Neutral Citation Number: 2012 EWHC 406 (Admin)

Case No: CO/9522/2011

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

2nd March 2012

Before :

HIS HONOUR JUDGE GILBART QC
HONORARY RECORDER OF MANCHESTER
(sitting as a deputy High Court Judge)

- -

Between :

THE QUEEN (ON THE APPLICATION OF W) **Claimant**

- and -

CHIEF CONSTABLE OF WARWICKSHIRE POLICE **Defendant**

- -
- -

Pete Weatherby (instructed by **Thompsons, Solicitors of Newcastle upon Tyne**) for the **Claimant**
Jeremy Johnson QC (instructed by **Warwickshire County Council Resources Group, Solicitors**) for the **Defendant**

Hearing dates: 13 th February 2012

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JUDGEMENT

(as approved by the Court)

JUDGE GILBART QC:

1. In this matter, Mr W seeks a declaration that the issue by the Defendant Chief Constable on 20th July 2011 of an Enhanced Criminal Record Certificate under section 113 B of the *Police Act 1997* (as amended) was unlawful, and also seeks damages for an alleged breach of Article 8 of the European Convention on Human Rights. The certificate in question here was issued by the Defendant Chief Constable on 11th July 2011, after Mr W had applied to an education authority (not Warwickshire) to become a supply teacher. A note appears at the end of this judgement on the reasons why I have not set out the Claimant's name.
2. By Regulation 12 of the *School Staffing (England) Regulations 2009* when the governing body of a community, voluntary controlled, community special or maintained nursery school approves, identifies, selects or recommends a person for appointment, it must obtain an "enhanced criminal record certificate" which is defined as one within the meaning of section 113B of the *Police Act 1997* which includes suitability information relating to children within the meaning of section 113BA(2) of that Act. That provision is applied to supply teachers by Regulation 13.
3. Section 113B, so far as is relevant, reads as follows

> 113B Enhanced criminal record certificates
>
> (1) The Secretary of State must issue an enhanced criminal record certificate to any individual who—
>
> (a) makes an application in the prescribed manner and form, and
>
> (b) pays in the prescribed manner any prescribed fee.
>
> (2) The application must—
>
> (a) be countersigned by a registered person, and
>
> (b) be accompanied by a statement by the registered person that the certificate is required for a prescribed purpose.
>
> (3) An enhanced criminal record certificate is a certificate which—
>
> (a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with subsection (4), or
>
> (b) states that there is no such matter or information.
>
> (4) Before issuing an enhanced criminal record certificate the Secretary of State must request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion—

(a) might be relevant for the purpose described in the statement under subsection (2), and
(b) ought to be included in the certificate.

(5) ……

(6) The Secretary of State must send to the registered person who countersigned the application—
(a) a copy of the enhanced criminal record certificate, and
(b) any information provided in accordance with subsection (5).

4. In this matter, the Chief Constable provided information under section 113B(4). The certificate under challenge was issued in July 2011.

The Certificate in Issue

5. The relevant parts of the Certificate read

"Police Records of Convictions, Cautions, Reprimands and Warnings
None Recorded
Information from the list held under section 142 of the Education Act 2002
None Recorded
ISA Children's Barred List information
None Recorded
ISA Vulnerable Adults' Barred List information
None Recorded
Other relevant information disclosed at the Chief Police Officer's discretion
……
Warwickshire Police holds the following information concerning the Applicant (Mr W) born……that in the opinion of the Chief Officer might be relevant to this application and ought to be disclosed under Part V of the Police Act 1997:

In 2002, (Mr W) was employed as a teacher at a school for children with learning disabilities, including autism. Between March 2002 and September 2002, 4 separate incidents were reported where it was alleged that (Mr W) had assaulted or used excessive force on pupils.
In March 2002, a 15 year old boy alleged that (Mr W) had hit him in assembly. This matter was dealt with internally by the school
In April 2002, a multi-agency strategy meeting considered reports from the parents of a female pupil that Mr W had touched her bottom and squeezed her arm leaving a red mark. This matter was dealt with internally by the school.
In September 2002, a classroom assistant reported that in June 2002 (Mr W) had kicked a classroom door shut on her and a pupil, causing both the pupil and assistant's hand/arm to be caught in the doorframe.
On 12 September 2002, an allegation was made that (Mr W) had deliberately slammed a classroom door on to a pupil's hand, causing a significant injury. This allegation resulted in a police investigation. Mr W was not charged.

> (Mr W) was subsequently dismissed from the school but was successful in proceedings before the Employment Tribunal for unfair dismissal. The Employment Tribunal is not believed to have had evidence before it (in) respect of the March April and June 2002 allegations."

The Law

6. The leading case is *R(L) v Commissioner of Police for the Metropolis* [2009] UKSC 3 [2010] 1 AC 410. It addressed earlier legislation (the *Police Act 1997* before its amendment in 2005) but the relevant test (s 115(7) of the 1997 Act) is the same as that in section 113B(4). The statute involves a two stage test

   (a) might the material identified in the certificate be relevant ?

   (b) ought it to be included ?

   At the first stage, it is for the Chief Constable to form an opinion as to whether the information might be relevant- see Lord Hope (with whom Lord Saville JSC Lord Brown JSC and Lord Neuberger of Abbotsbury MR all expressly agreed) in *R(L) v Commissioner of Police for the Metropolis* [2009] UKSC 3 [2010] 1 AC 410 at paragraph 39. The threshold is a low one, and may extend to mere suspicions or hints of matters which are disputed by the applicant; see Lord Neuberger of Abbotsbury MR at paragraph 77.

7. It is for the Chief Constable or his delegate to form an opinion on whether material might be relevant. In doing so, he must ask himself whether the information might be true, and if so, the degree of connection between the information and the purpose for which the certificate was required- i.e. in this case the Claimant teaching children. At this first stage, the issue is whether the opinion formed by the Chief Constable or his delegate was reasonably open to him. It is a matter of judgement only reviewable on a *Wednesbury* basis ; see Richards LJ in *R (Pinnington) v Chief Constable of Thames Valley Police* [2008] EWHC 1870, endorsed in *R(L) v Commissioner of Police for the Metropolis* by Lord Hope at paragraph 39.

8. At the second stage, Article 8 of the European Convention of Human Rights is relevant. That reads as follows

> "Right to respect for private and family life
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of

> national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

9. In the words of Lord Hope at paragraph 40 of *R(L) v Commissioner of Police for the Metropolis*

> "40. The question whether the information might be relevant is not, however, the end of the matter. An opinion must also be formed as to whether it "ought" to be included in the certificate. It is here, as the guidance that is available to the police correctly recognises, that attention must be given to the impact that disclosure may have on the private lives of the applicant and of any third party who is referred to in the information. For the reasons I have already given (see paras 22-29), I consider that the decisions which the chief officer of police is required to take by section 115(7) of the 1997 Act will fall within the scope of article 8(1) in every case. So in every case he must consider whether there is likely to be an interference with the applicant's private life, and if so whether that interference can be justified."

10. Lord Hope went on at paragraphs 44 to paragraph 47 to say

> "44……The words "ought to be included" in section 115(7)(b) require to be given much greater attention. They must be read and given effect in a way that is compatible with the applicant's Convention right and that of any third party who may be affected by the disclosure: Human Rights Act 1998 Act, section 3(1). But in my opinion there is no need for those words to be read down or for words to be added in that are not there. All that is needed is to give those words their full weight, so that proper consideration is given to the applicant's right to respect for her private life.
>
> 45. The correct approach, as in other cases where competing Convention rights are in issue, is that neither consideration has precedence over the other: *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, para 12, per Lord Nicholls of Birkenhead. The rating table in MP9 should be restructured so that the precedence that is given to the risk that failure to disclose would cause to the vulnerable group is removed. It should indicate that careful consideration is required in all cases where the disruption to the private life of anyone is judged to be as great, or more so, as the risk of non-disclosure to the vulnerable group. The advice that, where careful consideration is required, the rationale for disclosure should make it very clear why the human rights infringement outweighs the risk posed to the vulnerable group also needs to be reworded. It should no longer be assumed that the presumption is for disclosure unless there is a good reason for not doing so.
>
> 46. In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer

> true, chief constables should offer the applicant an opportunity of making representations before the information is released. In *R (X) v Chief Constable of the West Midlands Police* Lord Woolf CJ rejected Wall J's suggestion that this should be done on the ground that this would impose too heavy an obligation on the Chief Constable [2005] 1 WLR 65, para 37. Here too I think, with respect, that he got the balance wrong. But it will not be necessary for this procedure to be undertaken in every case. It should only be resorted to where there is room for doubt as to whether there should be disclosure of information that is considered to be relevant. The risks in such cases of causing disproportionate harm to the applicant outweigh the inconvenience to the chief constable.
> *Conclusion*
> 47. In my opinion it is possible for section 115(7) to be read and given effect in the way that I have indicated so that decisions are taken which are compatible with the applicant's article 8 rights. It must follow that it would not be appropriate for a declaration to be made under section 4 of the Human Rights Act 1998 that the subsection is incompatible."

11. Lord Neuberger said this at paragraphs 81 to 86

> " 81. Having decided that information might be relevant under section 115(7)(a), the chief officer then has to decide under section 115(7)(b) whether it ought to be included, and, in making that decision, there will often be a number of different, sometimes competing, factors to weigh up. Examples of factors which could often be relevant are the gravity of the material involved, the reliability of the information on which it is based, whether the applicant has had a chance to rebut the information, the relevance of the material to the particular job application, the period that has elapsed since the relevant events occurred, and the impact on the applicant of including the material in the ECRC, both in terms of her prospects of obtaining the post in question and more generally. In many cases, other factors may also come into play, and in other cases, it may be unnecessary or inappropriate to consider one or more of the factors I have mentioned. Thus, the material may be so obviously reliable, relevant and grave as to be disclosable however detrimental the consequential effect on the applicant.
> 82. In a nutshell, as Lord Hope has said, the issue is essentially one of proportionality. In some, indeed possibly many, cases where the chief officer is minded to include material in an ECRC on the basis that he inclines to the view that it satisfies section 115(7)(b), he would, in my view, be obliged to contact the applicant to seek her views, and take what she says into account, before reaching a final conclusion. Otherwise, in such cases, the applicant's article 8 rights will not have been properly protected. Again, it is impossible to be prescriptive as to when that would be required. However, I would have thought that, where the chief officer is not satisfied that the applicant has had a fair opportunity to answer any allegation involved in the material concerned, where he is doubtful as to its potential relevance to the post for which the applicant has applied, or where the information is

historical or vague, it would often, indeed perhaps normally, be wrong to include it in an ECRC without first giving the applicant an opportunity to say why it should not be included.

83. This conclusion is at odds with what was said by Lord Woolf MR in *R(X) v Chief Constable of West Midlands Police* [2005] 1 WLR 65, para 41. He said that "absent any untoward circumstance it is difficult to see that there can be any reason why the information that 'might be relevant' ought not to be included in the certificate" (although it is only fair to add that he did, correctly, refer to the issue as being one of proportionality). In my view, that approach is wrong, even if one ignores the fact that article 8 is engaged. Section 115(7) contains two tests which have to be satisfied, and there is no reason to think that the second test was intended to be of only marginal relevance and rare application. On the contrary: given the low threshold of the first test and the importance of an ECRC to an applicant, one would expect the second test to be important, and this point receives some support from the para 30 of the White Paper which preceded the 1997 Act (see para 5 of Lord Hope's judgment). The point is heavily reinforced, of course, once the impact of article 8 is taken into account.

84. In *R (X) v Chief Constable of West Midlands Police* [2005] 1 WLR 65, para 67, Lord Woolf MR, disagreeing with the view to the contrary of Wall J at first instance ([2002] EWHC 61 (Admin), [2004] 1 WLR 1518), said that it would be inappropriate to interpret section 115(7)(b) as imposing a duty on a chief officer to contact applicants where he was proposing to include material under section 115(6)(a)(ii) in an ECRC. Lord Woolf thought that this would involve imposing too heavy a burden on chief officers. I disagree. While far from suggesting that the duty would arise in every case, it seems to me that the imposition of such a duty is a necessary ingredient of the process if it is to be fair and proportionate. The widespread concern about the compulsory registration rules for all those having regular contact with children, as proposed by the Government in September 2009, demonstrates that there is a real risk that, unless child protection procedures are proportionate and contain adequate safeguards, they will not merely fall foul of the Convention, but they will redound to the disadvantage of the very group they are designed to shield, and will undermine public confidence in the laudable exercise of protecting the vulnerable.

85. ……The procedures currently adopted by chief officers have been described by Lord Hope in paras 30 to 34, and they are plainly, and sensibly, based on the observations of Lord Woolf MR in *R (X) v Chief Constable of West Midlands Police* [2005] 1 WLR 65. It is apparent that, as one would hope, chief officers and their staff take their responsibilities under Part V of the 1997 Act very seriously. However, it is also clear that the current procedures will need to be adapted to accord considerably greater weight to section 115(7)(b) and considerably greater recognition to the article 8 rights of applicants.

86. For these reasons, which are little more than an echo of those more fully expressed by Lord Hope, with whose judgment I agree, I conclude that sections 115(6)(a)(ii) and 115(7) of the 1997 Act can and

> should be given an effect which is compatible with the article 8 rights of those who make applications under section 115(1). I also consider that, for the reasons given by Lord Hope in para 48, the decision in this particular case cannot be faulted. Accordingly, I too would dismiss this appeal."

12. It should be noted that in *L*, although the Supreme Court held that the Police had in that case given insufficient weight to the then appellant's respect for her private life, yet the material should have been disclosed. In the words of Lord Hope at paragraph 48

> " I would also decline the appellant's request that the decision that was made in her case should be quashed. There is no doubt that the information that was disclosed about her was relevant for the purpose for which the ECRC was being required. As for the question whether it ought to have been disclosed, insufficient weight was given to the appellant's right to respect for her private life. But there is no doubt that the facts that were narrated were true. It was also information that bore directly on the question whether she was a person who could safely be entrusted with the job of supervising children in a school canteen or in the playground. It was for the employer to decide what to make of this information, but it is not at all surprising that the decision was that her employment should be terminated. The consequences that disclosure will have for her private life are regrettable. But I can see no escape from the conclusion that the risk to the children must, in her case, be held to outweigh the prejudicial effects that disclosure will give rise to. I would dismiss the appeal."

13. At the second stage, the court must assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; see *R (B) v Derbyshire Constabulary* [2011] EWHC 2362 (Admin) per Munby LJ. At paragraphs 65-66 he said

> 65 The function of the court is one of review, not decision on the merits. But what is the appropriate standard of review? That was not an issue considered by the Supreme Court in *L* though it had been touched on tangentially by the Court of Appeal: *R (L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2007] EWCA Civ 168, [2008] 1 WLR 681, paras [40]-[41]. But subsequent authority makes it clear that the applicable standard of review is not the *Wednesbury* test of irrationality; what is required in this sensitive area of human rights is the more intense standard of review described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, para [27]. In a case such as this, proportionality requires the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; this goes further than the traditional grounds of review inasmuch as it requires attention to be directed to the relative weight

> accorded to interests and considerations: *R (H and L) v A City Council* [2011] EWCA Civ 403, [2011] UKHRR 599, para [41].
> 66 That is therefore the approach we have to apply when considering the substance of the chief officer's opinion. But if and insofar as there is a 'reasons' challenge – and part of Mr de Mello's attack here goes to the reasons as set out by Ms Davies – the court must not be astute to find failings. I venture to repeat what I said very recently in *R (E, S and R) v Director of Public Prosecutions* [2011] EWHC 1465 (Admin), para [62], a 'reasons' challenge to a Crown Prosecutor's decision to prosecute which, in the event, was held by the Divisional Court not to have been compliant with the relevant guidance issued by the Director of Public Prosecutions:
>
> > "… a decision such as this is to be read in a broad and common sense way, applying a fair and sensible view to what the decision maker has said … as Lord Hoffmann pointed out in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, reasons should be read on the assumption that, unless she has demonstrated the contrary, the decision maker knew how she should perform her functions and which matters she should take into account."
>
> And I went on to point out the need to have very much in mind his warning that an appellate court – and the same must also go for this court – must "resist the temptation to subvert the principle that they should not substitute their own discretion for that of the [decision maker] by a narrow textual analysis which enables them to claim that he misdirected himself."

14. The decision under both heads was for the Defendant to make. As will become apparent, the Employment Tribunal has reached a decision on the Claimant's claim for unfair dismissal which held that he had been unfairly dismissed, and stated that it exonerated him from blame for the fourth incident, which led to his dismissal. What significance attaches to that? There is a line of authority which deals with what happens when one decision maker reaches a decision, and another reaches a different conclusion. I would refer to *R(Bradley & Ors) v Secretary of State for Work & Pensions & Ors* [2008] EWCA Civ 36 [2009] QB 114 and to the judgement of Sir John Chadwick at paragraphs 65-70, where he considered the effects of *R v Warwickshire County Council, ex parte Powergen Plc* [1997] EWCA Civ 2280; (1997) 96 LGR 617 and *R v Secretary of State for the Home Department, ex parte Danaei* [1997] EWCA Civ 2704. At paragraph 70, he set out the relevant principles

> " 70 For my part, I think that the following principles can be derived from the judgments in *Powergen* and *Danaei*: (i) the decision maker whose decision is under challenge (in the former case, the local highway authority; in the

> latter, the Secretary of State) is entitled to exercise his own discretion as to whether he should regard himself as bound by a finding of fact made by an adjudicative tribunal (in the former case, the planning inspector; in the latter, the special adjudicator) in a related context; (ii) a decision to reject a finding of fact made by an adjudicative tribunal in a related context can be challenged on *Wednesbury* grounds; (iii) in particular, the challenge can be advanced on the basis that the decision to reject the finding of fact was irrational; (iv) in determining whether the decision to reject the finding of fact was irrational the court will have regard to the circumstances in which, and the statutory scheme within which, the finding of fact was made by the adjudicative tribunal; (v) in particular, the court will have regard to the nature of the fact found (e.g. that the immigrant was an adulterer), the basis on which the finding was made (e.g. on oral testimony tested by cross-examination, or purely on the documents), the form of the proceedings before the tribunal (e.g. adversarial and in public, or investigative with no opportunity for cross-examination), and the role of the tribunal within the statutory scheme.

The Facts

15. Mr W is a teacher of considerable experience. As at 2002, he had worked in teaching for over 20 years, and had what can fairly be described as a quite unblemished record. At that time he was head of design and technology at a school for pupils with learning difficulties. Some pupils were autistic, some had mild learning difficulties, and some had severe learning difficulties which required one to one teaching. Some pupils could be challenging, disruptive and aggressive.
16. During the course of 2002 the four incidents referred to in the certificate took place at the school. The first was in March 2002: a pupil alleged that he had been struck on the back by Mr W during assembly. Mr W contended that he had been assaulted by the pupil. Mr W was suspended pending an investigation. The case was considered at a strategy meeting attended by, among others, the Head Teacher, the Education Officer, a member of the Police Child Protection Unit. It noted that there was no actual injury, nor any other witness to the alleged striking of a blow. It was determined that the matter be dealt with within the school disciplinary process. The suspension was lifted after about 7 weeks, and Mr W resumed teaching.
17. The second was said to have occurred in April 2002, about 3 weeks after the first incident. It was alleged that Mr W had squeezed the arm of a female pupil very hard, had touched her bottom, and stared at her in an inappropriate fashion. Another Strategy meeting took place attended by among others, the Head Teacher,

the Education Officer, a member of the Police Child Protection Unit. It decided that Mr W had difficulty controlling his behaviour and became very rough, which was inappropriate in a school for children who, however challenging, were vulnerable. It was decided to ask the girl's parents if she agreed that a complaint should be made to the Police. If she was not so willing, then it would be dealt with within the school's disciplinary processes. Subsequently, the parent of the child in question seems not to have wanted a complaint to be made, but asked instead that Mr W did not teach her daughter.

18. I shall come to the third incident after dealing with the fourth, for reasons that will become apparent.

19. The fourth incident which took place in September 2002, occurred when a boy of 13, whom I will refer to as AF, had his hand trapped in between the door and the doorframe of a classroom. He alleged that Mr W had deliberately trapped his hand in the door. The boy sustained a crushing injury to his hand, which required him having to spend some days as an in-patient, during which time he underwent surgery. The incident occurred when a boy had left the room without permission, and another followed him. A third then sought to leave the room. It was alleged that Mr W shut the door, and then deliberately held it shut on the boy's hand.

20. Mr W's account given to the school at the time was that (my italics)

> "……..JS was experiencing difficulties. This student is subject to bullying from other students and this group in general. On this occasion it was CA who was the culprit……..to avoid an incident I sent JS out of the room. I gave him a task to complete…….as soon as he entered the room he felt the animosity from the group and immediately left without my consent…….Eventually JS looked in through a locked door.. As soon as CA saw JS he rushed out of the room, clearly intending to go after JS and cause him harm. Before I was able to respond he had left the room and the door closed behind him on the self closer.
>
> As I turned back to the class AF had begun to charge out of the room after CA. I firmly believed that his intentions were to support his friend CA and to do harm to JS.

> As AF moved to the door I followed. I cannot be clear about who arrived at the door first. However AF placed his left hand on the door handle and pulled the door with some considerable force. *By this time I was standing next to AF, and the door hit my foot……..I did not touch the door or AF, but the door bounced off my foot and began to close. In so doing AF must have had his hand in the space between the door and its frame, trapping a finger. ……..*I am…. sure that I did not lay hands on AF or the door. The accident was as a result of his actions trying to escape from my room to do damage to another pupil……"

21. Mr W was suspended, and an investigation was mounted. The Police took statements from a number of witnesses, including a number of pupils in the class. He was not charged with any criminal offence, but it was decided that he should be dismissed. I shall say more about what occurred in due course.
22. When that matter was investigated, an earlier incident came to light, which had occurred in June 2002, which I have referred to as the third incident. On that occasion a disruptive pupil of 13 was trying to leave Mr W's classroom. A classroom assistant witnessed what happened. According to the statement she gave to the Police when they were investigating the September incident, she described Mr W becoming agitated and distressed as he sought to insist that the boy in question should not leave the room. The boy, who was in the assistant's words "in a strop" tried to open the door. According to her Mr W, who was in her words "wound up" approached the door and the pupil. The boy had tried to open the door, and had his hand between the door and the doorframe. According to her, she sought to get the boy back into the classroom, and also had her hand between the door and the frame. Mr W kicked the door, so as to shut it. It trapped her hand and that of the pupil. Mr W then leaned on the door to apply more pressure. By this time the boy was very distressed and even more abusive. She had to ask Mr W to open the door.
23. Mr W subsequently issued a claim for unfair dismissal in the Employment Tribunal. He succeeded on the grounds that the procedure of his dismissal was untoward, but a finding of contributory fault was made against him. He appealed successfully to the Employment Appeal Tribunal, who ordered that the issue of

contribution be considered afresh by the Employment Tribunal. On 29th August 2008 the Tribunal upheld his claim that he had been unfairly dismissed. In a written decision, it considered his claim, including the events of the incident in September 2002. Its decision shows that it had some evidence before it about the March incident, but none about that in April, and none at all about the incident in June 2002. I shall have more to say about the Tribunal's decision in due course.

24. I had put before me written evidence from the Claimant Mr W, and from the following witnesses for the Defendant

    (a) Mr Andy Parker, the Chief Constable of Warwickshire Police since 1st December 2011, and before that Deputy Chief Constable from July 2007. Before that he had been Assistant Chief Constable (from January 2005) and acting Deputy Chief Constable from July 2006;

    (b) Mr Neil Brunton, who has been Deputy Chief Constable since 1st December 2011, and was before that Assistant Chief Constable from April 2010, and before that Chief Superintendent;

    (c) Superintendent Martin Samuel, Head of Operations Support and Planning since February 2010, and before that Head of Intelligence from February 2008;

    (d) Superintendent Naveed Malik, Head of Intelligence since January 2011. As Head of Intelligence he is responsible for the Information Disclosure and Compliance Team, which deals with certificates of this kind. He has particular experience of dealing with the protection of children and vulnerable adults

25. This certificate was not the first issued in respect of Mr W. He had applied before for teaching posts, and also on three occasions as a volunteer coach. Two of the coaching positions would have involved dealing with children of all ages, including those with special needs. The four incidents had been included in certificates since 2005. Earlier attempts had been made by the Claimant and his Trade Union to persuade the Police not to include the four incidents.

26. In 2009 Mr Parker, then Deputy Chief Constable, reviewed the case. He concluded that

    (a) There was evidence of tension and conflict between Mr W and his then Head Teacher in 2002

(b) Mr W had no previous disciplinary matters recorded against him

(c) On the evidence, it was not possible to exonerate the Claimant and say that he had not used excessive force while teaching at the school, and that despite the challenging environment, his behaviour and actions may not always have been appropriate

(d) There was a need to balance the Claimant's rights against those of children and vulnerable young adults who may be taught by him. It was necessary to provide potential employers with relevant information, which was that which suggested that he may have used excessive force on more than one occasion. That was "clearly relevant to any post where he may be working with children, in particular ones which involved with difficult and/or violent children or those with special needs."

(e) While anxious not to make a judgement about how the Claimant deals with stress, yet the then Deputy Chief Constable believed that the evidence demonstrated concerning behaviour. It was a difficult working environment, yet there a number of incidents in a short space of time, and some independent witnesses had provided accounts. While there were no slurs on his professional ability and the Employment Tribunal had exonerated him, the Chief Constable and his officers concluded that it was appropriate and proportionate to disclose the material, particularly if he were to apply for a job in similar circumstances.

27. Superintendent Samuel's evidence showed that he had dealt with an earlier application in 2008 for the Claimant to take up a post teaching technology in a school. He had determined that each of the four allegations, and the pattern of them, were relevant to the Claimant's applications for teaching posts. He considered then that the conduct of the Claimant was reckless and dangerous in relation to his interaction with pupils, all of whom and been vulnerable at the 2002 school. He considered at that time whether, in his phrase, the claimant's right to a private life was outweighed by the right of children and vulnerable adults to be effectively protected from harm, and concluded that it was.

28. He dealt with further applications for posts in June 2008, July 2008 and February 2009. The first was for a teaching post, where he made disclosure. In the latter two it was for appointment as a "volunteer coach." Before determining what to do, he

requested information on the nature of the post involved, whether it was classroom based, the age and number of children involved, and whether any would have special needs. When told that it would involve children with special needs, would not be based in the classroom, and would involve children as young as 8 years old, he decided that the risk of stressful situations occurring and his professional concern about how well the Claimant dealt with the pressure of teaching children with special needs caused him to conclude that the balance fell in favour of disclosure.

29. In November 2009 a further application was received for a volunteer coaching position. Disclosure was again made, albeit with different wording. He was not involved in the consideration given to Mr W's case in 2011.

30. On 29th June 2010, the then Assistant Chief Constable ACC Holland wrote to the Claimant stating that while the first, third and fourth incidents would remain on the certificate, the second would not do so:

> "I have decided to make this amendment for all of the following reasons- it appears to indicate a different pattern of behaviour to the other matters disclosed, it was not corroborated or tested, and over the last 8 years nothing of a similar nature has been reported."

31. On 28th February 2011, the Claimant's solicitor wrote a letter before action, arguing that none of the material should be disclosed, and warning of potential judicial review. The Police then gave further consideration to the issues raised. The Chief Constable held a meeting attended by himself, ACC Brunton (as he then was), Superintendent Malik, the Force Information Compliance Manager and the legal adviser. ACC Brunton was asked to attend because he had had no previous involvement, and the Chief Constable wanted the benefit of having a fresh view. Superintendent Malik also had no previous involvement, and was also able to provide a fresh view. I have read the statements of the senior Police officers with care. It is quite apparent from them that the case was reviewed thoroughly and sensitively. DCC Brunton, as he now is, was aware of the legislation, of Article 8 of the ECHR, and of the relevant case law on the need to balance the Article 8 rights of the person seeking work with those of the children or vulnerable adults with whom an applicant for a job would work. He and Superintendent Malik (who was similarly aware) had access to and considered all

past certificates, and the police files on the four incidents, including the witness statements. They also had access to and considered the Employment Tribunal's decision.

32. After that meeting the solicitor acting for the Defendant wrote to the Claimant in May 2011 setting out his reasons for considering that all four incidents should be disclosed. Subsequently, a further application for a post was made by the Claimant, which resulted in the further certificate of July 2011, which is the one under challenge.

33. I received a considerable volume of evidence from the Police about that meeting. There was no challenge to that evidence, and I accept it. The Chief Constable's own evidence before the Court was as follows. His approach was based on the duty on the Police to manage risk. Each application was considered on its merits, and disclosure would probably not be made in respect of all teaching posts- e.g. teaching adult education at a college. He found the Claimant's attitude concerning, in that he refused to acknowledge the problems that had arisen in 2002, and refused to accept that he had done anything wrong. His professional judgement was that if the Claimant had recognised that there were more things he could have done at the time to prevent injury occurring, the Chief Constable would have more confidence that the risk would probably not arise again in the future. The investigating officer at the time had considered the accounts carefully, including that of the Claimant. He did not accept that the Claimant's account could be true. He was at that time saying that the door had bounced off him and then closed on the boy's hand. The reconstruction carried out by the investigating officer showed that the accident could not have happened as the Claimant described. In the light of that reconstruction, the fact that the Claimant continued to believe that he had done nothing wrong was relevant in considering whether the risk to other children from such an incident could be managed. The decision would have an adverse impact on the Claimant, and he wanted a reassurance given that not all teaching posts would lead to disclosure. (That view was communicated to the Claimant's solicitors by letter of 5th May 2011)

34. The evidence of Deputy Chief Constable Brunton was that he focussed his attention on the relevance of the information to the nature of the posts the Claimant had been applying for. He considered the gravity of the allegations, the

timescales involved, the previous character of the Claimant and the potential impact which any disclosure could have on him. He looked to see if there was any corroborative evidence, and wanted to know of the professional views of the police officers and others who had investigated the allegations. Given his own background in policing child protection and vulnerable adults, and his familiarity with the procedures in such cases and the issues involved, he looked carefully at the views of the investigating officers at the time of the fourth incident. He noted that the officer had been of the clear view that, were it not for the special needs of the injured pupil and of the witnesses, he would have charged the Claimant with a criminal offence at the time (presumably of common assault contrary to section 39 of the *Offences Against the Person Act 1861*, or of assault occasioning actual bodily harm, contrary to section 47 of that Act.). He supported that view, and agreed that it had not been in the public interest to prosecute.

35. He considered that the three other incidents should formally have been reported to the Police to allow a full investigation to be undertaken. He had cause for concern about the conduct of the Claimant in 2002, and believed that it was important that any prospective future employer should be able to make a fully informed decision about whether or not to offer a post to the Claimant which involved unsupervised or extensive access to children or vulnerable adults. He took into account the lack of any previous discipline findings against the Claimant, but was mindful that four allegations of a "broadly similar nature" had been made against the Claimant "within a short period of only 6 months." He found the Tribunal decision to be of no real assistance, because it was not considering the wider issue of the protection of vulnerable children or adults, and only whether it was fair for him to be dismissed from his post. Further, the Tribunal did not have knowledge of the pattern of the four allegations, and they did not have access to the statements and other information on the police investigation file into the circumstances of the injury to the boy's hand.

36. He considered the impact which disclosure would have on the Claimant's ability to secure a teaching post in the future. He noted that the Claimant had had many opportunities to comment on the disclosure made. He went on

> "I recognise the impact that disclosure is likely to have on the Claimant's ability to secure a post teaching children in the future. However it was my clear professional view that the balance between his rights and those of

> children whom he may teach fell in favour of protecting children from the potential harm in the future and that as such, we should authorise disclosure of the information in such cases."

He endorsed the approach that he would not favour disclosure if the post applied for involved the Claimant working with adults at a College.

37. He dealt with the certificate at issue in these proceedings. He disagreed with ACC Holland's assessment made on 29th June 2010. He did so having formed his own view. He noted that all the other officers who had considered the matter had disclosed material relating to all four incidents. He concluded by saying that

> "It is my professional judgement that in this case disclosure was necessary and proportionate. Given the seriousness of the allegations made, the views of those investigating the assault allegation as to the weight of the evidence, and the corroboration provided in a series of 4 allegations in a 6 month period, I believe the need to protect children in this case outweighs the Article 8 rights of the claimant."

38. Superintendent Malik had had no dealings with the issue before early April 2011. His evidence is to very much the same effect as DCC Brunton's. He noted that there was nothing discovered in the investigation of the fourth incident that discredited any of the children involved, or those involved in the earlier incidents. He considered that the Employment Tribunal was considering a different issue, involving different factors and a different test. He acknowledged that disclosure would disadvantage the Claimant, but considered that it was proportionate to disclose the information as, given the number of incidents and the weight of evidence as disclosed by the crime file, the rights of children outweighed those of the Claimant. He continued

> " Against a background of 4 separate allegations over 6 months, I was concerned about how we would justify to a future employer having not disclosed any information, if there were to be a future incident or injury involving the Claimant."

39. He stated that each application would be viewed on its merits as to whether disclosure would be proportionate, but that it was agreed that disclosure was more likely to occur if the Claimant applied to work with children. He went on

> " It is clear that we should not have a standard response and that we have to consider each case in context. However we had considered the source material- the crime file, including statements, letters and the views of the investigating officers- in detail and had discussed the case openly and frankly. We reached a clear position that we believed, having determined that the information " might be true" and " ought to be included in the certificate" that disclosure would satisfy the statutory test in principle. We also considered carefully the article 8 rights of the Claimant and recognised that he could be

adversely affected by any disclosure made. However we also have to protect children and vulnerable adults from harm and, given the context of the allegations and the weight of evidence which resulted in the Detective Inspector confirming that there would have been sufficient evidence to charge the Claimant in respect of the serious injury caused to the pupil in September 2003, I believed the rights of the children to be protected outweighed those of the Claimant."

Grounds argued by the Claimant

40. Mr Weatherby contended that

(a) The phrase " might be relevant" in section 113B (4) requires clear evidence, or if it falls short of amounting to evidence, something which is cogent. It cannot be rumour, tittle-tattle or mere assertion;

(b) The material referred to did not pass that test;

(c) On the fourth incident, while it is accepted that it cannot bind the Defendant, the findings of the Employment Tribunal should carry great weight. The Police wrongly asserted that the Tribunal had no access to the statements in the case of the fourth incident, and that it had no knowledge of the other assertions;

(d) On the second part of the test, the application of the criteria used by Lord Neuberger in *L* made disclosure disproportionate;

(e) The incidents took place in a particular and challenging situation, not in a general teaching position;

(f) Great weight should apply to the Claimant's record;

(g) The alleged incidents were over 9 years old.

41. Mr Weatherby accepted that Mr W had had the opportunity to make representations to the Defendant about the four incidents. He had done so through his Trade Union and by his solicitors, among other ways.

42. Mr Johnson QC argued that

(a) The test at the first stage is not whether the allegations were the subject of an adverse finding, but whether they might be true;

(b) The officers were plainly entitled to conclude that the allegations might be true;

(c) The Employment Tribunal

i. did not conclude that the allegation could not be true

ii. only heard direct evidence about the incident from Mr W

iii. did not analyse the other incidents, and was apparently unaware of two of them, including the third one, which is of particular significance

iv. could not bind the officers;

(d) the third and fourth incidents are strikingly similar;

(e) The officers applied the correct proportionality balance, taking account of his long unblemished record, the fact that there were no positive findings against him, the findings of the Employment Tribunal, and the effect disclosure would have on his ability to gain employment. They also considered the fact that he could apply for positions which would not require an enhanced criminal records certificate, and had done so in the past. However they concluded, and could properly have done so, that in relation to posts which would involve significant unsupervised access to children or vulnerable adults, it was relevant and proportionate to disclose the allegation.

Discussion

43. Subject to the question of the status or weight to be given to the decision of the Employment Tribunal, I regard the material in question to pass the test of relevance in section 113B (4)(a). The material showed that on four occasions within a period of 6 months, he had used violence on vulnerable children. The third occasion raised particularly serious issues. The teaching assistant's written evidence is unequivocal that Mr W closed the door on the arms both the child concerned and the assistant, and leaned on the door so that their arms were trapped. She said that he did so after seeming to become " very agitated and stressed. "

44. Within less than three months, the fourth incident occurred. However one puts it, it involved a child's hand being trapped in the door of the classroom. The statements taken at the time include the following

(a) The child who was injured says that Mr W took his hand, and then deliberately shut the door on it

(b) Other children present did not see exactly what happened. They did not suggest that there was a deliberate trapping.

45. The first two incidents had been investigated within the school. Both allegations showed a use of violence which would have caused the school concern, and which caused concern to the Police.
46. Subject to any arguments about the effect of the Employment Tribunal decision, I regard the case that the material failed the first test to be quite unarguable. If true, they were capable of showing a concerning pattern of conduct which would inevitably be highly relevant to any education authority wishing to entrust the care of children to a teacher. The Defendant's evidence put before me showed that each incident had been considered, and a judgement formed that they revealed information which passed the first statutory test. The investigation at the time had been thorough, and the subsequent assessment of relevance had been rigorous, and patently conducted with scrupulous fairness.
47. I have read the Employment Tribunal's written decision. It heard evidence from Mr W, but no evidence from anyone else concerned in the fourth incident. It does not refer at all to the second or third incidents. The Tribunal decided to accept the Claimant's evidence to the Tribunal that in the fourth incident, the boy's fingers had been trapped by accident, because the door had been shut on to the boy's hand without the claimant shutting it on him. That was inconsistent with the first account given by Mr W, as noted above. In evidence given to the Tribunal he said that he only said that the door had bounced off him because it was the only explanation he could think of. He gave evidence, accepted by the Tribunal, that he now realised that the boy CA must have been standing outside pulling the door shut.
48. The Tribunal said that it preferred the evidence of the Claimant to the evidence in the witness statements, which it found to be contradictory. It also, and perhaps regrettably, gave as a reason for not accepting their evidence " the nature of the pupils who gave them." It must be thought troubling that a vulnerable child's evidence is rejected on such a ground without the Tribunal ever, or even, hearing that child. It then went on to conclude that there were three potential causes of the door closing, one of which was that another named child (CA) outside had pulled it shut. It excluded one cause (a failure in the door closing mechanism) and considered the other two, namely whether the Claimant shut the door on the boy's hand, or whether another boy outside (CA) pulled it shut. The Tribunal, noting

that the child it named had not given a statement, decided that the claimant had not closed the door on the boy's hand, even accidentally, and preferred the explanation that the named child had pulled it shut.

49. It is not for this court to express any views about what may or may not suffice to deal with a claim for unfair dismissal. I also accept that, given the understandable evidence of the former pupils at the Tribunal hearing (and in my view no reasonable employer education authority would have thought it right to insist that they attend to give evidence given their vulnerability) then the Tribunal were faced with the problem that it had to act on evidence, and the only direct oral evidence which it had of the incident was that of Mr W. Given the absence of the witnesses to the incident, and particularly of the witness who was injured by the door closing, and of the one whom the Tribunal believed had pulled the door to, it would be wrong in principle to treat the decision of the Employment Tribunal as definitive. There are other points to be made as well

    (a) as a matter of fact the child CA had made a statement. There is no suggestion in it that he had anything to do with closing the door. Of course at the time he gave it, he was unable to comment on the Claimant's later contention that it was CA who had been responsible for closing it, as he had not then put it forward. A finding by the Tribunal that CA had done so in the absence of any evidence from him about that, might be thought to be unwise, not to say potentially quite unfair to both AF and CA ;

    (b) I am troubled by the fact that the Tribunal has effectively discounted the evidence of the injured child (that the Claimant had shut the door on to his hand) as being untrue (whether because it thought he was unreliable or a liar) when it had never heard him give evidence;

    (c) it knew nothing of the incident that had occurred in June. Had this matter been tried in a criminal court after 1st April 2004, there would have been a very powerful case for the admission of that evidence under section 101(1)(d) of the *Criminal Justice Act 2003.* Before that date there would have been a strong case for its admission as similar fact evidence at common law;

    (d) the Tribunal was aware of the first incident, but there is nothing in its decision which suggests that it had any knowledge of the second or third

incidents. In its decision it gave no consideration to whether the incidents revealed any form of pattern of conduct.

50. I turn therefore to the *Bradley* criteria, cited above:

> (i) the decision maker whose decision is under challenge is entitled to exercise his own discretion as to whether he should regard himself as bound by a finding of fact made by an adjudicative tribunal in a related context;
> (ii) a decision to reject a finding of fact made by an adjudicative tribunal in a related context can be challenged on *Wednesbury* grounds;
> (iii) in particular, the challenge can be advanced on the basis that the decision to reject the finding of fact was irrational;
> (iv) in determining whether the decision to reject the finding of fact was irrational the court will have regard to the circumstances in which, and the statutory scheme within which, the finding of fact was made by the adjudicative tribunal;
> (v) in particular, the court will have regard to the nature of the fact found……., the basis on which the finding was made (e.g. on oral testimony tested by cross-examination, or purely on the documents), the form of the proceedings before the tribunal (e.g. adversarial and in public, or investigative with no opportunity for cross-examination), and the role of the tribunal within the statutory scheme.

51. As to (i) the Defendant had a discretion. It is plain to me from reading the evidence of the senior officers that the Police considered the evidence for themselves, and also considered whether the Tribunal's approach should be followed by them. It is true that the Police were under the impression that none of the three other incidents were known to the Tribunal, whereas in fact it knew about the first as well. I do not consider that that undermines the central thrust of the police officer's reasons for not adopting the Tribunal's approach to the fourth incident. There was nothing whatever in the Tribunal's decision about the second and third incidents, nor about the issue of the pattern of conduct.
52. As to (ii) and (iii), I reject the claim by the Claimant that the decision of the Police was *Wednesbury* unreasonable. It was carefully thought through, and fully reasoned on proper grounds. The reasons for not following the Tribunal's approach were ones open to them.
53. As to (iv) , the Tribunal was dealing with one incident only, and even then only on the balance of probabilities. It was doing so to explore a claim for unfair dismissal. It was unable to determine that the allegation in the fourth incident was

not true , in a way which would make irrational a certificate that it " might be relevant." In fact, given the absence from the decision of any discussion of the second and third incidents, and the absence of any oral evidence from the children concerned, a Chief Constable making a decision under the first test would be entitled to form his own differing view, provided that it was based on proper material and was properly reasoned, if he chose to do so, as this one did.

54. As to (v), I have already commented on the absence of significant oral evidence from the Tribunal's consideration, and the absence of any evidence about two other incidents. While the Claimant gave evidence and was cross examined, there was no evidence about the other incidents.

55. Applying those criteria, there is nothing which would prevent the Defendant from determining that the material was relevant within the meaning of the Act. It follows that there was nothing in the Employment Tribunal decision which renders the decision of the Defendant *Wednesbury* unreasonable.

56. I turn now to the second stage test- i.e. whether the material ought to be disclosed. It is quite apparent when one looks at the evidence that the officers involved had been very well aware of the substantial impact which a decision adverse to Mr W would have on his ability to obtain employment in the occupation for which he was qualified, as a teacher. They then had to weigh that in the balance against the assessment of the risk to children and vulnerable adults should he be permitted to teach them, which would or could include dealing with them on a day to day basis. The Police considered that the information they had, referring to incidents occurring over a period of about 5 months when the Claimant was teaching in a challenging environment, would be of concern to any prospective employer considering his appointment as a teacher. In my judgement all relevant factors were weighed up by the Police , as required by Article 8. The Police had to weigh the risks to other children being exposed to the risk of injury because of a loss of control, or a stressed reaction, by the Claimant, against the serious effects that disclosure would have on his career. They did so properly, taking all relevant matters into account.

57. Lastly on this topic, I must address the fact that the Police has now elected to include the second incident, having previously decided to exclude it. It is apparent from the evidence called by the Police, and in particular that of DCC Brunton and

Superintendent Malik, that the officers involved took a different view from ACC Holland. They did so having reviewed the matter afresh, and given the weight they thought appropriate.

58. If the effect of *R (B) v Derbyshire Constabulary* [2011] EWHC 2362 is that the Court must also address the balance to be struck under Article 8, I now do so. In my judgement one is presented here with evidence of a set of allegations, which if true, show that the Claimant was someone who had serious and significant failings as a teacher when dealing with situations of stress or with challenging or difficult children. It follows that any education authority, or other body providing education or training to children or vulnerable adults, and whose duties includes that of protecting children or vulnerable adults in its charge from harm had a very important right to know that there was evidence that he had such failings. The risks of employing him which must be addressed are not that he may be a poor teacher, but that children in his charge may be injured or have violence used upon them. It follows that the consequences of the feared event occurring would be significant, and potentially harmful to the welfare of those meriting the utmost protection. That required a cautious approach, not least because if the allegations were true, he had used violence on four children within 5 months, or had at the very least acted in such a way that children came to harm. It does not reduce the risk significantly that the incidents occurred in 2002, because since that time the Claimant has not held employment as a teacher, and the circumstances in which a repetition might occur have not obtained.
59. Against that one must consider the serious effect which disclosure has upon his prospects of obtaining employment as a teacher of children, which should not be underestimated. I have no doubt that it has had a serious effect on him to pursue his career, not least because teaching was his chosen vocation. Disclosure does not prevent him obtaining employment, nor from obtaining employment in education, but it will prevent him from doing so in situations where children or vulnerable adults are involved, and that may effectively exclude him from anything but adult education.
60. In my judgement, the balance was struck in the right way. The only circumstances in which one could say that the risk had reduced to the point where disclosure could be allowed is if one were able to say that the allegations made about the four

incidents were unlikely to be true. Given the weight of the evidence, that point cannot be reached.

61. It follows that this application for judicial review is dismissed.

Note on anonymity

62. Although I was not asked to do so, I have anonymised the name of the Claimant (and of the children concerned) because the matters in issue involve serious allegations against the Claimant, but have not been the subject of criminal charges or prosecution. I have followed the approach of Lord Neuberger MR in *JIH v News Group Newspapers* [2011] EWCA Civ 42

> "Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions."

63. In my view, given the circumstances of this case, publication in a judgement of the name of the Claimant would amount to a breach of Article 8 of the ECHR, for it would inevitably result in publication of material which would be protected under Article 8 unless the subject of a section 113B certificate. It would be a strange outcome if a dispute about whether a certificate should have been issued would result in the allegations only disclosable under that restrictive provision were thereby given wide currency. Is it necessary for Article 10 purposes ? Given the fact that all the material upon which the certificates were given and considered is set out in this judgement, and the relevant reasoning and principles fully set out, there is no significant encroachment on the open justice rule.

Order and Application for permission to Appeal

64. The claim is dismissed.
65. The Claimant must pay the Defendant's costs of the claim, to be subject to a detailed assessment on the standard basis if not agreed.
66. Given the short time available between the circulation of the draft and the date of the judgement. I shall permit the Claimant to make any application for permission to appeal by 9th March 2012. It must be in written form. The Defendant must make any response (also written) by 18th March 2012.