gave oral answers to the panel's written questions, since it stated that "The teacher answered questions put to him by the panel", although the detail of this is not recorded in the decision. The decision also stated that "The teacher spoke to his Asperger's", although again the detail is not recorded. The panel further stated that;

“There was evidence that the first school was aware of the Teacher’s Asperger’s from at least October 2017, when it gave support to him although not expressly in relation to this condition. The Teacher provided the second school with a short document of issues due to his Asperger’s, dated 31 August 2018.... There was evidence of adjustments made there. Both schools considered that they provided appropriate support; the Teacher disagreed, although not while working at these schools.”

[10] The COR included some information about adjustments. This discloses that when the appellant arrived at the second school they were made aware of his Asperger’s, and his then mentor took advice from Autism Scotland, although a new mentor was assigned “to accommodate his needs”. At a meeting to discuss his experience at that school, the appellant was given the opportunity to outline any supports he thought would benefit him. It was recorded that he outlined some ways in which the school could support him. These included:

- Starting tasks – it may take me longer to adjust to courses/online systems/rules. I take longer to learn the complexities of rules.
- Time for change - I may need longer to adjust to changes in courses etc I would need more than one or two days' notice.
- I may communicate things to staff (in a different mannerism with pupils) that may come across different, simple or repetitive: I'm simply recognising the specific rules of the system.
- Opportunities to develop - discussions with staff on what they think my development needs are, no matter how honest it is! I'd like to know about developmental needs before it goes straight to council before I knew it was an issue. I like specific instructions and perfectly honest and honestly worded feedback, no matter how offensive it may seem. I appreciate regular reviews of my progress.

[11] The school accepted the appellant’s suggestions. He asked that the senior management team and the maths department be made aware of his condition and were clear with him when outlining areas for development. In turn it was suggested that he respond to any direct communications showing he clearly understood what was expected of him. Section 5 of the COR, under “other factors”, contained a list of reasonable adjustments “made at [his] request”. These included:

- Daily discussions with the maths department to establish routines.
- Instructions from all supporters to be clear and unambiguous and written where possible
- Agendas to be sent in advance.
- Clarity around policy and procedures
- The provision of time out if required.
- An alternative to noisy environments.

[12] The appellant's original mentor had "sought information from Autism Scotland to support [him] in his role as a maths teacher". She asked that consideration be given to the hours he worked, and suggested that socialising with colleagues might prevent his becoming over-anxious. Specific support strategies directed to the issues which the appellant said his Asperger's presented him with, or directed to assisting him to be more efficient as a teacher, were not identified. The mentor was said to have an understanding of autism, "based on recent staff training". The nature of this training is described elsewhere in the COR as "basic training in supporting young people with autism". There was a dedicated pupil autism unit to gather expertise and advise young people with autism. The head of the unit spent some time with the appellant, "helping him to understand his own condition". No support strategies from this meeting were identified.

[13] The mentor meetings and discussions were said to include certain supports, namely:

- [The appellant's] mentor had an understanding of Asperger' condition based on recent staff training (changed on 23rd August to further support [him]);
- Mentor meetings and PT discussions included the following supports:
 - Ensuring processes were made clear and unambiguous;
 - Ensuring expectations were clear and unambiguous;
 - Ensuring written information was clear and unambiguous;
 - Ensuring agenda for staff meetings were sent in advance;
 - Key policies within the school were shared;
 - Ensuring [the appellant] understood the hierarchy of staff within the school;
 - Support needs raised by [the appellant] including time out/down time/adult social environments;
 - Support needs raised by [the appellant] in terms of busy/noisy environments/children.

[14] The evidence appears to have indicated that there was little if anything by way of reasonable adjustments made at the first school; but that at the second school there were considerable efforts to try and identify reasonable adjustments, and that certain adjustments appear to have been agreed with the appellant. There can also be no doubt that at least some of those adjustments were implemented. However, in our view there was a significant factual dispute which the panel ought to have, but did not, resolve; namely, whether all of the agreed adjustments were properly implemented. Adjudicating on that aspect of the dispute did not require the panel to assess the sufficiency of those adjustments.

[15] Nevertheless, even if the panel had duly performed its duty to make findings in fact on that issue, it seems unlikely that that would have wholly resolved the more fundamental questions which the appellant's evidence raised. He maintained that the key factor in his failure to meet the SFR was the failure of both of the schools where he worked to make sufficient reasonable adjustments to assist him with his Asperger's syndrome. If, contrary to his view, he had not maintained the SPR standards, his evidence was that that failure was attributable to the same cause.

[16] The appellant's evidence in relation to these matters was opinion evidence. Had the proceedings been court proceedings, such opinion evidence would have been inadmissible because the appellant was not a skilled witness who was qualified to give opinion evidence of that nature. However, rule 1.7.17 of the 2017 Rules provides:

"1.17.17 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 UK."

Accordingly, the panel could admit the appellant's opinion evidence. If it did, it would then require to determine whether it found the evidence to be credible and reliable, and what, if

any, weight to attach to it. So far as weight is concerned, the fact that the appellant was not qualified to give skilled evidence would be likely to be a very important consideration.

[17] It would have been open to the panel to find that the appellant's evidence on these matters was unreliable; or that because he was not qualified to give skilled evidence no weight should be attached to it. On the other hand, since the proceedings were inquisitorial rather than adversarial, it could have decided that these aspects of the appellant's evidence raised potentially important issues which merited further investigation. It was not obliged to do that; but we are in no doubt that it was a course which was open to the panel. It could have raised with the parties the evidential difficulty which arose because of the absence of skilled evidence, and it could have adjourned the hearing to give them the opportunity to submit further evidence if so advised.

[18] Had the panel followed any of these possible courses it would have been hard for the parties to have challenged the panel's decision on the point. The difficulty here is that the panel did none of these things. Instead, it dealt with the Asperger's related issues in the following way:

"The Teacher's Asperger's

The Teacher spoke to his Asperger's. The Teacher's Representative submitted that the Teacher did not meet the Standards because of his condition of Asperger's and a lack of reasonable adjustments.

There was no medical evidence produced in relation to the Teacher's condition of Asperger's nor was there any expert evidence on the impact of Asperger's on his ability to teach, and what reasonable adjustments were necessary in his particular case.

The Local Authority did not challenge that the Teacher had Asperger's. There was evidence that the first school was aware of the Teacher's Asperger's from at least October 2017, when it gave support to him although not expressly in relation to this condition. The Teacher provided the second school with a short document of issues due to his Asperger's, dated 31 August 2018 (p. 126). There was evidence of adjustments made there. Both schools considered that they provided appropriate support; the Teacher disagreed, although not while working at these schools.

The Panel has not been provided with sufficient evidence to enable it to reach an informed decision on all reasonable adjustments, because of the complete lack of medical evidence on Asperger's and its impact on the Teacher's ability to teach, and other independent evidence as to what adjustments were required. The Panel was not able, therefore, to determine what material bearing, if any, the Teacher's condition and any lack of reasonable adjustments had on his progress in teaching."

The panel went on to accept the evidence that the appellant had failed to maintain the SPR in numerous specified respects.

[19] We have some sympathy for the panel. It was placed in a difficult position because the appellant did not lead expert medical evidence about his disability; or medical or other expert evidence relating to (i) the reasonable adjustments which he required; and (ii) whether he would have been likely to meet the standards with those adjustments. However, we agree with senior counsel for the appellant that the effect of the panel's decision was that it proceeded as if the issues relating to the appellant's Asperger's, reasonable adjustments, and their possible effect on his progress could be ignored. In our opinion they could not be ignored. The panel had to engage with those aspects of the appellant's evidence and decide how to deal with them, such as by following one or other of the courses already discussed. What it was not open to the panel to do was to disregard that evidence without properly explaining the basis upon which it was taking that course.

[20] In our opinion the panel fell into further error when it went on to consider the appellant's fitness to teach:

"The Panel had already determined that the Teacher had fallen short of the SPR while a probationary teacher. It considered then whether the shortfalls identified were remediable, whether they had been remedied, and the likelihood of the Teacher continuing to fall short of the standards expected. The Panel considered that potentially the shortfalls were remediable. There was no evidence, however, before the Panel that the shortfalls had been remedied. While the Teacher was volunteering at a school, there was no evidence as to what he was actually doing there and no evidence that there had been any improvement. In relation to the likelihood of

recurrence, at present the Panel considered that there could be recurrence given the lack of insight on the Teacher's part.

The Panel therefore concluded that the Teacher's fitness to teach is impaired. It considered that, given the failures across three sections of the Standards, the Teacher had fallen significantly short of the standards expected. As a result, he was unfit to teach."

The problem with that approach is that if the appellant's evidence about his Asperger's related difficulties and his failures to meet the standards being attributable to the insufficiency of reasonable adjustments was correct, it would be likely to have a very material bearing upon (i) whether he was unfit to teach; and (ii) whether an extension of his probationary period would be likely to be fruitful. We consider that in order to properly equip itself to answer those questions the panel had to engage with the relevant aspects of the appellant's evidence and decide how to deal with them, as already discussed.

[21] We shall allow the appeal and quash the decision of the panel. The matter should be reconsidered by a differently constituted panel. We do not consider it necessary to give that panel any formal guidance. The panel and the parties will no doubt have regard to the contents of this opinion. The parties and their advisers are now aware of the difficulties which the absence of independent expert evidence caused the first panel. It will be for them to consider what, if anything, they propose to do in that regard to assist the reconstituted panel.