Neutral Citation Number: [2013] EWHC 1555 (Admin)

Case No: 3SE90085

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
SHEFFIELD DISTRICT REGISTRY

The Law Courts
50, West Bar, Sheffield

Date: 10 June 2013

Before:

THE HONOURABLE MR. JUSTICE COULSON

- -

R (on the application of):

RK — **Claimant**

v

CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE — **First Defendant**

- and -

DISCLOSURE AND BANNING SERVICE — **Second Defendant**

- -

- -

Mr Alex Offer (instructed by **Lester Morrill inc Davies Gore Lomax Solicitors**) for the **Claimant**
Mr Simon Pallo (instructed by **South Yorkshire Police**) for the **First Defendant**
The Second Defendant was not present or represented at the hearing

Hearing date: 20 May 2013

- -

Approved Judgment

The Hon Mr Justice Coulson:

1. INTRODUCTION

1. This case represents a further stage in the long and unhappy dispute between the claimant and South Yorkshire Police ("SYP") in connection with the latter's proposed disclosure to prospective employers of information relating to events allegedly involving the claimant that occurred almost ten years ago. Casting a long shadow across this case is an issue of wider significance: in what circumstances is it appropriate for the police to disclose to prospective employers details of allegations in respect of which the prospective employee was tried and acquitted?

2. The claimant and SYP have already been through one set of Judicial Review proceedings. When, in early April 2013, the claimant saw the revamped draft disclosure that SYP proposed to make about him, he applied for and was granted an injunction on the papers. At a hearing on 11 April I continued the injunction. Following the grant of legal aid to the claimant on 29 April, the case came before me again on 9 May. In order to address the real issues in the shortest possible time, with the parties' consent, I transferred this case to the Administrative Court, ordered the necessary Perfected Grounds and Reply to be exchanged, and fixed a 'rolled up' hearing for 20 May. The matter was argued in full on that occasion, and I am extremely grateful to both counsel for their helpful submissions.

3. Because of its importance, I set out a brief chronology in **Section 2** below. In **Section 3** I deal with the relevant principles of law. In **Section 4** I set out the issues and then, in **Sections 5** to **8** I address each of those issues. My conclusions are set out in **Section 9** below.

2. BRIEF CHRONOLOGY

4. The claimant was a teacher at a school in Sheffield. In 2005 he was the subject of six allegations, made by four girls at the school aged around 15, of indecent assault and sexual activity with a child. The allegations were all of a similar nature, involving brief instances of the tapping or touching of the girls' bottoms. In addition to problems connected with the credibility of the complainants, there were also concerns about collusion, and a suggestion that the girls had acted together to revenge a male pupil whom the claimant had got expelled a few weeks before.

5. The defendant denied all of the charges and was consistent in his detailed responses to the allegations made. At a trial at Sheffield Crown Court on 5 October 2005, the claimant was acquitted on all charges. However, the following month, in November 2005, SYP disclosed material (which related to the trial) which caused the claimant to lose his volunteer job with the Red Cross, and his post with the local Neighbourhood Watch.

6. In May 2006, the claimant was dismissed from his job as a teacher. Unhappily it remains unclear precisely why he was dismissed. There is a suggestion in the proposed disclosure that one of the reasons was his use of inappropriate language in front of the pupils but, since the high watermark of that conduct was saying "shut the book up" and his admonition to his pupils not to "chat shit", I cannot believe that this was regarded as appropriate grounds for dismissal. The other ground for dismissal

identified in the documents was his apparent contact with pupils outside school hours, although the claimant appeared to have a number of innocent explanations for this conduct (such as giving pupils lifts to football matches). Although the claimant appealed against his dismissal, his appeal failed.

7. In 2008, the Department for Children, Schools and Families considered whether or not he should be barred from working with children or vulnerable adults. In a letter dated 10 September 2008, the Secretary of State decided that he should neither be barred nor restricted for carrying on such work. In addition, the General Teaching Council took no action against him and he was not removed from the register of teachers.

8. On 9 June 2009, SYP provided the claimant with a draft of the disclosure that they proposed to make in connection with any application that they received for information about him. This disclosure set out a good deal of material about the allegations in respect of which the claimant was acquitted. Accordingly, in October 2010 the claimant issued judicial review proceedings. In the end, the case was compromised by agreement but plainly represented something of a victory for the claimant (who was awarded some of his costs). Eady J ordered that SYP had to decide afresh what, if any, information to disclose. Moreover, attached to the order was a detailed memorandum which dealt, not only with SYP's obligation to consider the claimant's Article 8 rights, and to consult with him in advance of any disclosure, but which also included detailed guidance as to how to deal with the allegations of which the claimant had been acquitted. Paragraph 3 of the memorandum attached to Eady J's order said:

> "If the defendant decides to disclose any information about the allegations made against the claimant by four female pupils at [name of school] in or around May 2004, he shall also disclose information about the claimant's defence to those allegations and shall endeavour to produce a fair and balanced account. Such material shall include:
>
> (1) The fact that the claimant denied the allegations and that his account has been consistent throughout.
>
> (2) The fact that there were a number of inconsistencies in the prosecution evidence.
>
> (3) The fact that it was the claimant's case, which as left to the jury, that the prosecution witnesses had colluded to punish the claimant for the expulsion of a fellow pupil.
>
> (4) The fact that the claimant was acquitted by a jury of all charges in October 2005."

9. On 21 March 2012, SYP wrote to the claimant to say that, having considered his request afresh, they had decided that the material held "is, at this time, still relevant to your working in regular contact with children under 18 years of age…we repeat that this is the disclosure that would be made, at this point in time, in respect of a position

involving children." The claimant complained about his treatment by SYP and, in consequence, Hampshire Constabulary were invited to review SYP's disclosure.

10. The report of Hampshire Constabulary, dated 3 August 2012, was critical of SYP's approach for a number of reasons. The summary of their findings were set out in these terms:

> "In our opinion, disclosure of information held on [the claimant] could not be considered to be wholly unreasonable; however, in this instance, the supporting audit trail rationales, the wording of the disclosure itself, were found to not reach the standard required.
>
> It is our opinion that, should [the claimant] apply again for an ECRC, working in similar field, and the same/similar disclosure text and supporting rationale be used, [the claimant] will resort again to legal action and the audit trail would not reflect well upon SYP."

One of the principal criticisms made by Hampshire Constabulary was that SYP treated the allegations as if they had been proved, rather than rejected.

11. In December 2012, the claimant made a fresh application for disclosure of the draft Enhanced Criminal Records Certificate ("ECRC"), which SYP would provide to a prospective employer. They sent their proposed draft on 28 February 2013 and sought the claimant's representations. He replied on 13 March 2013 and set out in detail his response to the points raised. Following that, SYP went through their decision-making process, which was recorded in the AT3 document (see paragraphs 18 and 19 below). Amongst other things, box 6 of the AT3 said:

> "Although found Not Guilty of the Sexual allegations at court I still believe that there is enough substance to the allegations to warrant disclosure as I do not believe that there were so many inconsistencies or collusion by all concerned in this case to make me believe the information to be so untrue that it cannot be substantiated…"

Further, in the chief officer's declaration, the writer referred to the claimant's "offences" and concluded:

> "I am also of the opinion that something did occur here due to the gaps in instances and also one of the females not being friendly with the others also making allegations therefore making me believe that she did not collude with the others in this case."

12. On 2 April 2013, SYP sent the claimant the final version of the proposed ECRC. Amongst other things, that said:

"The information relates to unprofessional conduct and sexual offences against female students who attended his science lessons.

South Yorkshire Police believe this information to be relevant to an employer's risk and suitability assessment when considering [the claimant's] application for Supply Teacher working in regular contact with Children and Vulnerable Adults because the evidence available indicates that he has clearly overstepped the boundaries of teacher child relationship by acting inappropriately in his position and had to be warned on two occasions. In addition there are four females here all making similar allegations and although [the claimant] states that they colluded, on balance I do not believe there was evidence that they all did, it being accepted that there were submissions to that effect but no findings. The employer should be made aware of his previous conduct to assess his suitability to this role as he has not been in this profession for a number of years to show any recent conduct…

[The claimant] was interviewed by police on several occasions and remained consistent in his account throughout these interviews stating that he did not touch any of the females in a sexual way and any touching that had occurred was accidental. He did however state that he recalled one instance where he was placing his hand on a female's back to ask her to move from his desk but she stood up and he accidentally touched her on the bottom. He also admitted confiscating a photograph of a female pupil who was dressed up for a night out and scanned this photograph onto his laptop.

[The claimant] was charged to court for six offences of sexual touching and during the trial it was noted by Defence Counsel that there were a number of inconsistencies in the prosecution's evidence and it was also put forward by [the claimant] in his giving of evidence that some of the females had colluded to punish him after a fellow pupil who attended his lessons was excluded from school prior to the allegations being made. [The claimant] denied all allegations and his account was consistent throughout. The trial judge directed the jury on various matters, including the Defence submissions that prosecution witnesses had colluded to punish the claimant for the expulsion of a fellow pupil and that there were a number of inconsistencies in the prosecution evidence. The jury found [the claimant] not guilty of all charges in October 2005.

In the course of the police investigation [the claimant] admitted allegations of inappropriate language made by pupils. He stated that he used the phrases "shut the book up" and "don't chat shit" which would more than likely get students' attention. The Deputy Head confirmed that he had discussed with the

> claimant his behaviour on two occasions prior to the police investigation in respect of his inappropriate language during lessons and for mixing with students outside school…"

13. The claimant, acting in person, sought an injunction prohibiting SYP from disclosing the proposed ECRC. The injunction was granted on the papers, and has been continued, first at the return day of 11 April, and thereafter. On 11 April, I made a number of overt criticisms of the ECRC proposed by SYP. By the time of the next hearing on 9 May, SYP had supplied a further "final disclosure" of the ECRC which, amongst other things, changed the word "offences" to the word "allegations"; took out the references to "I believe"; and added in the fact that neither the Department for Children, Schools and Families nor the General Teaching Council had barred him from working with children or vulnerable adults. Each of these changes was a direct reaction to a specific criticism that I had made at the hearing on 11 April. No further AT3 was produced.

14. On 9 May the case was transferred to the Administrative Court and I ordered a rolled-up hearing so that all the issues could be properly dealt with. The final hearing took place on 20 May 2013. Given the importance of the issues, and the fact that this dispute has already been before the Administrative Court, I considered it appropriate to reserve judgment.

3. THE RELEVANT PRINCIPLES OF LAW

3.1 The Police Act 1997 (as amended)

15. Part V of the Police Act 1997 ("the 1997 Act") allows employers to obtain information about employees or prospective employees working in sensitive areas such as those involving significant contact with children or vulnerable adults. The employee or prospective employee is required to make an application for an ECRC which is a prerequisite for obtaining or retaining the job. There can be no doubt that working as a teacher of children under 18 is a prescribed purpose within Section 113B(2) of the 1997 Act and Regulation 5A of the Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233).

16. For present purposes, the critical part of the 1997 Act is Section 113B(4) which provides:

> "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."

3.2 Relevant Guidance

17. Pursuant to Section 113B(4A) of the Act the chief officer must have regard to any guidance published by the Secretary of State. That guidance is dated July 2012. It sets out a number of principles including:

(a) Principle 1 – there should be no presumption either in favour of or against providing a specific item or category of information.

(b) Principle 2 – information must only be provided if the chief officer reasonably believes it to be relevant for the prescribed purpose. Information should be reasonably believed to be relevant for the prescribed purpose for which the certificate is being sought. Information should be viewed as 'sufficiently serious'. As to this point, the guidance notes at paragraph 15:

> "There are no hard or fast rules to apply in this area, but chief officer should consider whether a specific piece of information is of sufficient gravity to justify its inclusion. It will be disproportionate to disclose information if it is trivial, or simply demonstrates poor behaviour, or relates merely to an individual's lifestyle."

(c) Principle 3 – information should only be provided if, in the chief officer's opinion, it ought to be included in the certificate. The guidance notes that there are two key areas to be considered under this heading, namely the impact of disclosure on the private life of the applicant or third party (Article 8), and the adverse impact of disclosure on the prevention or detection of crime.

(d) Principle 7 – Information for inclusion should be provided in a meaningful and consistent manner, with the reasons for disclosure clearly set out.

3.3 Other Guidance

18. The Criminal Records Bureau has also published a document (issued 10 September 2012) entitled 'Overview of the Quality Assurance Framework'. Amongst other things this document identifies the importance of the Audit Trail documents including in particular the AT3 which, it says, is "used to record the thought processes (*the rationales*) and decisions made when evaluating information; if disclosure is to be made, it also records the wording of the disclosure." The guidance goes on to say that the AT3 "should provide a robust cogent defensible rationale for why (and in what manner) information was disclosed (or why it was not disclosed)."

19. The specific guidance in respect of box 6 of the AT3 was that it had to "record your rationale, stating how/why you reached your conclusion that the information ought to be disclosed. A disclosure must be meticulous and not exceed its purpose." Furthermore, under MP7 (general guidance 1), the guidance provides:

> "You also need to be sure that all of the factors that influenced your decision are properly recorded – this is the purpose of AT3: to provide an appropriate audit trail of your considerations and decisions that can be reviewed/referred to whenever necessary. This audit trail should be complete and

> accurately reflect all of the considerations made at the time: the factors that influence your decision-making; the evidence available to you etc, all should be recorded to evidence and support how/why you reached your conclusion."

3.4 Assessment of Proportionality

20. The parties rightly agreed that, in considering this application to quash the decision to disclose the ECRC in its present form, I have to assess the balance which the decision-maker has struck; namely, to review the issue of proportionality. In ***SSHD ex parte Daly*** [2001] UKHL 26, Lord Steyn gave some general guidance as to that task:

> "First, the doctrine of proportionality may require 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. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly even the heightened scrutiny test developed in ***R v Ministry of Defence ex parte Smith*** [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights."

21. The leading case dealing with the disclosure of information by the police is the Supreme Court decision in ***R (L) v Commissioner of Police of the Metropolis*** [2010] UKSC 3, [2010] 1 AC 410. In his judgment, Lord Hope dealt expressly with the operation of Section 113B(4)(b) of the 1997 Act, and in particular the effect of the word "ought". He said that in essence that required a careful assessment of proportionality:

> "40. The question whether the information might be relevant is not, however, the end of the matter. An opinion must also be formed as 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…in every case [the chief officer] 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…"

22. A more recent case on the same topic is the decision of Langstaff J in ***C v Chief Constable of Greater Manchester*** [2010] EWHC 1609 (Admin). That was a case in which allegations of historic sex abuse were made against the claimant. These were grave allegation, involving repeated assaults of a child from the age of 5, increasing in seriousness to a point where the victim was forced to perform oral sex on him. There was no criminal trial because the Crown Prosecution Service concluded that, whilst there was no reason to disbelieve the female's account, there was insufficient evidence to provide a realistic prospect of conviction. The claimant was seeking to prevent the allegations from being used in the ECRC.

23. In setting out some of the relevant principles, Langstaff J said that tick boxes and matrices could never substitute for the exercise of a careful judgment:

> "…particularly in the knowledge that any decision in this area has the potential to have serous consequences, on the one hand, for those in respect of whom it is sought to prevent there being any real risk, and secondly on the other to avoid there being a serious damage done to the interests of the person in respect of whom the information may be provided."

24. Langstaff J also pointed out, at paragraph 11 of his judgment, that there was no presumption to be made against disclosure but neither was there any presumption to be made in favour of disclosure. He noted at paragraph 12 that "the balance required by proportionality necessitates close attention by the decision maker to detail. It is plainly important, as it seems to me, that the decision maker is to be careful in weighing the risk on the one hand of non-disclosure against the risks of disclosure." He went on to say:

> "13. Relevant, fifthly, in striking that balance is the force of the accusation. It is relevant to the decision that allegations which may be true, and are assessed as relevant if potentially true, are less compelling than others in similar circumstances might be where and to the extent that the allegations are weak even if not unbelievable. Weaker allegations must carry less weight in the balancing process than ones with stronger reason to believe them."

On the facts, he concluded that information about the allegations should not be included in the ECRC.

4. THE ISSUES

25. In the present case, the issues between the parties are these:

(a) Has SYP adopted a proper approach to proportionality?

(b) Has there been a failure by SYP to give adequate reasons?

(c) Has there been a reliance by SYP on irrelevant material or a failure to consider relevant material?

(d) Has there been an appearance of bias on the part of SYP?

26. It should be noted at the outset that the parties are agreed that there is no adequate remedy for the claimant other than these judicial review proceedings. Originally, SYP argued that, because Section 117A of the 1997 Act provided an internal review procedure which has not been triggered, the claimant had an alternative (statutory) remedy. However, Mr Pallo rightly conceded that this would not provide the claimant with an alternative remedy because, under Section 113B(6), the ECRC would have already been sent to the claimant's prospective employer before the review procedure

took place. In other words, the review procedure could not stop the damage being done by a flawed ECRC.

27. I note that, not only is it conceded that, because of this, there is no alternative remedy in this case, but that, in addition, this part of the legislation is going to be amended (again) so as to ensure that any objection to the ECRC can be heard before it is sent out. The amendment is effected by s.79(2) of the Protection of Freedoms Act 2012. The second defendant, who otherwise does not appear and is not represented, helpfully pointed out this imminent change in the law. In my judgment, this change confirms that, under the statutory regime as it presently stands, the claimant does not have an alternative remedy to prevent the proposed disclosure.

28. I therefore turn to deal with the issue of proportionality, which is, on any view, the most significant dispute in the case.

5. ISSUE 1: HAS SYP ADOPTED A PROPER APPROACH TO PROPORTIONALITY?

5.1 The Relevant Factors

29. I have already set out the general guidance available in ***Daly*** and ***C v Chief Constable of Greater Manchester***. There is also specific assistance as to the sorts of points that the chief officer should be looking for in assessing proportionality, in paragraph 81 of the speech of Lord Neuberger in ***L v Commissioner of Police of the Metropolis***. He said:

> "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."[1]

30. On behalf of the claimant, Mr Offer adopted those points by way of headings and I am content to adopt that approach in my analysis. However, I note that one of the difficulties with the defendant's disclosure (and this applies both to the AT3 and the two versions of the Final Disclosure of the ECRC) is that the information is set out in an incoherent way, so that the allegations that were unsuccessfully brought to court are often muddled in with other matters which (so it is said) were the subject of warnings from the Deputy Head, and yet further matters which may have been the stated reason for the claimant's dismissal. I consider that such confusion is unsatisfactory, and itself indicates a failure to approach the exercise in a proper way.

[1] The numbering of the sections is slightly different now because of subsequent amendments.

31. In my view, there can be no doubt that the allegations that were pursued against the claimant in the Crown Court, on each of which he was acquitted, form the centrepiece of the proposed ECRC. They are by far the most important element of the disclosure. Accordingly, at **Subsections 5.2 – 5.5** below, I assess the proportionality exercise in relation to those allegations. I deal with the other matters raised in the ECRC in **Subsection 5.6** below.

5.2 Gravity/Seriousness of Allegations

32. The allegations against the claimant which were the subject of his criminal trial concerned a minimum of four and a maximum of six incidents of tapping, or touching, a teenaged girl's clothed bottom. One complainant, KH, suggested that he had done this on three separate occasions over a two year period: it was not suggested that these taps were painful. A second complainant, KR, confined her allegation to one occasion in which the claimant put his hand on her bottom for about two seconds; however she said that she could not be sure that this had been deliberate. A third complainant, KB, said that he had smacked her on her bottom once. The fourth complainant, RC, made one similar allegation although the incident was witnessed by another teacher who was not prepared to say that the touching was sexual. RC was not called to give evidence as the prosecution did not regard her as a truthful or credible witness.

33. On behalf of the claimant, Mr Offer accepts that, if such behaviour had been engaged in, it was wholly inappropriate. But he submits that "it is also at the very lowest end of the spectrum of sexual offending." I accept that submission. Even taking the allegations as proved in full, they did not involve anything other than brief touching over clothes. It is also relevant that, although the girls were children, and were in the claimant's care and control – so that there is a major issue of trust – they were all around 15 years of age at the time of the incidents.

34. Mr Pallo agreed that the individual incidents were not grave, but argued that the seriousness lay in their repetition; in the fact that there was more than one girl involved. On the face of it, that is a reasonable point, but it is rather reduced in force by its absence as a consideration in the defendant's AT3 and other decision-making documentation. It does not appear to have been a point which the defendant had in mind when producing the ECRC.

35. In the round, I conclude that even though there were a number of them, these incidents were not particularly grave or serious. I do, however, accept that, if they were reliable allegations, their disclosure might, subject to the other elements of the proportionality test, be justified.

5.3 Reliability of Information

36. The principle that the weaker or less reliable the allegation, the less weight it can be given in the assessment of proportionality, is set out in ***C v Chief Constable of Greater Manchester*** (see paragraph 24 above). In that case, whilst there was no reason to doubt the complainant, the CPS had concluded that there was not a realistic prospect of conviction. In the present case, the allegations had been tested in court, and the claimant was acquitted on every charge.

37. Mr Offer accepts that, as a matter of principle, the mere fact that the claimant was acquitted does not – of itself – render it disproportionate to disclose the relevant material. It seems to me that this concession is rightly made: the proportionality test must apply to allegations of any kind, even if those were tested in court and rejected by a jury. However, the fact that the allegations failed seems to me to be a matter of significance in assessing proportionality. For the reasons noted below, I am not persuaded that SYP have had any proper regard to the significance of the acquittal; on the contrary, I think that, on one reading of their documentation, SYP have grudgingly noted the acquittal and then gone on to address the allegations as if they had been proved.

38. In addition to the fact of the acquittal itself, Mr Offer also points to the number of inconsistencies and inadequacies in the prosecution case. It is unnecessary to point them all out, but there can be no doubt that KH, the principal complainant, was an unsatisfactory witness because of the repeated contradictions in her evidence, and the evidence of another (RC) was so unreliable that not even the prosecution regarded her as a truthful or credible witness. Furthermore, the defence's case that there had been collusion between the complainants, and that this collusion was motivated by a desire to take revenge for TH's expulsion (which had been at the claimant's instigation), were matters which were raised by the judge in his summing up.

39. Thirdly, on the reliability of the information, there were clear and concise explanations given by the claimant answering each point, both at the trial and subsequently. Furthermore, at least some of the claimant's evidence was supported by other witnesses. In particular, the allegation involving RC was said to have occurred after the claimant had asked for another member of staff to attend his class. As Mr Offer put it, with considerable understatement, it is inherently unlikely that the claimant would have asked for other staff to attend his class and then proceed to assault one of the girls in front of them.

40. For all these reasons, it seems to me that these allegations were inherently unreliable. It is unsurprising that they failed. But there is nothing in the SYP's disclosure which suggests that they have given any consideration at all to the question of reliability. That can be illustrated in two simple ways. First, the disclosure talks about "offences", when none were proved: it is plain from SYP's whole approach that they have used 'allegation' and 'offence' interchangeably. That wholly negated any consideration of reliability. Secondly, although RC was regarded by the prosecution as being so unreliable that she was not even called to give evidence, no mention of that is made anywhere in the SYP disclosure, which treats her allegations in the same way as those of the other complainants.

5.4 Elapse of Time

41. The events occurred nine or ten years ago. Such a lengthy passage of time would appear to be a factor in the claimant's favour, and militate against disclosure. In order to counter that, SYP have contended that these allegations remain relevant because they are a reflection of the claimant's conduct on the last occasion when he was teaching teenage girls.

42. I confess to finding this argument circular. The claimant lost his job shortly after the trial and has not been able to find further employment as a teacher, due in large part to

SYP's original disclosure (which addressed these rejected allegations). If the ECRC continues to refer to these allegations, then the claimant will never get another job in teaching so these allegations will, on that reasoning, always remain relevant.

43. I consider that the passage of time since these events (if they occurred) is a relevant factor in any assessment of proportionality and would again militate against disclosure. Moreover, I do not think that the fact that the claimant has not subsequently worked as a teacher can then be used against him as a way of 'refreshing' the relevance of these allegations, because it is the allegations themselves that have prevented him from working as a teacher subsequently.

5.5 Impact on the Claimant

44. The impact on the claimant if disclosure was in accordance with the proposed ECRC would, of course, mean that his exile from teaching would continue. Putting it at its bleakest, it could be said that the claimant's entire professional career has been blighted by allegations which were rejected by a jury, but which continue to feature in the proposed ECRC.

45. One looks in vain for any consideration of this element of proportionality in SYP's documentation. Although they refer to the claimant's "human rights", that appears to be a rote reference, and there is no detailed analysis of the impact of this specific disclosure on the claimant himself. This is a huge failing on the part of SYP: they have placed all the emphasis on the allegations, and none on the claimant himself, or the effect on him of the disclosure of these failed allegations.

5.6 Other Matters

46. I have dealt in detail with the proportionality exercise in connection with the court allegations because both sides acknowledged that they were the most important part of the proposed ECRC. However, it is right to note that there are four other points which are raised somewhere or other in the ECRC. These include: (a) the confiscation of a photograph of KB dressed for a night out and its retention on his laptop; (b) the videoing of lessons; (c) inappropriate language; and (d) associating with pupils outside school. Those last two allegations appear to be of particular significance because, on the face of the incomplete documentation before the court, it is suggested that those were the reasons for his dismissal from his job. I turn to deal briefly with each of these four matters in turn.

47. The confiscation of the photograph of KB does not, of itself, appear a particularly serious matter. The claimant gave a full explanation as to the circumstances in which the photograph had been confiscated and put on the scanner (namely, in order to prevent disruption in class). SYP's principal criticism of the claimant in the ECRC appears to be that the photograph remained on the claimant's laptop for a month or more, but that is an incorrect finding. First, the photograph was on the school laptop, not the claimant's own laptop. Secondly, it only remained on that laptop because the claimant was suspended immediately after this incident and could no longer delete it.

48. In all the circumstances, it seems to me that this event was not particularly grave and was the subject of a potentially complete answer from the claimant. Unhappily, his response was not even referred to in the ECRC or the AT3.

49. As to videoing his classes, this seems to have been an issue which arose between the claimant and the Deputy Head, and had little or nothing to do with the other allegations in the case. Mr Pallo submitted that it was appropriate to refer to this matter in the ECRC because the videoing of lessons "could be seen as part of a course of conduct"; in other words, an ongoing and unlawful sexual interest in 15 year old girls. But in many ways that highlights the inherent unfairness of the SYP approach: once you assume, as SYP appear to have done, that the claimant is a sexual predator, then every other element of his conduct (no matter how far removed from the central issues) can potentially be linked back to that assumed basic characteristic. If, on the other hand, that assumption is not made, then the videoing of lessons – which the claimant always said was simply part of his teaching methodology –becomes an entirely neutral event, the only possible relevance of which was in the claimant's relations with the school authorities.

50. I have already said (at paragraph 6 above) that the allegations of bad language are, in my view, so trivial that they have absolutely no place in an ECRC. Furthermore, although it is suggested that this may have been one of the reasons why the claimant was dismissed, it appears that there is also evidence that the Deputy Head did not regard this as a disciplinary matter at all. On the face of the papers, therefore, there is therefore nothing in this point at all.

51. That leaves what I consider to be the most worrying aspect of the case against the claimant, namely his association with pupils outside school. I note at the outset that the claimant has provided detailed explanations for these associations, often involving giving pupils lifts to football matches and the like. Indeed, on one occasion, it appears that he offered a lift to one female pupil who refused him because she was already getting a lift with another member of staff. I also note that these explanations again find no reflection in the ECRC or the AT3.

52. On the other hand, it also appears that the claimant may have been warned (once, possibly twice) about this conduct by the Deputy Head. It also appears that this was – or certainly may have been - the principal reason for his ultimate dismissal. *Prima facie*, therefore, disclosure of this conduct, as part of any disclosure relating to his dismissal and the reasons for it, may pass the proportionality test.

53. Having been critical of SYP's approach to proportionality by reference to the individual issues, it is also worth just standing back and looking at SYP's documents in the round: do they show a fair approach to proportionality?

5.7 The Defendant's Documents

(a) The AT3

54. I have set out parts of the AT3 at paragraphs 11 above. In my judgment, the AT3 document is fundamentally flawed because it fails to address the issue of proportionality *at all*. In particular:

(a) It fails to assess the gravity or seriousness of the court allegations and the other matters to which it refers;

(b) It makes no real attempt to assess the reliability of the information;

(c) It fails to address the period that has elapsed since the events because it takes the spurious point that the claimant has not worked as a teacher since;

(d) It fails to deal at all with the impact on the claimant; and

(e) It wholly fails to consider or address the claimant's explanations or representations.

55. Some of the more obvious failings can be illustrated briefly. First, by reference to box 6 (paragraph 11 above), I consider that the officer's assertion that, although the claimant was found not guilty, "I still believe that there is enough substance to the allegations to warrant disclosure", begs numerous questions. Where is the assessment of the 'substance' of the allegations? What is 'enough substance' and why was there 'enough substance' in this case, when the claimant was acquitted?

56. That same part of the AT3 goes on to say: "I do not believe that there was so many inconsistencies or collusion by all concerned in this case to make me believe the information to be so untrue that it cannot be substantiated". Leaving aside the forlorn syntax of that sentence, it is, in my view, an object lesson in how not to compile an AT3. How can information not "be so untrue that it cannot be substantiated"? Something is either true of it is not. Moreover, if it is suggested that the allegations could be substantiated (despite the fact that they were rejected by the jury), then which precisely are the allegations that could be substantiated, and how and why is it that SYP know better than the jury? Furthermore, the statement of belief that there was not "so many inconsistencies or collusion" appears to require a detailed assessment of the inconsistencies and the collusion, and then explaining, in this officer's view, what aspects of the prosecution case survived both difficulties. There is no such analysis.

57. Furthermore, no detailed analysis relating to the trial has been carried out by SYP as a matter of fact. SYP have accepted that they have not been through the records of the evidence: indeed they say they do not have access to them. The critical evidence of KH, in transcript form, was provided to SYP by the claimant himself, as part of his responses; even then, on SYP's own admission, they did not read it. If the ECRC is going to disclose information in relation to allegations that have been rejected by the jury, on the grounds that the allegations could still be "substantiated", then at the very least that requires a detailed analysis of those allegations by reference to the evidence. On their own case, SYP have not done that.

58. The chief officer's declaration in the AT3 (paragraph 11 above) contains similar difficulties. More obviously perhaps, it contains factual errors, such as the photograph still being on the laptop (in another part of the AT3, SYP accept that the claimant did not have access to the laptop), and references to previous warnings from the Deputy Head despite the fact that, following the claimant's representations, SYP accept elsewhere that the AT3 needs to be reworded, because these allegations were not factually accurate.

59. Two final illustrations of the inadequacies of the AT3 will suffice. The chief officer's declaration refers to not going "into in-depth detail for each offence". There again is the use of the word 'offence' when, to be accurate, what should be referred to, is a

"failed allegation". Secondly, the chief officer says that he is of the opinion "that something did occur here". But his reasoning for that is either incomprehensible (what he mystifyingly calls "gaps in instances"); or incomplete: one of the females was said not to be friendly with the others (and the implication is that she was therefore not involved in the collusion), but of course that would not only require proper proof, but it also takes no account of the wider school rumour-mill.

60. For all these reasons, therefore, it seems to me that the AT3 is a fundamentally flawed document because it does not deal with the issue of proportionality in anything like a proper or fair way.

(b) ECRC Final Disclosure (2 April 2013)

61. This document is set out in paragraph 12 above. Unsurprisingly, perhaps, it exhibits many of the same flaws as the AT3 including:

(a) The unblinking equation between unproved allegations with what are here expressly called "sexual offences";

(b) The subjective statements of belief;

(c) The unreasoned conclusion that, even though the allegations were dismissed, there was still something in them;

(d) The partial way in which the allegations are dealt with, and the introduction of the other matters (bad language and so on) in an unstructured and impressionistic fashion.

62. The ECRC of 2 April 2013 suffers from the same faults as the AT3. It is the product of an improper approach to proportionality.

(c) The Amended ECRC of 25 April 2013

63. As I have already said, the amended document dated 25 April (paragraph 13 above) is not based on a reconsideration of the underlying flaws but merely an attempt to answer some of the more glaring errors and anomalies which I had pointed out in open court on 11 April 2013. It need hardly be said that a disclosure exercise which has been done, as it were, on the hoof, attempting to meet the criticisms made along the way, is not an exercise in which it is possible to have any real faith. The fact that there has not been a proper redoing of the AT3 exercise means the amended document is, ultimately, no better an ECRC than its predecessor.

5.8 <u>Conclusion on Proportionality</u>

64. In my judgment, the defendant has had no proper regard to the exercise of proportionality. The reasons for that are set out above. In consequence, the proposed ECRC of 2 April (even as amended on 25 April) is flawed and must be quashed.

65. The fundamental flaw in SYP's approach is not difficult to discern. Although SYP have not done a detailed analysis of the evidence at the trial, they plainly believe that the claimant was fortunate to be acquitted and they have decided that they will treat the allegations as "substantiated" (to use their word) in any event. That blinkered

view has hampered them all the way through. It was even the subject of adverse comment by Hampshire Constabulary. It explains why SYP have never got close to a proper assessment of proportionality.

66. I am confirmed in that view by reference to ***C v Chief Constable of Greater Manchester***. In that case (unlike here) the allegations had not been rejected by a jury, and in that case (unlike here) the allegations of sexual abuse were of the gravest kind. Yet, Langstaff J quashed the disclosure, and in doing so, said this at paragraph 53:

> "That the conclusion ultimately was as it was seems, as I have indicated, to place too high an emphasis on the fact that if any allegation of sexual interference with a youngster is necessarily grave and serious, and implies that a disclosure in any such case should, whatever the consequences to a claimant, be revealed. It does not strike the proper balance for the interests of the subject of that disclosure."

67. In my view, precisely the same conclusion applies here.

68. It follows, in the light of my views as to proportionality that I must order the quashing of the disclosure decision. It is thus unnecessary for me to deal in detail with the other three issues. However, I do so briefly below.

6. ISSUE 2: HAS THERE BEEN A FAILURE TO GIVE ADEQUATE REASONS?

69. As I have already said, I consider that SYP failed to give adequate reasons. First, box 6 of the AT3 form contains no mention of, and certainly no reasoned assessment of, the impact on the claimant on the proposed decision or the level and severity of that impact. I accept Mr Offer's submission that this aspect of the case is entirely missing from the documents generated by SYP. Their whole focus has been on what they see as the wider policy issues in favour of disclosure, rather than the impact of disclosure on the claimant.

70. Secondly, there has been a failure to explain why the disclosure of the allegations outweighs everything else. Given that the reliability of the information in much of the ECRC is self-evidently questionable, for the reasons noted above, SYP were obliged to explain how and why they had, notwithstanding those difficulties, come down in favour of disclosure.

71. The failure to give adequate reasons can also be seen on the repeated use of the formula (in both the AT3 document and the ECRC) of "I believe that…" Not only are such expressions of subjective belief contrary to the guidance to which I have previously referred, but they also appear to be used as a substitute for adequate reasoning. For example, SYP consistently state their "belief" that the collusion did not happen, and certainly not to the extent alleged. But there is no rational explanation for that; nor could there be in circumstances where, as I have already said, SYP have not seen the material generated by the trial.

72. The only piece of reasoning put forward to justify this belief is the absence of what are referred to by SYP as any "findings" of collusion. That explanation simply beggars belief: juries do not make findings; they simply say whether or not the

defendant is guilty. Such a misconceived conception of the process of the criminal trial is, I think, eloquent testimony to the failure of reasoning on the part of SYP.

73. Essentially, the whole approach of SYP is encapsulated in the chief officer's statement that "I am also of the opinion that something did occur here…" No proper reasons for any such conclusion have been provided, and no justification is offered for the officer setting himself above the jury.

74. Accordingly, I accept Mr Offer's alternative submission that this decision should be quashed on the grounds of inadequate reasons.

7. ISSUE 3: HAS THERE BEEN RELIANCE ON IRRELEVANT MATERIAL AND/OR A FAILURE TO CONSIDER RELEVANT MATERIAL?

75. It is plain that SYP have had regard to irrelevant material. For example, I consider that the allegations relating to the videoing of lessons, and the inappropriate language, to be entirely irrelevant to any question as to whether or not this claimant is a risk to children.

76. In addition, SYP have failed to have regard to relevant material. In particular, I have in mind the claimant's detailed representations in respect of the allegations concerning the confiscation of the photograph and the association with pupils after school. Both these events feature in the SYP documentation as being of potential significance. Yet parts of the proposed disclosure on these topics are factually inaccurate (as confirmed by other parts of the AT3). More importantly, the final disclosure does not take into account – indeed makes no reference to – the claimant's detailed representations in which he provides explanations for both allegations. It is not appropriate to invite representations, and then provide an ECRC which appears, on its face, to ignore them altogether.

77. There are a number of other instances of reliance on irrelevant material and a failure to consider other matters, but those have really been addressed under the proportionality issue and I do not need to repeat them again here.

8. ISSUE 4: HAS THERE BEEN AN APPEARANCE OF BIAS?

78. The relevant test in respect of the appearance of bias was set out by Lord Phillips in ***In Re Medicaments*** [2001] 1 WLR 700 at 726 as follows:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

79. When I first saw these papers I considered that there was little in this part of the case, and it certainly was not the centrepiece of Mr Offer's submissions.

80. However, having set out the history of this dispute, and all the relevant circumstances, I am not so sure. I consider a fair-minded observer may conclude that those at SYP involved in this disclosure exercise have been intent on ensuring that the ECRC

includes reference to the court allegations, regardless of the fact that the claimant was acquitted. The material appears repeatedly slanted or "spun" in a way that is designed to cast the claimant in a bad light. Because of the repeated instances where this has occurred, to which I have already referred, it may be that the appearance of bias has indeed been made out.

81. On this point, Mr Pallo submitted that bias could not be discerned, and relied in part on the review by Hampshire Constabulary, which did not suggest it. However, for myself, I do not consider that the Hampshire Constabulary material is of any real assistance to SYP on this issue. True it is they seemed to support the result, if not the methodology, but Hampshire's view that "the audit trail will not reflect well on South Yorkshire Police" is, I think, an admission that there may well be the appearance of bias. Furthermore, I note in passing that, although it is said that Hampshire's report agreed with SYP in the result, their overall conclusion was that the disclosure information held on the claimant "could not be considered to be wholly unreasonable". That is manifestly *not* the test for disclosure; the claimant does not have to prove that disclosure would be "wholly unreasonable". I am not therefore persuaded that, on a proper analysis, Hampshire Constabulary have actually supported SYP at all.

82. I am not prepared to make a finding of the appearance of bias in this case because I am already quashing the order for other reasons, and because I am aware of the potential significance of such a finding. However, in the light of my observations, I consider that it would be prudent for SYP to ensure that, hereafter, this disclosure issue is dealt with by different officers within SYP.

9. CONCLUSIONS

83. For the reasons that I have given, this decision must be quashed. That is principally because I consider that SYP have failed to deal properly with the question of proportionality.

84. SYP have sought a period of six or eight weeks in order to reconsider the decision. Since I have advised them that they ought to use different officers, I am prepared to grant an eight week period for this to be done.

85. It is not for the court, in these circumstances, to say definitively what should be disclosed. However, it may help if I indicate what I consider to be the real parameters for disclosure in this case.

86. I would not include in the ECRC any of the material relating to the court proceedings. The allegations were rejected; they were allegations which were not of the gravest or most serious kind; they were not supported by reliable evidence, with clear suggestions of collusion and revenge; and they were met with a cogent and consistent defence. If they happened at all, it was a long time ago. In any event, the impact on the claimant would, in my view, outweigh the inclusion of this material in the ECRC.

87. In my view, any consideration of the contents of the ECRC should be limited to two contrasting matters: the claimant's dismissal, on the one hand, and the decisions not to bar him from teaching, on the other. As to the former, if the claimant was dismissed for associating with pupils outside of school, and his appeal against that decision

failed, then it may be that this information would meet the proportionality test. However, the reasons for his dismissal will need to be clearly stated and, to that end, it will be important that the ECRC is accurate. Notwithstanding that the claimant unsuccessfully appealed that decision, there seems to be a good deal of confusion as to precisely why he was dismissed, which would need to be resolved for the purposes of any future ECRC.

88. On the other hand, of course, if the dismissal is referred to, then so too should be the decisions not to disbar the claimant from teaching. They will also need to be fully set out.

89. It follows from what I have previously said that, in my view, on the basis of the material currently available to me, the confiscation of the photograph, the videoing of lessons, and the inappropriate language, should not be included in any ECRC.

90. I make plain that these observations are provided to be of assistance to the parties but it is not for the court to make a ruling as to precisely what the ECRC should or should not disclose.

91. In accordance with the agreement at the hearing on 20 May 2013, this judgment was sent to the parties in draft and various typographical errors have been corrected. All ancillary matters will be dealt with subsequently.