Neutral Citation Number: [2016] EWHC 1519 (Admin)

Case No: CO/1679/2016

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

Leeds Combined Court Centre
1 Oxford Row, Leeds
West Yorkshire LS1 3BG

Date: 24 June 2016

Before :

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between :

TARIQ ALSAIFI	**Appellant**
- and -	
THE SECRETARY OF STATE FOR EDUCATION	**Respondent**

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- -

The Appellant appeared in person
Ms A. Walker (instructed by the **Government Legal Department**) for the **Respondent**

Hearing dates: 20 June 2016

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Approved Judgment

Mrs Justice Andrews:

1. This is a statutory appeal against the decision of the authorised decision-maker for the Secretary of State for Education ("the Secretary of State") dated 29 February 2016, to make an indefinite Prohibition Order (with a review period set for three years from 7 March 2016) prohibiting the appellant from teaching in any school, sixth form college, relevant youth accommodation or children's home in England. The Prohibition Order was made on the recommendation of a professional conduct panel ("the panel") of the National College for Teaching and Leadership ("NCTL"), an executive agency appointed as the regulator for the teaching profession by the Secretary of State, dated 25 February 2016, finding the appellant guilty of unacceptable professional conduct.

2. The appeal raises important questions concerning the interpretation and effect of s.141A and s.141B of the Education Act 2002 ("the 2002 Act") read in conjunction with the Teachers' Disciplinary (England) Regulations, 2012 SI No.560 ("the Regulations").

3. The key issue for determination is whether the Secretary of State (or the NCTL acting on her behalf) has any power to investigate an allegation of unacceptable professional conduct, or to take any consequential action, including making a Prohibition Order, where the person under investigation was not a person employed or engaged to carry out teaching work at any of the types of institution defined in s.141A either at the time of the alleged unprofessional conduct, or at the time of the referral of the allegation to the NCTL, but serendipitously happened to be so engaged at the time of the hearing before the panel, and at the time when the Prohibition Order was actually made. For reasons that I shall explain, I have reached the conclusion that the Secretary of State had no such power, and consequently the Order made in the present case is a nullity and must be set aside.

BACKGROUND

4. On 5 August 2013, the appellant was engaged on an hourly paid fixed term contract as a lecturer in accountancy and finance by Newcastle College ("the College") in its School of Health and Enterprise ("SHE"). The SHE offers finance and business courses at levels 2, 3 and 4, undergraduate courses, and postgraduate courses. Its campus is situated within the campus of Northumbria University. Newcastle College is part of the Newcastle College Group ("NCG") which also includes Newcastle Sixth Form College (whose campus is on a different site). In the advertisement for the job for which the appellant successfully applied, the College described itself as "one of Britain's largest and most successful further education institutions". The advert stated that the successful candidate "will work within the Higher Education, Management and Professional department of [the SHE] and have a related degree level academic/vocational qualification in a relevant curriculum area and a teaching qualification."

5. By all accounts the appellant was a particularly well qualified, lively and popular lecturer in subjects that it was difficult for the College to find suitable candidates to teach. However, on 4 November 2013, an allegation was made of inappropriate behaviour by the appellant, then aged 38, towards one of the 12 learners in his Tuesday class on the Sage Accounting course on the College's level 2 Associate

Accountancy Technician ("AAT") programme, to whom I shall refer as Ms A. She was 17 years old at the time, and was attending the class on a part-time basis under an apprenticeship arrangement with her employer.

6. The initial allegation centred on a series of emails which the appellant had sent to Ms A between 15 and 25 October 2013. All except the first were sent from the appellant's personal email address to Ms A's personal email address. The initial email asked Ms A to let him know if she needed any extra help with Sage. Two subsequent emails, sent on 22 and 23 October 2013, asked after the health of her mother, who had just undergone an operation. The first of these said "it's Tariq here and this is my personal email. How is your Mum now?" It was signed with the appellant's first name (which is how all the learners in the class addressed him) followed by "xx". The second email said "I'm not sure if you have received my email I have sent you yesterday (see below). I know sometimes sending emails between Yahoo and Hotmail have some problems and sometimes they don't arrive! I hope your Mum is OK now. Anyway, it was nice talking to you." Under the appellant's name was his personal mobile telephone number. A further email sent on Friday 25 October 2013 asked Ms A "do you wanna to go for a lunch tomorrow (Saturday)?"

7. Ms Catherine Hassan was the assessor for both Ms A and her best friend Ms B, who was also an apprentice studying in the same class, and a witness before the panel. Ms Hassan first became aware of issues relating to the appellant's behaviour towards Ms A when another apprentice learner in the AAT class, and a friend of both the young women, C, expressed concerns to her about posts that Ms A had put up on Facebook. C told Ms Hassan that he was going to ask Ms A to come and see her. Following that conversation, on 1 November 2013 Ms Hassan had a conversation with Ms B, and it was she who told Ms Hassan about the emails from the appellant to Ms A, their content, and Ms A's concern about them. Ms B also said that the appellant spent a lot of time around Ms A in class. Ms B's evidence was that she did not go out of her way to tell Ms Hassan, but it just dropped into the conversation. Ms B said she did not think the matter was all that serious, but her assessor did. Ms Hassan told Ms B to ask Ms A to tell her that she knew about the emails and to come and speak to her about it.

8. Later that day, Ms Hassan spoke directly to Ms A for about an hour, and Ms A expressed her concerns about the emails and about certain aspects of the appellant's behaviour towards her in class. Ms Hassan notified her superiors. She reported that Ms A was "upset and was concerned that [the appellant] had her personal details, she feels that if this issue is raised with the tutor it will have repercussions in the class and this is why she's not raised [it] directly." Ms Jackie Rankin, the operations manager to whom Ms Hassan reported these concerns, then spoke to Ms A herself. Ms A told her that she did not feel comfortable at all being in the class with this tutor. On 4 November, Ms Rankin reported the allegations to Ms Barbara King, the Director of Health and Enterprise at the College, adding that Ms A did not wish to attend the next class (which was due to take place the following afternoon) if the appellant was taking it, and she did not want to join another class, as she had done nothing wrong and she did not want to be removed from her friends.

9. The appellant was suspended from work on the same day, pending the outcome of an internal investigation. On 11 November he sent a final email to Ms A, with attachments of her and other learners' Sage copies, in which he said:

"I am not allowed into the college, because somebody did a complaint against me (I don't know yet who is that person or what are the details) … I am sure I haven't done anything worth sacking me [for], but if I don't come back again to the college; it was nice meeting you and try to do your best to pass (email me if you need any help or support)."

10. The appellant was interviewed on 13 November 2013 by Mr Mark Bolton, then the College's Business Development senior manager, in the presence of the head of HR at the College, Mr Ron Smith. The interview lasted over an hour. Mr Bolton, who has since moved to another job, gave evidence before the panel. He made contemporaneous handwritten notes of the questions he asked of the appellant, and of the answers he received. The appellant asserts that it was only at the interview that he found out that it was Ms A who had made the complaint, and the nature of the allegations against him. He admitted sending the emails, but denied any inappropriate behaviour.

11. The appellant and Mr Bolton both signed Mr Bolton's notes of the interview. The appellant accepts that Mr Bolton offered him the opportunity to read through the notes before he signed them, but it is his case that he did not do so, because he trusted Mr Bolton and expected him to have made an accurate record. Mr Bolton told the panel that 2 ½ years later, he could not remember much about the interview, other than that he noticed that the appellant was recording it. It is not in dispute that the appellant deleted the recording immediately when Mr Bolton asked him to.

12. Mr Bolton said in cross-examination by the appellant that his notes would have been a true and fair reflection of what was discussed, as they always are, and that he always asks every interviewee to sign and date his notes, once they have read them or he has read them back to them, [to confirm] that they represent a fair reflection of the conversation that has just taken place. He said "that was my method of interviewing then, it was before and it still is now". He was adamant that the document would not have been signed without either his reading it out to the appellant or the appellant reading it for himself beforehand. Under no circumstances would he have allowed him to sign it otherwise. The panel accepted that evidence.

13. According to Mr Bolton's notes, the appellant said he was shocked that Ms A had made the complaint as they had a good relationship, and he had done nothing inappropriate. He had sent her the emails because she had told him that her mum was feeling unwell. He explained the two xxs on the 22 October email as being just an expression of friendship, and said he would send messages signed off that way to boys as well as to girls. When asked if he knew how old Ms A was, the appellant said that he presumed she was 18 or 19. When he was asked why he used his personal email address, he responded "because it was a personal question". When asked if he thought it was appropriate to use his personal email address with students, he is stated to have responded "it was not about work". He subsequently explained that what he meant by that was that he was asking about a personal matter, namely, the health of her mother.

14. The appellant told Mr Bolton it was the first time he had ever invited a student out to lunch at a weekend. When asked "you say you asked her out, what do you mean?" the appellant's reply is recorded as: "I like her". The notes then record that Mr Bolton asked "if everything worked out, would your intention be to become boyfriend and

girlfriend?" and that he responded "yes". He disputes the accuracy of that part of Mr Bolton's record. The appellant's case is that Mr Bolton put to him the hypothetical question "if you went out with her and things developed and you became boyfriend and girlfriend, what would you think [about that]?" and he replied "it is possible" or "it might happen." That is the evidence the appellant gave to the panel under cross-examination.

15. On 15 November 2013, Ms A and Ms Hassan were each interviewed by Mr Bolton; it appears that Ms A was interviewed first, and Ms Hassan was able to hear what she said, because she confirmed in her own interview that Ms A had told her on 1 November what she had "just told" Mr Bolton. Contemporaneous handwritten notes of those interviews were made by Mr Bolton, and they were signed by Mr Bolton and the two interviewees. Among the things that Ms A said was that the appellant had put his hand on top of hers when she was running the mouse, that he rubbed her hand with his thumb, and that he would put his arm along the back of her chair. She also said that he had commented on her appearance, and that he had asked Ms B if C was Ms A's boyfriend, and Ms B had said no. When asked how she felt about the emails, Ms A said that she worried every time her phone vibrated in case it was an email from the appellant.

16. On 15 November 2013, Mr Bolton made an investigation report to Ms King. That report and its attachments, including the emails and the contemporaneous notes of the interviews, formed part of the materials that were relied on before the panel in due course. On 25 November 2013 Ms King wrote to the appellant stating that she was satisfied that there was a case to answer under the College's disciplinary policy and procedure. She stated that the nature of the complaint being made against him was one of inappropriate contact with a learner, with the admitted intention of pursuing a personal relationship. He was required to attend a formal disciplinary meeting on 28 November, and informed that if the complaints were found to be proven, they could amount to gross misconduct and result in a recommendation to terminate his employment with the College. That letter annexed a copy of Mr Bolton's investigation report and all the documents appended to it. He was therefore able to read for himself the handwritten notes taken of his own interview, and those with Ms A and Ms Hassan. Therefore he would have known that her complaint related to other matters besides the emails, though the College was focussing upon them.

17. On 27th November 2013 the appellant sent a letter to Ms King in response. It stated that it appeared that the College was trying to construct his dismissal, that the allegations against him appeared to be one of grooming Ms A or of harassment or both, and that they should inform the police. He said that he had not had contact with Ms A since being informed of her real age for the first time in the interview with Mr Bolton and in Ms King's letter informing him of the outcome of the investigation.

18. At the internal disciplinary hearing, which was attended by the appellant, Ms King, Mr Smith and Mr Bolton, notes were taken by Mr Smith. Typed copies were later supplied to the appellant. Mr Bolton presented the outcome of his investigation, and the appellant was asked whether he wanted to ask any questions of Mr Bolton about it. He replied that he did not wish to ask any questions, that he had received legal advice and that he did not want to comment. He asserted that there was no case to answer. Mr Bolton is recorded as saying that there was no insinuation of grooming; that this was a case of harassment under the College's disciplinary procedure. Ms

King asked the appellant whether he knew the learner's real age, and he said he had thought that she was 19. He was asked if he would like to present his case, and he again said that he would not wish to comment. In summary of his findings, Mr Bolton said that there were clear breaches of the NCG's IT policy, that it was clear that the appellant had brought the College into disrepute, and that the examples of inappropriate contact with the learner had all been triangulated. The appellant said that he had not broken any law, that he had fulfilled his duty of care, that he did not deserve this, and that he was not going to comment any further.

19. After a short adjournment to consider the matter, Ms King stated that she believed the appellant's actions to be gross misconduct and that she was going to recommend the termination of his employment. That recommendation would be considered by a senior post-holder and that he would have the opportunity to make representations to that post-holder before any final decision was taken. This never happened, because on the following day, 29 November 2013, the appellant tendered his resignation. In the College's letter of acceptance, sent by Mr Smith on 3 December 2013, the appellant was advised that in accordance with its Safeguarding duties, the College would be referring his case to the Disclosure and Barring Service ("DBS").

20. In the event, the matter was not forwarded to the DBS by the College until 15 August 2014. On 28 April 2015 the DBS wrote to the appellant and said it had decided that it was not appropriate to include him in the Children's Barred List or the Adults Barred List. It explained that this meant that he would not be prevented from carrying out regulated activity with vulnerable children or adults, but "other bodies may place other restrictions upon you and our decision does not overrule these".

21. Having made that decision, the DBS passed on the College's referral to the NCTL, which received the papers on 11 May 2015. That is the date on which, for the purposes of s.141B of the 2002 Act, the allegations of unacceptable professional conduct were formally referred to the Secretary of State, or rather, to the NCTL acting on her behalf. There is no evidence that the appellant was teaching anywhere, or engaged to teach anywhere, on that date. The only evidence put before the Court that he was teaching at any point after he left the job at the College comprised documents produced by the Secretary of State very late in the day, annexed to Counsel's skeleton argument, indicating that on 4 January 2016 he commenced working as a science teacher with a Church of England Academy in the North of England. He continued in that job until 17 March 2016, which was before he received a copy of the Prohibition Order on 22 March. It appears that the NCTL only became aware of these matters after the Prohibition Order was made.

22. The appellant accepted that the information about that job was correct. He explained that it was a "zero contract", i.e. his services were supplied to the Academy through an agency with which he was registered, and he got paid only as and when he did any teaching. Of course, the fact that he was doing supply teaching through an agency, and that the work was sporadic in nature, would make no difference to his meeting the requirements of s.141A of the 2002 Act. As at 4 January 2016, and until 17 March 2016, he was undoubtedly a person falling within the ambit of that section, whose provisions are set out later in this judgment.

23. The NCTL wrote to the appellant on 1 June 2015 informing him that it had considered the referral and decided that a formal investigation should be started in relation to allegations that he had:

    i) Inappropriately made physical contact with a female student in his care;

    ii) Inappropriately breached his professional boundaries when he gave prolonged unwanted attention to Ms A in class;

    iii) Inappropriately given his personal contact details to Ms A and invited her to lunch,

    and that in doing 1, 2 and 3, his actions were sexually motivated. The letter expressly warned the appellant that the allegations might be subject to change at any stage of the NCTL's investigation if additional relevant evidence was received or if it was decided to refer the matter to a professional conduct panel.

24. The letter enclosed the documentation received by the NCTL in relation to the referral in order that he could respond to it. It was apparent from this that the NCTL had not been sent a full copy of Mr Bolton's investigation report, but only the first page, and not all of the annexures. Whilst it was sent copies of Mr Bolton's handwritten notes of the interviews with Ms A and Ms Hassan, it did not have the notes of the interview with the appellant himself. No explanation for these omissions has ever been forthcoming, so far as I am aware. It was the appellant himself who subsequently sent a full copy of the internal investigation report and its appendices to the case presentation officer in October 2015.

25. On 1 July 2015, the appellant wrote back to the NCTL correcting certain factual information about the nature of his job with the College. He stressed that he was <u>not</u> teaching at the Sixth Form College (a different entity from the SHE). He said he knew the difference between children and adults and he understood safeguarding issues. In the job in question he was dealing with adults from the ages of 18 to 60. He pointed out that the College had not sent the full file and paperwork to the NCTL, and therefore the NCTL did not have the full picture. The appellant said that his approach with all the learners was to be friendly and treat them equally, and that many of them were still his friends. He said that many learners had both his college and personal email addresses, and many of them emailed him on both. When Ms A, Ms B and C had left his class together on 22 October (the last class he taught them) they had all been happy, and wished him a Happy Halloween.

26. As for the allegations, which he said he found very distressing and disturbing, he said that he was not going to respond to them directly. However, he raised two specific matters which he said he did not understand. The first can be summarised as an intimation that Ms B may have put Ms A up to making a complaint about him because he had not responded to what appeared to be an attempt by Ms B to flirt with him. At one point during the lesson, he said he had asked her "what are we doing here?" referring to the Sage program on her computer, and she had replied "I'm not doing anything this weekend". He had ignored that comment. The second point was that he did not know Ms Hassan and had had no dealings with her.

27. On 3 August 2015 a caseworker at the NCTL wrote to the appellant to inform him that a determination panel had considered his alleged behaviour to be a serious departure from the personal and professional conduct elements of the teachers' standards, as well as being misconduct that had the potential to seriously affect the education and well-being of pupils. Therefore the determination panel decided that there was a realistic prospect of a professional conduct panel imposing a prohibition order, and referred his case for consideration at a hearing. The reasons for that decision and the nature of the allegations to be considered at the hearing were set out in the letter. They were in identical format to those set out in the letter of 1 June 2015.

28. In the course of further communications by email and telephone with the NCTL, the appellant raised a number of concerns, primarily that the College had never accused him of having any sexual motivation. He denied admitting that the purpose of the communications with Ms A was to begin a relationship with her, and set out his version of the "hypothetical" question and his answer to it, which he alleges that Mr Bolton recorded inaccurately in his notes.

29. The NCTL addressed the appellant's many concerns fully and fairly. It gave him the kind of assistance that one might expect to be given to a person representing himself and facing serious allegations of this nature. For example, on 14th September 2015 the case presentation officer, Mr Ben Chapman of Browne Jacobson LLP, sent a letter to the appellant explaining that the NCTL had reviewed the evidence independently of the College and had decided that there was potential sexual motivation apparent from the material that needed to be addressed. He explained that sexual motivation could be found on the basis that it was "the only credible and realistic explanation for what has occurred" or inferred from the circumstances of the case. He referred the appellant to two specific panel decisions in other cases which might assist his understanding, and when the appellant subsequently told them he was unable to open the links on the website, Mr Chapman sent him hard copies.

30. Mr Chapman said in the letter "if you disagree that your actions were sexually motivated, you are advised to put your reasons in writing addressing each of the allegations and giving your version of events. In particular, if you accept that some of the allegations are true, you are advised to explain why you conducted yourself in the way that you did." In answer to further queries Mr Chapman explained to the appellant that he should address the writing to the panel, but send it to him at Browne Jacobson. He would prepare the bundle of documents for the hearing, which would contain the evidence gathered so far and anything that the appellant wished to include. A copy of that bundle would be sent to him nearer the date of the hearing to him to agree.

31. The appellant duly provided a very lengthy and detailed written response to the allegations on 19 October 2015, with 19 appendices. One of the points he made expressly was that he was not a teacher in the Sixth Form College at any material time. He agreed that he had been a teacher there between February and August 2008, but he had left to pursue his academic studies, and when he returned in August 2013, five years later, he was employed by the College in the SHE, which he again pointed out was entirely separate. He referred to his job description as an hourly paid lecturer, and reiterated that he was teaching AAT, Undergraduate and Postgraduate courses to adult learners. He claimed that he was unaware that any learner in his class was under the age of 18.

32. On 16 December 2015 a letter was sent by the NCTL to the appellant to notify him that his case would be heard by a professional conduct panel on 22 to 25 February 2016. The letter set out the allegations that the panel would hear. They had been amended from those set out in the decision letter sent to him in August to which he had responded in October. Allegation 1 now asserted that whilst employed at the College the appellant failed to maintain professional boundaries towards Ms A in that he:

    a) made comments as to the way she looked;

    b) sent her one or more emails from his personal email address;

    c) sent her one or more emails containing "kisses";

    d) gave his personal telephone number to her;

    e) sent her several follow up emails in an attempt to encourage a response;

    f) invited her to lunch;

    g) put his arm around the back of her chair;

    h) made inappropriate physical contact with her by touching her hand;

    i) asked Ms B whether a fellow learner, C, was the boyfriend of Ms A.

33. Allegation 2, which in the event the panel found unproved, was that on one or more occasions the appellant unbuttoned his shirt in a teaching environment to such an extent that he was left in "an inappropriate state of undress". Allegation 3 was that his conduct in regard to allegation 1 was sexually motivated. It was no longer alleged that the appellant behaved inappropriately towards Ms A by giving her "prolonged unwanted attention" in class.

34. The letter informed the appellant that the presenting officer (Mr Chapman) wished to rely on evidence in the form of witness statements from Ms A, Ms B and Mr Bolton, all 3 of whom were to be called to give oral evidence at the hearing. He was informed that he should send any documents on which he wished to rely or statements from any witnesses that he proposed to call to the presenting officer at least 4 weeks before the hearing. One of the complaints made by the appellant in this appeal is that the changes to the allegations were unjustifiable, and that he did not have a full and fair chance to respond to them.

35. The appellant made a phone call to Mr Chapman on 18 December 2015, following which Mr Chapman sent him an email noting the content of their conversation. This recorded that the appellant had raised concerns over the allegations contained in the notice of proceedings and that he felt that they had changed since the previous correspondence he had received. Mr Chapman explained that the allegations had been made more specific, so that the appellant could see exactly what it was that the NCTL said amounted to unacceptable professional conduct. He reassured the appellant that all of the allegations had been formulated before the witness statements had been obtained, and were based on the evidence that the appellant had already seen.

36. The appellant completed a form that was sent to him by the NCTL indicating that he intended to appear at the hearing, that he was not going to be legally represented, and that he did not admit any of the allegations. He also indicated that he wished to call Ms King, Ms D (another female learner in the class, to whom he had sent an email after his suspension), and his ex-line manager Ms Louise Roberts as witnesses. He said "I have no direct relation[ship] with them at the moment, but they can provide vital information to the hearing committee, such [as] dates and times of classes, arrangements of the classes, and other information that I can examine in front of the hearing committee. Please contact them directly or through Newcastle College."

37. In an email dated 12 February 2016, a caseworker of the NCTL confirmed to the appellant that it would not be calling witnesses on his behalf and that it expected him to make the necessary arrangements, or provide the necessary statements. The appellant responded that he did not believe 5 working days to be sufficient time to enable him to contact the witnesses or obtain statements from them. The caseworker then sent an email asking him what the contents of the evidence that he intended to obtain would be, and the relevance of it to the allegations made against him. The appellant did not answer that question, but asked why the NCTL was asking it only 3 working days before the hearing.

38. In an effort to assist, Mr Chapman sent an email to the appellant explaining that the expectation was that he, as the defendant to the charges, would be responsible for obtaining statements from and securing the attendance of any witnesses upon whom he wished to rely. However, under the rules the panel did have a discretion to require individuals to attend and give evidence, if that evidence was material to the issues in the case. Mr Chapman did not consider the three people whose names were provided by the appellant were going to be able to give material evidence, but he had asked for the questions to be asked of the appellant by the NCTL caseworker, in order to further consider whether their evidence might be material, and therefore whether the NCTL should attempt to secure their engagement on the appellant's behalf. Mr Chapman said that unless the appellant could explain what evidence he expected those witnesses to provide, and how it was relevant to the issues in the case (i.e. to the allegations made against him), he would not be in a position to contact them. In my judgment that explanation could not have been clearer.

39. The appellant did not provide any further explanation of the relevance of any evidence that any of those three individuals could give to assist the panel in the resolution of the allegations against him. Therefore the hearing proceeded without their being called. The appellant told the Court that the reason why he did not provide the information sought was that he had thought that because Mr Chapman was representing the opposing party, he (Mr Chapman) was trying to find out information about the appellant's case in advance of the hearing in order to gain some kind of improper tactical advantage. That suggests to me that he did not read Mr Chapman's email properly, if at all.

40. On 3 February 2016 there was what was described as a "Case Management Hearing" although in fact the case management issues to be determined were dealt with on the basis of the parties' written submissions, and neither the appellant nor Mr Chapman was present. Mr Chapman's application for Ms A to be treated as a vulnerable witness and to be permitted to give her evidence from behind a screen, accompanied by a witness supporter and cross-examined indirectly (i.e. the appellant's questions were to

be put to her by the panel instead of by him) was the only matter considered on that occasion that is of any relevance to this appeal.

41. The appellant's objections to that course, articulated in letters dated 3 and 31 January 2016, were taken into account, but the application was allowed for reasons which were fully explained in the case management decision. In fact, the appellant had stated in the 3 January letter that he was happy to provide his questions for Ms A to the panel in advance and to write them down on a piece of paper for the panel to ask her. His main objection to the directions sought was to Ms A being accompanied by anyone within the hearing room, as he said that she had been put up to making the allegations against him in the first place by Ms B, and that having someone else present whilst she gave evidence would put her under pressure to keep making false allegations. He also told the NCTL that he refused to sit behind a screen, but as the decision maker pointed out, the application was in relation to Ms A being permitted to give her evidence from behind a screen, which was a different matter.

42. I have seen and read the transcripts of the substantive hearing before the panel from which it is apparent that the appellant was given a fair opportunity to put his case and to cross-examine all three witnesses, and that the special measures adopted in respect of Ms A did not create any difficulties in that regard. As an unrepresented party he was allowed considerable latitude in terms of the questioning. At the hearing of this appeal he very frankly accepted that he was able to ask Ms A all the questions that he wished, albeit that they were put to her by the panel rather than by him directly. The panel dismissed allegation 1(g) (the arm round the back of the chair) and allegation 2, (the inappropriately unbuttoned shirt) but, after directing itself appropriately with the assistance of advice from its legal adviser, it found all others proved to the requisite standard (the balance of probabilities). It then carefully considered whether this was an appropriate case for a Prohibition Order, taking into account the positive references relied upon by the appellant, and reached a conclusion that it was. That conclusion was reasonably open to it given the factual findings it had made, especially in the light of what it described as the appellant's total lack of insight into his behaviour. The appellant challenges the findings as being clearly wrong.

JURISDICTION

43. Logically, the first issue that arises is whether the NCTL had any power to investigate the matter, refer the matter to a professional conduct panel, and make the recommendation upon which the Secretary of State acted. This turns on the proper interpretation of sections 141A and 141B of the 2002 Act, which only apply to certain types of teacher. The power of the Secretary of State, and thus any devolved power of the NCTL, is derived solely from that statute. If the statute does not permit the NCTL to do what it did, its actions (including the actions of any professional conduct panel) are *ultra vires* (which means, beyond its powers) and would be treated as a nullity.

44. Section 141A is entitled "*Teachers to whom sections 141B to 141E apply*". It provides as follows:

> *(1) Sections 141B to 141E apply to a person who is employed or engaged to carry out teaching work at –*
>
> *a) a school in England*

b) a sixth form college in England

ba) a 16 to 19 Academy

c) relevant youth accommodation in England, or

d) a children's home in England.

"teaching work" means work of a kind specified in regulations under this section…"

45. Section 141B is entitled "*Investigation of disciplinary cases by Secretary of State"*. Its material provisions are as follows:

(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.

(2) Where the Secretary of State finds on an investigation of a case under subsection (1) that there is a case to answer, the Secretary of State must decide whether to make a prohibition order in respect of the person.

(3) *Schedule 11A (regulations about decisions under subsection (2)) has effect.*

46. The Regulations define "teacher" in exactly the same terms as the definition in s.141A of the 2002 Act, and "teaching work" as various specified activities relating to pupils, including delivering lessons to pupils, and assessing the development, progress and attainment of pupils. "Pupil" is defined by s.3 of the 2002 Act in these terms:

(1) In this Act "pupil" means a person for whom education is being provided at a school, other than –

a) A person who has attained the age of 19 for whom further education is being provided, or

b) A person for whom part-time education suitable to the requirements of persons of any age over compulsory school age is being provided.

47. Ms A was excluded from the statutory definition of "pupil" because, despite being only 17, she was undergoing part-time education suitable to the requirements of persons of any age over compulsory school age. On that basis alone, the appellant was not engaged in "teaching work" for the purposes of the Act or the Regulations when he was lecturing on the AAT course that she attended, which was open to adults aged up to 60. In any event, Ms A was not being provided with education at a "school" as defined in the 2002 Act. Newcastle College does not fall within the ambit of the descriptions of any of the educational institutions referred to in s.141A. It was, as it described itself to be, a further education establishment. Therefore, at the time of the conduct complained of, (and when it came to light) the appellant was not a teacher to whom sections 141B to 141E of the 2002 Act applied.

48. There may be some different regulator responsible for the conduct of those engaged as lecturers by further education establishments such as Newcastle College, or by Universities; however, at the hearing, neither counsel nor the appellant was able to identify any such body, if indeed it exists. It is possible that such conduct is solely a matter for internal regulation by the individual establishment that engages the teacher. In any event Parliament, in deliberately restricting the categories of educational establishment whose teachers are subject to regulation by the NCTL, plainly did not intend that someone doing the job that the appellant was doing at the relevant time would be subject to regulation by that body, regardless of the age of the people he was teaching, and however desirable such regulation might objectively appear to be. It is not the function of this Court to widen the ambit of the statutory restrictions on the Secretary of State's powers.

49. Ms Walker, who appeared on behalf of the Secretary of State, did not lodge a skeleton argument in this case until 4.30pm on the day before the hearing of the appeal, and I saw it (and the accompanying documents) for the first time less than an hour before the hearing commenced. Ms Walker apologised for the lateness of its arrival, but there was no excuse for it other than that the Secretary of State was considering her position in the light of the recent decision of HHJ Molyneux, sitting in this Court, in *Zebaida v Secretary of State for Education* [2016] EWHC 1181 (Admin) ("*Zebaida*"). The consequence was that an unrepresented appellant had no proper opportunity to respond to the points that Ms Walker made about whether or not I should follow that decision, as I am obliged by convention to do unless I consider it to be "clearly wrong".

50. Ms Walker sought to take some of the blame for the extreme lateness on the basis that she could have started drafting whilst waiting for instructions, but I do not consider that counsel is to be criticized for the late service of the skeleton argument in such circumstances. Regardless of the outcome of this appeal, the court's disapprobation of the Secretary of State's cavalier attitude to the rules of civil procedure, particularly in a case where the opposing party is representing himself, needs to be marked in a way that will discourage repetition. I will therefore direct that the Secretary of State shall bear her own costs of the appeal to this Court in any event, irrespective of the outcome of any further appeal.

51. The appellant did not seek an adjournment although, quite understandably, he protested about being faced with complex legal arguments at the very last minute. Having heard his objections, I decided to hear the legal argument before reaching a view as to whether fairness required me to give the appellant some time to consider that argument and to respond to it (which would have involved adjourning the hearing at the Secretary of State's expense). In the event, that course proved unnecessary, for reasons that will become apparent.

52. Ms Walker contended that it was not open to the appellant to take this objection on appeal because (unlike the appellant in *Zebaida*) he did not raise the point expressly with the panel. The first, and complete answer to this is that if the Secretary of State and the NCTL did something that they were not empowered to do, and the panel made a determination and recommendation that it had no jurisdiction to make, then the failure by the appellant to protest about it at the time does not confer the necessary power on them or validate their actions. The situation is not the same as, for example, a failure by a party to an arbitration to challenge the jurisdiction of the arbitrators.

Arbitration is a consensual process where the tribunal's jurisdiction is derived from the assent of the parties. However I am concerned in this case with a power that is derived from statute, and that power cannot be conferred by private agreement. In any event, given that the appellant is representing himself and this point is of such fundamental importance, going as it does to the legitimacy of the NCTL's actions from the outset, I would have allowed him to argue the point on appeal even if it had not occurred to him earlier. A refusal to do so would have been grossly unfair.

53. However, in my judgment the point was sufficiently flagged up in the appellant's response to the allegations, when he repeatedly stressed that he was engaged by the College and not by the Sixth Form College and that he was essentially teaching adults in a higher education context. The panel and the case presenter should have been aware of the ambit of the NCTL's jurisdiction but it appears that no-one, not even the panel's legal advisor, was alive to the fact that there was a serious issue about the legitimacy of the proceedings. What the appellant said was enough to have put them on notice of the issue.

54. Indeed, in the course of the appellant's correspondence with Mr Chapman the latter said, at one point, that the NCTL was seeking clarification from the College which had indicated that he "may have been" conducting hourly paid work with Sixth Form classes during his time in the SHE. That information turned out to be mistaken. In a subsequent letter from Mr Chapman dated 21 September 2015, he sought to justify the NCTL's involvement in the matter on this basis:

"As you have previously been engaged in teaching work with pupils under the age of 19 in a Sixth Form setting, it is reasonable to suggest that you may choose to re-engage in such work in the future. For this reason, it is in the public interest to ensure that any misconduct is fully investigated and tested to ensure that you are suitable to work with such students in the future…"

55. That implies that the NCTL had a power to investigate and refer the matter to a professional conduct panel merely because the appellant had been a teacher in the Sixth Form College in the past. Although she did not abandon that purported justification, Ms Walker very wisely chose not to press it. Instead, she sought to persuade the court that s.141B should be afforded an extremely generous interpretation, which she contended would address the mischief against which the statute was aimed.

56. On the face of it, s.141B(1) empowers the Secretary of State/NCTL to investigate an allegation that "a person to whom this section applies" may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute, or has been convicted (at any time) of a relevant offence. The natural interpretation of those words is straightforward. The section only applies to a person who falls within s.141A, i.e. someone who "is" employed or engaged by an institution falling within the categories listed in that section, to carry out teaching work as defined by the regulations. Although a literal interpretation of s.141B would require the subject of the allegations to be a teacher (as thus defined) at the time of the reference of the allegations to the NCTL, a purposive construction would embrace someone who was a teacher at the time of the conduct complained of, since it is his conduct in (or relating to) that professional role that would be the concern of the NCTL.

57. I note that the two subsections of s.141B (1) draw a distinction between relevant convictions (which the section specifies, may occur at *any time)* and unacceptable professional conduct or conduct that may bring the profession into disrepute. The fact that the draftsman drew that distinction at least arguably gives rise to an inference that conduct of the type falling within subsection (1) (a) may not occur at any time; it must be conduct occurring at or during a time when the person concerned fulfils the requirements of s.141A, i.e. when they are employed or engaged as a teacher (as defined in that section and the Regulations). There would be some sense in that interpretation, because conduct is unlikely to bring the teaching profession into disrepute if the person in question is not a teacher at the time. This approach to the construction of the section is fortified by the fact that the guidance for professional conduct panels of the NCTL specifically states that conduct outside of the education setting will only amount to unacceptable professional conduct if it affects the way the person fulfils their *teaching role,* or if it may lead to *pupils* being exposed to or influenced by such behaviour in a harmful way.

58. The appellant was charged solely with "unacceptable professional conduct". He was not charged with conduct that was likely to bring the [teaching] profession into disrepute. The conduct in question occurred during a period when he was teaching, in the ordinary sense of the word, but he was not then a "teacher" subject to the Regulations or ss.141A-E of the 2002 Act and the learners in his class were not "pupils". The emails were private communications sent outside classroom hours.

59. Ms Walker very properly referred me to ***Zebaida***, in which the issue was whether the 2002 Act permitted the referral to the Secretary of State of a person who was not employed as a teacher either at the time of the conduct or at the time of the referral. HH Judge Molyneux held that it does not. She said that if Parliament had intended s.141A to apply to a person who "is or has been employed" as a teacher then it could easily have drafted the section to say so. I respectfully agree.

60. Judge Molyneux was alive to the problems that could arise if s.141B (1) were interpreted as requiring that the person still be employed as a teacher as at the date of the referral. It would plainly defeat the object of the statute, chiefly, the protection of children and young persons, if a teacher who was dismissed for gross misconduct or chose to resign before a reference was made, could not be made the subject of NCTL investigation or a Protection Order. Therefore she held, applying the approach to construction endorsed by the House of Lords in Re M (a Minor) (Care Orders) [1994] 2 AC 424 that "a common sense and plain reading of the legislation allows for referral to the Secretary of State of a person who is employed or engaged in teaching (whenever the conduct giving rise to concern takes place) or who was so employed or engaged at the time the conduct complained of takes place or comes to light."

61. It is perhaps important to bear in mind that in that case, the "conduct" complained of was the commission of a sexual offence against a 15 year old, of which the individual concerned had been convicted, and thus under s.141B(1)(b), the teacher's conviction *at any time* could trigger a referral. That may possibly explain what she had in mind when she referred to the conduct "coming to light" at a time when the person concerned is engaged or employed as a teacher. Judge Molyneux was not specifically concerned with the position of someone whose alleged "unacceptable professional conduct" occurred at a time before they became a teacher falling within s.141A.

62. Some support for the construction adopted by the Judge in ***Zebaida*** is to be found in s.141D and 141E of the 2002 Act, which envisage that an employer or agency who has ceased to use the services of a teacher (or might have done so if the teacher had not ceased to provide those services) because of serious misconduct, must consider whether it would be appropriate to provide prescribed information about the teacher to the Secretary of State. There would be no point in the ex-employer or agency providing such information, if the Secretary of State were powerless to act upon it because the person concerned was no longer a "teacher" as defined in s.141A.

63. I agree with HHJ Molyneux that the words "a person to whom this section applies" in s.141B must refer to a person who fulfils the criteria in s.141A at the time of the conduct complained of, regardless of whether his or her contract of employment or engagement as a teacher remains in force at the time of the referral. That interpretation does not do undue violence to the language of the Statute, and is consistent with and gives effect to its underlying purpose. It would be far too easy for an individual to escape the sanction of a prohibition order simply by dint of resigning, if s.141B (1) were interpreted literally.

64. I also agree with HHJ Molyneux that a reference may also be made to the Secretary of State under s.141B(1) concerning someone who fulfils the criteria in s.141A at the time of the reference, and that the conduct complained of may have occurred at any time prior to the reference. However, if and insofar as the Judge's statement, in parenthesis, about the conduct occurring "at any time" could be interpreted as meaning that such a person need not have fulfilled the criteria in s.141A at the time when the conduct complained of occurred, provided that he or she does so at the time of the reference, I deliberately express no view as to whether or not that interpretation is correct. I would prefer to leave that issue for another occasion, when it arises squarely for consideration and can be properly and fully argued. For present purposes, suffice it to say that it does not appear obvious to me that it was the intention of Parliament that a person who is currently a teacher in a school should be subject to investigation or the making of a Prohibition Order in respect of non-criminal conduct occurring at some time in the past when he or she was not engaged or employed as a teacher as defined in s.141A.

65. There are respectable arguments for and against that interpretation. Unfortunately, because of the way this case developed, I did not hear them. I have already mentioned the indications in the statute itself and in the interpretation of the regulations in the guidance to the NCTL that favour the more restrictive interpretation. On the other hand, if the conduct in question casts doubt on such a person's suitability to teach children and young persons, then arguably it should qualify for investigation – dishonesty of any kind, for example, or inappropriate behaviour towards someone in respect of whom the individual concerned was in a position of authority or trust, even in a different kind of job.

66. What makes this case particularly troublesome is that the appellant's behaviour, and his failure to observe the appropriate boundaries between himself and a learner in his class (even if, as he says, he believed the learner to be an adult) is undoubtedly conduct of a type that would trigger alarms in the minds of those who were concerned to protect sixth-formers or teenagers that he might be teaching in future. On the other hand, the conduct occurred at a time when the responsibility for regulation of his conduct was not a matter for the Secretary of State and he was not engaged to teach

such pupils. Why should his subsequent engagement as a teacher suddenly bring that matter within the remit of s.141A and s.141B? It is plain from the way that the charges against the appellant were framed that the case presenter and the NCTL panel were all proceeding under the misapprehension that he was a "teacher" within the definition of s.141A at the time of the behaviour complained of and that Ms A was a "pupil" by reason of her age (which she was not).

67. Fortunately, it is unnecessary for me to determine that issue in order to decide this the appeal. Whatever else it means, the 2002 Act plainly does not permit a reference to be made to the Secretary of State on the basis that a person who did not fulfil the statutory criteria either at the date of the conduct (or, for that matter, when it came to light) or at the date of the reference had been engaged five years previously to teach in a sixth form college, or on the basis that the institution which engaged him was part of a group which included a sixth form college at which he was not teaching at the time of the conduct complained of. The reasons for pursuing the matter deployed by Mr Chapman in his letter of 21 September 2015 do not amount to a legal justification for the NCTL embarking on its investigation or referring the matter to a professional conduct panel.

68. Therefore, far from considering the decision in ***Zebaida*** that there is no power to investigate a person who did not fulfil the criteria either at the time of the conduct complained of occurring (or coming to light), or at the time of the referral, to be wrong, I would have reached exactly the same decision myself were the matter entirely free from authority. "Is" in s.141A must mean "Is, at a time which is relevant". It cannot mean "was at any time".

69. If the appellant had met the criteria in s.141A at the time of the conduct complained of, then I would have held that his resignation was no bar to an investigation by the NCTL. However he did not meet those criteria either at the time of the conduct or at the time of the reference. The investigation was therefore something which in my judgment the Secretary of State, and therefore the NCTL, had no power to commence. The NCTL had no power to investigate his conduct when it purported to do so, or to direct that the matter be put before a professional conduct panel. The panel itself had no power to hold a hearing or to make any recommendations following that hearing.

70. As a general rule, where the power to do something is conferred by legislation, and the legislation does not extend to what was done, any steps taken in purported exercise of that power which goes beyond what the legislation permits must be regarded as a nullity. The question of ratification does not arise in this case, even if it were within the power of the Secretary of State to ratify what the NCTL had done (another point on which I heard no argument and was shown no authorities). First, the Secretary of State did not argue that there was ratification. Secondly, there is no evidence that anyone acting on behalf of the Secretary of State or the NCTL recognized the fact that the NCTL was acting *ultra vires*, let alone took a conscious decision to seek to cure the situation by formally adopting the steps taken when there was no power, at a time when the power in fact existed. In fact, the evidence all points the other way: the NCTL did not even know that the appellant was acting as a teacher until after the Prohibition Order had been made.

71. That leaves the vexed question of whether an investigation which the NCTL had no power to carry out, and a referral of professional conduct charges for hearing before a

professional conduct panel which had no jurisdiction to hear them at the time, somehow became legitimate by reason of the happenstance that, at the time when the hearing took place, unbeknown to the case presenter and the panel, the appellant did fulfil the criteria in s.141A. There is an obvious attraction in Ms Walker's submission that it would be pointless to require the Secretary of State to initiate the whole process over again once the appellant fulfilled the criteria for referral, especially if I were to conclude that the investigation and the ensuing process leading to the panel's recommendation was conducted fairly and that there was no merit in the substantive arguments raised by the appellant on this appeal. She contended that because the appellant was engaged as a teacher as defined in the statute and the Regulations at the time when the panel hearing took place and at the time when the Prohibition Order was made, the Secretary of State had the power to make it.

72. I cannot accept that line of reasoning. S.141B(2) expressly provides that the Secretary of State must decide whether to make a prohibition order in respect of the person where the Secretary of State finds on an investigation of a case under subsection (1) (my emphasis) that there is a case to answer. The Regulations relate to a certain body of teachers, which excludes lecturers in higher or further education institutions. They only prescribe how the allegations against such persons should be investigated, and require the recommendation of an NCTL panel, to whom a lawful reference has been made pursuant to an investigation under subsection (1), to be considered before the Secretary of State decides what to do. In this particular case there was no investigation under subsection (1) at any time, because there had been no valid referral under that subsection. There was no lawful reference to the panel and it had no power to make any recommendation. The fact that the appellant became a teacher afterwards did not somehow convert the unlawful investigation into a legitimate investigation under subsection (1) without anyone involved realising it.

73. Ms Walker made the point that the powers of the Secretary of State to protect children and young persons should not be frustrated by someone dropping in and out of the teaching profession. I see the force of that argument; but that is a matter of policy which Parliament is best placed to address. At present, Parliament has specified that the Secretary of State's regulatory powers should only apply to persons who fulfil the criteria in s.141A at the time of the conduct complained of occurring (or possibly, at the time of it coming to light) or at the time of the referral of the allegations to the NCTL, not to persons who may fulfil those criteria at some time in the future, or at any time whatsoever. The appellant, who did not fulfil those criteria at any of the relevant times, has been subjected to an investigation and a disciplinary process that the NCTL had no business instigating. Why should the NCTL be entitled to salvage the position and reap the benefits of an unlawful investigation simply because he happened to start teaching in an Academy before the panel sat, when it would have had no answer to the objection if someone in exactly the same situation did not start working as a teacher until the day after the Secretary of State issued the Prohibition Order? The lawfulness of the behaviour of a regulator and the actions taken by the Secretary of State based upon its recommendations cannot depend on such vagaries of timing.

74. I have concluded that it would go beyond the legitimate powers of interpretation of the relevant provisions of the 2002 Act to extend s.241B to a person who was not a "teacher" as defined by s.241A at the time of the conduct complained of, (or possibly,

at the time when it came to light) and who was not a "teacher" at the time of the referral, but who became a "teacher" at a later date, even if that was before the panel hearing took place and before the Prohibition Order was made. The 2002 Act simply does not contemplate that scenario. I can find nothing in s.241B which permits the Secretary of State to make a Prohibition Order in circumstances in which the allegation was not lawfully referred to her in the first place under s.241B(1). Indeed the language of s.241B(2) appears to me to indicate the precise opposite.

75. In summary, Parliament has stipulated in s.241A and 241B of the 2002 Act that the NCTL's regulatory remit extends only to those who are teachers, as therein defined, at the time of the conduct complained of (or, possibly, when that conduct came to light) or at the time when the allegations of misconduct were referred to the Secretary of State or the NCTL acting on her behalf. That interpretation accords with the language adopted by the draftsman, including the use of the present tense in s.241A, and creates a certainty and a uniformity of approach by which regulators and professionals alike can be guided. Any other interpretation would create a lottery.

76. Tempting though it is to jump to the conclusion that it would serve no useful purpose to make the NCTL start a fresh investigation in a case such as this, or that to require it to do so would result in a waste of time and costs, the apparent iniquities of the result in an individual case do not justify giving the statute an interpretation it plainly cannot bear. In any event, requiring the investigation to be initiated at a time when the appellant does fulfil the requirements of s.141A would at least afford him the opportunity to raise the argument, if he so wishes, that the conduct complained of is not within the remit of investigation by the NCTL as "unprofessional conduct" because it was not committed at a time when he was a teacher, and that point can then be the subject of full and proper legal argument and a properly reasoned decision.

77. For those reasons the appeal must be allowed and the Prohibition Order set aside. However, in case this matter goes further, I will deal as briefly as possible with the remaining grounds raised by the appellant.

PROCEDURAL UNFAIRNESS

78. The appellant complained of the following matters:

i) The late change in the allegations that he had to face;

ii) The decision to treat Ms A as a vulnerable witness and afford her special measures;

iii) The fact that he did not have an opportunity to actively participate in the Case Management Hearing despite telling the NCTL that he wished to do so and giving them a range of dates and times on which he could make himself available for a telephone hearing;

iv) The failure by the NCTL to call the witnesses he wanted to call.

v) The fact that the NCTL's decision to investigate and put the matter before a panel was made on the basis of an incomplete version of Mr Bolton's internal report and the annexures to it.

vi) Being afforded insufficient time to make his final submissions at the end of the hearing.

The appellant did not actively pursue this final complaint at the hearing of the appeal: this is not surprising because, having read the transcripts it is plain that he was perfectly able to put his case about the alleged inconsistencies in Ms A's and Ms B's evidence in order to demonstrate that they were making things up. He also had a fair opportunity to criticise the evidence given by Mr Bolton.

79. I am also satisfied that the appellant suffered no procedural unfairness in any other respect. The allegations made about his behaviour towards Ms A were essentially the same as allegations that had been made by her from the outset; all that the NCTL did in December 2015 was to spell out the particulars of each aspect of his conduct towards her which it alleged overstepped the permissible boundaries and (by allegation 3) to have been sexually motivated. There was nothing new in allegation 1, and so he was not taken by surprise or unable to defend himself against each particular aspect of it. Allegation 2 was mentioned in Ms A's original interview and in any event, that was found by the panel not to have been proved.

80. Fairness did not require that the appellant should be given another opportunity to put in yet another written response to the reformulated allegations, since his original detailed written response essentially covered all the necessary ground. As Ms Walker pointed out in her skeleton argument, when asked by the Chairman of the panel on the morning of the first day of the hearing whether he had had sufficient time to gather his evidence and he felt that he was capable and able to proceed, the appellant confirmed that he was.

81. At one point in his oral submissions the appellant contended that if the allegations had been left in their original formulation they would not have been proved. Apart from the allegation which was dropped, I disagree. Allegations 1 and 3 as originally formulated would have been proved on the findings made by the panel. The appellant said that allegations 1b, c, d, e and f were all seen as proved already, and that was the unfairness, because if all or most of the allegations were proved "the panel was bound to find my behaviour was inappropriate". However, it did not follow that because the allegations were particularised in the way that they were, or because some of the facts (such as the sending of the emails) were not disputed, it created an unfair impression of more serious behaviour, or that his motivation ceased to be the central issue.

82. Regardless of how the allegations were particularised, the key question for the panel to determine was why the appellant sent those emails, particularly those on 22, 23 and 25 October. His defence was that he was acting out of pastoral concern and nothing more. His alleged behaviour towards Ms A in the course of the lessons, particularly in the lesson on 22 October 2013, was something that would potentially assist in answering the question, and that was going to depend on an assessment of the credibility of Ms A's and Ms B's account. Much was also going to depend on the panel's assessment of the appellant himself as a witness.

83. The panel had the power under the rules to treat Ms A as a vulnerable witness; that was a matter for its discretion. Whilst another panel might well have taken a different view, considering that the only alleged physical contact between the appellant and Ms A was that he touched her hand over a computer mouse and rubbed his thumb over it,

and that he put his arm around the back of her chair, it does not mean that this panel acted unreasonably or unfairly to the appellant by acceding to the case presenter's application for special measures. The appellant was able to put all the questions that he wished to Ms A. In his oral submissions, the appellant claimed that he was disadvantaged by not being able to put them directly to her in the way he did with Ms B, which he said led to Ms B contradicting herself; however, as I have already pointed out, in his letter of 3 January 2016 he had expressly assented to his questions being put to Ms A via the panel and written down in advance. In any event, I am not satisfied that he suffered any material or significant detriment through the procedure that was adopted in Ms A's case. He had a proper opportunity to test her evidence, and to make submissions to the panel about its reliability and her credibility.

84. As to the failure to hold an oral case management hearing, the appellant's position with regard to the directions sought by the presenting officer was fully explained to the panel in his two letters sent in January 2016, and as the case management decision demonstrates, what he had to say in those letters was taken into consideration when the issues were considered on the papers. Mr Chapman was not present at that "hearing" either, so he gained no procedural advantage over the appellant. I am not satisfied that there was any disadvantage to the appellant in the matter being dealt with in the way that it was, let alone that a determination on the papers amounted to procedural unfairness.

85. The complaint about the failure by the NCTL to call the witnesses the appellant wished to give evidence on his behalf is misconceived. First of all, he should have sought to obtain statements from them himself; his failure to read the rules or to properly read the letter sent to him in December 2015 which spelled this out, and his failure to understand that it was his responsibility, is not something that can be laid at the door of the NCTL. In any event, none of the three people that the appellant said he wished to call, even Ms D, was alleged to have been an eyewitness to his behaviour towards Ms A who might contradict Ms A's and Ms B's evidence about it. Their evidence, to the extent that I am able to discern what it might cover, appears to be of marginal significance to anything the panel had to decide.

86. At the hearing of the appeal, I asked the appellant to explain to me how these witnesses might have helped his defence (i.e. what he would have said to Mr Chapman had he not mistakenly believed that Mr Chapman was doing something wrong by asking him what issues their evidence would address). He said that Ms Roberts would prove that he had had his first review period with her at 4pm on 22 October immediately after the class finished. I could not understand how establishing that would in any way undermine the credibility of Ms A or Ms B, or might otherwise assist him. He did not clearly explain to me why it was that he wished to call Ms D, other than that he wanted to ask her why she had forwarded an (innocuous) email that he had sent her to the College. No explanation was given as to why he wished to call Ms King. I am not persuaded that anything they might have said would have made a material difference. Even if it would have done, it was not the NCTL's fault that they were not called. The appellant cannot blame the NCTL for his own failure to tell them why he wanted those witnesses when he was given the opportunity (more than once) and a very fair explanation from Mr Chapman which he chose not to believe. Even if he had explained why he wanted to call them, the panel could still have reached a fair

decision that they were not material witnesses and that it was not going to require their attendance under the rules.

87. On the appeal, the appellant sought to rely on a witness statement from Ms Karen Quilley, a course leader for the AAT qualification and related accountancy courses with Newcastle College. It appears that Ms Quilley's evidence might be of the same nature as at least some of the evidence that the appellant may have wished to adduce from Ms Roberts, who was the line manager for them both. Ms Walker did not object to my reading the statement even though technically it did not meet the requirements of the rules for adducing fresh evidence on appeal.

88. Ms Quilley states that there was no electronic college register for apprentices and that the appellant used to email her the names of students who attended his lessons so as to create a record of their attendance. She refers to the inability of apprentice students to save their work to temporary accounts created for them on the college network, and explains that this was why the appellant would save the apprentice's work onto a memory stick which was provided by the college and re-load it onto their computer at the next lesson. That explained the attachments to his final email to Ms A, though it did not explain why he sent them to her and not to the other learners. Finally she says that there were endless problems with Sage not working, and that if it did not work on a computer into which a student had logged in, the student would have to move to another computer.

89. That final piece of evidence of Ms Quilley is potentially of some relevance to a suggestion by Ms A and Ms B that the appellant appeared to have made up an excuse to move C from the computer at which he had been sitting, in between Ms B and Ms A, by pretending that the computer was not working. However, Ms A said in her witness statement that the computers were "not great and sometimes they would not let you log on" and Ms B also referred to computers not working at exam times. Both Ms A and Ms B said that C was (actively) working on the computer on the specific occasion when he was moved. Ms Quilley's evidence casts no light on whether he was or not, and adds little or nothing to a point about the state of the College computers that appears to have been uncontentious.

90. Finally, the fact that the NCTL had an incomplete version of Mr Bolton's report and its annexures until the appellant supplied it with the complete version in October 2015 does not invalidate its earlier conclusions that there was sufficient information to send to the professional conduct panel. Leaving aside the point on jurisdiction, which is a separate matter, even the incomplete version included Ms A's near-contemporaneous account of events in interview with Mr Bolton. There was more than sufficient material to warrant the NCTL sending the letters of 1 June and 3 August 2015. In any event the NCTL had the full documentation by the time it formulated the final version of the allegations in December 2015.

91. Therefore I find that there was no procedural unfairness to the appellant as he alleges on any of the grounds that he has raised.

CREDIBILITY OF THE WITNESSES

92. The appellant submitted that it was not open to the panel to find that the evidence of Ms A and Ms B (and, to the extent that he disputed it, that of Mr Bolton) was

credible. That is not an easy allegation to make good on appeal, even an appeal by way of rehearing, as this appeal is: especially where the tribunal of first instance has had the advantage of seeing and hearing the witnesses over three days of evidence. There may be rare occasions in which the appellate court is in as good a position to assess credibility as the court or tribunal below, or where the latter has not gone through a proper process of assessment, or its reasons for accepting someone's account can be demonstrated to be plainly flawed. A mere disagreement by the appellant with the panel's assessment of credibility will not suffice.

93. The appellant essentially made the same points to this Court as he made to the panel; he referred to a number of passages in the transcripts which he said showed that the witnesses contradicted themselves and/or each other in such a way that the panel could not have believed them (essentially because the evidence was too inconsistent to be reliable). He submitted, for example, that if he had put his right hand over Ms A's left hand on the mouse, as Ms B said he did, Ms B would not have been able to see him doing it, because his back would have obstructed her view. However that rather depends on where he was standing at the time. He also referred to the fact that Ms Hassan had recorded in an email that Ms A told her that he touched her hand over the mouse several times, whereas Ms A's oral evidence was that it only happened once. Ms A was unable to recall which hand he had used to guide hers on the mouse, although she thought it was his right hand.

94. As Ms Walker pointed out in her skeleton argument, the fact that this panel conscientiously considered the evidence and weighed it carefully is demonstrated by the fact that it rejected two of the allegations against the appellant, one on the basis of its inconsistencies. Moreover, the panel was not bound to determine that the witnesses were not credible even if it decided that their accounts were inconsistent; and if it rejected parts of their accounts as unreliable or inconsistent, it was not thereby bound to reject the rest. The appellant did not appear to appreciate that lying is not the only explanation for a witness giving evidence that is inconsistent or contradictory. Memories of facts or events may fade over time. Persons to whom events are reported may not record or recollect them accurately. His own account of the "hypothetical" question that Mr Bolton asked him in interview has changed from time to time.

95. I have carefully considered all the points raised by the appellant in his skeleton argument and drawn to my attention in his oral submissions, and read and re-read all the parts of the transcript that he relied on as demonstrating fatal inconsistencies or other matters that might adversely affect the credibility of the witnesses. However, this is not a case in which there is anything obvious to indicate that any of these witnesses must be lying; on the contrary, the two learners readily agreed to points that might be helpful to the defence, including that the appellant was a good teacher, and that he was popular and friendly and got on very well with their small group (i.e. Ms A, Ms B and C). They accepted that they would chat to him about matters unrelated to the class. Ms A accepted that she might have written her personal email address down on a piece of paper in response to a request that all the learners did so, although she did not remember doing so. Ms B, the person who is alleged by the appellant to have put Ms A up to making a false complaint, said that initially she did not take the matter of the emails sent to Ms A particularly seriously. Ms A did not exaggerate the number of occasions on which the alleged behaviour took place.

96. My overall impression is that the evidence did not support a picture of two young women making up a story to get a lecturer into trouble, or support the appellant's suggestion that Ms B put Ms A up to making a false complaint against him – particularly since Ms A appears to have been reluctant to say anything about the matter, until after she was asked to see Ms Hassan. The motive suggested by the appellant makes little sense; if Ms B resented the appellant's failure to respond to her own supposedly over-friendly overtures about the weekend on 22 October, she cannot have foreseen that he was going to send personal emails to her friend after the class, let alone ask her out to lunch. If she had a grudge against him, it would have been far easier for her to make up a story about his behaviour towards her, than to get her friend to lie to the College and then persist in telling those lies to a professional conduct panel. If anything, the inconsistencies in the two young women's evidence support its truthfulness, because someone making up a story would tend to exaggerate and would not be willing to admit that she might be mistaken about something. In any event, the panel was in the best position to judge their credibility.

97. The panel was entitled to prefer Mr Bolton's evidence regarding the accuracy of his notes of the interview with the appellant, which were countersigned by him and were not challenged at the disciplinary hearing on 28 November 2013, as one might expect had they really contained any material inaccuracies. Mr Bolton readily accepted that he had paraphrased some of the questions and answers in his notes, though not the "hypothetical" exchange. In any event, even if the panel had accepted the appellant's version of the "hypothetical" question Mr Bolton asked him, it is unlikely to have improved his position; his own account of the question and answer he gave to it indicated that he would have been quite comfortable with the idea of the relationship between himself and Ms A developing into a romantic one, and that in itself is indicative of the lack of insight into his behaviour which the panel unsurprisingly found.

98. As Ms Walker pointed out, Mr Bolton had no reason to try and engineer the appellant's dismissal because as Mr Bolton acknowledged, it was very difficult to get suitable lecturers in the subjects that the appellant was teaching and the appellant was very good at what he did.

MISCELLANEOUS GROUNDS

99. I have also considered the complaints made in the appellant's written grounds of an alleged lack of impartiality and discrimination, although the appellant did not address them in his oral argument at the hearing of the appeal. I am satisfied that there is no merit in any of the complaints made by the appellant in this regard, which are answered comprehensively in paragraphs 68 to 73 of Ms Walker's skeleton argument.

CONCLUSION

100. For these reasons I am satisfied that there is no substance in any of the grounds of appeal raised by the appellant apart from the legal point he has taken objecting to the power of the NCTL to carry out the investigation and to the power of the Secretary of State to make the Order. However, he only needs to succeed on one ground in order to succeed in his appeal. As the Secretary of State had no power to investigate the matter, the fact that process adopted was conspicuously fair and the fact that if the NCTL had been empowered to refer the matter to the panel, its findings would have

been unimpeachable, are of no consequence. The proceedings were a nullity; the panel had no power make any findings about the appellant's conduct, or to recommend a Prohibition Order in this case, and the Secretary of State had no power to make one. Therefore this appeal is allowed and the Prohibition Order will be set aside.