



Neutral Citation Number: [2024] EWHC 1998 (Admin)

Case No: AC-2023-LON-003771

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2024

Before :

MR JUSTICE COTTER

Between :

The King (on the application of Claudia Aquilina)

Claimant

- and -

Secretary of State for Education

Defendant

Sarah Hannett KC & Andrew Faux (instructed by TRP Ltd) for the Claimant
Leon Glenister (instructed by GLD) for the Defendant

Hearing dates: 18 June 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 01 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MR JUSTICE COTTER

Mr Justice Cotter:

1. This claim concerns the correct interpretation of section 141B(1) of the Education Act 2002 (“EA 2002”) and regulation 7(5) of the Teachers’ Disciplinary (England) Regulations 2012 (“the Regulations”). The Claimant challenges the findings and recommendation of a professional conduct panel (“PCP”) appointed by the Teaching Regulation Agency (“TRA”) dated 20 September 2023.
2. The Claimant seeks judicial review of:
 - (a) The decision of the PCP that her conduct amounted to “conduct that may bring the teaching profession into disrepute”.
 - (b) The content of paragraphs 21 to 31 of the advice issued by the TRA (“the Advice”).
3. Permission was granted by Mrs Justice Lang by an order dated 23 February 2024.
4. The claim raises a far from straightforward point of statutory construction. I am obliged to Counsel for their focused and helpful written and oral submissions.
5. The only evidence submitted in relation to the issue to be determined was the statements of Stuart Blomfield of the TRA and Colin Henderson.

Facts

6. The misconduct in question in this case is the sharing of confidential information in relation to pupils by the Claimant, an experienced Headteacher, with her husband, Canon Aquilina, who was not an employee of the school. That information included, for example, the involvement of identified children with social services and a Family Court order which was attached to an email which expressly stated it was confidential.
7. The disclosure of the information came to light after a data subject access request (‘DSAR’) was received by the school from a parent in June 2020. Searches took place between July and August 2020 and e-mail exchanges between the Claimant and Canon Aquilina were returned, which included the sharing of sensitive personal information about the parent and pupil concerned. In August 2020, a second DSAR was received from the Archdiocese of Southwark. This had been made by Canon Aquilina. The searches highlighted further email exchanges between the Claimant and Canon Aquilina where sensitive, personal information about parents and pupils had been shared.
8. On the 28 August 2020, the Claimant was suspended from the school. A disciplinary hearing was held on 6 October 2020 and she was dismissed. An appeal hearing was held on 9 November 2020.
9. The Claimant’s conduct was considered by the Defendant and referred to a PCP.
10. The allegations considered by the PCP in the Decision were as follows:

“Between October 2015 and June 2020, (the Claimant) shared confidential information and/or material connected to the School with Individual A (her husband, Canon Aquilina¹):

- a) revealing personal addresses and/or email addresses and/or telephone numbers;
- b) regarding staffing and/or governance;
- c) containing photographs of pupils;
- d) containing achievement data;
- e) regarding involvement with social services and/or the local authority;
- f) regarding concerns and/or complaints; and
- g) including an email from a firm of solicitors with a footer which stated ‘information in this email and any attachments are private and confidential and intended for the addressee only... it may not be disclosed to or used by anyone other than the intended recipient. You must not disclose its contents or send it to anybody else.’ Attached to the email and forwarded to individual A was a family court order.

11. Mrs Aquilina admitted allegations 1(a), 1(b), 1(e), 1(f) and 1(g) and admitted allegations 1(c) and 1(d) in part.
12. The PCP received the statement of, and had oral evidence from, the Claimant within which she gave explanations for sending each of the relevant e-mails and stated that Canon Aquilina was connected to the School and she did not consider him to be a third party. A third of the 61 emails shared with Canon Aquilina related to one very difficult situation concerning peer-on-peer abuse where he was involved in providing support to the pupil and parents. The Claimant argued that several of the emails involved her own career and/or issues about herself and that in sharing them she was seeking advice, pastoral support and guidance for the benefit of the school. The PCP also heard oral evidence from (and considered the witness statement of) Ms McQueen who stated that Canon Aquilina was treated as a member of staff because of his teaching and pastoral role. Ms McQueen was part of the governing body that appointed Canon Aquilina to support the role of Chaplaincy at St Thomas’ School as the parish priest was nearing retirement and he had become too frail to meet the demands of his role at the school.
13. The Claimant did not admit that her behaviour amounted to unacceptable professional conduct or conduct that may bring the profession into disrepute.
14. The PCP found allegations 1(a), 1(b), 1(c), 1(d), 1(e), 1(f), and 1(g) proven. In respect of allegations 1(c) and 1(d) it did not find that confidential information was shared with Canon Aquilina.
15. The PCP was satisfied that the Claimant’s conduct involved breaches of the Teachers’ Standards, specifically, the requirements that:
 - (a) “Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school, by... showing tolerance of and respect for the rights of others.”

¹ A Parish Priest within one of the three parishes served by the school and who was involved with the school through the provision of pastoral support.

- (b) “Teachers must have proper and professional regard for the ethos, policies and practices of the school in which they teach, and maintain high standards in their own attendance and punctuality”.
- (c) “Teachers must have an understanding of, and always act within, the statutory frameworks which set out their professional duties and responsibilities.

16. The PCP then stated:

“The panel considered paragraph 21 of the Advice and in particular, that unacceptable professional conduct is misconduct of a serious nature. The panel found that there was misconduct, which was supported and accepted by Mrs Aquilina. However, the panel was not satisfied that this amounted to serious misconduct for the following reasons: Mrs Aquilina had shared this information with Canon Aquilina in order to seek his advice on the matters contained within some of the emails. There has been no sharing of information with any other party, and her intention in sharing this information was in order to do what was best for the School and the pupils. Any harm to a pupil or parent was potential rather than actual. Canon Aquilina had a pastoral role within the School and provided Mrs Aquilina, the pupils and the parents with support, as part of his pastoral role. The panel found that if the information had been shared with anyone other than Canon Aquilina then this may have resulted in a finding of serious misconduct and therefore, unacceptable professional conduct. The panel was satisfied that [the] conduct of Mrs Aquilina in respect of allegation 1 amounted to misconduct but had not found that this was of a serious nature which fell significantly short of the standards expected of the teaching profession. The panel also considered whether Mrs Aquilina’s conduct displayed behaviours associated with any of the offences listed on pages 12 and 13 of the Advice. The panel found that none of these offences were relevant. Accordingly, the panel was satisfied that Mrs Aquilina was not guilty of unacceptable professional conduct.”

17. The PCP then went on to consider whether the Claimant had engaged in conduct that may bring the profession into disrepute. It considered she had done so given the nature of the breaches relating to confidential information, public expectations, her experience, the fact she was headteacher and the consequential influence she had upon pupils’ lives. The panel stated:

“The panel took into account the way the teaching profession is viewed by others and considered the influence that teachers may have on pupils, parents and others in the community.

The panel considered that it was a basic expectation and essential requirement that teachers do not share confidential information and/or materials connected to the school. Mrs Aquilina had worked as a headteacher at the School for over 5 years, and was an experienced teacher who would have undergone relevant training, and therefore, she should have been aware that her actions had been unprofessional and wrong. The panel considered it clear that the public would not expect or tolerate a teacher sharing confidential information about pupils and parents and/or sharing material connected to the school with another

individual. The panel considered it would be likely that public trust in the teaching profession would be weakened if members of the public were aware of the proven facts. The panel also took account of the uniquely influential role that teachers can hold in pupils' lives, particularly head teachers, and the fact that pupils and parents must be able to view teachers as role models in the way that they behave. The panel considered that if pupils and parents were aware of Mrs Aquilina's actions, it would set a bad example and suggest that it is acceptable to share confidential information. The findings of misconduct, and the conduct displayed would be likely to have a negative impact on Mrs Aquilina's status as a teacher, potentially damaging the public perception. The panel, therefore found that Mrs Aquilina's actions constituted conduct that may bring the profession into disrepute."

18. Having found that the Claimant had engaged in conduct that may bring the profession into disrepute, the PCP went on to consider whether to recommend the imposition of a prohibition order. It considered a recommendation of no prohibition order would be proportionate and appropriate. In reaching that decision, the PCP noted that:

"there had been a departure from the personal and professional conduct elements of the Teachers' Standards but not a serious departure".

Further, the PCP noted that "the nature and severity of the behaviour" were "at the less serious end of the possible spectrum".

19. On 22 September 2023 Secretary of State accepted the PCP's recommendation, concluding that a prohibition order would not be proportionate or in the public interest. The Secretary of State concluded that the publication of the findings made would be sufficient to send an appropriate message to the teacher as to the standards of behaviour that were not acceptable and that the publication would meet the public interest requirement of declaring proper standards of the profession.

Regulatory framework

20. The Secretary of State has responsibility for regulating teachers' conduct and for holding a list of teachers who have been prohibited from teaching. The legal framework governing the regulation of the teaching profession is contained in Part 8 of the Education Act 2002 ("Teacher misconduct etc: England") and the Teachers' Disciplinary (England) Regulations 2012 ("the 2012 Regulations"). Guidance as to the process to be followed is set out in the TRA guidance, Teacher misconduct: Disciplinary procedures for the teaching profession (May 2020)
21. Section 141B(1) of the Education Act 2002 (as amended by the Education Act 2011) provides a discretion to the Secretary of State to investigate a case where particular criteria apply:

"141B Investigation of disciplinary cases by Secretary of State

- (1) The Secretary of State may investigate a case where an allegation is referred to the Secretary of State that a person to whom this section applies—
 - (a) may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute, or
 - (b) has been convicted (at any time) of a relevant offence.”

22. Section 141B(1)(a), the interpretation of which is in issue in the present claim has two ‘limbs’ which have different criteria, The first limb is limited to professional conduct, which to engage the section must be “unacceptable”. The second limb is conduct that may bring the teaching profession into disrepute and is not expressly limited to professional conduct. The central issue in this claim is the extent to which the two limbs are mutually exclusive. The Claimant argues that they are; the defendant that they are not. Framed another way the central issue is whether on a correct interpretation of this section “non serious” misconduct can bring the teaching profession into disrepute.

23. Section 141B(3) gives effect to Schedule 11A, paragraph 1 of which requires the Secretary of State to make regulations about decisions under section 141B(2) “in accordance with the provisions of the schedule”. The Regulations were made by the Secretary of State pursuant to Schedule 11A. Regulation 4 of the 2012 Regulations provides that:

“Any decision made under these Regulations may take into account any failure by a teacher to comply with the personal and professional standards set out in part two of the ‘Teacher Standards’ published by the Secretary of State in July 2011”.

24. The Department of Education has published Teachers’ Standards: Guidance for school leaders, school staff and governing bodies (published in July 2011, last updated in December 2021) (“the Teachers’ Standards”).

25. The Secretary of State has issued Advice (“the Advice”) which is non-statutory guidance. As explained at paragraph 3,

“The TRA will only consider allegations of the most serious cases of misconduct, in order to make a decision about whether a teacher should be prohibited from teaching work.”

26. The current iteration of the Advice contains the following section;

“(ii) Has there been: a) “unacceptable professional conduct”; b) “conduct that may bring the profession into disrepute”; or c) “conviction, at any time, of a relevant offence”?”.

It continues as follows;

“a) “Unacceptable professional conduct” is misconduct of a serious nature, falling significantly short of the standard of behaviour expected of a teacher.

Misconduct outside of the education setting will amount to “unacceptable professional conduct” only if it affects the way the person fulfils their teaching role or if it may lead to pupils being exposed to or influenced by the behaviour in a harmful way.

In making a judgment as to whether the behaviour demonstrated falls short of the standard expected of a teacher, a panel should draw on its own knowledge and experience of the teaching profession, particularly the personal and professional conduct elements of the Teachers’ Standards and the responsibilities and duties in relation to the safeguarding and welfare of pupils set out in statutory guidance KCSIE and Working Together to Safeguard Children, which is underpinned by legislation.

... b) “Conduct that may bring the profession into disrepute” is conduct that could potentially damage the public’s perception of a teacher, therefore bringing the teaching profession into disrepute. Misconduct outside of the education setting will be considered relevant only if the conduct displayed is of a serious nature and would likely have a negative impact on the public’s perception of the individual as a teacher, therefore bringing the teaching profession into disrepute.

Panel members should use their knowledge, skills and experience to take into account how the teaching profession is viewed by others, the responsibilities and duties of teachers in relation to the safeguarding and welfare of pupils, and the influence that teachers may have on pupils, parents and others in the community. Panels should take account of the uniquely influential role that teachers can hold in pupils’ lives and that pupils must be able to view teachers as role models in the way they behave.

27. A previous version of the Advice, published in October 2018 (“the 2018 Advice”), noted in respect of conduct that may bring the teaching profession into disrepute that it “should be judged by a panel in a similar way” to unacceptable professional conduct. That instruction is absent from the current Advice.

The Claimant’s case

28. The Claimant’s argument is the PCP failed to correctly interpret section 141B(1) of the EA 2002 and regulation 7(5) of the Teachers’ Disciplinary (England) Regulations 2012 (“the Regulations”).

29. The Claimant advances the following grounds of review:

(a) The PCP misconstrued section 141B(1). On its proper construction the section is concerned with two discrete types of conduct: “unacceptable professional conduct” (“the first limb”) and “conduct that may bring the teaching profession into disrepute” (“the second limb”). “Professional conduct” does not fall to be considered within the second limb.

(b) Further or alternatively, the second limb of section 141B(1) implicitly requires conduct to be “serious”. The PCP misconstrued section 141B(1) and/or acted

irrationally by making a finding of misconduct under the second limb when it had already concluded that the conduct alleged was not “of a serious nature” when considering the first limb.

(c) Further or alternatively, the PCP’s conclusion that conduct that did not amount to “unacceptable professional conduct” was “conduct that may bring the teaching profession into disrepute” was irrational. Professional conduct that is not “unacceptable” cannot rationally cause the public to have a lesser view of the teaching profession.

(d) the Advice is unlawful in that it fails to reflect the proper interpretation of section 141B(1) in that:

- (i) Paragraphs 21 to 26, which deal with “unacceptable professional conduct” do not explain that this concerns professional conduct, as opposed to conduct more generally.
- (ii) Paragraphs 26 to 31, which deal with “conduct that may bring the teaching profession into disrepute” do not explain that such conduct must be serious and that such conduct must be conduct which does not constitute “professional conduct”.

30. The Claimant argues that as a result of these grounds the decision of the Secretary of State should be quashed and the Defendant should immediately cease relying on the Advice in so far as it gives guidance as to the proper approach to 141B(1).

Defendant’s case

31. The Secretary of State argues that the claim should be dismissed for the following reasons:

- a. The claim stems from an erroneous interpretation of the section. The Claimant seeks to add a qualification that the first limb is limited to professional conduct and the second limb to nonprofessional conduct, but there is no basis in the legislative text for this rigid distinction. The categories are purposely broadly defined and conduct may fall within only one category, both categories or neither. That is the clear, straightforward and correct interpretation of the statutory language.
- b. Misconduct only constitutes “unacceptable professional conduct” where it is “of a serious nature, falling significantly short of the standard of behaviour expected of a teacher”. As such, in relation to that limb specifically, where a PCP finds conduct falls short of the standard of behaviour expected of a teacher but not significantly so, then it would not be deemed to be sufficiently serious for the purposes of the definition and would not constitute unacceptable professional conduct. Misconduct which may bring the profession into disrepute does not have the similar threshold of misconduct “falling significantly short of the standard of behaviour expected of a teacher”. Therefore, misconduct which does not meet this threshold may still be judged by a PCP as potentially bringing the profession into disrepute. The Claimant reads into the legislation that any conduct falling within either limb must reach

a threshold of “serious”. This does not arise from either the statutory language or any relevant authority. There is no express threshold of misconduct being “serious”, but plainly any misconduct must be sufficiently serious that it “could potentially damage the public’s perception of a teacher”.

- c. The decision of the PCP was clearly rational. There is nothing inherently irrational in finding that conduct did not fall “significantly short of the standard of behaviour expected of a teacher” such that it did not constitute unacceptable professional conduct; but nevertheless, due to the nature of the conduct, it could damage the public’s perception of a teacher and therefore constitute conduct which may bring the profession into disrepute.
- d. The challenge to the Advice is contingent on the Claimant’s interpretation of the legislation being correct. Once the legislation is correctly interpreted, this challenge falls away.

Issues to be determined.

32. The issue at the heart of this claim is whether, given the wording of section 141B of the 2002 Act professional misconduct which is not sufficiently short of the standard expected of a teacher to amount to serious professional misconduct can still amount to conduct which may bring the profession into disrepute. It is an issue that is easily set out but not so easily determined.

33. I turn to the specific grounds.

Ground 1

34. Ms Hannett KC argued that there are two discrete elements within section 141B “unacceptable professional conduct or conduct that may bring the teaching profession into disrepute” which are mutually exclusive. The first limb applies to “professional conduct”. The second limb applies to “non-professional conduct”. Therefore, the TRA will generally be permitted only to allege one of the limbs has been breached.

35. Once the PCP has concluded that the conduct is “professional conduct” (i.e. where, as here, the conduct alleged arises in the practice of teaching) the question is solely whether or not that conduct is “unacceptable”. Conversely, where the PCP concludes that the conduct is outwith the practice of the teaching profession, the questions is whether that conduct “may bring the teaching profession into disrepute”. It is not open to a PCP to conclude that conduct is professional, but that it is not “unacceptable” (and thus not caught by the first limb) but is nevertheless conduct that may bring the teaching profession into disrepute (and thus is caught by the second limb). Such an approach is inconsistent with the statutory language given:

- (i) There are different tests applicable (“unacceptable” in the first limb, and “that may bring the teaching profession into disrepute” in the second limb), and the use of “or” between the first and second limb (and between section 141B(1)(a) and (b)).

- (ii) The distinction drawn is between “professional conduct” and “conduct”, not between “impact” and “effect”.
 - (iii) The Defendant’s approach would be inconsistent with the line of cases that have treated professional conduct and non-professional conduct as discrete concepts.
 - (iv) The approach would render the first limb otiose i.e. if the second limb encompassed professional conduct that was not unacceptable (or not serious).
36. Mr Glenister submitted that the Claimant’s interpretation is not what the legislative text says when read in context and having regard to its purpose. There is nothing at all in the legislative text itself which supports the Claimant’s interpretation that the categories are mutually exclusive. Indeed, the Claimant’s interpretation adds a significant qualification to the legislative text with no basis for doing so.
37. He also argued that consistent with the breadth of the wording, the correct position is that some conduct will constitute “unacceptable professional conduct” and not “conduct that may bring the teaching profession into disrepute”; some conduct will constitute “conduct that may bring the teaching profession into disrepute” and not “unacceptable professional conduct”; some conduct will constitute both. Whether conduct meets either criterion is a matter for the PCP and Secretary of State. Also the legislation and guidance must also be interpreted in the context of a regulatory body with a high level of expertise.

Analysis

38. There is nothing in the section or the 2002 Act which directly supports the Claimant’s interpretation i.e. there is no express reference to a partition between the two limbs. Accordingly, it is necessary to imply a partition between the categories. As set out within Bennion on Statutory Interpretation 7th Edition Chapter 11.5) implications may arise either because they are directly suggested by the words of the enactment, or are indirectly suggested by rules or principles not disapplied by the words of the enactment. The court must have regard to both context and purpose, and any relevant interpretative criteria. A necessary implication is “an implication that is compellingly clear” (as stated by Lady Arden, Lord Hamblen and Lord Burrows in **Pwr v Director of Public Prosecutions** [2022] UKSC 2 at [34].
39. Applying these principles I do not accept Ms Hannett KC’s submission as to the correct construction of the section for the following reasons.
40. I accept Mr Glenister’s submission that this breadth of definition is purposeful given the context; the purpose being to capture a wide range of conduct, with the judgment as to whether any conduct is incorporated within either or both of the two categories left to a specialist panel very well placed in light of their experience to decide where the line needs to be drawn in a particular case.
41. The rigid distinction contended for by Ms Hannett KC has not been previously recognised (or indeed the necessary requirement of determining whether any alleged

conduct was “professional conduct” or not). **In R (Remedy UK) v. General Medical Council** [2010] EWHC 1245 (Admin): Lord Justice Elias stated at paragraph 37:

“(1) Misconduct is of two principal kinds. First, it may involve sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise. Second, it can involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession.

(6) Conduct falls into the second limb if it is dishonourable or disgraceful or attracts some kind of opprobrium; that fact may be sufficient to bring the profession... into dispute. It matters not whether such conduct is directly related to the exercise of professional skills”.

42. Ms Hannett’s KC construction would require the first part underlined to be replaced with “which must”. At first blush support for the proposition (the high water mark of support within any of the authorities cited) advanced by Ms Hannett KC is to be found at paragraph 54. Elias LJ stated:

“54. As to the second limb of the misconduct complaint, I reject Mr de la Mare’s central submission that whenever the profession is brought into disrepute, or at least arguably so, that of itself is capable of rendering any conduct which causes that consequence to constitute misconduct within the meaning of subsection (a).”

43. However in that case the Court was concerned with Section 35C of the Medical Act 1983 which provided that

“A person’s fitness to practise shall be regarded as ‘impaired’ for the purposes of this Act by reason only of –

- (a) misconduct;
- (b) deficient professional performance;
- (c) a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence.

44. Importantly and in distinction to section 141(B)(1) there was no express reference to conduct that may bring the teaching profession into disrepute. As Mr Glennister submitted the issue in the present case is whether admitted misconduct which does not fall significantly short of the standard of behaviour expected can be conduct that brings the teaching profession into disrepute. It is therefore not a question of whether there has been misconduct or deficient professional practice within a doctor’s medical calling which was the issue before the Court in **Remedy UK**.

45. In **Beckwith-v-Solicitors Regulation Authority** [2020] EWHC 3231 the Court was concerned with an argument that the Disciplinary Tribunal had erred in finding the Appellant had contravened two of the ten principles set out in the SRA handbook. The relevant principles were:

“2. act with integrity “

And

“6. behave in a way that maintains the trust the public places in you and in the provision of legal services”;

46. The Court (Dame Victoria Sharp P and Mr Justice Swift) noted:

“41. Principles 2 and 6 have a common characteristic. Of the ten 2011 Principles, eight are formulated by reference to conduct impinging on a solicitor's practise of the law. Most events that give rise to misconduct proceedings will comprise conduct that, in one way or another, contravenes one of these eight principles. Principles 2 and 6 are a little different. There will be many occasions where the obligation to act with integrity and the obligation to act so as to maintain public trust will be adjectival in the sense that misconduct that contravenes one or other of the remaining eight principles can also be characterised as showing a lack of integrity or conduct that adversely affects public trust”.

And

“42. However, both Principle 2 and Principle 6 also cover ground beyond that covered by the other eight principles. In the context of Principle 2 what that ground is, is identified by construing the contents of the Handbook – i.e. the body of rules made in exercise of the power at section 31 of the 1974 Act. See above at paragraphs 28 – 35. Approaching Principle 2 in this way keeps it within foreseeable boundaries by attaching the obligation to act with integrity to matters that touch upon professional practise as a solicitor.

43. We consider the same general approach must also apply when determining the scope of Principle 6. The content of Principle 6 must be closely informed by careful and realistic consideration of the standards set out in the 2011 Code of Conduct. Otherwise Principle 6 is apt to become unruly. There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful. Whether that line between personal opprobrium on the one hand and harm to the standing of the person as a provider of legal services or harm to the profession *per se* on the other hand has been crossed, will be a matter of assessment for the Tribunal from case to case, but where that line lies must depend on a proper understanding of the standards contained in the Handbook.”

There was no suggestion, in the context of those principles, of any partition between principle six and the other principles.

47. As Ms Hannett KC accepted public perception of professional misconduct is a feature which may be taken into account under the section 141B(1). The consequence of the interpretation she advanced is that the setting and assessment of professional standards must take (and must be taken by any panel to have taken) into account the potential impact on the public's perception of any breach and that the sole issue to be determined under the first limb is the extent to which the conduct fell below the standards expected of a teacher; effectively the issue of culpability. This approach is not reflected in the advice which states in respect of the first limb:

“22. In making a judgment as to whether the behaviour demonstrated falls short of the standard expected of a teacher, a panel should draw on its own knowledge and experience of the teaching profession, particularly the personal and professional conduct elements of the Teachers' Standards and the responsibilities and duties in relation to the safeguarding and welfare of pupils set out in statutory guidance KCSIE and Working Together to Safeguard Children, which is underpinned by legislation.”

48. And in respect of the second limb:

“27. Panel members should use their knowledge, skills and experience to take into account how the teaching profession is viewed by others, the responsibilities and duties of teachers in relation to the safeguarding and welfare of pupils, and the influence that teachers may have on pupils, parents and others in the community. Panels should take account of the uniquely influential role that teachers can hold in pupils' lives and that pupils must be able to view teachers as role models in the way they behave.”

So no reference is made to consideration of public perception when considering the first limb. As is conceded on behalf of the Defendant if the Claimant is correct as to the proper approach the advice will need revision.

49. When considering any allegation of professional misconduct the key factors in assessing seriousness will normally be:

- (a) The nature of the misconduct
- (b) Harm (or the risk of harm)

50. It is not argued on behalf of the Claimant that the panel took into account something which it should not have taken account of (public perception of the data breach). Rather the Claimant's argument is, in effect, that it did so at the wrong stage. So had the panel considered the potential damage to the public perception of a teacher giving the relevant confidential data to a third party and concluded that, although it was to a person with a pastoral role and done with misplaced good intent, the conduct would fall significantly short of the behaviour expected this would have been a permissible approach. However,

it is submitted that it is impermissible to take the approach of first considering the conduct of disclosing confidential data and asking how far short it fell of the standard expected of a teacher and if it is found that it did not fall significantly short of the standards expected of a teacher, then considering if nevertheless the conduct may potentially damage the public's perception of teacher such that it may bring the teaching profession into dispute. As under either approach it is permissible to consider the extent to which the relevant conduct may potentially damage public perception and the result should be the same under either route, this militates against an interpretation that requires rigid partition.

51. It is also of significance that the Claimant's interpretation requires a staged approach (a decision tree) in relation to conduct. The first question is whether the conduct is professional or not. If the answer is in the affirmative then the sole question is the extent to which the conduct was serious and fell significantly below the standard to be expected. Only if the answer is negative can consideration be given to the second limb. As Ms Hannett KC conceded that there may be cases in which it is unclear whether the conduct is "professional". She submitted that in such cases the TRA may allege both limbs in the alternative and the PCP will need to make a decision as to the correct characterisation of the conduct. In my view this stepped approach (not previously taken by panels convened under the Regulations) would inevitably lead to disputes as to whether conduct was wholly or partly professional conduct (with the line to be drawn frequently difficult to determine e.g. a teacher's interaction with pupils outside school or with recent ex-pupils). When considering an argument as to statutory construction the court may assess the likely consequences of adopting each construction, both for the parties in the case and (where similar facts arise in future cases) generally. If on balance the consequences of a particular construction are more likely to be adverse than beneficial this is a factor telling against that construction. (see Bennion 11.6; as judicially approved: **Project Blue Ltd v Commissioners for Her Majesty's Revenue and Customs** [2017] UKSC 70; Lord Briggs at paragraph 110);
52. In my judgment the rigid approach of mutually exclusive categories of behaviour does not flow from a natural reading of the section and the Claimant's arguments over-judicialise and over-define broad definitions. It is important to bear in mind that the context of the section is that the consideration of breaches under section 141B(1) will be by a specialist panel applying its experience and judgment. Such a panel can be trusted to consider the two limbs without the rigidity of the approach contended for by Ms Hannett KC. I do not accept the submission that allowing a panel to take into account the public perception of a teacher's professional misconduct would allow an unacceptable lack of foreseeability. As I have set out it can be considered even if her interpretation is correct.
53. In my view, given the implications, had parliament meant to require the approach Ms Hannett KC contends is correct it would have expressly provided for it. An obvious route to ensure a partition would have been by inserting the words "non-professional" in relation to the second limb. I note that to the extent the Explanatory Notes assist, they are consistent with the Secretary of State's interpretation of the legislative language as there is nothing set out to suggest there is a qualification that conduct related to teaching can only fall within the first category. Although Ms Hannett KC is clearly correct when she submitted that the Defendant's construction was either right or wrong; I do also not accept that the fact that the Advice and panel decisions have reflected the Defendant's

approach for over a decade has no relevance. It would be surprising that if the an implication of discreet mutually exclusive categories was compellingly clear that nobody had ever followed this approach and/or that the failure to do so (Mr Blomfield set out several examples of a panel coming to a similar conclusion in respect of the interaction of unacceptable professional misconduct and conduct that may bring the profession into disrepute) has not been challenged to date.

54. Finally it is to be noted that a finding does not automatically lead to a recommendation of prohibition, so a limited degree of culpability can be taken into account by the panel at the recommendation stage (although the finding does have to be published). It is also a factor that the Secretary of State can take into account when deciding whether or not to accept the recommendation.

Ground 2

55. The Claimant argues that for a teacher to be guilty of conduct which contravenes either the first limb or the second limb the misconduct must be “serious” and this requirement is to be implied into section 141B(1)(a). Further, the second limb ought not to be interpreted as setting “a lower standard of culpability than the first limb”. Ms Hannett KC submitted that this is consistent with the case law on the general meaning of misconduct. The stigma and sanctions attached to the concept of professional misconduct across the professions generally are not to be applied for non-serious/minor lapses. In **Khan v. Bar Standards Board** [2018] EWHC 2184 (Admin) Warby J (as he then was) noted at paragraph 36 that:

“[t]he 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. There is, as Lang J put it, a ‘high threshold’. Only serious misbehaviour can qualify”.

56. Ms Hannett KC submitted that as the relevant conduct considered under limb two had to satisfy this seriousness requirement and when considering the first limb the panel had already concluded that it was not of a serious nature it must have misconstrued the test under the second limb i.e. applied some lower standard and/or acted irrationally (ground 3).

Analysis

57. As with ground one Mr Glenister submitted, in my view correctly, that this argument was not founded on any statutory language and constituted an attempt to simply read in additional words which Parliament has not used. Parliament had set the threshold for each limb – for the first limb to be satisfied conduct must be “unacceptable”; and for the second limb the conduct must be such that it “may bring the profession into disrepute”. On the latter, conduct must be sufficiently serious that it may bring the profession into disrepute but the legislation places no further threshold on the conduct that falls within the limb.

58. It is relevant that there is an initial assessment or filter before matters reach the panel. In the Secretary of State's Advice, it is explained at paragraph 3, the TRA only deals with the "most serious cases of misconduct":

"The TRA will only consider allegations of the most serious cases of misconduct, in order to make a decision about whether a teacher should be prohibited from teaching work."

59. In my view conduct which objectively satisfies the test of potentially damaging the public perception of a teacher, therefore bringing the teaching profession into disrepute cannot be trivial or inconsequential or otherwise excusable. There is no need to add in any additional requirement. In present case it could not be realistically argued that the misconduct was so minor that it would not be likely to cause significant concern to any pupils, parents or the wider public.

Ground 3

60. It is the Claimant's case that the panel's conclusion that conduct which did not amount to "unacceptable professional conduct" was "conduct that may bring the teaching profession into disrepute" was irrational. Professional conduct that is not "unacceptable" cannot rationally cause the public to have a lesser view of the teaching profession.

Analysis

61. As explained in the statement of Mr Blomfield, the panel is specialist to cover a broad range of expertise – and in particular will have at least one person with teaching experience and one person who has never been a teacher. The key function of a panel is to bring their broad and professional experience to the hearing process, as recognised in the Advice (see for example at paragraph 22, "a panel should draw on its own knowledge and experience of the teaching profession"). The judgments made by a panel are such that they should be given a high level of deference and a wide margin of appreciation.
62. The panel concluded that the Claimant's misconduct in breaching Teacher's Standards did not fall significantly short of the standards to be expected of the teaching profession but the public trust in the teaching profession would be weakened if members of the public were aware of the proven facts/findings of misconduct. In effect (to borrow from another jurisdiction) lesser culpability but greater damage. If public perception had been taken into account when assessing the standards (as Ms Hannett KC submitted should have been the case) then there would be force in the argument that the conclusion in respect of the second limb was inconsistent and as a result irrational. However it is clear that this was not how the panel approached matters and provided they acted in line with the correct statutory interpretation, which in my judgment they did, their decision was clearly one open to them.

Ground 4: an error of law in the Advice

63. This ground is dependent on the ground on statutory interpretation and falls away given my conclusion in relation to ground one.

Conclusion

64. For the reasons set out above the four grounds fail.

65. I leave it to Counsel to try and agree an appropriate order.