



Neutral Citation Number: [2024] EWHC 44 (KB)

Case No: AC-2022-CDF-000168; CO/4759/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 19th January 2024

Before :

MR JUSTICE EYRE

Between :

Mahzia `Pepe` Hart
- and -

(1) Secretary of State for Education
(2) Teaching Regulation Authority

Appellant

Respondents

Simon Smith (solicitor advocate of **Knights Professional Services Limited**) for the **Applicant**
Tom Cleaver (instructed by the **Government Legal Department**) for the **Respondent**

Hearing dates: 16th and 17th November 2023

Approved Judgment

This judgment was handed down remotely at 10.00 am on 19th January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Eyre:

Introduction.

1. The Appellant was formerly the head teacher of the Academy of Trinity Church of England Voluntary Controlled Primary School, Radstock (“the School”). On 21st November 2022 the First Respondent (“the Secretary of State”) imposed on the Appellant a prohibition order under section 141B of the Education Act 2002. This order had the effect of prohibiting the Appellant from teaching indefinitely albeit with provision for her to apply for a review of the prohibition after a period of two years.
2. The Secretary of State’s order was made pursuant to the recommendation of a professional conduct panel (“the Panel”) of the Second Respondent (“the TRA”). The Panel made that recommendation at the conclusion of professional conduct proceedings brought by the TRA. A total of seventy-nine allegations had been made against the Appellant. These were broken down into nine headings several of which contained a number of sub-allegations. The Appellant had denied each allegation. The TRA had withdrawn eleven of the allegations at the start of the hearing before the Panel. After a five-week hearing which had begun on 6th September 2022 the Panel found that there was no case for the Appellant to answer in respect of four of the allegations; it found that twenty-three others had not been proved; but it found that the remaining allegations had been proved. It then concluded that the proven allegations amounted to unacceptable professional conduct and/or conduct which might bring the profession into disrepute. The Panel recommended that a prohibition order be imposed with provision for review after two years.
3. The Appellant appeals against the prohibition order and advances five grounds of appeal. Two of these relate to the procedural fairness of the proceedings; two relate to the Panel’s approach to the assessment of the evidence; and one relates to the sanction imposed.

The Background to the Misconduct Proceedings.

4. The Appellant had been headteacher of the School since 2005 (initially jointly with another post holder). The School became an academy in 2011. The School was in a former mining community and at least some of its pupils came from areas of deprivation. There was no dispute that the Appellant was committed to putting the interests of the School’s pupils first and it is apparent that she had a transformative effect on the lives of a number of pupils. The School was repeatedly rated as “outstanding” both in OFSTED reports and in reports by inspectors addressing the School’s distinctive Christian ethos.
5. Unfortunately the Appellant’s relations with staff members were less happy. In November 2015 David Biddleston, the local district secretary of the National Education Union (then known as the National Union of Teachers), submitted grievances on behalf of a number of staff members. On 18th December 2015 the Appellant and her two deputy headteachers all resigned.

6. In 2016 the Appellant began defamation proceedings against Katy Mimmagh. Miss Mimmagh was a staff member and the proceedings related to a public posting she had made about the Appellant on a Facebook page. Those proceedings concluded in January 2017 with a formal apology being made by Miss Mimmagh.
7. Miss Mimmagh had been represented in the defamation proceedings by the National Education Union's solicitors and officers of that union had been involved in assisting her. In March 2017 a regional secretary of the union referred the Appellant's conduct to the predecessor of the TRA and the misconduct proceedings flowed from that reference.
8. The Appellant contends that the reference to the TRA was made in retaliation for her action in suing for defamation and that it was also motivated by the union's opposition to academies. The union's position appears to have been that the preparation of Miss Mimmagh's defence gave the regional officer knowledge of matters amounting to misconduct which should have been but which had not been referred to the TRA previously.
9. In August 2021 the Appellant commenced proceedings in the High Court ("the High Court Action") against Mr Biddleston and the National Education Union. Those proceedings are continuing and in them the Appellant alleges that Mr Biddleston conspired with others to injure her by unlawful means alternatively by lawful means. It is said that the object of the conspiracy was to achieve "the removal of [the Appellant] from her post and to seek to harm her professional reputation with a view to her being debarred as a teacher". The Appellant alleges that Mr Biddleston was motivated by a negative view of academy schools and "by an excessive zeal manifesting itself in deep-seated personal prejudice against, and animus towards, [the Appellant]".
10. The Particulars of Claim in the High Court Action identified a number of persons who were said to be conspirators. These included some but not all of those who were witnesses in the misconduct proceedings and included others who were not witnesses. In that pleading the Appellant averred that others might also have been party to the conspiracy. She pointed to the existence and membership of Facebook groups entitled "The Downfall of Mrs Hart" and "The Official Trinity Triumph" as evidence of the conspiracy.
11. In those proceedings the Appellant says that the conspirators had encouraged the making and publicising of allegations against her. She does not allege that the making of false allegations had been encouraged but rather that the motivation for the making and publicising of the criticisms had been to harm her.
12. Mr Biddleston denies the alleged conspiracy. He says that he had been motivated not by any animus against the Appellant nor with a view to harming her. Instead he says that he was acting in his capacity as an officer of the National Education Union and with a view to ensuring that concerns which had been raised with him were presented to the relevant authorities and dealt with appropriately by them.
13. The pleadings in the High Court Action closed with service of the Appellant's Reply in October 2021. However, little progress appears to have been made in that matter and even now it does not appear that a hearing is imminent.

The Proceedings leading to the Final Hearing before the Panel.

14. The proceedings before the Panel were governed by the procedural rules set out in the “Teacher Misconduct – Disciplinary Procedures for the Teaching Profession 2018” (“the Disciplinary Procedures”). Notice of the proceedings had first been sent to the Appellant in April 2018. The nine allegations made in that notice were:
 1. The bullying of teachers who were pregnant. Sixteen instances of alleged bullying were set out under this heading.
 2. Failing to ensure that risk assessments were carried out in respect of pregnant teachers. Here three instances were alleged.
 3. The making of inappropriate comments to or about staff members. Here there were fifteen instances alleged.
 4. The mocking or mimicking of parents, pupils, or staff members with eleven instances alleged.
 5. The intimidation of staff members with thirteen instances alleged.
 6. Pressurising a staff member to give an account to the police of an incident involving the Appellant in terms which did not accord with his true recollection.
 7. Falsely telling a staff member that a reference received about her had been unacceptable.
 8. Three instances of sending an inappropriate text message to a particular staff member.
 9. Acting dishonestly in the conduct alleged at (6) and (7).
15. That notice gave the names of the staff members and others concerned in the particulars of each allegation and also gave a list of the names of those whom the TRA intended to call as witnesses.
16. There followed a series of case management conferences. Of note for current purposes are those held on 14th – 15th June 2022 and on 11th August 2022. These were before the Panel which conducted the final hearing. The Panel had three members two of whom were teachers. It was chaired by the lay member and was assisted by a legal adviser.
17. At the case management hearing on 14th – 15th June 2022 the TRA applied for the admission of hearsay evidence; for a direction as to the attendance of witnesses; and for directions in particular for the listing of the hearing. The Appellant applied for the disclosure of certain categories of documents and the striking out of three of the allegations. The Panel refused to allow the TRA to adduce hearsay evidence. It gave directions for the Appellant’s solicitors to have access to the documents and provided directions for a resolution of any further dispute as to their relevance. The Panel concluded that the strike out application was premature (save in respect of one allegation where the TRA withdrew the allegation) because the Panel did not have the entirety of the evidence. However, the Panel directed that the application could be renewed either at the start of the hearing or at the close of the TRA’s evidence in the course of the hearing.

18. At that hearing the TRA sought the listing of the substantive hearing for 6th September 2022. The Appellant resisted this partly on the basis of her availability but also on the ground that the matter was not ready for hearing and/or that she would have insufficient time to prepare for the hearing. The Panel rejected that submission. In doing so it noted that the matter had been commenced some time before; that the Appellant had already been provided with “most if not all of the witness statements relied upon”; that she knew the allegations she was to face; and that she had been provided with the documents relied on by the TRA. The Panel also noted that the TRA was to serve a final notice of hearing at least eight weeks before the hearing specifying the details of the allegations made and identifying the witnesses to be called and the documents to be relied upon.
19. The final notice of hearing was sent on 8th July 2022. This set out the same allegations as had been specified in the notice of April 2018 save that allegation 3 had been expanded from 15 instances to 22 and allegation 5 from 8 instances to 9 instances. In this document the names in the allegations had been replaced by pseudonyms. Thus Stacey Curtis, who featured in allegations 1 – 5, became “colleague C” and Mr Biddleston became “individual 22”. However, the schedule of documents referred to the documents by the name of the maker and the list of witnesses contained the actual names of those being called.
20. On 4th August 2022 the TRA supplied its final bundle for the hearing which included a schedule of identification cross-referencing the pseudonyms to the names of the witnesses and of the other persons mentioned. The Appellant’s solicitors responded to the service of that material by their letter of 5th August 2022. In this they complained about the late service of the schedule and sought agreement to a seven-day extension of the time for the service of the Appellant’s witness statement.
21. The Panel held a further case management hearing on 11th August 2022. At that hearing Mr Smith made a number of applications on behalf of the Appellant.
22. The Appellant sought a direction that the proceedings be discontinued (in effect for a permanent stay). On her behalf Mr Smith prayed in aid the delay generally in the proceedings; an alleged breach of the directions as to disclosure; the delay in providing the identification schedule; and the fact that there was no provision for the Appellant to recover the costs of her defence. The Panel rejected the application in respect of the time of service of the identification schedule. In that regard the Panel noted that it had been acknowledged on the Appellant’s behalf that “the allegations had previously been provided in a way in which the relevant colleague was named”. The Panel considered whether it would be possible for the Appellant to receive a fair hearing and whether it would be contrary to justice or propriety for it to continue with the hearing and concluded both that a fair hearing was possible and that the continuation of the proceedings was not contrary to justice or propriety.
23. The Appellant also sought a direction that the misconduct proceedings should be stayed until the conclusion of the High Court Action. In that regard Mr Smith contended that the High Court would be dealing with substantially the same issues as the Panel. He submitted that a High Court judge’s experience of applying evidential rules, assessing evidence, and making findings of fact would outweigh

that of the Panel. He said that the High Court Action was progressing “at a pace” and that the factual matters should be left to be determined by the judge in those proceedings rather than by the Panel: an outcome which could be achieved by a stay of the misconduct proceedings. Mr Smith told the Panel that a Case Management Conference was to take place in the High Court Action on 19th September 2022 and that he anticipated that there would be a final hearing in that matter in the Autumn or Winter of 2023.

24. The Panel expressed its reasons for declining to stay the proceedings in short terms. It noted that the misconduct proceedings had been commenced a “considerable period of time” before the High Court Action and said that the Appellant had not demonstrated that continuing the misconduct proceedings would cause prejudice or unfairness to her.
25. Mr Smith renewed his attack on the July 2022 notice of hearing at the start of the substantive hearing. He submitted that the notice was defective because it included allegations which the TRA had subsequently withdrawn. Mr Smith submitted that the withdrawal of some of the allegations meant not only that a revised notice of hearing containing only those allegations being pursued should have been served but also that in order to comply with the Disciplinary Procedures this should have been served at least eight weeks before the hearing. He submitted that as a consequence the hearing should be adjourned to allow for the service of such a revised notice and for an interval of eight weeks between that service and the resumed hearing. In addition Mr Smith contended that the failure to serve the identification schedule with the notice of hearing had made it more difficult for the Appellant and her lawyers to link the allegations to the evidence. He also complained of the fact that the unused material had only been served on 19th August 2022 and so shortly before the hearing. That material had run to 1,973 pages. It consisted principally of correspondence between the TRA and its witnesses. In the email accompanying the service of this material the TRA had identified six pages which it said appeared to be relevant to questions which the Appellant had been raising.
26. The Panel rejected the argument that the July 2022 notice of hearing did not comply with the Disciplinary Procedures saying:

“This was not a situation in which the Notice of Hearing dated 8 July 2022 failed to specify any of the allegations that Mrs Hart would face at this hearing. Rather, it contained certain allegations that were to be withdrawn. The panel did not agree that the disciplinary procedures should be construed as requiring a revised Notice of Hearing to be issued and served giving eight weeks' notice whenever an allegation is withdrawn or amended.”
27. The Panel similarly rejected the argument based on the fact that the identification schedule had not accompanied the notice of hearing saying:

“As to the absence of an identification key when the Notice of Hearing was served, the panel noted that this issue had been raised in the last Case Management Meeting and it was acknowledged that an earlier iteration of the allegations in the Notice of Hearing had referred to the individual members of staff by name. The panel noted that the absence of an identification key had not precluded Mrs Hart responding to the allegations in her detailed evidence. The panel recognised that it had the power under paragraph 4.54 of the Disciplinary Procedures 2018 to

adjourn the proceedings at any stage if it considered it to be fair and appropriate to do so. However, the panel was not satisfied that there was any unfairness that would justify an adjournment of the hearing.”

The Final Decisions of the Panel and of the Secretary of State.

28. The Panel set out its decision, findings, and reasons in detail. After rehearsing the allegations and its decisions on sundry preliminary applications it set out a summary of the case. The Panel then made a number of general findings:
 - a) The first was a finding derived principally but not solely from the evidence of the parents whose children had been at the School. This was to the effect that the Appellant had “always put the interests of pupils first” and that she had made a “significant impact” on the lives of pupils. The Panel noted that this was a matter to which it had “careful and particular regard” when assessing the allegations relating to pupils.
 - b) The second was a finding as to the alleged conspiracy to fabricate evidence. The Panel undertook an analysis of the postings in the Facebook group which had been said to demonstrate the conspiracy and concluded that the material did not establish that there had been such a conspiracy. However, it went on to note that the existence of the Facebook group remained a relevant factor and gave itself a number of self-directions as to the consideration of the evidence. I will return to these when considering the challenges to the Panel’s findings of fact below.
 - c) Finally by way of general findings the Panel made a number of findings as to the events of the Autumn term of 2015.

29. After the general findings the Panel set out its findings on the individual allegations. It did so with detailed reasoning running to thirty-six pages of analysis. Those findings were as follows:
 - a) In respect of allegation 1 the Panel found ten of the instances of the bullying of pregnant teachers proved. Of those eight instances related to one teacher and two to a second teacher. The Panel found one instance not to have been proved and the other alleged instances had been withdrawn.
 - b) Turning to allegation 2 (the failure to ensure that risk assessments were carried out) one instance had been withdrawn and the Panel found the case against the Appellant not to have been proved in respect of the remaining two.
 - c) Two of the alleged instances of making inappropriate comments to or about staff in allegation 3 had been withdrawn. Of the remaining instances the Panel found fifteen proved and the remaining nine were either found to have been not proved or to be allegations in respect of which the Appellant had no case to answer.

- d) In addressing allegation 4 the Panel found three instances of the mimicking or mocking of staff members to have been proved but found the other instances of mocking staff members and all the alleged instances of mocking or mimicking parents or pupils not to have been proved.
 - e) Two instances of the alleged intimidation of staff members in allegation 5 had been withdrawn. The Panel found nine of the remaining instances proved but not the other five.
 - f) The Panel found that the Appellant had no case to answer on allegation 6 and found allegation 7 not to have been proved and as a consequence allegation 9 also fell away.
 - g) In addressing allegation 8 the Panel found two of the three alleged instances of the sending of inappropriate text messages to a colleague proved.
30. The consequence of those findings was that the Panel had concluded that the Appellant had bullied two pregnant teachers (in one case on several occasions and in the other case twice); that she had repeatedly made inappropriate comments to or about staff members; that she had mocked or mimicked staff members on two occasions; and that she had intimidated staff members on nine occasions. The allegations which were found proved spanned a period from late 2012 to the Autumn of 2015.
31. The Panel then recorded its finding that the Appellant's conduct "amounted to misconduct of a serious nature which fell significantly short of the standards expected of the profession" and as being, therefore, "unacceptable professional conduct". It then concluded that this was conduct which was liable to bring the profession into disrepute.
32. Next, the Panel set out its recommendation as to sanction. As Holgate J explained in *Wallace v Secretary of State for Education* [2017] EWHC 109 (Admin) at [78] under the Teachers' Disciplinary (England) Regulations 2012 there are only two possible sanctions. One is the making of a prohibition order. Such an order can provide for a review after a specified period which must be at least two years. The other potential sanction is the publication of the finding of misconduct. There is no provision for a range of sanctions such as suspension or the imposition of conditions on practice.
33. The Panel's reasoning in respect of sanction covered 4½ pages. It began by saying that it had to consider whether a prohibition order would be a necessary and proportionate measure and whether it would be in the public interest to make such an order. It had regard to the need to maintain public confidence in the teaching profession and to uphold proper standards of conduct. It noted that considerations relating to the safeguarding or wellbeing of children were not engaged but said that "the need to protect the rights and interests of staff" was a relevant consideration. The Panel approached the matter on the basis that it was conducting a balancing exercise between the public interest in upholding proper standards of

conduct and the public interest in retaining the Appellant in the teaching profession. As to the latter it said:

“The panel also decided that there was a public interest consideration in retaining Mrs Hart in the profession as her contributions to pupil achievements have been highly significant. As the panel has already determined, there was little dispute relating to Mrs Hart's commitment to improving the lives of pupils. The panel found the evidence of parents to be particularly compelling about the significant impact that Mrs Hart had on the lives of their children.”

34. The Panel set out the following matters as pointing to the appropriateness of a prohibition order:

“The panel has found that Mrs Hart was guilty of bullying, intimidating, mocking, mimicking and making inappropriate comments towards staff over a number of years. This represented a pattern of behaviour that was incompatible with being a teacher.

Furthermore, in her capacity as Headteacher, the panel found that Mrs Hart was guilty of abusing her position of trust towards staff. ...

The panel was satisfied by the evidence presented that Mrs Hart had displayed a deep-seated attitude that led to harmful and bullying behaviour towards staff. There were numerous examples of Mrs Hart being abusive about members of staff to other members of staff, both verbally and in text messages. ...”

35. The Panel noted the significant negative impact which the Appellant's behaviour had had on a number of the staff members in question and also that her actions had been deliberate.

36. By way of mitigation the Panel had regard to absence of any previous disciplinary finding and to the “large number of very positive testimonials and character references” provided on the Appellant's behalf.

37. The Panel noted that the Appellant's conduct had persisted over a number of years and also that she had not expressed either remorse or insight. It found that the absence of insight had prevented the Appellant from “taking any steps to address her harmful behaviour”.

38. The crux of the reasoning causing the Panel to conclude that a prohibition order was both necessary and proportionate was expressed thus:

“The panel was of the view that prohibition was both necessary and proportionate. The panel decided that the public interest considerations of the protection of members of the public (including staff), the maintenance of public confidence in the profession and declaring and upholding proper standards of conduct outweighed both the public interest in retaining Mrs Hart in the profession and Mrs Hart's own personal interests.

Significant factors in forming that opinion were the seriousness of the allegations found proved, the length of time over which they continued and the numbers of staff negatively impacted. Given the repetitive pattern of the conduct found proved and the absence of any remorse or insight the panel felt that there was a significant risk of the behaviour being repeated. The panel recognised that, whilst the conduct took place in her capacity as Headteacher, a prohibition order would prevent her

undertaking any teaching work. However, given the findings relating to negative deep-seated attitudes leading to harmful behaviour, the panel concluded that these behaviours could persist in any teaching role. The panel, therefore, determined that a prohibition order is both necessary and proportionate.”

39. The Panel then turned to consideration of whether a review period was appropriate. It recommended that it be open to the Appellant to seek a review after two years (which was the minimum period available to the Panel). The Panel said that the seriousness of the findings would have caused it to consider recommending a longer period before review but that it recommended the minimum period because it:

“had regard to the Mrs Hart's ability to make an exceptional contribution to the education of pupils and felt that she should have the earliest possible opportunity to demonstrate clear and unequivocal insight into the misconduct that led to the prohibition and a clear commitment to adhere to and exhibit the Teachers' Standards.”

40. The Secretary of State adopted the recommendation of the Panel. Her reasons for doing so were set out in the document of 17th November 2022. The decision maker approached the question of sanction by considering whether a prohibition order was proportionate and in the public interest. In assessing whether a failure to impose a prohibition order would be regarded as a failure to uphold the high professional standards expected of teachers the decision maker considered matters “from the point of view of an `ordinary intelligent and well-informed citizen””. The decision maker expressly considered:

“whether the publication of a finding of unacceptable professional conduct, in the absence of a prohibition order, can itself be regarded by such a person as being a proportionate response to the misconduct that has been found proven in this case.”

41. The decision maker noted and took account of the “exceptional contribution” which the Appellant had made to the teaching profession but concluded that this was outweighed by the need to maintain public confidence in that profession. The decision maker noted that a prohibition order would not only prevent the Appellant from teaching but that it would also “deprive the public of her contribution to the profession”. The decision maker placed “considerable weight” on the Panel’s assessment that in the absence of remorse or insight there was a significant risk of repetition of the behaviour in question. The decision maker considered whether it would be sufficient to publish the finding of misconduct but concluded that it would not be saying:

“A published decision, in light of the circumstances in this case, that is not backed up by full remorse or insight, does not in my view satisfy the public interest requirement concerning public confidence in the profession.”

The Grounds of Appeal.

42. In ground 1 the Appellant asserts that it was procedurally unfair for the Panel to proceed to the final hearing while the Appellant’s High Court Action was yet to be determined. It is said that the Panel should have acceded to the application to grant a stay until the resolution of that action. The existence or otherwise of a conspiracy was best determined, the Appellant contended, by a High Court judge rather than by the Panel composed of non-lawyers.

43. Ground 2 relates to the sanction imposed. The Appellant says that the Panel and the Secretary of State erred in concluding that a prohibition order was both necessary and proportionate. The Appellant says that in circumstances where the complaints against her were essentially employment related grievances rather than matters of the safeguarding of children and in light of the positive mitigation such an order was neither necessary nor proportionate.
44. Ground 3 has two elements. First, it is said that the presentation of the final Notice of Hearing so close to the hearing amounted to a breach of the Appellant's right to a fair hearing in circumstances where that notice is said to have been "incomplete, [to have] contained errors, [and to have] relied on extensive late disclosure". The second element relates to the TRA's failure to provide the Appellant's representatives with audio recordings of the evidence in the interval between the close of evidence and the making of final submissions. It was said that this amounted to procedural unfairness infringing the Appellant's right to a fair hearing.
45. In ground 4 the Appellant challenges the adverse findings of fact made against her. She said that these were against the weight of the evidence; that they failed to take account of the demonstrated exaggeration, untruthfulness, and unreliability of the TRA's witnesses; and that they failed to take account of the evidence called on her behalf. The Appellant says that as a consequence the Panel's findings were unsafe.
46. In ground 5 the Appellant makes a further challenge to the Panel's findings of fact. She says that the Panel's approach to the issue of the credibility and reliability of the TRA's witnesses was flawed because it failed to appreciate the existence of the conspiracy to injure her. As I will consider further below the Appellant drew a distinction here between the question of a conspiracy to fabricate evidence, which was considered by the Panel, and that of a conspiracy to injure which was being alleged in the High Court Action.
47. It will be convenient to deal first with the grounds raising issues of procedural unfairness (grounds 1 and 3), then, with those challenging the Panel's approach to the assessment of the evidence (grounds 4 and 5) and, finally, with that challenging the sanction imposed (ground 2).

The Approach to be taken to the Appeal.

48. The appeal is brought pursuant to regulation 17 of the Teachers' Disciplinary (England) Regulations 2012. By reason of CPR rule 52.21(1) the appeal is to be limited to a review unless the appeal is in a category for which a practice direction makes different provision or "the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing".
49. Appeals under the 2012 Regulations are not in a category for which different provision is made by a practice direction (see per Steyn J in *Ullmer v Secretary of State for Education* [2021] EWHC 1366 (Admin) at [23] and [70]).
50. Here Mr Smith for the Appellant did not contend that the appeal should be by way of re-hearing. The Appellant's position was that if the appeal was successful the matter should potentially be remitted for re-hearing by a differently constituted

panel (albeit to be heard after the conclusion of the High Court Action) but she accepted that this appeal was by way of a review. I will consider below whether the interests of justice nonetheless require me to proceed by way of re-hearing but before doing so it is necessary to consider briefly the nature of an appeal by way of review and the difference between that and an appeal by way of re-hearing.

51. The approach to be taken on a review was set out in the judgment of the Court of Appeal in *General Medical Council v Bawa-Garba* [2018] EWCA Civ 1879, [2019] 1 WLR 1929 at [60] – [67] as explained and confirmed by Nicola Davies LJ in *Sastry v General Medical Council* [2021] EWCA Civ 623 at [34] – [39] and [107]. The question is whether the decision below is wrong. On such an appeal the court has to exercise caution before interfering with findings of fact but also before interfering with evaluative judgements involving the assessment of a number of different factors which have to be weighed against each other. The requirement for caution “applies with particular force in the case of a specialist adjudicative tribunal ... which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts” (*Bawa-Garba* at [67]). Here the Panel was such a body in respect of matters of teaching practice and the needs of that profession. The court “should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation or (2) for any other reason, the evaluation was wrong, that it is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide” (*ibid*).
52. On an appeal by way of re-hearing the approach is different. The judge on the appeal has to exercise his or her own judgement and is “fully entitled” to substitute his or her own decision for that of the tribunal below. A degree of deference is to be accorded to the judgment of the tribunal below but that deference will not be greater than is appropriate. The question of what is the appropriate degree of deference will depend on the circumstances which will include the nature of the issue under consideration and the composition of the tribunal (see *Sastry* at [102] - [103] and [107] – [108]). In *Ullmer* at [84] Steyn J explained that the distinction between a review and a re-hearing is “real not illusory” and that “if the appeal is by way of re-hearing, the appellate court can be more interventionist than on an appeal by way of review”.
53. In *Ullmer* the appellant had contended that the interests of justice required that the appeal be conducted as a re-hearing. That was an appeal by a teacher against a prohibition order imposed by the Secretary of State in accordance with the recommendation of a panel set up by the TRA and so mirrored the position here. There Steyn J accepted that the interests of justice required that the appeal be by way of re-hearing. Steyn J was influenced by the fact that the order would prevent the appellant from ever practising his profession again but also and “particularly” by the “profound impact” which there would be on his reputation from the panel’s conclusion that he had engaged in sexual activity with a pupil.
54. Notwithstanding the Appellant’s acceptance that the appeal was to be a review and out of abundance of caution I have reflected on whether the interests of justice require this appeal to proceed as a re-hearing. I am satisfied that they do not. I am conscious of the gravity of the effect of the prohibition order on the Appellant and the effect on her reputation of the findings which were made. There was not here,

however, the additional heightened effect of a particular stigma as there was in *Ullmer*. The consequences of a prohibition order and the reputational harm resulting from findings of misconduct do not without more necessitate an appeal by way of re-hearing. To decide otherwise would be to create a new category where the appeal is to be by way of re-hearing rather than review and to do so notwithstanding the fact that this could have been done by way of practice direction if that had been regarded as necessary or appropriate.

55. I will, therefore, proceed by way of review while remaining conscious of the grave effect of the findings and of the sanction on the Appellant. In the circumstances here the findings flowing from the Panel's assessment of the evidence and the recommendation as to sanction were a combination of findings of primary fact and of evaluative judgements. Those findings were made and those judgements reached by a specialist tribunal with particular knowledge of how matters were handled in schools and of the needs of the teaching profession. I can only uphold an appeal in respect of those matters if one or other of the conditions set out in *Bawa-Garba* at [67] is present. That is the approach to be taken to grounds 2, 4, and 5 of the appeal.
56. The Panel's case management decisions were also decisions involving the evaluation of a number of different factors. Moreover, they involved the exercise of discretion as to questions of case management where there is scope for legitimate disagreement as to the correct approach and where there can be a range of legitimate outcomes. Even on an appeal by way of re-hearing a considerable measure of deference is accorded to such a decision (see per Andrews J, as she then was, in *Suddock v General Medical Council* [2015] EWHC 3621 (Admin) at [34]). However, the questions of whether there is procedural injustice or whether a particular decision has caused the proceedings to be unfair relate to matters within the particular expertise of the courts. It follows that if, having made proper allowance for the scope for legitimate differences of approach to case management matters, the court concludes that the decision of a tribunal below has made the proceedings unfair there is, even on a review, markedly less scope for deference than there is in respect of evaluative judgements in respect of other matters. In the circumstances here that means that the deference to be accorded to the Panel's decisions is less in respect of the subject matter of grounds 1 and 3 than in relation to grounds 2, 4, and 5.

Ground 1: Procedural Unfairness in refusing to stay the Proceedings to await the Outcome of the High Court Action.

57. In support of this ground Mr Smith repeated the argument that it would be necessary in both the High Court Action and in the hearing before the Panel to determine whether there was a conspiracy against the Appellant. He contended that a High Court judge would be better placed to determine that issue than the Panel. Mr Smith proceeded from that proposition to contend that as a consequence it had been procedurally unfair for the Panel to decline to stay the misconduct proceedings until after the conclusion of the High Court Action. That argument was coupled with the assertion that the outcome in the High Court would be determinative of the issues which the Panel would need to address or at least of a significant proportion of those issues. Mr Smith also said that if the misconduct proceedings continued there could be an adverse impact on the Appellant's

position in the High Court Action. In his skeleton argument he said that the effect of the refusal of the stay and of the conclusion reached after the hearing by the Panel was that:

“the Panel has made findings of fact or otherwise determined issues which would or might inhibit or embarrass the High Court judge, potentially even creating an Issue Estoppel”.

58. That contention had been foreshadowed in the letter written by the Appellant’s solicitors on 19th August 2022. At that stage the Appellant and her advisers had been considering applying for judicial review of the Panel’s decision not to stay the proceedings. The letter was a pre-action protocol letter sent in that context and in it the solicitors had asserted that the refusal of a stay could prejudice the Appellant because of the effect on the High Court Action.
59. I reject this ground for the following reasons.
60. It is correct that some of the same issues would need to be considered in both the misconduct proceedings and in the High Court Action. However, the subject matter of the two sets of proceedings was very far from being identical. Indeed, in his submissions in support of ground 5 Mr Smith emphasised that there was a difference between a conspiracy to fabricate evidence (a matter which the Panel would need to address) and a conspiracy to injure, potentially by otherwise lawful means (the subject matter of the High Court Action).
61. Even to the extent that the issues to be considered in the two sets of proceedings overlapped it is by no means self-evident that a High Court judge would be better-placed to resolve those issues than the members of the Panel. The overlapping matters were questions of fact. The relevant exercise would be one of the finding of facts in the context of competing allegations about events taking place in a school and/or in the context of relations between a head teacher and members of the school’s staff. I do not accept that a High Court judge would by virtue of his or her experience or position necessarily be any better able to determine those issues properly than would the Panel. The judge would be sitting alone and could not be assumed to have any particular experience of the context of the dispute. Conversely the three members of the Panel would be able to pool their impressions of the evidence and two of the three had particular experience of the context of working in schools.
62. I do not accept the contention that the conclusion reached by the Panel on the allegations against the Appellant has in some way had or will have an adverse effect on the Appellant’s interests in the High Court Action. The High Court judge will be neither inhibited by nor bound by the findings of fact made by the Panel in the misconduct proceedings. That judge will be entitled and able to reach a different conclusion as to the credibility of the witnesses and as to the events if that is merited as a result of the evidence adduced in that action. A finding of fact made by the Panel when addressing questions of misconduct cannot give rise to an issue estoppel preventing the Appellant from advancing her case alleging a conspiracy against particular persons.
63. In those circumstances the Panel was right to conclude that no unfairness would be caused to the Appellant by the refusal of a stay and by the Panel proceeding to

the hearing of the evidence and to the determination of the allegations against the Appellant. The continuation of the misconduct proceedings did not prejudice the Appellant's conduct of the High Court Action. Nor did the existence of the High Court Action and the prospect of a hearing in that matter prejudice the Appellant's position in the misconduct proceedings. In that latter regard I reject Mr Smith's submission that the Panel should have taken account of the possibility that those called as witnesses in the misconduct proceedings would tailor their evidence so as to protect their positions in the High Court Action. The contention seemed to be that the witnesses would have an incentive to stick to their accounts even if they were untrue and/or to heighten their evidence rather than conceding points made on behalf of the Appellant so as to avoid exposing themselves to criticism in the High Court Action when that came to trial. Such a contention was speculative at best: there is no basis for the argument that the possibility of being called to account in the High Court Action for their evidence before the Panel would cause the witnesses to act in that way. Indeed the converse is rather more likely namely that the prospect of having to answer again for the evidence they gave would cause the witnesses to take particular care to give accurate and honest evidence.

64. My conclusion that the Panel were right in approaching the matter on the basis that the Appellant would suffer neither prejudice nor unfairness from the continuation of the misconduct proceedings is determinative of this ground in circumstances where the ground is based on an assertion of procedural unfairness. However, even if the ground were to be seen as covering some wider criticism of the Panel's decision to decline a stay then it would still fail. That is because in the circumstances of August 2022 that decision could not be faulted. The Panel was entitled to take account of the length of time for which the misconduct proceedings had been continuing and of the Panel's obligation to resolve the allegations against the Appellant. The misconduct proceedings had been continuing for a considerable period of time and the conclusion of the High Court Action was not imminent. Although Mr Smith had submitted to the Panel that the High Court Action was proceeding at pace his estimate at that stage of when it would come to trial was that this would be towards the end of 2023 and so about one year after the conclusion of the misconduct proceedings. In fact that estimate has turned out to have been markedly over-optimistic given that there has been very little progress in the High Court Action in the intervening period. Matters might have been different if the misconduct proceedings had only just begun or if a trial in the High Court Action had truly been imminent but neither of those was the case in August 2022.
65. In this regard it is also relevant that, as Mr Cleaver pointed out, even if the Panel had granted a stay to await the outcome of the High Court Action it would still have been necessary for the Panel ultimately to consider the allegations when the stay was lifted after the determination of the High Court Action. The decision in that action would only have been determinative of the existence or otherwise of a conspiracy to injure the Appellant. It would not have determined whether the allegations were or were not substantiated nor of whether any substantiated allegations amounted to misconduct (and still less the appropriate sanction if there was misconduct) and so a further hearing to determine those matters would have been necessary albeit against the background of a finding as to the alleged conspiracy to injure.

Ground 3(a): Procedural Unfairness arising from the late Presentation of the Notice of Hearing and related Issues.

66. Before me the Appellant, rightly, did not press the contention that the withdrawal of some of the allegations should have led to the service of a fresh notice of hearing and an adjournment of at least eight weeks. However, Mr Smith did make the point that the changes had the effect that the Appellant was facing a changing case even though the proceedings against her had been commenced some years earlier. He did persist in his criticism of the bundle which was served by the TRA on 4th August 2022 saying that some of the documents were in the wrong place and/or attributed to the wrong witness such that it was “confusing” and “not put together in the manner one is entitled to expect with weeks to go to a final hearing”. He criticised the fact that the TRA included and relied on at the hearing the statements of three witnesses who had said in the statements that they had not been members of the ”Official Trinity Triumph” Facebook group even though one had subsequently accepted that she had been a member and had provided copies of postings by the others. Mr Smith also criticised the disclosure to the Appellant of correspondence between the TRA and its witnesses only days before the hearing.
67. However, Mr Smith did not advance any particular respect in which the Appellant’s defence to the allegations would have been conducted differently if either the identification schedule or the unused material had been provided to her lawyers earlier. Rather he said that the unfairness lay in the fact that she was being “bulldozed into the hearing” and had to address a changing case.
68. I accept that the fact that the final notice of hearing contained pseudonyms rather than names and that it was not accompanied by the identification schedule would have made the preparation of the Appellant’s response more time consuming than it would otherwise have been. I also accept that the late disclosure of the unused material would have meant that the work of analysing that had to be undertaken nearer to the hearing date than was ideal and that this difficulty was compounded by the volume of that material. However, neither these matters nor the Panel’s refusal to adjourn the hearing caused the proceedings to be unfair. It is highly relevant that the Appellant had known the substance of the allegations against her since April 2018. From then onwards she knew the substance of what she was said to have done and in almost every instance knew who it was in relation to whom she was said to have acted inappropriately. The alterations contained in the July 2022 notice of hearing were relatively modest and the absence of the identification schedule did not mean that in truth the Appellant did not know who she was alleged to have bullied, mocked, or intimidated. It is of crucial importance that the Appellant was not able to say that the conduct of her case at the hearing would have been materially different if the identification schedule or the unused material had been provided sooner. It was not, for instance, being said that there was particular evidence in her favour which could have been obtained if the information had come sooner. In that regard it is noteworthy that her lawyers’ response on receipt of the identification schedule was not to say that there needed to be an adjournment of the hearing and still less to say that the nature of the case had changed. Rather the response was to ask for a relatively short extension of time for the service of the Appellant’s witness statement. That statement was prepared in time for the hearing before the Panel and, as was noted by the TRA’s

representative at that hearing, it extended to 456 paragraphs and represented a detailed response to the allegations.

69. It follows that these matters did not make the proceedings unfair and this ground fails.

Ground 3(b): Procedural Unfairness arising from the TRA's Failure to provide an Audio Recording of the Hearing.

70. The hearing before the Panel was recorded. Mr Smith requested that the audio recordings be released to him to assist in preparing his closing submissions for the Appellant. The Panel said that to the extent that it was able to do so it agreed to the release of the recordings. However, it noted that the recordings were held by the TRA and said that the final decision on release would have to be that of the TRA's data controller. That data controller resisted the release of the recordings taking the view that such release was incompatible with the TRA's data protection obligations. As a consequence Mr Smith's submission of no case to answer and his closing submissions were made without access to the recordings of the hearings. A transcript, running to 1927 pages, has now been obtained and made available to the Appellant.
71. The Appellant contends that the TRA's action in refusing to release the recordings was deliberately oppressive behaviour intended to frustrate her defence to the allegations. She says that this behaviour had the effect of depriving her legal team of the fullest possible opportunity to prepare her case and thereby rendered the proceedings unfair.
72. I have not received any submissions as to the basis on which the TRA had believed that it would be a breach of its data protection obligations for it to provide the recordings to the Appellant and her lawyers. My view (albeit in the absence of such submissions) is that the TRA's stance was over-cautious to say the least in the context of a hearing the majority of which had been held in public; where the Appellant and Mr Smith had been present and entitled to take notes even when the public were excluded; and where transcripts have now been provided. Mr Cleaver did not seek to dissuade me from that assessment. However, there is no basis for believing that the TRA's stance was due to anything other than a genuine if exaggerated or mistaken concern to avoid a breach of its legal obligations. I do not find that it was in some way a deliberate ploy to frustrate the Appellant's defence.
73. The question is whether the failure to provide the recordings rendered the proceedings unfair. It is implicit in the Appellant's contention that there was unfairness that the Panel should not have proceeded to make a determination until the recordings had been provided. Mr Smith did not put the matter in that way before me and had not submitted to the Panel that it should not proceed until the recordings had been provided. However, if the failure to provide the recordings rendered the proceedings unfair that conclusion must follow.
74. The contention that either the failure to provide the recordings or the action of the Panel in hearing final submissions before the Appellant had the recordings rendered the proceedings unfair is simply untenable. Fairness does not require a party to be provided with an audio recording of the evidence before making closing

submissions. Fairness does require that a party has an opportunity to hear and to make comment on the evidence advanced against that party but the Appellant had that opportunity. She and Mr Smith had been present throughout and had been able to take notes of the evidence. I was told that the Appellant's husband had been present and able to take notes during those parts of the hearing which were open to the public. It had been open to the Appellant to have arranged for a larger legal team to be present at the hearings to assist in the taking of notes. Copies of the statements of the witnesses being called by the TRA had been provided in advance of the hearing. I appreciate that those making a manuscript note of oral cross-examination will not be able to record every word that has been spoken and that such a note will not be as detailed as a transcript. Such a note can, however, adequately record the gist of such oral evidence and in particular those answers which are of significance.

75. It is only in relatively recent times that there has been audio recording of most court proceedings. Even in such proceedings the parties do not typically have access to the recordings or to a transcript before making their closing submissions. The recordings are for the use of the court or for use on appeal rather than for use during the proceedings being recorded. The exception is those cases where the parties have obtained the court's permission and have paid for their own transcription or recording services. It cannot be suggested that proceedings where no recording is provided are inherently unfair. It is relevant that here Mr Smith was, even without a transcript, able to prepare a detailed written closing submission which was seventy-five pages long. That was accompanied by an "evidence summary and reference table" some ten pages long. That cross-referenced the witnesses to the allegations and analysed which witnesses supported which allegation. These documents were clearly the result of considerable work on Mr Smith's part. He had been able to prepare them by reference to the written evidence; to the notes which he and the Appellant had taken; and to their recollection of the evidence. I have considerable doubt as to whether for Mr Smith and the Appellant to have had access to the audio recording (and it was that rather than a transcript which was sought) between the close of the evidence and the making of the final submissions would in practice have been of any real assistance to them.
76. The Appellant and her team now have the lengthy transcripts. They have been able to make submissions in support of the appeal and in particular in support of ground 4 based on those. It is telling that Mr Smith did not identify any point of significance as opposed to matters of detail which he had been able to make based on the transcript which had not been made before. By reference to the transcript he was able to make submissions as to the flaws in the evidence of the TRA which were more focused and more detailed than the previous submissions had been. He was able to refer to the actual words used by the witnesses and to give precise references to the evidence and to its context. However, these points were essentially the same as had been made to the Panel albeit they were now being made in a more detailed way. They were not new or different points and the case being advanced was not materially different from that advanced to the Panel. It is not being said that the transcript revealed a significant flaw in the TRA's case which had gone unnoticed rather than providing support for the existing arguments.

77. In those circumstances the proceedings were not rendered unfair by the failure to provide the audio recordings and this ground is dismissed.

Ground 4: Deficiencies in the Panel's Findings of Fact.

78. This ground of appeal is a challenge to conclusions which were either findings of primary fact or evaluative assessments made by a specialist tribunal. In respect of these, as explained at [51] above, the appeal can only succeed if there was some error of principle in the Panel's approach or if the conclusion reached was one which was outside the wide range of those open to a body in the position of the Panel acting reasonably. For the following reasons the Appellant has failed to establish either of those matters and this ground fails.
79. The Panel took a notably careful approach to the assessment of the evidence. It found that there was no case for the Appellant to answer in respect of some of the allegations and found that a number of the others had been not proved. In the case of the latter that was in many instances because of the lack of contemporaneous records and/or corroborative evidence.
80. The care taken by the Panel is reflected in the fact that it distinguished between different allegations in respect of which the same witnesses gave evidence accepting that evidence on some allegations but not on others. The Appellant criticises this approach. On her behalf it was said that having rejected the evidence of a witness on one matter the Panel should then have regarded that witness's evidence as being unreliable generally and should not have accepted it in relation to any different matter. This is said to be particularly so where the evidence which was not accepted related to a more serious allegation than that where the evidence was accepted. The point being made was that if the evidence had been found unreliable on a serious issue then the Panel should have concluded that the witness could not be relied on in relation to any matter. This was because it was said that a reliable witness would have been more likely to recall accurately a serious matter than a less striking or more trifling one. This is not a tenable criticism. The Panel's approach demonstrates that care was taken to analyse the reliability of the different elements in the evidence. It shows a realistic understanding that it is possible for a witness to be correct about some matters but mistaken about others (and thus that it is possible for a witness to be mistaken about some matters even if the same witness is able to recall others accurately). This is an entirely appropriate and proper course involving a recognition that the quality of a witness's recollection may vary from matter to matter. It is certainly not an approach which discloses any error of principle. Conversely the Appellant's contention in this regard is based on the view that a witness of fact is either totally reliable, such that all his or her evidence is to be accepted even when it relates to different incidents, or as totally unreliable, such that none of the witness's evidence is to be accepted. That proposition is unsound. The experience of the courts is that an entirely honest witness can, by reason of the imperfect nature of recollection, be capable of giving evidence which is accurate and reliable in some respects but inaccurate or unreliable in others whether that evidence relates to a single incident or to a number of incidents.
81. The Panel's treatment of the evidence of Stacey Curtis illustrates the approach it took and shows the caution it applied in making adverse findings against the

Appellant. The Panel attached weight to the evidence of Miss Curtis in large part because it was supported by a contemporaneous log (which had commenced before the formation of the second Facebook group). Many of the allegations made by Miss Curtis were found proved but even in respect of this witness whom they regarded as generally reliable the Panel was not uncritical and at least one allegation which she supported was found not to have been proved.

82. The care taken generally by the Panel and the caution it exercised before making findings against the Appellant are also illustrated by its approach to allegation 7. This was an allegation that the Appellant had falsely described a reference relating to Isabelle Potterton as having been unacceptable. There the Panel explained that it found Miss Potterton to be a credible witness. Nonetheless it did not find the allegation to be proved. This was because of the absence of the underlying documentation (the reference in question) and also because the Panel approached the matter on the footing that as the allegation was associated with another which alleged dishonesty then more cogent evidence was needed for the allegation to be proved.
83. Those examples could be multiplied and it is apparent that the Panel took considerable care in analysing the evidence.
84. Thus the Panel noted that there were significant conflicts between the TRA's witnesses and those called for the Appellant and that the conflicts were reflected in "extremely polarised positions" and in the use of "emotive language". It is apparent that the Panel took care to approach matters carefully and objectively, avoiding being swayed by the language being used, and being alert, as I will explain further below, to the possibility of the exaggeration of evidence.
85. The Panel made a careful assessment of whether there had been a conspiracy to fabricate evidence against the Appellant. A significant part of that exercise was the interpretation of postings in the latter of the two Facebook groups mentioned above and an assessment of the inferences which could properly be drawn from that material. The Panel took account of the fact that postings on the relevant pages encouraged those in the groups to submit grievances against the Appellant. It also took account of the use of "strident and inappropriate language". However, it noted that "there was no suggestion that any grievance should be fabricated". In addition it took account of the references in postings to the availability of counselling and to individuals feeling emotional or scared. It concluded that the material showed the Facebook group operating in a way akin to a support group and rejected the contention that the postings demonstrated that there was a conspiracy to fabricate evidence. There was no error of principle in that approach and the conclusion reached was one which was properly open to the Panel.
86. In support of this ground and of ground 5 the Appellant prayed in aid the approach taken in *Suddock* above. It was said that the Panel had failed to take proper account of the evidence of a conspiracy against the Appellant as had happened in that case. The circumstances of that case and the current appeal are, however, very different and the invocation of the decision in that case does not advance matters. *Suddock* was an appeal by re-hearing. It was, moreover, one where the judge found that there had been "the clearest possible evidence... that someone was making a crude attempt to frame [the appellant in that case]" and that the panel below had "brushed

aside” that evidence (see at [55]). It was in addition a case where the reasoning given for a number of the findings of the panel had been “woefully deficient” [67] and where the judge was critical of the panel’s approach to demeanour which had caused it to accept as reliable evidence which it should have concluded was unreliable. Here the Panel addressed directly and with care the allegation of a conspiracy. It explained the reasons for its conclusion in that regard clearly and cogently. In addition the Panel was markedly cautious in its reliance on the demeanour of witnesses. As I have explained above, the Panel declined to find proved even some allegations supported by witnesses whom it regarded as credible where documentary support was lacking.

87. It is notable that even having found that there was no conspiracy to fabricate evidence the Panel had regard to the possibility that the existence of the Facebook group had had an effect on the evidence saying:

“However, this did not mean that the existence of the Facebook group or the content of the posts were irrelevant. The panel took care to consider the possibility that, short of fabrication, the evidence of witnesses, who might have been attempting to give genuine accounts, could have been influenced by the sharing of experiences on the Facebook group. The panel recognised that this might have contributed to false memories or exaggeration.”

88. The Panel went on to record an impeccable self-direction as to the need for caution in the assessment of the evidence and as to the effect of the passage of time saying;

“The panel acknowledged that extreme caution was required when considering the memories of witnesses. The panel adopted the approach of testing the evidence of witnesses, in the first instance, by reference to objective facts and, where available, contemporaneous documents. The panel avoided making any initial general assessment of the credibility of any witness by reference to their demeanour and confined its analysis to the specific allegations and consistency or lack of consistency with other evidence. In the absence of contemporaneous documents, the panel felt that it was able to attach some weight, where appropriate, to demeanour.

The panel also recognised that it was dealing with matters that were alleged to have taken place some years ago. The panel made allowances for the fact that, with the passage of time, memories can fade or change. Witnesses, whoever they may be, cannot be expected to remember with crystal clarity, events which occurred many years ago. From the point of view of Mrs Hart, the panel recognised that the longer the time since an alleged incident, the more difficult it may have been for Ms Hart to answer the allegation. This was considered in Mrs Hart's favour in deciding whether the allegations against her were proved on the balance of probabilities.”

89. The Appellant set out a detailed critique of the evidence of a number of the witnesses called by the TRA saying that the matters raised should have caused the Panel to reject the evidence of those witnesses and/or that they showed that the Panel had made findings on the basis of unreliable evidence. In large part the critique was a variant of the point I have considered and rejected above: namely that a flaw in one aspect of a witness’s evidence or the rejection of a witness’s evidence in respect of one allegation should have caused the Panel to reject all the evidence of that witness. The Appellant’s approach was to identify aspects of a witness’s evidence which had not been accepted by the Panel or which the Appellant contends should have been regarded as inherently incredible and to say that as a consequence all of the evidence of that witness should have been rejected. For the reasons given above I do not accept this contention and the Panel’s failure

to take that approach did not amount to a failing nor did it mean that the conclusions reached were not properly open to the Panel.

90. In addition, and as an aspect of this critique, the Appellant advances points of detail as to the interpretation of particular parts of the evidence. An example of this line of argument was a point made in relation to the evidence of Miss Curtis. Under cross-examination Miss Curtis had said that she did not wish to hurt the Appellant. Miss Curtis was then referred to a posting on the Facebook page in which she had said that she wanted to punch the Appellant. On behalf of the Appellant it was said that this showed that Miss Curtis had given untrue evidence in her answer when she had denied wanting to hurt the Appellant. I reject the Appellant's analysis of this particular exchange. It was entirely open to the Panel to find that the posting in anger of a statement that Miss Curtis wanted to punch the Appellant was not indicative of a genuine intention to hurt the latter (let alone of an intention to attack her physically) nor that Miss Curtis was giving untrue evidence. The posting was doubtless an indication of the strength of Miss Curtis's emotion and of the anger she felt at the time of the posting. However, those are very different matters from the manifestation of an intention to harm the Appellant and still less from an indication that the answer in the course of cross-examination was untrue. The other elements of the critique were similarly criticisms of particular aspects of the evidence where I am satisfied that it was open to the Panel to differ from the interpretations now being advanced by the Appellant and more important where it was open to the Panel to conclude that the relevant matters did not necessitate the wholesale rejection of the evidence of the witness in question. The Appellant set out her critique of the particular witnesses at some length but it is unnecessary to analyse that critique in similar detail here because it is based on the mistaken approach I have just described and is moreover an attempt to reargue the factual issues in a way which is inappropriate on a review.
91. The Appellant says that the Panel erred in failing to attach proper weight to the evidence of the witnesses called on her behalf. The weight to be attached to the evidence of a particular witness is very much a matter for the fact-finding body which heard that evidence. It will only be in the rarest of cases that a contention as to the weight to be attached to evidence will show an error of principle or will demonstrate a conclusion outside the range of those properly open to the fact-finder. In any event it is apparent here that the Panel did attach real weight to the evidence called on the Appellant's behalf and also that it was properly careful to identify the questions to which that evidence was relevant and those to which it was not.
92. Thus the Panel attached weight to the evidence of the nature of the Appellant's qualities as a teacher and of the transformative effect she had on the lives of a number of children. The Panel expressly took account of this evidence and described its relevance when addressing allegation 4 – an allegation which included sub-allegations that the Appellant had mocked or mimicked pupils—saying (in relation to the allegation of mocking a pupil in assembly):

“In considering this allegation and others relating to pupils, the panel had regard to the compelling evidence presented by some parents of pupils and others, including most of the TRA's witnesses, as to Mrs Hart's commitment to pupils. The panel

approached consideration of these allegations on the basis that more cogent evidence would be required to prove the allegation on the balance of probabilities.”

93. The Panel rightly noted the limitations on much of the evidence advanced on the Appellant’s behalf which was in a number of instances to the effect that the witness believed that the Appellant would not have acted in the way alleged. At page 24 of its decision the Panel set out an entirely appropriate approach to such evidence thus:

“The panel was conscious that the written statements in the hearing bundle, particularly those submitted on behalf of Mrs Hart, contained some expressions of opinions which were not based upon what the witnesses concerned observed. ... the panel accepted the legal advice that opinions of speculative nature, whether expressed by a witness for the TRA or a witness on behalf of Mrs Hart, should be disregarded.”

94. The position, therefore, is that the Panel’s approach to the fact-finding exercise was markedly careful and restrained and the matters advanced by the Appellant here do not show any error of principle in that approach. Still less do they show that the conclusions reached were not properly open to the Panel.

Ground 5: The Adoption of a flawed Approach to the Assessment of the Credibility and Reliability of the TRA’s Witnesses.

95. This ground is related to the preceding one and fails similarly.
96. The Appellant says that the Panel’s approach was flawed because although it considered the issue of whether there was a conspiracy on the part of the TRA’s witnesses to fabricate evidence it did not adequately address the possibility that there was a conspiracy to injure her. It was said that this would have the consequence that the evidence against the Appellant was motivated by bad faith or by a personal animus against the Appellant. This contention does not take matters any further. If the Panel found that the evidence of a witness was being given honestly and was reliable then it entitled to rely on that evidence. This would be so even if the witness in question was personally hostile to the Appellant and would be pleased if the misconduct proceedings were to result in her prohibition from teaching. Such hostility and/or feeling of satisfaction at the ending of the Appellant’s career would be deeply unattractive but if the evidence was otherwise honest and reliable the witness’s motivation was irrelevant.
97. In any event it is clear that the Panel did take account of the potential for personal animus against the Appellant and that it had regard to this when assessing the reliability of the evidence against her. As I have already explained the Panel noted the polarised opinions and the emotive language which was used. It had regard to the possibility that the sharing of experiences through postings by members of the Facebook group “might have contributed to false memories or exaggeration”. That was an entirely appropriate course for the Panel to take but it was not required to go further and no failing is shown in this regard.

Ground 2: Failings in the Approach taken to Sanction by the Panel and the Secretary of State.

98. The Appellant contends that the Panel and the Secretary of State failed in truth to approach the issue of sanction on the basis that a prohibition order was only to be imposed where such an order was both necessary and proportionate. Instead an order which was neither necessary nor proportionate was imposed when the appropriate order was one of the publication of the findings.
99. In support of that contention the Appellant says that the allegations which had been proved “were essentially employment law issues amongst members of disgruntled junior staff or former junior staff” which should not have been regarded as misconduct or as impairing her fitness to practise. The case was to be distinguished from those where questions of safeguarding or of the wellbeing of children arose.
100. The Appellant also asserted that insufficient account had been taken of her previous good character or of the applicable guideline which provided that a prohibition order was not to be imposed for the purpose of punishment. She said that the Panel and the Secretary of State had failed to apply the four stage assessment of proportionality laid down in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 at [71].
101. The Appellant said that her position was akin to that of the appellant in *Wallace* above where Holgate J concluded that the proper conduct of the balancing exercise would necessarily have led to the conclusion that the misconduct should be addressed by publication of the finding and not by a prohibition order.
102. Next, the Appellant contended that it was wrong for the Panel to have placed significant weight on her lack of remorse and/or insight and that in that regard account should have been taken of the existence of the High Court Action. She said that to have expressed remorse would have undermined her position in that action.
103. Finally, the Appellant pointed to the period of time which had passed since the commencement of the proceedings. This was said to have been relevant in two respects. First, because there had been a period of five years during which her ability to work had been impaired. Second, because it had not been thought necessary to impose an interim prohibition order during that period which, the Appellant said, indicated that a prohibition had not been thought necessary.
104. Some of the points made by the Appellant can be disposed of shortly. Thus it was indeed necessary for the Panel to have regard to proportionality and to consider whether the relevant public interest could be met by a less intrusive measure than prohibition. However, while that required the Panel to have regard to the impact of the sanction and the nature of the misconduct while taking account of the public interest and then to give careful consideration to proportionality it did not require the formal application of the four stage *Bank Mellat* approach. The issues are whether the Panel had proper regard to proportionality and whether the conclusion reached was within the range of those properly to be seen as proportionate: the structure of the reasoning leading to the conclusion is markedly less important.
105. Similarly, the Panel cannot be criticised for attaching considerable weight to the Appellant’s absence of remorse and lack of insight. Having found the allegations proved the Panel had to proceed on the basis that the Appellant had acted in the

way alleged and had done so knowingly. The Panel took care not to regard the fact that the Appellant had contested the allegations as an aggravating feature but it was entitled to regard her failure to acknowledge that her behaviour had been unacceptable as an indication that there was a risk of recurrence. The point that for the Appellant to have acknowledged that her behaviour had been inappropriate would have undermined the claim she was making in the High Court Action simply does not advance matters. If, as the Panel was bound to conclude following its findings, the Appellant had behaved in the way alleged then her failure to accept this was a relevant factor even if such an acceptance would have had an adverse impact on the separate proceedings she had chosen to commence.

106. Again, the amount of time which had passed since the commencement of the misconduct proceedings was not a material factor in the circumstances here. The delay in bringing the proceedings to a hearing had in part been due to the applications which the Appellant had made. These had included two applications for judicial review. One of those had succeeded and the Appellant is not to be criticized for bringing either set of applications nor for her other interim applications but having made them the scope for her to invoke the delay since the commencement of the proceedings as a factor in her favour is markedly reduced. The period since the incidents in question might have been a relevant factor operating against the making of a prohibition order if the misconduct finding had been in respect of a single isolated or out of character incident. It could not, however, assist where, as here, the conduct in question took place over a number of years and where the Panel concluded that the conduct showed a deep-seated attitude on the part of the Appellant.
107. Similarly, the absence of an interim prohibition order cannot affect the assessment which was to be made once the allegations had been determined and findings of misconduct made. The Panel had to assess the position as it was in the light of its findings. The fact that the view had been taken at an earlier stage that an interim prohibition order was not necessary was not a material consideration for the Panel and does not indicate that the Panel's conclusion was incorrect.
108. Does the decision in *Wallace* assist in determining the approach I should take? The allegations which had been found proved there involved breaches of financial governance standards; a failure to declare a conflict of interest; the improper disclosure of confidential information; and the improper deletion of emails. The allegations that the appellant there had acted dishonestly had been dismissed and so the appellant's case was to be considered on the basis that he had not been subjectively dishonest.
109. In *Wallace* the appellant had "fully acknowledged his errors and had 'shown great insight into his actions'" [9]. In addition he had taken steps to ensure that there would be no recurrence of the relevant behaviour [39]. Moreover, Holgate J summarised the relevant background as being that the misconduct was "out of character" and had been at a time when the appellant was under great pressure to take on more responsibilities but had lacked sufficient support [96(vi)]. While the last of those factors might potentially be relevant in the case of the Appellant the former elements were not present.

110. In the earlier case the panel had recommended that a prohibition order should not be imposed but the Secretary of State had decided nonetheless that a prohibition order was appropriate.
111. Holgate J approached the case on the footing that he was conducting a re-hearing [28]. The case was heard before the decisions in *Bawa-Garba*, *Sastry*, and *Ullmer* to which I have referred above and which provide that I am to proceed by way of review rather than rehearing and which explain the approach to be taken on a review. I am, therefore, only to find that an evaluative assessment was wrong if there was an error of principle in the approach taken by the Panel or the Secretary of State or if the decision reached was outside the range of those properly open on the application of that correct approach.
112. Holgate J took account of the fact that the publication of a finding of misconduct was to be regarded as a considerable sanction in itself [79]. He also noted, at [81] and [82], that the appellant's conduct was "at the lower end of the scale of severity covering behaviour for which a prohibition order might be appropriate"; that there was an "unusually significant public interest" in the appellant being allowed to continue to teach; and that the case was "on the cusp or the threshold for imposing a prohibition order".
113. At [91] Holgate J concluded that the Secretary of State had not carried out the necessary proportionality assessment.
114. It was against that background that Holgate J held that the decision could not stand and concluded that in the particular circumstances if the balancing exercise were to have been undertaken properly then that would inevitably have resulted in a decision to impose only the sanction of publication of the finding of misconduct.
115. In those circumstances the assistance to be derived here from the decision in *Wallace* is limited. Holgate J was applying a different test from that which I am to apply. He was, moreover, dealing with different circumstances from those here. Not only are the circumstances of the misconduct and of the appellant different in the two cases but there are a number of particular and significant differences from the current case. In *Wallace* the misconduct was on the cusp of that which would merit a prohibition order. Here the Panel and the Secretary of State were clearly of the view that a prohibition order was clearly merited and as I will explain below that was a conclusion which was perfectly properly open to them. Also of particular note is the presence in *Wallace* of significant remorse and insight coupled with particular action on the part of the appellant to prevent a recurrence of the behaviour in question. Here there was neither remorse nor insight and the Panel concluded that there was a significant risk of recurrence of the behaviour which had led to the allegations. It is right to note that both in *Wallace* and here the appellants had made outstanding contributions to education and that in both cases there was a real public interest in their skills continuing to be available for the benefit of children. Those are significant factors but I do not understand Holgate J to have been purporting to lay down a general rule that whenever there is a teacher who has such skills or who has made such a contribution it would be inappropriate to impose a prohibition order.

116. I return to the substance of the questions I have to address namely whether the approach taken was wrong in principle and whether the conclusion reached was outside the range of decisions which could have been reached by the Panel acting properly and reasonably. In addition, I note that questions of what is necessary and proportionate in order to maintain professional standards and as an appropriate response to particular behaviour in the context of relations between a headteacher and her staff are very much within the field of expertise of the Panel with its two teacher members.
117. The Panel and the Secretary of State were clearly aware that there was a choice between two sanctions. They were also aware that a prohibition order was only to be imposed if that course was both necessary and proportionate. They approached the matter on the basis that the assessment of proportionality involved a balancing exercise taking account of a number of factors including the gravity of the misconduct; the risk of repetition; the effect on the Appellant; the public interest in maintaining professional standards; and the public interest in retaining the benefits which the Appellant's skills could provide. There was, accordingly, no error of principle in the approach taken by the Panel and the Secretary of State. The Appellant says that although referring to the need for the imposition of a prohibition order to be necessary and proportionate the Panel and the Secretary of State did not in truth apply that test. I reject that submission. It is clear that the Panel and the Secretary of State were approaching the question of sanction by reference to that test. Whether the conclusion reached was open to them applying that test is a separate question to which I will now turn.
118. The conclusion reached by the Panel and the Secretary of State was, in my judgement, well within the range of conclusions open to them applying the proper test. The Appellant's submissions as to the nature and gravity of her actions markedly underplay the seriousness of her conduct. On her behalf the allegations are characterized as being employment grievances which should have been dealt with locally and as an aspect of the management of human resources. That is to misunderstand the nature of the findings. When in a position of leadership and power the Appellant was found to have bullied teachers who were pregnant (and as such vulnerable at least to a degree); to have made inappropriate comments to or about staff members; to have mocked staff members; and to have intimidated staff members. She was found to have done this repeatedly and over a period of three years. It is of note that a number of instances of this behaviour related to younger and/or newly qualified teachers. Those findings were made by a panel which included two teacher members who are to be taken to have had experience of what was and what was not acceptable in the context of a school seeking to achieve the best for pupils from an area of deprivation. Even when full account is taken of the scope for different views as to appropriate leadership styles and of the pressures which the Appellant was undoubtedly under the Panel were entitled to regard this as grave conduct warranting the making of a prohibition order. It is apparent that, unlike *Wallace*, this was not a case at the borderline for the making of a prohibition order. The fact that no question of harm to children or of related safeguarding issues arose does not prevent the Appellant's conduct being correctly characterised as grave. The Panel was entirely justified in regarding it as significant that the behaviour had continued over several years and had involved a number of different staff members. Similarly, the findings that the Appellant's

conduct was the result of a deep-seated attitude in respect of which the Appellant had no insight and where there was, as a consequence, a risk of recurrence were properly open to the Panel. Having made those findings the Panel and in turn the Secretary of State were entitled to regard the risk of recurrence as a very powerful factor. That was, moreover, a further factor which distinguishes the Appellant's case from *Wallace*.

119. In those circumstances and notwithstanding both the impact on the Appellant and the public benefit in enabling children to benefit from her skills the conclusion reached by the Panel and by the Secretary of State was properly open to them.
120. It follows that this ground of appeal also fails.

Conclusion.

121. The appeal is, therefore, to be dismissed.