EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 18
XA20/18

Lady Paton
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LORD GLENNIE

in the appeal

by

AD

Appellant

against

THE GENERAL TEACHING COUNCIL FOR SCOTLAND

Respondent

Appellant: McAlpine; DAC Beachcroft Scotland LLP
Respondent: Lindsay QC; Anderson Strathern LLP

26 March 2019

Introduction

[1] The appellant, who is 53 years old, is a teacher registered with the General Teaching Council for Scotland ("GTCS") on its register of teachers.

[2] In January 2018 a Fitness to Teach Panel ("the Panel") was convened to consider allegations against her relating to her employment by the local authority as a teacher at a Grammar School ("the school") during 2016 and early 2017. On 8 February the Panel found

the allegations proved. It went on to find that the appellant was "unfit to teach"; directed that her name be removed from the register; and directed that she be prohibited from making an application for re-registration for a period of two years from the date of its decision, that being the maximum period permitted under the rules.

[3] The appellant appeals to this court against that decision pursuant to article 24 of The Public Service Reform (General Teaching Council for Scotland) Order 2011 ("the 2011 Order").

[4] In terms of article 24(5) of the 2011 Order, the bringing of an appeal prevents the Panel's decision from having effect until the withdrawal of the appeal or its final determination. Initially that was of no practical consequence. The appellant resigned from her position at the school, left the United Kingdom and went to live in Italy. However, in October 2018 she returned to the United Kingdom. Thereupon the GTCS, no doubt concerned that she might seek to resume her teaching career in Scotland before this matter was concluded, made an order under article 21 of the 2011 Order (to which provision the suspensive effect of article 24(5) does not apply) restricting her registration and thereby, in effect, preventing her from teaching until the appeal is determined.

The GTCS, statutory provisions, the register of teachers and relevant rules

The GTCS

[5] The GTCS describes itself as "the world's first independent, self-regulating professional body for teachers": see the Code of Professionalism and Conduct published by the GTCS (referred to hereafter variously as "the GTCS Code" or simply "the Code"). Its existence, functions and powers are currently governed by the 2011 Order made under and in terms of the Public Service Reform (Scotland) Act 2010. Among its "general functions",

the GTCS is required to keep a register of teachers ("the register"), to establish and keep under review the standards of conduct and professional competence expected of a registered teacher, and to investigate the fitness to teach of individuals who are registered: article 6(a), (b) and (c) of the 2011 Order. Its "general powers" include the power to do anything which appears to be appropriate for the purposes of or in connection with the performance of its functions: article 8. And it has power, in terms of article 10, to publish information and advice relating to its functions. The GTCS Code is an example of such a publication.

The register of teachers

[6] Part 3 of the 2011 Order is directed to the register of teachers which the GTCS is required to keep. Within that Part, article 15 requires the GTCS to make and publish rules ("the GTCS rules") governing the operation of the register. Such rules may make provision about removing individuals from the register. In terms of article 16, which is concerned with entry in the register of teachers, the GTCS must include an individual in the register if it is satisfied, *inter alia*, (i) that the registration criteria are met in relation to that individual and (ii) that the individual is not unfit to teach.

Fitness/unfitness to teach

[7] Article 18 of the 2011 Order deals with the question of fitness to teach in the following way:

> "18. Fitness to teach
>
> (1) The GTCS –
>
> (a) must investigate the fitness to teach of any individual seeking registration; and

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

(2) The GTCS must –

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

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

(3) An individual is 'unfit to teach' for the purposes of this Order if the GTCS considers that the individual's conduct or professional competence falls significantly short of the standards expected of a registered teacher (and 'fitness to teach' is to be construed accordingly).

(4) Schedule 4 makes further provision regarding individual's fitness to teach."

[8] Paragraph 1(1) of Schedule 4 to the 2011 Order provides that the GTCS rules may make provision about the circumstances in which, and the manner in which, an individual's fitness to teach may be investigated; and they may also allow the GTCS to impose conditions and record reprimands on the entry of an individual in the register where their fitness to teach has been investigated. Paragraph 2(1) of the Schedule provides that the GTCS may hold proceedings in respect of an investigation of an individual's fitness to teach; and, in terms of paragraph 2(2), the GTCS rules must set out the procedure, the standard of proof and the rules of evidence which are to apply to such proceedings. In terms of paragraph 3, the GTCS is required to appoint a legal assessor to advise it on questions of law arising in such proceedings.

The GTCS Code

[9] The purpose of the GTCS Code ("the Code") is to set out the key principles and values for registered teachers in Scotland. The Code is divided into separate parts covering

different aspects of a teacher's responsibilities. Each part is accompanied by a commentary. Read together, the Code and commentary state both to the profession and the public "the standard of conduct and competence expected of registered teachers". It is recognised that the Code and commentary cannot address every possible circumstance in which teachers might find themselves, but teachers are expected to be mindful of the Code in relation to the judgements which they will be called upon to make in situations which might occur both within and outwith the professional context. To this end it is emphasised that the Code is "guidance and not a statutory code" and that teachers must use their own judgement and common sense in applying the principles to the various situations in which they find themselves. It goes on to say that teachers must be aware that a serious breach of these principles, or a series of minor breaches, could lead to action resulting in an adverse fitness to teach finding and imposition of sanctions.

[10] The relevant parts of the GTCS Code for present purposes, being the parts considered in the hearing before the Panel, are parts 1.2, 2.1, 2.3, 4.1 and 4.3. They provide as follows:

> "**Part 1: Professionalism and maintaining trust in the profession**
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> As a registered teacher:
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> …
>
> 1.2 you must maintain appropriate professional boundaries, avoid improper contact or relationships with pupils and respect your unique position of trust as a teacher; …
>
> **Part 2 : Professional Responsibilities towards Pupils**
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> As a teacher:
>
> 2.1 you must treat sensitive, personal information about pupils with respect and confidentiality and not disclose it unless required to do so by your employer or by law;

…

2.3 you should aim to be a positive role model to pupils and motivate and inspire them to realise their full potential; …

Part 4: Professionalism towards Colleagues, Parents and Carers

As a teacher:

4.1 you should work in a collegiate and co-operative manner with colleagues and members of other relevant professions;

…

4.3 you should not make malicious or unfounded criticisms of, or accusations about, colleagues that may undermine them professionally or in the professional judgements they make; …"

The GTCS rules

[11] The relevant GTCS rules are The General Teaching Council for Scotland Fitness to Teach Rules 2017, which apply to any referral, application or recommendation raised, initiated, made or lodged on or after 21 August 2017. The present case came by way of a referral, ie information received by the GTCS about the applicant from her employers at the school. In terms of the rules, the matter was placed before a Panel (sometimes referred to as a Fitness to Teach Panel) composed of independent members appointed by the GTCS.

[12] Part 1 of the GTCS rules deals with "General" matters. The Panel consists of at least three members, the majority of whom are registered teachers and at least one a lay person: rule 1.4.1. The case against the teacher is presented on behalf of the GTCS by a Presenting Officer. A teacher is entitled to attend and be represented (rule 1.7.1) but the Panel may proceed in the absence of a party who, having been given notice of the hearing, fails to attend. Decisions are taken by a majority: rule 1.5.1. Where the facts alleged by the

Presenting Officer are in dispute, the burden of proving such facts rests with the Presenting Officer: rule 1.7.15. The standard of proof is on the balance of probabilities: *ibid*.

[13] Part 2 of the GTCS rules deals with "conduct cases". We should note that Part 3 deals with "professional competence cases", but it is not in dispute that this case is a conduct case to which Part 2 applies. In a conduct case, where the GTCS receives a referral it will first be subject to initial consideration by the GTCS. In general terms, unless the person giving that initial consideration decides *inter alia* that the conduct complained of is not "Relevant Conduct", or that it happened too long ago, or that the referral is frivolous or vexatious, then the case will be referred for investigation to be carried out by the GTCS (rule 2.1.1). At this stage the case may be dismissed (rule 2.2.4) or may be referred to a Panel for consideration: rule 2.2.4(c). Where the case is referred to a Panel, rule 2.3.1(a) provides that the teacher will be provided with a notice that will "set out the allegation(s) to be considered by the Panel" together with copies of any documents to be placed before the Panel following the investigating process (rule 2.3.1(b)).

[14] After meeting in private, the Panel may refer the case on for a hearing: rule 2.3.2(f). That was what was done here. At a full hearing, which is the substantive hearing in the case, the Panel determines, in turn, the following matters (rule 2.8.1):

> "(a) Whether it finds the facts set out in the allegation(s) proved;
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> (b) Whether, on the basis of any facts found proved, the Teacher's fitness to teach is impaired or he/she is unfit to teach; and
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> (c) If it finds that fitness to teach is impaired, with reference to rule 2.10, what disposal to impose in view of the identified impairment."

No doubt the reason why paragraph (c) quoted above is restricted to a finding that "fitness to teach is impaired", and does not include the case of a finding that the teacher is "unfit to teach", is that a finding that the teacher is "unfit to teach" leads inexorably, there being no

discretion on this point, to the removal of the teacher from the register in accordance with article 18(2)(b) of the 2011 Order.

[15] Rule 2.10 is headed "Decision and Disposal". Rule 2.10.1 provides that where the Panel is satisfied that a teacher is unfit to teach it will direct that the Teacher's name be removed from the register; and rule 2.10.6 provides that the Panel may also direct that the teacher be prohibited from applying for re-registration until the expiry of such period (not exceeding 2 years) as it may determine. As noted above, the Panel in this case directed that the appellant's name be removed from the register and further directed that she be prohibited from applying again until the expiry of that maximum two year period.

Indicative Outcomes Guidance

[16] In a Practice Statement issued in August 2017 under rule 1.3.4 of the GTCS rules, the GTCS published "Indicative Outcomes Guidance in Fitness to Teach Conduct Cases" ("Indicative Outcomes Guidance") to support "the rational and consistent determination of fitness to teach conduct cases". At page 3 of the document, the Indicative Outcome Guidance repeats the three stage decision making process identified in rule 2.8.1 of the GTCS rules (see paragraph [14] above) and goes on in Part A to provide guidance on "Determining Fitness to Teach". The relevant passages in Part A read as follows (all underlining and italicisation being in the original text):

> "Once a Panel has determined that the facts set out in a complaint are proved (stage 1 of the process), it will need to make a determination on the Teacher's fitness to teach (stage 2 of the process). This is a matter of judgement for the Panel and is not something that is proved in the same way as findings of fact are.
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> [The 2011 Order] states that an individual is unfit to teach if GTC Scotland considers that his/her conduct or professional competence falls *significantly* short of the standards expected of a registered teacher. An individual's fitness to teach should be

considered impaired where GTC Scotland considers that the individual's conduct or professional competence falls short of the standards expected of a registered teacher.

It is important that the Panel has 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 facts found proved took place). 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 the relevant case law … Assessing fitness to teach should be approached holistically, taking account of: (i) the way in which the Teacher has acted or failed to act; (ii) any information available as to where the Teacher is now with regards to his/her fitness to teach and how he/she is likely to behave or perform in future; and (iii) wider public interest considerations.

In putting the above into practice in the context of a conduct case, the Panel should consider:

1. Whether the facts found proved mean that the Teacher's conduct at that time fell short of the expected professional standards. Another way of putting this is: has the Teacher been guilty of misconduct?

   The Panel should have regard to the [GTCS Code] together with the GTC Scotland Standard for Full Registration (the "SFR") in determining this. It may also make use of the professional judgement, expertise and experience of its members.

If the Panel finds that the Teacher is guilty of misconduct, it should then consider:

2. Whether the shortfalls identified are remediable; whether they have been remedied; and whether there is a likelihood of reoccurrence; and

3. If the conclusion at bullet point 2 above is that the shortfalls are remediable, have been remedied and that reoccurrence is not likely: whether there is nevertheless an overriding public interest in making a finding that fitness to teach is impaired or that the Teacher is unfit to teach in the circumstances. Guidance on what consideration of the public interest involves is set out above.

…

If the Panel decides that the Teacher's fitness to teach is impaired, it will then need to make a judgement as to the extent to which the person has fallen short of the standards expected. The critical question for the Panel in this respect will be: has the Teacher fallen *significantly* short of the standards expected meaning that he/she is unfit to teach? If the Panel is of the view that the Teacher's conduct is fundamentally incompatible with being a registered teacher, this indicates that he/she is unfit to

> teach. It may also be the case that the public interest requires a finding to be made that the Teacher is unfit to teach as noted above.
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> Where a determination is made by a Panel that an individual is unfit to teach, the Order dictates that he/she must be refused registration or removed from the Register. As a result, in any case where a Panel determines that an individual is unfit to teach, it need not deliberate on which section to impose as is envisaged below. This will only be necessary where the Panel makes a determination that fitness to teach is *impaired*. The Panel will, however, need to decide how long the Teacher should be prohibited from applying to be restored to the Register, or from making a further application for registration. This period may not be set at more than 2 years. The Panel should hear submissions from the parties on the matter before making its decision on the appropriate period …"

[17] Part B is headed "Determining outcomes". Under the sub-heading "General Principles", it states this:

> "Once a Panel has decided that a Teacher's fitness to teach is impaired, it needs to decide what action it is appropriate for GTCS to take in light of this impairment (stage 3 of the process). The Panel will hear submissions from the parties on this issue."

The Indicative Outcomes Guidance then states that in making a decision on these matters the Panel should consider and have "proportionate regard" to the public interest, the interests of the Teacher (including any mitigating factors) and the particular circumstances of the case (including any aggravating factors). It then turns to consider possible sanctions, which the Panel must consider in "ascending order", ie from the least severe to the most severe, explaining in each case why the particular sanction was or was not considered appropriate. Those sanctions include a reprimand, a conditional registration order (with or without a reprimand) and, at the most severe, removal or refusal of registration. In connection with this last sanction, removal or refusal of registration, it states that:

> "Where a removal or refusal decision is reached, a Panel has to decide how long the Teacher should be prohibited from making a registration application subsequent to this. The period of prohibition can be set at up to 2 years. In order to ensure that a generally consistent approach is adopted in this respect, Panels may regard:
>
> - 6 months as an appropriate starting point; and

- 2 years as the period that is applied in the majority of cases where registration removal or refusal is determined to be the appropriate outcome.

It must be emphasised that the above is general guidance only. A Panel should always set the period of time according to what it considers appropriate based on the circumstances of the case."

The allegation against the teacher

[18] The allegation against the teacher of which she was given notice in terms of rule 2.3.1(a) of the GTCS rules was in the following terms (amended at the hearing as indicated in italics):

"1. In or around January 2017, whilst employed by [the local authority] as a teacher at [the school] you [AD] did:

a. On 9 January 2017, discuss sensitive information with a vulnerable pupil;

b. On dates unknown make unfounded allegations on numerous occasions about the attitudes and behaviours of other staff towards you, including:

(i) claiming to several members of staff that [Depute Head Teacher 1] was having an affair with your 'man';

(ii) accusing a music teacher and learning centre *teacher* of blanking you as they were friends with [Depute Head Teacher 1];

(iii) accusing a classroom assistant of laughing at you as you were having hot flushes;

(iv) accusing members of the PE department of looking at you in a sexual manner;

c. on 27 January 2017, refuse to follow a reasonable instruction by your line manager to meet with *your Head Teacher*.

And in light of the above, it is alleged that your fitness to teach is impaired and you are unfit to teach, as a result of breaching Parts 1.2, 2.1, 2.3, 4.1 and 4.3 of the [GTCS Code]."

Proceedings before the Panel

The hearing

[19] At the hearing on 17 and 18 January 2018, on the basis that the appellant (referred to in the decision letter as "the teacher") had been given sufficient notice of the hearing and had indicated that she did not intend to attend, the Panel decided to proceed in her absence. It also decided to allow certain minor typographical amendments to the allegations made against her, and to allow evidence to be taken by electronic communication. In addition, the Panel decided to admit as evidence for the purposes of the hearing (a) referral documentation from the local authority, copies of which had been sent to the appellant with the allegations at an earlier stage, (b) a statement from DM, the head teacher at the school, who also gave oral evidence by video link and (c) the Servicing Officer's hearing papers consisting of correspondence with the appellant relating to the upcoming hearing. No objection was taken to any of these matters.

Evidence from DM

[20] DM was the only witness called to give evidence. His written statement ran to three and a half pages. His oral evidence is summarised by the Panel in its decision. The summary runs to nearly two full pages. We refer to it in some detail so as to inform our consideration of the Panel's decision.

(1) DM said that towards the end of September 2016 the appellant sent an email to Depute Head Teacher 1 ("DHT1") stating that she believed members of staff were talking about her private life and making jokes about her having "hot flushes". As a result, DM started to keep a log of such matters.

(2) In early November 2016 DM received an email from the appellant requesting that she be excused attendance at the weekly staff meeting as she considered that members of staff were laughing about her health and looking at her in what she considered to be a "sexualised manner".

(3) At the same time the appellant complained that DHT1 had displayed erratic behaviour towards her.

(4) DM asked the appellant to meet him to discuss her concerns. That meeting took place on 14 November 2016. The appellant's line manager ("LM1") was present. During that meeting:

- the appellant stated that a music teacher ("MT1") and a Learning Centre teacher ("LCT1") were "blanking her" because they were friends of DHT1;
- she also accused LCT1 of laughing at her; and
- she said that other staff were looking at her in a "sexual" manner.

DM said he would investigate all her complaints.

(5) On 15 November 2016 the appellant told a support teacher ("ST1") that DHT1 was having an affair with a man with whom she (the appellant) was involved.

(6) DM spoke to all the staff whom the appellant had mentioned. They all denied the allegations against them,

(7) At a meeting on 21 November 2016 DM told the appellant of the result of the enquiries he had made of other members of staff. The appellant maintained that she believed that what she had said was true.

(8) LM1 was present at that meeting. He offered to provide the appellant with any support that might be required.

(9) On 13 December 2016 DM was contacted by email by a member of staff at Queen Margaret University, Edinburgh, to draw his attention to the fact that, on a course which she had attended at the University, the appellant had made a number of disparaging comments about staff at the school and their treatment of her. In a telephone call a week later that same person told DM that he had concerns about the appellant and her involvement with vulnerable pupils.

(10) On (or possibly just before) 19 December 2016 the appellant tendered her resignation. Before this could be considered, she retracted it and instead asked for support. At a meeting later on the same day, attended by DM and LM1, it was suggested to the appellant that she be referred to Occupational Health because of concerns about her behaviour and mental health. DM understood the appellant to have accepted that suggestion.

(11) On 9 January 2017 DM was notified by a member of staff that the appellant had spoken to a vulnerable pupil, during which conversation she (the appellant) had referred to another pupil who had recently committed suicide. In this connection there was evidence that on that same day DM had sent an email to all staff requesting them not to discuss the incident in relation to the deceased pupil with any other pupils and that the matter had been raised that morning at the weekly staff meeting. We need not go into the details of this since it was accepted by the Panel that the appellant had not been at that staff

meeting, and the Panel placed no reliance upon the appellant having been aware, if she was aware, of that instruction.

(12) On 16 January 2017 the appellant declined an appointment with Occupational Health. She told both DM and LM1 that, contrary to their understanding of what had been agreed at the meeting of 19 December 2016, she was unaware of any decision to involve Occupational Health. She also said that she felt bullied in the school.

(13) There was a series of emails passing between the appellant and DM over the next 10 days. There was an allegation about an incident on 26 January 2017 in the school gymnasium, but we are not concerned about that matter.

(14) On 27 January 2017, LM1 asked the appellant to attend a meeting with him and DM. The appellant told LM1 that she would not attend.

(15) As a result of these matters, on 30 January 2017 the appellant was suspended from duty pending a formal investigation into her conduct and behaviour.

(16) An investigation meeting was scheduled to take place on 16 February 2017. However, by email dated 15 February 2017 the appellant submitted her resignation and advised that she was leaving the country the next day. Her resignation was accepted by the local authority.

(17) Thereafter the matter was referred by the local authority to the GTCS to enable allegations against her to be investigated. That referral led ultimately to the hearing before the Panel and to this appeal.

DM said that the appellant's conduct had had a dramatically adverse impact on the school and its staff, leaving a number of staff upset and distressed by the allegations made against them which they denied in their entirety. He (DM) said that he had discovered no

supporting evidence to substantiate the complaints made by the appellant. Having completed his investigations, he considered that the allegations made by her were without foundation. During his time at the school he had never received any complaints of a similar nature against any member of staff.

The appellant's position

[21] Although the appellant did not give evidence or take part in the hearing in any way, the Panel had regard to the email responses made by her prior to her resignation. So far as concerned the first allegation, that she had discussed sensitive information with a vulnerable pupil, the appellant said that she had not mentioned anything about a suicide to the pupil concerned, though she did accept that, when the pupil had started to talk about self-harming, she had asked him if it had anything to do with the now deceased pupil. So far as concerned allegation b(i), the claim by her that DHT1 was having an affair with her "man", the appellant maintained that she believed that DHT1 had been having a relationship with him but that she (the appellant) may have been mistaken. So far as concerned the other allegations concerning her complaints about other members of staff, the appellant maintained that they had happened and were true. In relation to the allegation that she had refused to meet DM on 27 January 2017, she said that she did this because she found DM intimidating and had said that she would only attend a meeting with him if he provided an agenda.

Other relevant material

[22] The Panel had before it the referral from the local authority together with the documentation accompanying that referral. That documentation included a chronology of events and copies of emails from the appellant outlining her position.

The Panel's decision

Findings of fact

[23] The Panel (correctly) bore in mind that the burden of proof rested on the Presenting Officer and that the standard of proof was that used in civil proceedings, namely the balance of probabilities. The Panel also considered DM to be a credible and reliable witness.

[24] In relation to allegation 1a, that on 9 January 2017 the appellant discussed sensitive information with a vulnerable pupil, the Panel concluded that the appellant had spoken to a vulnerable pupil who had indicated to her that he was considering self-harming and that the appellant had mentioned the name of a pupil who had recently committed suicide. The Panel found that this had upset the vulnerable pupil who spoke to a support teacher who had in turn reported the matter to DM. In his evidence, DM confirmed that when he spoke to the vulnerable pupil about this, the pupil confirmed that the appellant had asked him if his thoughts were anything to do with the pupil who had committed suicide. The Panel considered that this was corroborated in part by the appellant's own response, to the effect that when the pupil came to her that morning and said that he felt like taking his own life she had asked him if it had anything to do with the other pupil, though the appellant said that she had not mentioned suicide at the time. On that basis the Panel was satisfied that the appellant had shared sensitive information with the vulnerable pupil and that it was the appellant who had initially mentioned the other pupil (the pupil who had committed

suicide) in the context of what the vulnerable pupil had disclosed to her. The Panel accepted that the appellant had not been at the meeting at which DM had requested staff not to discuss the matter with any of the pupils, but concluded that, regardless of whether the appellant was aware of that directive, she should not in any event have raised the matter with the vulnerable pupil in the way she did.

[25] In relation to allegation 1b(i), to the effect that the appellant had made unfounded claims to members of staff that DHT1 was having an affair with her "man", after setting out certain parts of the evidence from DM, including his evidence that DHT1 denied any knowledge of the man in question, and after referring to the appellant's email of 17 January 2017 in which she said that she was now satisfied that she had been mistaken about the allegation, the Panel expressed itself satisfied that the remarks were made by the appellant to other members of staff and "accordingly found the allegations proved".

[26] Allegation 1b(ii) related to claims by the appellant that two teachers at the school had "blanked her" because they were friendly with DHT1 (who she had alleged was having an affair with her man). The Panel was satisfied that the appellant had made such claims about the teachers and, on the basis of DM's evidence of what the teachers had told him in response to the claim, found the allegation proved.

[27] As to allegation 1b(iii), to the effect that the appellant had falsely accused a classroom assistant of laughing at her as she was "having hot flushes", the Panel recorded DM's evidence that the classroom assistant had admitted to having mentioned hot flushes in a general conversation but had explained that she was talking about herself. Her remarks were not directed at or about the appellant. Indeed, according to the classroom assistant, the appellant had responded by advising her on the use of herbal medicine. DM had accepted this explanation. The Panel was satisfied, on balance of probabilities, that the appellant's

accusation against the classroom assistant was made and that it was unfounded. It found the allegation proved.

[28] Allegation 1b(iv) was that the appellant had falsely accused members of the PE department of looking at her in a sexual manner. The Panel was satisfied that those accusations had been made and was also satisfied, based on what the PE teachers had told DM in response to his enquiries, that the accusations were without foundation. The Panel was therefore satisfied on balance of probabilities that the allegation was proved.

[29] In relation to all the allegations grouped together as allegation 1b, the Panel noted that on completing his investigations DM was satisfied that there was no basis for any of the accusations made by the appellant and that they were without foundation. It noted the appellant's response to the effect that the accusations which she had made were not false and that it was the resulting cover-up which had resulted in the difficulties. The Panel was not persuaded by this response. It accepted the evidence of DM as credible and reliable. He had carried out immediate and appropriate enquiries with all named members of staff. They had all denied the accusations and had expressed surprise that they had been made. On this basis he (DM) was satisfied that there was no foundation for them. The Panel was also persuaded by the fact that the accusations had been made against a range of members of staff at different times and that all had denied what they had been accused of. DM had given evidence that staff members did not want to speak to the teacher on their own because of the danger that she would take things personally, overreact or make unfounded allegations against them. The Panel consider that that lent weight to the view that the accusations made by the appellant against her colleagues were unfounded. For those reasons and on the balance of probabilities the Panel considered it "more likely than not that the allegations were unfounded".

[30] Finally, so far as concerned allegation 1c, the refusal of the appellant to attend a meeting with DM on 27 January 2017, the Panel set out the appellant's response to the allegation but concluded that it was satisfied that she had refused to attend a meeting with DM when requested to do so and, accordingly, found the allegation proved.

Findings on fitness to teach

[31] Having found the allegations proved, the Panel went on to consider the question of the appellant's fitness to teach. It first considered whether the allegations proved amounted to misconduct as defined in *Roylance* v *GMC* [2000] 1 AC 311 ("a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances"). It was satisfied that the appellant's conduct did fall short of what was proper in the circumstances and that it contravened paragraphs 1.2, 2.1, 4.1 and 4.3 of the GTCS Code.

[32] In relation to allegation 1a, the appellant had disclosed sensitive information to a vulnerable pupil with a history of self-harm about another pupil who had recently committed suicide; and while it was unclear whether the appellant was aware of the directive that members of staff should not speak about the matter to any pupil, "a registered teacher should not have raised the matter in the way she did". The pupil was sufficiently upset to speak to another teacher about what had happened.

[33] In relation to allegations 1b(i)-(iv), the Panel considered that the appellant had made unfounded "and malicious" accusations against various members of staff who had been upset and distressed by them. In particular, the Panel considered that the accusation that a member of staff (DHT1) was having an affair with a person who was, in fact, unknown to her was extremely hurtful and distressing to her. The appellant did not deny making the

accusation, but had provided no proof to substantiate it and had accepted that it was made without foundation. The Panel therefore concluded that this allegation "was made maliciously". Equally, the accusations against male members of staff that they had looked at the appellant in a sexual manner were distressing to the individuals concerned and could have had serious implications for them. The Panel was satisfied that there was no foundation to these accusations and again considered that "they were made maliciously".

[34] In relation to allegation 1c, the Panel noted that the appellant deliberately chose to disregard a request to meet with DM "when he was involved in a lengthy and time-consuming investigation into the allegations made by her". The investigation had been properly conducted and the appellant had been offered appropriate support to try to resolve matters satisfactorily.

[35] The Panel considered that the behaviour of the appellant had had a very negative effect on the school and the staff were left fearful of further unfounded accusations being made by her.

[36] Having decided that the allegations proved did indeed amount to misconduct, the Panel went on to consider whether the appellant's behaviour met the test of impairment to fitness to practice. It concluded that it did meet this test. In particular, it considered that the appellant's behaviour had caused "harm" to a vulnerable pupil (allegation 1a) and to various members of staff (allegation 1b). She had brought the profession into disrepute and breached fundamental tenets identified in the relevant parts of the GTCS Code. There were a variety of actions taken by the appellant which, cumulatively, were very serious. The Panel concluded that she had fallen significantly below the standards expected of a registered teacher at the time of the conduct.

[37] The Panel went on to consider whether the appellant's fitness to teach was currently impaired. In doing so, it considered whether the misconduct had been remedied. It considered that the conduct was remediable but that the teacher had not engaged in this process and in particular had made clear in her correspondence to GTCS that she did not wish to communicate or hear from GTCS again. She had been encouraged to engage with the process but had refused to do so. At no time had she apologised or shown remorse for her behaviour. She had not provided any information as to her current circumstances or as to where she was now living. In the absence of such engagement or information, the Panel concluded that her misconduct had not been remedied and that the risk of repetition remained extremely high. The Panel also considered that the public interest required there to be a finding against the appellant in relation to her fitness to teach for pupil and public protection, as well as for the fact that she had brought the profession into disrepute. It therefore concluded that the behaviour of the appellant over a number of months "was so serious and concerning that it fell significantly short of what was to be expected of a registered teacher". The Panel concluded that the appellant was "unfit to teach".

Disposal – the Panel's decision

[38] Since the Panel had determined that the appellant was unfit to teach, it directed that her name be removed from the register in accordance with article 18(2)(b) of the 2011 Order.

[39] The Panel noted that her name remained so removed unless and until an application for re-registration was made by her and granted by a Fitness to Teach Panel. The Panel directed that the appellant should be prohibited from making an application for re-registration for the maximum period of two years from the date of its decision. It considered that this was "an appropriate period of time" because it was unlikely that the appellant

would be able within a shorter period to remedy the misconduct and provide evidence that she was now fit to teach, particularly given that there had been no indication of any remorse or remediation shown by her.

The appeal to this Court

[40] The appeal is brought pursuant to article 24 of the 2011 Order. Although eight separate grounds of appeal are advanced, many of them overlap. Grounds 1-4, read short, assert that the conduct described in the charges, whether considered individually or as a whole, was not sufficiently serious to constitute misconduct, let alone support a finding that the appellant was "unfit to teach". In ground 5 it is contended that the Panel did not have a factual basis for concluding that the appellant's behaviour over a number of months "was so serious and concerning that it fell significantly short of what was to be expected of a registered teacher"; its findings were only of isolated incidents of differing kinds. Ground 6 asserts that the finding in respect of allegation 1a, namely that the appellant's behaviour had caused harm to a vulnerable pupil, was not justified in fact. We need not set out the terms of ground 7, since we did not understand it to be insisted on before us. Finally, in ground 8 it is argued that the decision to impose the maximum period of two years before the appellant could apply for re-registration was excessive and disproportionate, particularly since the Panel had before it evidence that the employer had thought the appellant to be mentally ill. It is pointed out that an appeal against the decision of the Panel is not restricted to error of law.

Submissions

Appellant

[41] Counsel for the appellant invited us to allow the appeal, to set aside the decision of the Panel and, thereafter, to dismiss the proceedings against the appellant, failing which to remit to a freshly constituted Panel. In the alternative, he invited us, at the very least, to reduce to six months (from two years) the period during which the appellant was prevented from applying for her name to be put back on the register.

[42] The Court of Session was exercising an appellate jurisdiction, not a supervisory one. Under reference to the decision in *Mallon* v *General Medical Council* 2007 SC 426, in particular at paragraphs 17-20, it was submitted that, while the court should show respect to the Panel's decision, particularly in relation to issues about teaching and learning in respect of which the Panel had a degree of expertise, it should be prepared, depending on the circumstances, to substitute its own judgment for that of the Panel as it thinks right, having regard to the public interest in the maintenance of public confidence in the teaching profession and the upholding of proper standards of conduct and behaviour. Reference was also made to *Fyfe* v *Council of the Law Society of Scotland* 2017 SC 283 at paragraphs 21 and 31, where the court emphasised that it might more readily depart from the professional body's assessment of the effect on public confidence where the case did not relate to matters of professional performance. It was submitted that only one of the allegations against the appellant, that concerning the appellant's conversation with a vulnerable pupil, involved anything which might be said to be within some particular expertise of the Panel.

[43] Under reference to Part A of the Indicative Outcomes Guidance ("Determining Fitness to Teach"), it was submitted that before the teacher's conduct could open the door to a finding that the teacher was unfit to teach, or even that her fitness to teach was impaired,

the Panel had to consider whether the conduct which was proved constitutes misconduct. In its decision the Panel followed this course ("first we consider whether the allegations found proved amounted to misconduct"). The Panel had asked the right question but had given the wrong answer. Whether taken individually or together, the allegations, even if proved, were not sufficiently serious as to call into question the registration of a professional person. Before an adverse finding could be made, the conduct had to be one of "serious professional misconduct", a standard adopted across the various regulators: see eg *Mallon* v *General Medical Council* (supra) at paragraph [18].

[44] Of the allegations made against the appellant, only one (allegation 1a) related to teaching. That allegation was of a single, isolated incident of a different nature to the other charges. There was material before the Panel in the form of an email from a class teacher to a pupil support teacher showing that, about a week later, when the vulnerable pupil again said that he wanted to kill himself, the appellant passed her concerns about this to the class teacher and another, senior, member of staff. In other words there was no repetition of the conduct complained of. In addition, the allegation against the appellant on this matter did not include an allegation that the child was harmed in any way by the teacher's conduct; yet the Panel found (in their Findings of fact) that "this" had "upset" the vulnerable pupil, and later (in their Findings on fitness to teach) that the teacher's behaviour "had caused harm to a vulnerable pupil". The findings went beyond anything raised in the allegations which the teacher was facing; and there was in any event no evidential basis for a finding of harm. The Panel accepted that the teacher was not aware of the instruction given by the Head Teacher earlier that day. In the circumstances the allegation, even if proved, did not justify a finding of misconduct or unfitness to teach.

[45] The other allegations against the appellant did not raise any issues as to her teaching abilities or her relations with pupils at the school. The allegations at 1b(i)-(iv) were simply that she had made a number of accusations against other members of staff which were unfounded. It was accepted that the accusations were unfounded, but it was not difficult to see how, in a relatively confined space such as a school, misunderstandings and jealousies could lead someone, wrongly, to have suspicions and make such accusations. There was no justification for the finding (in the Findings on fitness to teach, albeit not in the Findings of fact) that the accusations made about various members of staff were "malicious", and this did not feature in the formal allegations made against the appellant. At worst what it amounted to was that the appellant had made herself a thoroughly unpleasant co-worker so that other staff did not want to work with her. That might mean that she would not be able to work in the school and it might constitute grounds for dismissal but it was not misconduct going to her suitability to practise as a teacher. The allegation at 1c was simply that the appellant had disobeyed the instruction to attend a meeting. It was wrong for the Panel to consider that to be misconduct, let alone serious misconduct, affecting the appellant's ability to teach. It should have been dealt with at a local level without the current process being engaged.

[46] Under reference to Part B ("Determining Outcomes") of the Indicative Outcomes Guidance, it was pointed out that removal of the teacher's name from the register was only required by the 2011 Order in a case where the Panel determines that the teacher is unfit to teach. In other cases, if the Panel determines that the teacher's fitness to teach is impaired it has a range of options open to it, the choice of which would depend on the public interest, the interests of the teacher (including any relevant mitigating factors) and the particular circumstances of the case (including any aggravating factors). The options available to the

Panel ranged from no sanction, through a reprimand, a conditional registration order (with or without a reprimand) through to removal from the register in the most serious of cases. It was submitted that the appellant's conduct in the present case did not warrant a finding of unfitness to teach. The formal allegations against the appellant did not suggest that she had acted with malice; but in any event there was no evidential basis for the finding that the appellant had acted maliciously in making accusations against fellow members of staff. The incident with the vulnerable pupil, the only allegation raising any question concerning the teacher/pupil relationship, was an isolated incident. It was not repeated and the appellant had clearly learned from it (as shown by the fact that she handled matters differently when a similar situation arose during the following week). The appellant's refusal to attend a meeting was an employment or disciplinary issue unrelated to any aspect of professional misconduct. None of those matters reflected upon the appellant's fitness to teach. It was important to remember that the relevant question was whether the teacher's fitness to teach was currently impaired. But even if a finding that the appellant's fitness to teach was impaired could be justified, which was disputed, her conduct did not justify the Panel's decision to prevent her applying for re-registration for a period of 2 years. In all the circumstances that was excessive.

Respondent

[47] The respondent moved the court to refuse the appeal. We intend no disrespect to the respondent's submissions by summarising them more briefly; we are able to do so because, in the main, they simply adopted and supported the findings and decision of the Panel. In summary the respondent's position was as follows: the findings made by the Panel were reasonably open to them on the evidence; they were not perverse or plainly wrong or

vitiated by error of law; the Panel was entitled to conclude that the false accusations made by the appellant against other members of staff, being without foundation, were made maliciously; that the findings on charges 1a, b and c, whether taken individually or as a whole (fitness to teach being an holistic assessment), supported a finding that the appellant was unfit to teach; and the period of two years, fixed as the period before the expiry of which the appellant could not apply for re-registration, was neither excessive nor disproportionate.

[48] Counsel explained that the effect of the interim order made under article 21 of the 2011 Order in October 2018 was that, even though the Panel's decision to remove the appellant's name from the register was, in effect, suspended pending the outcome of this appeal, the interim order had the effect of preventing the appellant from teaching, in Scotland at least, during its currency (in practice until the whole proceedings, including this appeal and any further proceedings arising out of the decision of this court, were concluded). So although the Panel's decision was, in effect, suspended until determination of this appeal, the appellant could not take advantage of that and resume teaching in Scotland in the meantime because of the existence of the interim order. If the court were to refuse the appeal, the interim order would lapse; but the two year period before the appellant could apply for re-registration would start to run from the date of the court's decision. If, on the other hand, the court was minded to allow the appeal to any extent and remit the matter to the Panel (or another Panel), the interim order would remain in place so as to prevent the appellant teaching in Scotland, and would remain in place until the proceedings before the Panel and any further appeal to the court was completed. Of course, if the court allowed the appeal it could simply quash the decision in its entirety without remitting the matter back. If it did that, that would be the end of it.

Discussion and decision

[49] It is convenient to remind ourselves of the legislative framework within which an appeal of this nature falls to be decided. The 2011 Order requires the GTCS to remove from the register any registered teacher whom it subsequently considers to be "unfit to teach": article 18(2)(b). There is a definition of "unfit to teach" in article 18(3): a person is "unfit to teach" for the purposes of the 2011 Order if the GTCS considers that his or her conduct or professional competence "falls significantly short of the standards expected of a registered teacher". There is no reference in article 18 to a teacher's fitness to teach being "impaired", an expression used in the Indicative Outcomes Guidance and in the decision of the Panel in this case. Nonetheless, paragraph 1 of Schedule 4 to the 2011 Order appears to contemplate that an investigation into an individual's "fitness to teach" may reveal something, falling short of "unfitness to teach", which justifies the GTCS in imposing conditions on that individual's registration or recording a reprimand. We emphasise that this is something falling short of "unfitness to teach", since if the finding was that the teacher was "unfit to teach" the teacher would be removed from the register under article 18(2)(b) and there would be no scope for the imposition of conditions or the recording of a reprimand. It is this condition which is referred to in the Indicative Outcomes Guidance and in other documentation, including the Panel's decision in this case, as a case where the teacher's fitness to teach "is impaired". That is a convenient shorthand for the type of case contemplated in paragraph 1 of Schedule 4 to the 2011 Order, where the severity of the sanction, a reprimand or the imposition of a condition on the registration or a combination of the two, will depend upon the gravity of the failing or impairment and all other relevant circumstances. It is important to note, however, that, in terms of article 16(1)(a) of the

2011 Order, the GTCS must include a qualified individual in the register of teachers if it is satisfied that the individual "is not unfit to teach". It follows that the sanction of removal from the register cannot be applied to an individual in respect of whom there is a finding that his or her fitness to teach "is impaired", without it also being found that he or she is "unfit to teach". We make this point because in the Indicative Outcomes Guidance the sanction of "removal of registration …" is listed amongst the other sanctions (reprimand and conditional registration) available to the Panel if it has decided that a teacher's fitness to teach is impaired, and where consideration of removal of registration is introduced by wording to the effect that "it may be appropriate to remove a Teacher from the Register … where most or all of the following indicating factors are present". This suggests an element of discretion where, on a proper understanding of the 2011 Order, there is none.

[50] The GTCS rules set out a three stage process to be followed by the Panel in determining fitness to teach conduct cases. We have quoted this at paragraph [14] above. That three stage process is set out at the beginning of the Indicative Outcomes Guidance: see paragraph [16] above. We make certain observations about it in the following paragraphs.

[51] The first stage of this three stage process requires the Panel to decide whether it finds "the facts set out in the allegation(s)" proved. This refers to the facts set out in the allegations provided to the teacher in terms of paragraph 2.3.1 of the GTCS rules. Those allegations give clear notice to the teacher of the case made against him or her and enable consideration to be given to the question of what response if any the teacher should make. It was no doubt with this in mind that the Notice of Appeal from the decision of the Panel in this case largely focused on the conduct described in the allegations (or "charges" as they are called in that document) and argued that the conduct described in the charges was not

sufficiently serious to justify the conclusion that the appellant was guilty of "misconduct" and "unfit to teach".

[52] At the second stage of this three-stage process the Panel has to decide whether, "on the basis of any facts found proved, the Teacher's fitness to teach is impaired or he/she is unfit to teach". It is important to note that the decision on whether the teacher's fitness to teach is impaired or whether the teacher is unfit to teach is to be taken "on the basis of any facts found proved", in other words on the basis of such of the facts set out in the formal allegations as the Panel finds proved. There is no basis for going beyond what is set out in the allegations. It is clear that the decision on fitness to teach or impairment is an holistic exercise, involving a consideration of all the matters properly within the remit of its investigation and considering them as a whole rather than in some compartmentalised way, but that does not mean that the Panel can go beyond the facts set out in the allegations of which the teacher has been given notice in accordance with the GTCS rules. Fairness demands that the teacher knows the case against him or her and that any question of fitness to teach or impairment is taken on the basis of the case made known to him or her.

[53] An important point to emphasise in the context of this second stage, and it is emphasised in the Indicative Outcomes Guidance, is that a finding of impairment or unfitness must apply to the teacher "currently", at the time the case is being considered and for the foreseeable future, rather than at the time that the facts found proved took place. The professional regulation with which we are here concerned "is about looking forward in order to protect rather than about looking back in order to punish". In that context the Panel must not only take account of the way in which the teacher has acted or failed to act but must also have regard to how the teacher is likely to behave or perform in the future.

[54] The third stage applies only if the Panel makes a finding that fitness to teach is impaired. In such a case it has to decide what action should be taken or sanction imposed in view of the identified impairment. As noted above, there is no such decision to be made if the Panel finds that the teacher is "unfit to teach": in such a case the sanction is laid down in article 18 of the 2011 Order; the teacher is removed from the register of teachers. There is a decision to be made in such a case as to the period during which the teacher should be prohibited from applying for re-registration, but that is not what this third stage is addressing. The third stage of this process, which applies where there is a finding of impairment (but not unfitness), is for the Panel to decide whether the impairment justifies a reprimand or the imposition of a condition on the teacher's registration. This, as the Indicative Outcomes Guidance makes clear, will involve a consideration of all the circumstances, including the public interest, the interests of the teacher and the particular circumstances of the case, having regard to both mitigating and aggravating factors. Since in this case the Panel made a finding of unfitness to teach, and not merely impairment, it did not have this choice available to it and we need say nothing more about it for present purposes save to note, with approval, the statement in the Introduction to the Indicative Outcomes Guidance that "the range of sanctions available must not influence the decision regarding the Teacher's fitness to teach" (emphasis in the original).

[55] Having correctly set out the three stage process, the Indicative Outcomes Guidance deals with the question of how to determine fitness to teach. It refers to the definition of unfitness to teach to be found in article 16 of the 2011 Order, emphasising that "unfitness" involves the teacher's conduct or professional competence falling significantly short of the standards expected of a registered teacher, and suggests that an individual's fitness to teach should be considered impaired where the GTCS considers that the individual's conduct or

professional competence falls short of those standards, albeit without the addition of the epithet "significantly". It refers to the need to consider the situation currently and looking forward, a point discussed earlier. It then suggests that the proper approach for the Panel to take in determining "unfitness" or "impairment" should begin with a consideration of whether the facts found mean that the teacher has been guilty of "misconduct". We note that this is the approach followed by the Panel in this case. Under reference to the description of misconduct in *Roylance* v *GMC* [2000] 1 AC 311 ("a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances") the Panel considered each of the different allegations against the appellant and concluded that the appellant's conduct fell within this description. In argument before us no issue was taken with this approach, it being accepted by the appellant in the Note of Argument submitted on her behalf that this was "the right issue". The argument for the appellant was that the conduct must be "serious professional misconduct", a standard "adopted across the regulators". Reference was made to *Mallon* v *General Medical Council* (*supra*). While we would not wish to decide the case on the basis of a point not argued before us, we would at least question whether this is in fact the right approach. There is, of course, some merit in looking at the regulatory cases as a whole in order to discern common principles applicable across the board; but that approach carries with it the danger of failing to address the particular legislative framework within which decisions in each case have to be made. In the present case it seems to us that the introduction of a "misconduct" test may be unnecessary, unhelpful and potentially misleading: unnecessary because article 18(3) of the 2011 Order itself provides the definition of what amounts to unfitness to teach ("the individual's conduct or professional competence falls significantly short of the standards expected of a registered teacher"), and the meaning of impairment as used by the GTCS in

the Indicative Outcomes Guidance simply omits the epithet "significantly" from that definition; unhelpful because the description of misconduct in *Roylance* ("some act or omission which falls short of what would be proper in the circumstances") adds nothing to the general understanding of the meaning of impairment as set out above, but still requires the question of "significantly" to be addressed in determining the question of unfitness; and potentially misleading because unfitness to teach and, by parity of reasoning, impairment may simply be based upon a poor level of professional competence which is difficult to fit within any ordinary definition of "misconduct", so that the addition of this extra test opens up the possibility of arguments about whether in any particular case the conduct or competence of the teacher can be said to be misconduct.

[56] We should emphasise that we did not hear argument specifically on this point, so it follows that these comments are tentative and provisional in nature. However, having considered the matter in light of the arguments presented to us, we have reservations about the introduction of a gateway test of "misconduct" or "serious professional misconduct". In cases brought under these particular rules, it may be better to avoid altogether any consideration of misconduct but keep instead to the test of unfitness set out in article 18(3) of the 2011 Order and the test of impairment as derived from article 18 and Schedule 4 as explained earlier in this Opinion.

[57] Having made these points of general import, we can deal with the merits of the appeal much more briefly.

[58] It was not in dispute that in considering an appeal under article 24 of the 2011 Order the court is exercising an appellate jurisdiction rather than a supervisory one. The appeal may be on questions of fact as well as on questions of law. Nonetheless, as with all appeals on questions of fact, the court will pay due respect to the findings of the inferior court or

tribunal, in this case the Panel. Further, the court will pay particular respect to the views of specialist tribunals, such as the Panel, on areas within their particular expertise. The correct approach in this regard is set out in *Mallon* v *General Medical Council* (*supra*) at paragraph [19].

[59] As noted both in the GTCS rules and in the Indicative Outcomes Guidance, determining fitness to teach conduct cases, such as the present, involves a three stage process. At the first stage, the task before the Panel was to consider whether any of the allegations against the appellant were proved. Those allegations were the allegations of which she had been given notice pursuant to rule 2.3.1(a) of the GTCS rules. They are set out, with certain minor amendments, in the Panel's decision. The Panel found those allegations proved and there is no appeal against those findings.

[60] The second stage was for the Panel to decide whether, on the basis of the facts found proved, the teacher's fitness to teach is impaired or he/she is unfit to teach. The decision about fitness to teach must be made on the basis of the facts found proved at the first stage, that is to say the facts set out in the allegations against the teacher of which she had been given notice pursuant to the GTCS rules and which the Panel found proved. The allegations here, which the Panel found proved, comprise three separate elements: discussing sensitive information with a vulnerable pupil; making unfounded allegations about other members of staff; and refusing to attend a meeting with the Head Teacher. At risk of repetition, those, in summary, are the facts found by the Panel on the basis of which they had to reach a decision as to whether the appellant's fitness to teach was impaired or she was unfit to teach. It is for that reason that the Note of Appeal focuses in grounds 1-4 on the conduct described in the charges, by which is meant the conduct described in the allegations notified to the appellant pursuant to the GTCS rules.

[61] Looking at the conduct described in the allegations notified to the appellant, it is to be noted that only the first of those allegations relates directly to the appellant's professional competence or, to put it another way, her conduct in relation to pupils at the school. The other matters reflect upon matters of discipline and the appellant's ability to get on with other teachers at the school. Questions might be asked as to how these other matters could reasonably have led or contributed to a finding that the appellant's fitness to teach was impaired, still less that she was unfit to teach. The conduct described in those charges may well have shown that she was a difficult work colleague and that she was at times unwilling to accept reasonable instructions, conduct which might (and we express no view on this) have justified disciplinary action against her or even dismissal. But it is not immediately obvious (at least to this court) how these matters bear on the appellant's fitness to teach. The same cannot be said about the first allegation, which does relate to the appellant's conduct as a teacher, and we come back to consider this matter in due course.

[62] Let us assume, however, that the allegations as a whole are capable of reflecting upon the appellant's fitness to teach. The Panel considered this question in a separate (second stage) section headed "Findings on fitness to teach". Having considered the first allegation, and decided that a registered teacher should not have raised the matter with the vulnerable pupil in the way she did, the Panel moved on to consider the second allegation, concerning the making of unfounded accusations against fellow members of staff. In respect of each of the four specific matters alleged against the appellant under this head, the Panel said that it considered that the appellant had made "unfounded and malicious" accusations against various members of staff. On the basis that the appellant did not deny making the various accusations, that she had provided no proof to substantiate them and that they were made without foundation, the Panel concluded that each of these accusations was made

"maliciously". We have considerable misgivings about this finding that the accusations were made maliciously, for two reasons: first, because it formed no part of the formal allegations made against the appellant and notified to her in accordance with the GTCS rules that her accusations against the other members of staff were malicious; and, second, because there was, in our opinion, no evidence before the Panel upon which the Panel could have reached that conclusion. As to the first point, it is in our view important as a matter of elementary fairness that the teacher against whom allegations are made with a view to those allegations being considered by a Fitness to Teach Panel should know precisely what it is that he or she is facing. That hardly needs elaboration. It may affect the way in which the teacher responds to the allegations. We cannot tell whether it may have done so in the present case. But we do not decide the present appeal on this basis. When the matter was raised in the course of argument, counsel for the respondent urged us not to decide the case on this basis. He suggested that there might be relevant case law on this point. He submitted that the point was not foreshadowed in the Note of Appeal. We are not persuaded that that is correct, since as pointed out above the first four grounds of appeal focus on the question whether the conduct as described in the various charges was sufficiently serious to have permitted the conclusion that the appellant was unfit to teach. Be that as it may, however, we do not in fact need to decide the appeal on this basis. That is because we are satisfied that there was no evidence before the Panel to justify a finding of malice. The reasoning of the Panel in this respect appears to proceed entirely on the basis that the accusations made by the appellant were in fact unfounded and that the appellant provided no proof to substantiate them. The Panel may also have been influenced by the fact that by the time of the hearing the appellant appears to have accepted that the accusations were without substance. None of this, however, is sufficient to justify the

conclusion that at the time she made these accusations she did so maliciously, ie knowing them to be untrue and with a desire to cause harm or annoyance to the person against whom they were made. The mere fact that an accusation is untrue does not mean that it was made maliciously. It is clear from the material before the Panel – and we have had access to the whole of that material – that there were concerns at the time about the appellant's mental state. At the very least it is clear that she was or felt herself to be vulnerable. All of the relevant accusations had a sexual element to them and in this field it is, we think, self-evident that paranoia, jealousies and misunderstandings can easily take root, leading to genuine albeit unfounded suspicions about other people and baseless accusations. No doubt this is particularly so in the confined setting of a school and a staff common room. Among the evidence was evidence that a member of staff had indeed made some remark about "hot flushes" and had sought to reassure the appellant that the conversation was not directed at her. We have no reason to doubt that evidence, but this is perhaps an illustration of how the appellant, in a vulnerable state and being sensitive, perhaps unduly so, to what people were saying, could have (wrongly) understood the remarks to be directed at her. This is but one illustration, but it is, in our view, illustrative of the possibility that the appellant genuinely believed that she was being targeted; and in the same manner may have genuinely believed that DHT 1 was having an affair with her man; that other teachers, friends of DHT 1, were blanking her; and that members of the PE department were looking at her in a sexualised manner. The Panel does not appear to have considered this possibility at all. Had it done it seems unlikely that it would have arrived at a conclusion that in making these accusations against other members of staff the appellant was acting maliciously.

[63] It is clear to us that the Panel's assessment of whether the appellant was unfit to teach was affected by its conclusion that in this respect the appellant had acted maliciously. There would be no point in the Panel making this additional finding of malice in connection with its findings on fitness to teach if that were not the case. For that reason and for that reason alone we have come to the conclusion that the Panel's decision on unfitness to teach cannot stand.

[64] In those circumstances we do not need to go into the Panel's consideration of the other parts of the allegations made against the appellant. We simply mention a few points which cause us some concern. The Panel's assessment of the first allegation, about the appellant having disclosed sensitive information to a vulnerable pupil with a history of self-harm is, we think, entitled to particular respect, the teacher/pupil relationship being at the heart of a teacher's fitness to teach. It does seem to us, however, that it is stretching matters somewhat to treat what happened as falling under the description of disclosing confidential information contrary to paragraph 2.1 of the GTCS Code quoted above. At face value, the instruction in that paragraph of the Code to treat sensitive, personal information about pupils with respect and confidentiality and not to disclose it to others appears to be aimed at protecting the confidentiality of that information and the pupil to whom the information relates. That is not this case. It is not at all clear from the evidence as to what it was that caused the pupil upset or harm, given that this pupil was already considering self-harm and was therefore already in an upset state. And there was nothing in the evidence to suggest that this was more than an isolated error of judgement. On that basis we have some difficulty in understanding the Panel's finding that on this ground the appellant was at the time of the hearing unfit to teach. In addition, the third allegation made against the appellant, concerning her refusal to attend a meeting with the Head Teacher, appears to us

to be no more than a disciplinary matter as we have already indicated. However, standing our decision in the previous paragraph, we need say no more about either of these matters.

Disposal

[65] Upon the basis that the decision of the Panel cannot stand, the question then arises as to whether we should remit the matter back to a freshly constituted Panel to reconsider the matter either in whole or in part. We have come to the conclusion that this would not be the appropriate course. The events with which this matter is concerned occurred in late 2016 and early 2017. The decision appealed against followed a hearing before the Panel in January 2018. The appellant has not been teaching since she resigned from the school in February 2017 and she has been prevented from teaching by the interim order made in October 2018 pursuant to article 21 of the 2011 Order. Were we to remit the matter, that would simply extend the period covered by the interim order and might lead to a further finding of unfitness to teach with a two year period before she was entitled to apply for re-registration. That delay would be punishment in itself. In all the circumstances we consider that the appropriate course is simply to set aside the decision of the Panel and dismiss the proceedings against the appellant.

[66] Agreement was reached between counsel as to the consequence of our decision in terms of expenses. In accordance with that agreement we shall order the appellant to pay to the respondent the expenses of the discharged hearing on the Summar Roll on 21 August 2018. *Quoad ultra* we shall order the respondent to pay the appellant her expenses of the appeal. It was suggested on behalf of the respondent that on this hypothesis there would be contra orders for expenses which could sensibly be set off against each other and that, in those circumstances, the court could make no order for expenses to or by. We think,

however, that it is best to make the order for expenses indicated above, leaving parties to reach some agreement if they can with a view to saving the expenses of taxation.