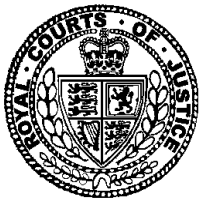

Neutral Citation Number: [2019] EWHC 531 (Admin)

Case No: CO/4997/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before :

MR JUSTICE WILLIAM DAVIS

- -

Between :

MOHAMMAD SARWAR LONE	**Appellant**
- and -	
SECRETARY OF STATE FOR EDUCATION	**Respondent**

- -
- -

Marc Beaumont (instructed by **Direct Access**) for the **Appellant**
Iain Steele (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 26 February 2019

- -

Approved Judgment

Mr Justice William Davis:

Introduction

1. Mohammed Lone is a teacher. He qualified in 2004. He spent the first 11 years of his teaching career at a school in Huddersfield teaching RE. In 2015 he moved to Grange Technology College in Bradford where he was employed as Assistant Head of Humanities. By then he was aged 36. Shortly after he took up his post a 24 year old woman, known for the purposes of these proceedings as A, arrived at the College to teach Health and Social Care. It was her first post qualification post. Between March and May 2016 Mohammed Lone sent many texts and e-mails to A – at least a hundred different communications – which she said were unwanted. There were other incidents involving the two of them over the same period.

2. On 25 May 2016 A complained about Mr Lone's behaviour to the then head teacher. A formal investigation was put in train which led to a disciplinary hearing on 13 September 2016. The conclusion of that hearing was that Mr Lone was found to have made persistent and unwanted contact with A and that this amounted to gross misconduct. Notwithstanding his good record hitherto Mr Lone was dismissed for gross misconduct.

3. I was told that Mr Lone took proceedings in the Employment Tribunal in respect of his dismissal and that those proceedings were compromised in due course with the payment of £5,000 to Mr Lone by the Trust which operated Grange Technology College. In any event he took up other employment as a teacher. He continued to teach until the end of October 2018. At that point a professional conduct panel ("the panel") of the Teaching Regulation Agency ("TRA") conducted a hearing to consider the events of 2016 and whether they required consideration by the Secretary of State for Education of a prohibition order preventing Mr Lone from pursuing his career as a teacher. The panel recommended such prohibition.

4. The Secretary of State followed the recommendation. By a decision dated 6 November 2018 which was notified to Mr Lone on 19 November 2018 he made a Prohibition Order which meant that Mr Lone was not able to teach in any school, sixth form college or similar institution. Mr Lone now appeals against that decision.

Legal framework and its operation

5. The Education Act of 2011 in part 3 abolished a body known as the General Teaching Council for England. That body hitherto had been the regulatory body of the teaching profession; there had been no final decision-making vested in the Secretary of State. The regime introduced by the 2011 Act gives the Secretary of State a power to investigate any case where an allegation is referred to him that a person to whom the section applies, namely a teacher, might have been guilty of unacceptable professional conduct or conduct that might bring the teaching profession into disrepute. The statutory framework in the Education Act 2011 does not identify in terms how it is that the Secretary of State is to investigate the case. Section 141B(2) simply states:

Where the Secretary of State finds on an investigation of a case….that there is a case to answer, the Secretary of State must decide whether to make a prohibition order in respect of the person.
Thus, it is for the Secretary of State to decide whether a prohibition order is to be made in relation to a teacher who has been guilty of the relevant conduct. That decision is the Secretary of State's decision.

6. The regulatory framework imposed by reference to the Education Act of 2011 is contained in the Teachers' Disciplinary (England) Regulations of 2012. Those regulations set out at Regulation 5 the process by which the Secretary of State is to investigate allegations of misconduct. First, the Secretary of State has to inform the relevant teacher of the allegation made, giving the teacher the opportunity to respond to the allegations. Having considered the representations of the teacher, the Secretary of State either then can simply discontinue the process or decide that the case should be considered by a professional conduct panel. A professional conduct panel is established by the regulations as being a body including at least three people, one of whom must be somebody who has been a teacher in the past five years. The proceedings of the panel require the panel to determine all cases following a hearing, though they can determine the case without a hearing if the teacher concerned makes such a request. The professional conduct panel potentially can find a case not proved in which event, the Secretary of State will publish a statement to that effect. A decision of the panel that the case is not proved is final. Regulation 7(5) provides that, where the panel finds the teacher guilty:

   The panel must make a recommendation to the Secretary of State as to whether a prohibition order should be made.

   Regulation 8(1) requires as follows:

   The Secretary of State must consider any recommendation made by a professional conduct panel before deciding whether to make a prohibition order.

   It follows that the factual enquiry is conducted by the panel which reaches findings of fact . Sanction is a decision reserved to the Secretary of State as an exercise of his ministerial function.

7. Operation of this statutory scheme is conducted by an agency within the Department for Education. Initially the agency was the Teaching Agency. Between April 2013 and March 2018 the agency was known as the National College for Teaching and Leadership. Since 1 April 2018 that role has been taken on by the Teaching Regulation Agency ("TRA"). As already noted the TRA was the agency in place when the Secretary of State made a decision on prohibition in Mr Lone's case. Whatever the title each agency was in reality the same thing, a department or section of the Department for Education. Those who worked in the agency were civil servants employed by the Department.

8. The TRA employs caseworkers. When a case is referred to the TRA a caseworker will consider the allegations made. He or she will decide whether, if proved, they might amount to unacceptable professional conduct or conduct that might bring the teaching

profession into disrepute. If that threshold is met, the TRA will investigate the allegations. There will be cases where the TRA caseworker will carry out the investigation but this will only be where no significant investigation is required e.g. if the relevant conduct is established by a relevant criminal conviction. Generally, the investigation i.e. the collection of evidence will be contracted out to an independent law firm. That is what happened in Mr Lone's case.

9. Once the investigation process is complete a TRA caseworker will assess the material provided and decide whether a hearing is required. In over three-quarters of all cases referred no hearing takes place. This mirrors the pattern commonplace in relation to complaints of misconduct against professionals of one kind or another in whatever sphere, namely that most complaints are found to be inadmissible or unsubstantiated. Where a hearing is required an independent panel will be appointed from the list of approved panel members. The appointment process for panel members ensures their independence. A panel will consist of three members, one of whom has to be a teacher and another of whom must be a lay representative. The TRA will appoint an external lawyer to act as legal adviser to the panel. Another external lawyer will act as presenting officer. That lawyer's task is to present the evidence gathered in the course of the investigation, to cross-examine any witness called by the teacher and to make submissions on the issues of conduct.

10. The panel then reaches a decision on the facts and provides its written reasons together with its recommendation as to sanction. It is on the basis of that document alone that the Secretary of State makes his decision on sanction. In no case will the Secretary of State see any of the evidence or other core material considered by the panel. The Secretary of State himself does not make the decision. A duly authorised civil servant takes the decision. In law that will be the decision of the Secretary of State: Carltona v Commissioners of Works [1943] 2 All ER 560. The relevant civil servant will be someone with no previous dealings with the case whether in relation to the investigation or the panel hearing. It is clear from previous decisions of this court dating from the time at which the National College for Teaching and Leadership operated the scheme under the 2011 Act that the authorised civil servant in each case was a senior official of that agency. In Mr Lone's case the authorised civil servant was a Mr Meyrick who was and is the Chief Executive of the TRA. Prior to that he was a deputy director in the Department for Education and line managed by the Chief Executive of the National College for Teaching and Leadership. He is well used to taking decisions in relation to sanction following a hearing by the panel.

11. The appellate jurisdiction I am exercising is not properly identified in the Education Act or the regulatory scheme set out thereunder. The jurisdiction that I must exercise is that provided by the CPR, part 52.21(3):

    The appeal court will allow an appeal where the decision of the lower court was (a) wrong, or; (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

    The nature of the jurisdiction at (a) is not the same as in a judicial review challenge to a decision founded on classic public law principles. The appeal is a rehearing rather than a review. Thus, it is not for me to apply a rationality test based on the *Wednesbury*

standard. Rather, I must consider the overall merits of the decision taking into account the requirement to give proper weight to the judgment of the decision maker with expertise and experience in a specialist field. It is not sufficient that I conclude that I would have reached a different decision. I must find that the decision was wrong. The proper approach is helpfully summarised in the judgment of Mrs Justice Lambert in Zia v NCTL [2018] EWHC 159 (Admin) at paragraph 21.

Procedural irregularity

12. The first ground of appeal – which occupied a very substantial part of the hearing of the appeal – is that the Prohibition Order was unlawful because the authorised civil servant who made the decision was the Chief Executive of the prosecuting authority. In the written grounds it was argued that the order was not made by the Secretary of State as required by law. On the face of it this was a challenge to the *Carltona* principle, a challenge which was bound to fail. In the event this argument was not pursued. Rather, it was said that Mr Meyrick was automatically disqualified from making the decision because he was thereby acting as a judge in his own cause. In the alternative it was argued that Mr Meyrick's position as Chief Executive of the TRA created an appearance of bias such as to vitiate the decision.

13. In relation to the proposition that Mr Meyrick was automatically disqualified I was referred to various authorities with particular emphasis being given to *Ex Parte Pinochet Ugarte (No 2) [2000] 1 AC 119* and *In re P (A Barrister) [2005] 1 WLR 3019.* I hope that I do not appear to be dismissive of the argument relating to automatic disqualification when I say that it is misconceived. The argument fails to deal with the fact that the decision maker was the Secretary of State. His statutory duty is to make a decision when a panel makes a recommendation. He does not engage in a judicial decision which is the context in which automatic disqualification will arise. Rather, it is an administrative decision made by reference to his ministerial duty. Self-evidently he has an interest in the outcome but it is not an interest which disqualifies him from making the decision.

14. The real question is whether the official authorised by the Secretary of State in this instance had an appearance of bias. Mr Beaumont on behalf of Mr Lone was at pains to stress that no suggestion is made of actual bias on the part of Mr Meyrick. Rather, it is said that the fair-minded and informed observer would conclude that there was a real possibility that Mr Meyrick was biased: *Porter v Magill [2002] 2 AC 357.* Mr Beaumont's argument is that the TRA was the equivalent of a prosecuting authority. It had an interest in the outcome of the process. As Chief Executive of the TRA Mr Meyrick would be perceived by the fair-minded and informed observer as being someone who realistically might be biased.

15. Mr Beaumont relied in particular on the judgment of Lord Justice Rix in *Kaur v ILEX [2012] 1 All ER 1435.* In that case K, a student member of ILEX, was accused of cheating in an ILEX examination. K denied any cheating. She was charged with misconduct. The charge was considered by a three-person disciplinary tribunal. One of the members of the tribunal was an ILEX council member. The tribunal found one of the charges of cheating proved. K appealed as of right to the ILEX appeal tribunal. That tribunal also had three members, one of whom was the vice-president of the ILEX

council. K's appeal was dismissed. She applied for judicial review of the decisions of the appeal tribunal on the basis of apparent bias. Although K failed at first instance she succeeded on appeal. Lord Justice Rix concluded that the vice president of ILEX had an inevitable interest in ILEX's policy of disciplinary regulation. As such a real possibility of bias would have been apparent to the fair-minded and informed observer. What was critical was that promotion and achievement of self-regulation was very high on the agenda of any self-regulating profession. For a person concerned with the governance of such a profession also to take part in the regulatory or disciplinary functions assumed by the professional body would undermine the integrity of the process.

16. The impact of *Kaur* in the circumstances of the statutory scheme in relation to teacher misconduct was considered by Mr Justice Holgate in *Wallace v Secretary of State for Education [2017] EWCA 109 (Admin).* This was in the context of an argument that the process was not compliant with Article 6 of ECHR rather than an assertion of apparent bias. However, the effect of the argument was the same as that put by Mr Beaumont. Mr Justice Holgate said this:

57. The Appellant has failed to demonstrate a lack of independence on the part of the senior official of the NCTL who takes the final decision under section 141B(2) and regulation 8…..Mr Faux….asserted this argument simply on the basis that officials who are responsible for the investigation for the decision that there is a case to answer and the senior official who takes the final decision are all employed by NCTL. He sought to draw an analogy with the case of R (Kaur) v Institute of Legal Executives Appeal Tribunal [2011] EWCA Civ 1168; [2012] 1 All ER 1435. But that decision dealt with a very different situation where the vice identified by the court was the inclusion of members of the Institute's Council on its disciplinary tribunal and appeal tribunal. Council members were also responsible for representing the members of the Institute and for governing and protecting its interests. That was all in the context of self-regulation by a professional body (see paragraphs 45 to 51).
58. The scheme in the present case has nothing to do with self-regulation at all. Here Parliament has decided that the Secretary of State is responsible initially for investigating whether an allegation may amount to misconduct falling within section 141B(1) and determining whether there is a case to answer. Thereafter, an independent process is interposed whereby the PCP decides whether the allegations are factually proven and amount to relevant misconduct under the statutory scheme. It is only if the PCP decides that the allegations are made out and constitute relevant misconduct that the Secretary of State has any further involvement, and at that stage she cannot interfere with the PCP's findings on misconduct and is solely responsible for deciding which of two sanctions to impose. The decision in Kaur is of no assistance.

I agree with that analysis. I add that the position in *Kaur* was a finding of liability by the person affected by apparent bias. In this instance, as in *Wallace*, Mr Meyrick was required only to determine the sanction as a choice between two options with the recommendation of the panel forming the backdrop to his decision.

17. Mr Beaumont further relied on the proposition that the TRA stands in the same position vis-à-vis teacher misconduct as the Crown Prosecution Service does in respect of criminal proceedings. No employee of the Crown Prosecution Service – certainly no

senior employee – can sit on a jury in a criminal trial where the prosecuting authority is the Crown Prosecution Service. This is the practical effect of the decision of the House of Lords in *Abdroikov [2007] 1 WLR 2679.* The rationale propounded by the majority was that, in that situation, justice would not be seen to be done. Since I reject Mr Beaumont's analysis of the position of the TRA, the analysis of *Abdroikov* takes him nowhere. The TRA is not a prosecuting authority in the same sense as the Crown Prosecution Service. As I noted in the course of argument, it has an interest in the process. That is because it carries out part of the statutory functions required by Section 141B of the 2011 Act. It does not thereby take on the mantle of a prosecutor in the adversarial sense. I was told during the hearing that the agency insofar as it deals with teacher misconduct operates with a relatively small staff who deal with the administrative functions. The investigative work and the presentation of evidence to the panel are contracted out to independent lawyers. Moreover, it is not an independent entity. It is an executive agency of the Department for Education i.e. part of the department. The person with ministerial responsibility for it is the Secretary of State for Education. He is the very person who makes the decision as required by statute.

18. None of this is to say that someone in Mr Meyrick's position could never have his decision impugned on the grounds of bias, whether apparent or actual. For example, if it were to be shown that he had some interest in the trust which had dismissed Mr Lone (albeit that this would be improbable given Mr Meyrick's status as a senior civil servant), there could be a legitimate basis on which to conclude that his decision was affected by apparent bias. Those who make administrative decisions are not immune from challenge on the grounds of bias. However, in the context of Mr Meyrick's status within the Department for Education, the nature of the TRA and the statutory scheme applicable to teacher misconduct, no such challenge is sustainable in this case. It follows that there was no procedural irregularity.

Decision of the panel on conduct

19. There are eight grounds of appeal against the factual findings of the independent panel. They can be distilled into two broad propositions. First, the panel did not deal with important parts of the evidence so as to vitiate its findings. Second, even at their highest, the findings of the panel could not amount to unacceptable professional conduct or conduct which brought the teaching profession into disrepute. To assess the merits of these criticisms I must set out in brief the findings and the conclusions of the panel as set out in the written reasons.

20. The first set of allegations which the panel found proved concerned a failure by Mr Lone "to maintain appropriate and professional boundaries", namely he persistently contacted A by text, telephone, e-mail and in person in her classroom. This contact was "unwanted" by A. E-mails were sent sometimes from anonymous e-mail addresses. Mr Lone admitted in evidence that he contacted A very frequently in the various ways alleged. His case was that the course of conduct was not unwanted so far as A was concerned. The panel in its written reasons had regard to the fact that around 90 e-mails were sent by Mr Lone to A's school e-mail account. The panel also noted that Mr Lone provided no reason as to why many of the e-mails were sent from unidentifiable e-mail addresses or why he had created those addresses. Some of the e-mails referred to a decline in the emotional state of A. The panel's conclusion was that

there was no such decline save and except perhaps insofar as it was caused by Mr Lone's repeated contact. Those e-mails were wholly inappropriate.

21. I should note at this point that the panel clearly had regard to the content of the communication between Mr Lone and A, particularly the e-mails sent by him. That must follow from the fact that the panel was able to identify the use of unidentifiable e-mail addresses and to make observations about what was referred to in some of the e-mails. Mr Beaumont argued that the case against Mr Lone was not one of harassment. What he said to A was not to the point. The panel should have been concerned only with the frequency of communication and whether the communication was unwanted. I reject that argument. The panel could hardly reach any informed view on the issue of the contact being unwanted unless it acquainted itself with the nature of the contact. The tone and content of the contact was a principal reason for it being unwanted. Implicit in the allegation that the contact was unwanted was the proposition that the nature of the contact was inappropriate.

22. In relation to contact with A in her classroom the panel considered one visit in particular by Mr Lone to be of significance. A was in her classroom speaking with a senior pupil. Mr Lone came in and interrupted the discussion. He did so in order to have a personal conversation with A. A told the pupil to stay but Mr Lone forced him to leave the classroom. The pupil then was able to see through a window that A was telling Mr Lone to leave. He did so only reluctantly. This incident occurred on 25 May. It was of significance because it was the trigger for A's complaint to the headmaster.

23. The second (and connected) allegation in respect of which the panel was satisfied was that Mr Lone continued with his contact despite being told by A to cease contacting her. There were two e-mails from A to Mr Lone in which she told him in unequivocal terms that she did not wish him to contact her in any way. One was sent on 3 April 2016. The second was sent on 18 May 2016. Mr Lone's case was that she "blew hot and cold". The panel's conclusion was that there was no credible evidence of this.

24. The third allegation was that Mr Lone had made inappropriate comments to A by reference to suggestions to her that she should pray or pray more. The panel was satisfied that these suggestions had been made orally. There were e-mails, the content of which was in similar terms. These were considered by the panel i.e. another example of the panel considering the content of the material sent to A.

25. The panel was not satisfied that Mr Lone had been responsible for leaving sweets in A's classroom on an occasion immediately after the Easter holiday. This had been put as a further example of Mr Lone making unwanted contact with A. The panel did accept that Mr Lone had made an inappropriate comment to A about the length of her skirt. However, it did not form part of the findings against Mr Lone because the comment had been made outside the period specified in the written allegations.

26. The panel had to consider two allegations involving physical actions towards A by Mr Lone. First, it was said that he had pulled a lanyard from A's neck "in a threatening way". The panel accepted that Mr Lone pulled the lanyard but did not conclude that it had been carried out in a threatening way. This was because A in her evidence to the panel described the act as playful. Mr Lone had denied the incident had happened at

all. Second, it was alleged that during the incident on 25 May Mr Lone threw a Quran towards A. The panel was not satisfied that there was sufficient evidence of this not least because the incident had been witnessed by the pupil to whom reference already has been made and the pupil did not make mention of a Quran.

27. Having made its findings in relation to the allegations, the panel considered whether Mr Lone's behaviour was unacceptable professional conduct and/or conduct that may bring the profession into disrepute as defined in the Advice published in April 2018 by the TRA. Unacceptable professional conduct is misconduct of a serious nature falling significantly short of the standard of behaviour expected of a teacher. Misconduct outside the education setting will come within this definition if it affects the way the person fulfils their teaching role. Conduct that may bring the profession into disrepute will be judged in a similar way. The panel explicitly considered those definitions. The panel also considered a document published in 2011 (and updated in 2013) by the Department for Education entitled Teachers' Standards. The panel concluded that its findings meant that there were breaches of the following published standards:

Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school, by

- *Treating pupils with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a teacher's professional position*
- *Showing tolerance and respect for the rights of others.*

Teachers must have proper and professional regard for the ethos, policies and practices of the school in which they teach.

The panel was satisfied that Mr Lone's conduct fell significantly short of the standards to be expected of a teacher. Mr Lone had told the panel that his behaviour had been that of a "lovesick teenager". The panel found that this was not an acceptable reason for his departure from the relevant standards. Rather, his actions had a significant negative impact on A's working environment. In relation to the pupil who witnessed the events of 25 May the panel concluded that the pupil had been negatively affected.

28. The criticism of the panel's approach to the evidence concentrates on the way in which it dealt with the nature of the relationship between Mr Lone and A. His case was that he had been in a sexual relationship with A which had lasted for weeks if not months. A denied any such relationship. Rather, she said that she had been friendly with Mr Lone who had regularly given her lifts to and from work. Mr Lone had given her advice as a newly qualified teacher. The relationship had not extended beyond that. The panel said this when addressing the nature of the relationship between Mr Lone and A and the conflict of evidence:

The panel noted this conflict of evidence and did not find it relevant to the allegation as regardless of whether there had been a relationship in the past, Mr Lone's behaviour at the time of the allegations was not welcomed by A and indeed, she did ask him repeatedly to stop contact both in conversation and by e-mail.

Mr Beaumont on behalf of Mr Lone argues that the panel was obliged to make a finding in respect of the nature of the relationship prior to the point at which the unwanted contact began. Had it done so it would have been bound to conclude that there had been an affair given the evidence it had from other witnesses from the school. The grounds of appeal refer to another teacher whose view was that Mr Lone and A were intimate and to three videos made by A and sent to Mr Lone. The consequence of a finding that Mr Lone and A had been in a sexual relationship which then had broken down would have been to render Mr Lone's conduct excusable. It is said that the situation would have been similar to that in *BSB v Howd [2017] 4 WLR 54* where a finding of professional misconduct on the part of a barrister was overturned because the disciplinary tribunal had misunderstood medical evidence. That evidence showed that the barrister's undoubtedly inappropriate and offensive behaviour towards a female was caused by a medical condition. Thus, the behaviour was beyond the barrister's control.

29. I do not agree with the proposition that a finding in respect of the affair was required for the panel to carry out its function properly in assessing whether there had been unacceptable professional conduct or conduct which could bring the teaching profession into disrepute. Behaving in the way Mr Lone did because he was upset by the end of an affair (if that was the position) could not conceivably be regarded as behaviour beyond his control. The behaviour which formed the basis of the allegations occurred after the end of any intimate relationship there may have been. A's position vis-à-vis Mr Lone by then was one of a junior female colleague who had told him more than once to stop contacting him. The fact that Mr Beaumont conducted Mr Lone's case before the panel on the basis that the issue of whether there had been an affair would be determinative is clear from the available record of the panel proceedings. That the case was conducted in that manner does not mean that the existence of an affair was an essential part of the fact-finding exercise. The real issue was the nature of the conduct by a senior male teacher in his thirties towards a much younger and very junior female colleague. Whether the conduct occurred in the aftermath of an affair did not affect this issue. I should say that I have read the witness statements referred to by Mr Beaumont and I have watched the videos. They do not have the inevitable effect contended for by Mr Beaumont.

30. In his written submissions Mr Beaumont submitted that either I should remit the matter for a re-hearing before a fresh panel or I should re-make the decision. For the reasons I already have given I do not consider that either course is required. In any event the latter submission is unsustainable. I could not possibly reach a finding on the issue of whether there had been an affair when I have not seen A give evidence albeit that I have a transcript of what she said at the panel hearing and I have no means at all to test Mr Lone's evidence save for his short witness statement.

31. There is a secondary criticism made of the factual findings of the panel in respect of the pupil who was involved in the incident on 25 May 2016. The panel found that the pupil was "negatively affected". First, Mr Beaumont complains that the pupil was not called to give evidence before the panel. Had that happened it would have been put to the pupil that he was spying on Mr Lone in order to see what occurred between Mr Lone and A. I fail to understand how that proposition would have advanced Mr Lone's case. If the suggestion is that it would have undermined the credibility of the pupil's

evidence, the suggestion is untenable. The substance of the pupil's evidence appears not to have been subject to significant challenge. This is hardly surprising. The pupil prepared a written account on the very same day of what had occurred. Any challenge would have necessarily been on the basis of lack of bona fides which clearly would not have succeeded. The mere fact that the panel took into account the statement of someone not called to give evidence cannot be a legitimate criticism. The panel took into account hearsay evidence as it was entitled to do.

32. The second point made by Mr Beaumont in relation to the pupil is that there was no evidence that the pupil was negatively affected. This proposition cannot survive a cursory reading of the pupil's contemporaneous statement. The pupil said "I was very shocked" by A's reaction to an encounter with Mr Lone and that "what I had seen was extremely inappropriate". It was correct to describe the pupil as negatively affected.

33. The second limb of the criticism made on behalf of Mr Lone of the panel's decision is that the behaviour it found proved did not on any view amount to unacceptable professional conduct and/or conduct liable to bring the teaching profession into disrepute. Mr Beaumont relies on what was said by Warby J in *Khan v BSB [2018] EWHC 2184 Admin*, namely:

The authorities make plain that a person is not to be regarded as guilty of professional misconduct if they engage in behaviour that is trivial, or inconsequential, or a mere temporary lapse, or something that is otherwise excusable, or forgivable.

The relevant ground of appeal puts the argument succinctly. A professional person who is in a state of exceptional emotional turmoil in his personal life may well, in some circumstances, fall into the category of the "excusable" or "forgivable", as in *Howd* and, on the facts here, Mr Lone did so.

34. The panel concluded that this was not trivial or inconsequential behaviour and was not a mere temporary lapse. That conclusion cannot be impugned. The conduct extended over many weeks and involved repeated contact with a junior female colleague when she had made it clear that she wanted to have no contact at all. It was of a serious nature. No reasonable panel would have concluded that the behaviour was anything other than wholly inappropriate for a teacher in Mr Lone's position. Was the panel in error in not finding that the behaviour was excusable or forgivable? I am sure that it was not. The panel noted Mr Lone's explanation i.e. that he had behaved like a lovesick teenager. It decided that this explanation "was not an acceptable reason" for the conduct. It follows that the panel took account of the background as described by Mr Lone and determined that it did not excuse the conduct. Was the panel wrong in that determination? It is not arguable that it was.

Sanction

35. The panel recommended a prohibition order with provision for a review after 2 years, this review period being the shortest permissible. That recommendation was made after taking into account all the mitigating factors available to Mr Lone – his previous good teaching history, the many supportive references from colleagues and pupils, the fact that the behaviour was out of character and the fact that Mr Lone was suffering emotionally at the time of the relevant conduct. On the other hand the panel concluded

that there had been a serious departure from the personal and professional conduct elements of the Teachers' Standards and sustained undermining behaviour towards a colleague. These were factors identified in the Advice published by the Department for Education indicating that prohibition would be an appropriate sanction.

36. As I have already explained the decision on sanction fell to be made by the Secretary of State via Mr Meyrick. Mr Meyrick expressly considered the issue of proportionality i.e. whether the aim of maintaining public confidence in the teaching profession required prohibition taking into account the impact of such an order on Mr Lone. He further considered the alternative sanction i.e. publication of the panel's findings. I observe in passing that the Secretary of State always is faced with that stark choice when a panel makes findings adverse to a teacher. Mr Justice Holgate dealt with the point in some detail in *Wallace*. I agree with his analysis of the position. It is not necessary for me to repeat or add to it.

37. Mr Meyrick considered the question of future risk. In that regard he took account of the panel's conclusion as to Mr Lone's lack of understanding of or insight into the effects of his behaviour. The panel had said that "Mr Lone had not demonstrated a full understanding of the impact of his behaviour on (the pupil) and A". The panel was concerned with the tone, content and undermining nature of at least some of the e-mails. Mr Meyrick placed considerable weight on this factor in coming to the conclusion that the need to impose a prohibition order to maintain public confidence outweighed the factors personal to Mr Lone including the contribution Mr Lone had made over the years to the profession.

38. Mr Beaumont relies on the following to support his argument that the sanction of a prohibition was wrong:

    - The strong personal mitigation available to Mr Lone.
    - The fact that Mr Lone had worked in schools without incident between 2016 and 2018.
    - The nature of the misconduct being insufficiently serious to warrant the most severe sanction, particularly when compared with other cases of teacher misconduct and the sanction imposed in those cases.
    - The absence of any factor which engaged the issue of public confidence in the teaching profession.
    - The fact that Mr Lone's personal statement provided to the panel contained ample evidence of insight and remorse.

39. I am satisfied that the mitigation available to Mr Lone of itself cannot vitiate the conclusion reached by Mr Meyrick any more than it undermines the recommendation of the panel. It is a matter of judgment as to whether, in any particular case, the misconduct is such that the public interest outweighs the mitigation. There may be cases where the outcome of the balancing exercise is so clearly wrong that the court can and should interfere. This is not one of those cases.

40. It is not a useful exercise to compare the sanction outcome in one misconduct case as compared with another. It is akin to suggesting that a decision in the Court of Appeal Criminal Division in respect of an appeal against sentence which is concerned purely with its own facts is of general assistance in other cases involving the same offence or type of offence. In that context no assistance is to be gained from a comparative exercise. The same applies here. The issue is whether the decision maker took into account the relevant factors including the requirement of proportionality – which in this case he did - and whether the outcome can be described as wrong.

41. I do not accept that the misconduct did not engage the issue of public confidence. This type of sustained misconduct towards a junior colleague coupled with some effect on a pupil is a matter of public confidence. A vital element of teaching as a profession is the concept of working with colleagues as a team within the school or college. Public confidence in teachers requires that all members of the profession have respect for their fellow teachers. That is particularly so where the fellow teacher is a young woman. Part of the requirement of public confidence comes from the need to create a willingness amongst young graduates to take up the challenge of teaching. Such willingness is less likely if there is a perception that older colleagues may behave as Mr Lone did.

42. The matter pressed most strongly in oral argument by Mr Beaumont was the proposition that the suggestion of lack of insight was unsubstantiated. Indeed, his argument was that the evidence pointed the other way. He relied on what is described as the reflective statement signed by Mr Lone which formed part of the material before the panel. It was apparently prepared in March 2017. There are two problems with this argument. First, the statement of itself expressed very substantial regret for all that had occurred. Mr Lone set out the impact on his marriage and his career of his relationship with A. He accepted that he caused distress to A and that his conduct was inappropriate. However, it did not demonstrate real insight into what it was that he had done wrong and why it was wrong. There was no acknowledgment of the real effect that this type of behaviour could and would have on someone in A's position. It showed no appreciation of the nature of the relationship between an older male teacher and his younger female colleague. Second, the panel and Mr Meyrick were bound to consider insight in the context of Mr Lone's approach to the panel hearing and the allegations made. This is not to say that he was to be penalised for the very fact that he disputed the allegations. Rather, the fact that he did not acknowledge his culpability was an indication of his insight or lack thereof.

43. As I said in *Lonnie v NCTL [2014] EWHC 4351 Admin* my function is not to remake the decision of the Secretary of State and to replace his decision with mine in the event that I take a different view. Rather, by reference to the terms of the written decision and to the material available to the Secretary of State I must ask whether the decision he made was wrong. For all of the reasons I have given I am satisfied that the decision on sanction was not wrong. It has led and will lead to grave consequences for Mr Lone. That was recognised by the Secretary of State. I also recognise it. The gravity of the consequences is part of the balancing exercise. It cannot outweigh the legitimate public interest in the appropriate case. The appeal is dismissed.