Case No: CO/4263/2014

Neutral Citation Number: [2015] EWHC 2085 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

In an application for Judicial Review: CPR 54

The Court House
Oxford Row
Leeds LS1 3BG

Date: 16 July 2015

Before:

His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

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Between:

The Queen on the application of	
SD	**Claimant**
- and -	
THE CHIEF CONSTABLE OF NORTH YORKSHIRE POLICE	**Defendant**
- and -	
THE DISCLOSURE AND BARRING SERVICE	**Interested Party**

- -
- -

David Comb (instructed by **Thompsons Solicitors**) for the **Claimant**
Ian Skelt (instructed by **Emma Morris**) for the **Defendant**

Hearing dates: 9 July 2015

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Judgment

Judge Behrens:

1. Introduction

1. This is an application for judicial review by SD. It relates to an entry made about him by the Chief Constable in an Enhanced Criminal Records Certificate ("ECRC").

2. The Certificate is dated 14th February 2014. It includes an entry under the heading "other relevant information disclosed at the Chief Police Officer's discretion":

> "The information relates to SD's alleged unprofessional behaviour during a college trip
>
> North Yorkshire Police believe this information to be relevant to an employer's risk and suitability assessment when considering SD's application for technician working with children because without this information the registered body may not be able to mitigate and manage any potential risk.
>
> SD underwent a police investigation in November 2011 following an allegation that he had behaved in an unprofessional manner whilst working as a lecturer supervising a college trip in July 2010. SD allegedly made inappropriate comments of a sexual nature in the presence of students aged between 17 - 24 and other adults present on the trip. The findings of the investigation revealed no criminal offences committed.
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> SD made representations regarding the above information. Mr SD stated that the complaints were made against him after he had made a complaint against another member of staff. He believed that this member of staff had encouraged others to make allegations about him to discredit him and they were only ever based on hearsay. SD further stated that the allegations were untrue.
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> After careful consideration, North Yorkshire Police believe that this information ought to be disclosed because it shows SD's alleged inappropriate behaviour /language in the presence of students in his care. In this particular case SD's right to privacy is outweighed by the need to protect the interest of children and for the registered Body to have details of the incident in order to make a balanced decision. The potential risk to any child of being exposed to similar behaviour/language in this instance outweighs any prejudicial impact, however regrettable, to SD.

3. It is SD's case that this entry disproportionately interferes with his right to respect for private life, guaranteed by Article 8 of the European Convention on Human Rights (ECHR). He accordingly seeks an order quashing the entry in the ECRC.

4. The Chief Constable opposes the application. It is the Chief Constable's case that the decision in this case was proportionate. It was taken in accordance with the applicable legislation and guidance. Amongst other points he relies on the fact that in a report dated 4th December 2014 the Independent Monitor ("IM") upheld the North Yorkshire Police's decision in relation to the entry concluding that the disclosure was "accurate, relevant and proportionate and that it ought to be disclosed". It is not suggested that the views of the IM are conclusive. However it is submitted that a degree of respect is owed to the primary decision maker especially where, as here, it is supported by the IM.

2. The facts

The trip to Romania

5. In July 2010, SD was employed at Craven College, teaching joinery skills to students aged 17- 24 years. He was tasked at that time with supervising a student trip to Romania. In the course of that trip, it is alleged *inter alia*:

(1) That he took photos of male students outdoors with their tops off;

(2) That he made a sexually inappropriate remark on a train "I've never been sucked off on a train before"; and

(3) That he made sexually inappropriate remarks while drinking in a bar, which have been reported in various ways but at their height, include attribution of the remarks "fishy jump" and "nothing like sex with a 12 year old, right juicy fanny."

6. SD accepts that he took photographs which depicted some of the male students with their shirts off. It was done with a camera provided by the college for the purpose of keeping a record of the trip. The photographs were recorded innocently as part of his duties. As this allegation is not referred to in the ECRC it is not necessary to make any further reference to it.

7. SD categorically denies that he made any sexually inappropriate remarks either whilst on a train or whilst in a bar. He believes that the allegations are a deliberate attempt to discredit him.

8. He accepts that following the trip he was spoken to about relieving himself behind a tree after becoming intoxicated at a local bar and that he accepted an informal reprimand. As this is not mentioned in the ECRC it is not necessary to refer to it further. However, as will appear below, the College investigation report also suggests he was spoken to about the sexually inappropriate comments and that he denied making such comments.

Events in 2011 and 2012

9. On 4th August 2011 SD raised a formal grievance against his Line Manager at Craven College, Steven Jarvis. He alleged systematic failure by the institution to meet the educational needs of its students and perhaps more seriously, a concerted effort by various staff members to certify falsely the attainment levels of students, including by the production of fraudulent exam evidence.

10. During the course of the investigation into Simon Jarvis allegations were made against SD. These were investigated by Ms Mercer who produced a report dated 13th October 2011. Ms Mercer spoke to 9 of the students. All recalled the incident in the pub and at least 4 of them remembered that he had made the inappropriate sexual remarks attributed to him. She spoke to a lecturer who had said that he had witnessed SD using the offensive language whilst on the train. The lecturer felt it had been overheard by at least one student and an external lecturer. He had put his comments in an email in July 2010. Another member of staff recalled that he overheard SD telling another member of staff: "All I said was that there is nothing like sex with a 12 year old, right juicy fanny"

11. Ms Mercer interviewed SD who denied making any of the offensive remarks and suggested that they must have been made by students wanting to make trouble for him as he had been involved in keeping discipline on the trip.

12. Ms Mercer recommended that in the light of the corroboration SD's actions be dealt with as gross misconduct and dealt with under the college's disciplinary procedure.

13. In fact no disciplinary hearing took place because SD entered into a compromise agreement with the College on 31st October 2011. Under that agreement SD's employment terminated on 31st October 2011, he received modest severance pay of just under £9,000 and the College agreed to provide him with a positive reference which included a statement to the effect that

> S has good interpersonal skills and is keen to be involved with the community, youth and voluntary groups.

14. In November 2011 there was a police investigation. SD was not interviewed and not informed of the investigation at the time. A decision was made that no crime had been committed.

15. On 12th January 2012 the Independent Safeguarding Authority ("ISA") sent a letter to SD to the effect that he was to be investigated as a result of a referral by Craven College. The investigation was to consider whether SD was to be barred from working with children or vulnerable adults. On 13th March 2012 SD was informed that the investigations were complete and that he would not be included in either barred list.

Events leading to the ECRC.

16. In 2013 SD applied for a job as a child workforce technician with Visions Learning Trust. As a result he had to make an application to the Disclosure and Barring Service for an Enhanced Criminal Record Check.

17. On 8th November 2013 the DBS unit employed by North Yorkshire Police ("DBS") wrote to SD informing him that:

> We have information that suggests that in October 2011 you were subject to disciplinary and grievance proceedings by Craven College in relation to complaints made by staff and students. We are considering releasing this information on your DBS Certificate.

18. The letter asked for the result of the investigation.

19. On 14th November 2013 SD replied in detail to the letter enclosing a copy of the compromise agreement and the letter from the ISA. He denied the allegations and repeated his position that the allegations were false.

20. On 19th December 2013 DBS wrote to SD with the text it proposed to insert in the ECRC. It invited further comments from SD.

21. On 29th December 2013 and 11th January 2014 SD sent further detailed representations to DBS making a number of points about the proposed wording and pointing out a number of alleged inaccuracies. He maintained his position that disclosure would be unfair.

22. These representations were considered again by the DBS Unit. A decision was made that disclosure should be made, but the terms were amended in light of the Claimant's comments. The decision was reflected in a Form AT3. The AT3 records:

> 1. The initial decision of Carrie White including her view as to why disclosure was considered appropriate in the light of SD's right to privacy. It is to be noted that she considered that the allegations were more likely to be true than not.
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> 2. That representations had been made by SD with a brief summary of those representations.
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> 3. The amended proposed disclosure
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> 4. That the proposed disclosure was checked by a DBS Quality Assurance Officer, who agreed with the proposed disclosure, a DBS Manager and by Chief Officer (DCC) Tim Madgwick. Each of these persons gave detailed reasons for believing the disclosure to be proportionate. Each of them believed that the allegations were more likely to be true than not and that it was proportionate to release the information as it would enable the employer to manage the risk.

23. The ECRC was duly issued on 14th February 2014.

The dispute

24. On 12th May 2014 SD raised a dispute against the contents of the ECRC. The grounds of the dispute were detailed and referred to much of the relevant law. All of the grounds raised by SD were considered and rejected on 12th June 2014.

25. SD exercised his right to request the IM review the disclosure. Before the result was known these proceedings were issued. The IM's decision was on 4th December 2014. He supported the disclosure.

26. Permission to make this application was granted by HHJ Gosnell on 9th February 2015 who made the following observations:

> "There is no doubt that the disclosure interferes with the Claimant's Article 8 rights and the main issue in this case is whether such disclosure is proportionate to a legitimate aim. The legitimate aim is obvious but the balancing exercise in cases where there is no conviction and the behaviour complained of is not the most serious is a difficult one. The report of the Independent Monitor clearly supports the Defendant's decision and is well reasoned. The test at this stage however is whether the claim is arguable not whether it is likely to succeed."

Impact on SD

27. In his witness statement SD deals with the impact of the ECRC. He points out that he managed to keep his job with Vision Learning Trust in Burnley. He attributes this to the fact that he had in fact been employed for some time before the issue of the ECRC. He had made a sufficient impression on the managers to enable them to retain him as an employee.

28. However he wishes to be employed as a College Lecturer where the earnings are significantly higher.

29. He was offered a post at Preston College. Following an interview on 24th June 2015 the offer was withdrawn due to the entry on a new ECRC. It is assumed that

the disclosure was similar to that contained in the ECRC challenged in this application.

30. Thus there is no doubt that the entry is affecting SD's ability to obtain work with vulnerable people. Whilst it cannot be said that he is unable to work at all it is plain that the entry on the ECRC is significantly affecting his ability to obtain work as a College Lecturer.

3. The Law

31. There was very little difference between Counsel as to the relevant legal principles involved. However during the course of the hearing I was referred to no fewer than 9 authorities including the decision of the Supreme Court in R(L) v Commissioner of Police for the Metropolis [2010] 1 A C 410, and the decision of the Court of Appeal in R(A) v Chief Constable of Kent [2013] EWCA Civ 1706.

32. The relevant law and principles can be taken from section II the judgment of Beatson LJ in the decision in A's case.

> **II The legal framework**
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> 8. This consists of the 1997 Act, the jurisprudence, and statutory guidance issued by the Home Office in 2012. By section 113B(4) of the 1997 Act:
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> > "Before issuing an enhanced criminal record certificate, the Secretary of State must request any relevant chief officer to provide any information which –
> >
> > (a) the chief officer reasonably believes to be relevant for the purpose described in the statement under sub-section (2), and
> >
> > (b) in the chief officer's opinion, ought to be included in the certificate."
>
> A chief officer is required to comply as soon as practicable with a request under section 113B. Sub-paragraphs (a) and (b) require an ECRC to contain information which the chief officer "reasonably believes to be relevant" to a post caring for children or vulnerable adults and ought, in the chief officer's opinion to be included in the certificate.
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> 9. The leading decision on section 113B(4) is that of the Supreme Court in *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, reported at [2010] 1 AC 410 ("*L*'s case"). It is clear from that decision that the information disclosed may be information that does not involve any allegation of criminal behaviour on the part of the person employed in a post caring for children or vulnerable adults or applying for such a post (see [51]). It follows from this that whether any such information which "might be relevant" "ought" to be included requires a balance to be struck between the need to protect children and vulnerable adults from the risk of harm and the employee or prospective employee's right under Article 8 of the European Convention on Human Rights ("the ECHR") to respect for his private life: *L*'s case at [42].
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> 10. In *L*'s case Lord Neuberger (at [81]) gave guidance about the balancing process and examples of the different and sometimes competing factors which have to be weighed up by the decision-maker. He stated:
>
> > "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."

He continued:

> "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."

11. In July 2012 the Home Office issued guidance under section 113B(4A) of the 1997 Act ("the statutory disclosure guidance") to assist chief officers of police in (see paragraph 2) "making appropriate, proportionate and consistent decisions in providing information from local police records for inclusion in enhanced criminal record certificates (ECRCs)". The statutory guidance also contained a number of principles. Those material in the present context are principles 2 and 3, respectively that "information must only be provided if it is reasonably believed to be relevant for the prescribed purpose", and "information should only be provided if the opinion is that it ought to be included". Paragraph 13 of the statutory guidance states that, in order to decide whether he or she reasonably believes material to be relevant, the chief officer must consider a number of factors, in particular the credibility and reliability of the information.

12. Paragraph 18 under principle 2 deals with credibility. It states that the question whether information is sufficiently credible:

> "…will always be a matter of judgment, but the starting point will be to consider whether the information is from a credible source. Chief officers should consider whether there are any specific circumstances that lead them to consider the information is unlikely to be true or whether the information is so without substance that it is unlikely to be true. In particular, allegations should not be included without taking reasonable steps to ascertain whether they are more likely than not to be true."

13. As to the question whether information that the chief officer has a reasonable belief is relevant should be included in the certificate, paragraph 22 states:

> "If there is a legitimate aim pursued, the next step is to consider whether the disclosure of the information is necessary to pursue that aim including consideration of whether there are any other realistic and practical options to pursue that aim. If disclosure is considered necessary to pursue that aim then the question becomes one of proportionality. In practice, this will involve weighing factors underpinning relevancy, such as seriousness, currency and credibility, against any potential interference with privacy. All decisions must be proportionate. This means that the decision is no more than necessary to achieve the legitimate aim and that it strikes a fair balance between the rights of the applicant and the rights of those the disclosure is intended to protect. It is therefore essential that the reasoning in reaching a decision is fully and accurately recorded in each case."

The last sentence of paragraph 22 is also embodied in principle 7, that "information for inclusion should be provided in a meaningful and consistent manner, with the reasons for disclosure clearly set out."

14. Principle 8 concerns delegation of a chief constable's responsibilities. Paragraph 4 *inter alia* states that "where delegation occurs, the chief officer should ensure that the delegate has regard to this statutory guidance".

33. The judgment of Beatson LJ also contains a number of observations on the role of the Court in a challenge to an ECRC. The relevant passage is from paragraph 36 to 39 of the judgment:

> 36. It was common ground between the parties that, where the question before a court concerns whether a decision interferes with a right under the ECHR and, if so, whether it is proportionate and therefore justified, it is necessary for the court to conduct a high-intensity review of the decision. The court must make its own assessment of the factors considered by the decision-maker. The need to do this involves considering the appropriate weight to give them and thus the relative weight accorded to the interests and considerations by the decision-maker. The scope of review thus goes further than the traditional grounds of judicial review: see e.g. *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [27].
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> 37. There are also clear statements that it is the function of the court to determine whether or not a decision of a public authority is incompatible with ECHR rights. In *R (SB) v Governors of Denbigh High School* [2006] UKHL 15 at [30], Lord Bingham stated that "proportionality must be judged objectively by the court". See also Lord Hoffmann at [68], Lord Neuberger MR in *L*'s case [2009] UKSC 3 at [74], and *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19. In the last of these decisions Baroness Hale stated (at [31]) that it is the court which must decide whether ECHR rights have been infringed. In *Huang v Secretary of State for the Home Department* [2007] UKHL 11 Lord Bingham also stated that the court must "make a value judgment, an evaluation". But he made it quite clear (at [13]) that, despite the fact that cases involving rights under the ECHR involve "a more exacting standard of review", "there is no shift to a merits review" and it remains the case that the judge is not the primary decision-maker. In *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, Lord Reed (at [131]) stated that, "although the courts must decide whether, in their judgment, the requirement of proportionality is satisfied, there is at the same time nothing in the Convention, or in the domestic legislation giving effect to Convention rights, which requires the courts to substitute their own views for those of other public authorities on all matters of policy, judgment and discretion".
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> 38. In *SB*'s case Lord Bingham stated (at [30]) that the evaluation of proportionality must be made by reference to the circumstances prevailing "at the relevant time". In these proceedings, possibly the issue between the parties with the widest implications is what his Lordship meant by "the relevant time". I deal with this at [67] – [92] below.
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> 39. Much consideration has also been given to the weight it is "appropriate" for the court to give to the judgment of the person who has been given primary responsibility for the decision. That person has, in the words of Lord Bingham in *Huang*'s case at [16], been given "responsibility for a subject-matter" and "access to special sources of knowledge and advice". If that person has addressed his or her mind at all to the existence of values or interests which, under the ECHR, are relevant to striking the balance, his or her views and conclusions carry some weight. But, if the primary decision-maker has not done so, or has not done so properly, his or her views are bound to carry less weight and the court has to strike the balance for itself, giving due weight to the judgments made by the primary decision-maker on such matters as he or she did consider: see *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 *per* Baroness Hale at [37] and Lord Mance at [47].

34. In paragraphs 67 to 91 of his decision Beatson LJ considered the question of whether the Court can consider post decision/post disclosure material. The reasoning is detailed and it is not necessary to summarise it in this judgment. He expressed his conclusion in paragraph 91:

> 91. For these reasons I consider that, in a case such as this, where the primary decision-maker is not under a continuing duty in relation to the matter in the way that the Home Secretary is in the cases to which I referred at [77] – [78], the reviewing court should not consider post-decision material when conducting its assessment of whether a *prima facie* infringement of an ECHR right has been justified as proportionate. In the context of ECRCs issued pursuant to the 1997 Act, the court was informed that, while the trigger for an ECRC is usually an application for a new job, many bodies, in particular NHS Trusts, require an annual ECRC. On the assumption that, on 12 October 2012, when the disclosure that is challenged was made, the decision to disclose the material was proportionate notwithstanding the effect on A, after the 12 December 2012 decision by the NMC, it would, as I stated at [81], have been appropriate for A to make a further application for an ECRC. That, in my judgment, is what should generally happen. I recognise that exceptional circumstances may justify a different approach in a particular fact situation, but the flexibility of the judicial review procedure as seen in the cases to which I have referred (at [77] above) would permit the court to proceed appropriately in such circumstances.

35. In paragraphs 4 and 5 of his skeleton argument Mr Comb submitted that the appropriate standard of review is to reassess the proportionality balance that the decision maker has struck. He submitted that the Court was not concerned with the process adopted by the Chief Constable and that the suggestion (in paragraph 27 of the Detailed Grounds of Defence) that the Court should be reluctant to intervene in decisions of the IM on the issue of risk assessment was wrong.

36. In my judgment the proper approach is that set out in the above passages of Beatson LJ's judgment. I am required to make a high intensity review of the decision. I must make my own assessment of the relevant factors. However there is no shift to a merits review. The degree of weight to be attached to the decision maker's decision depends on the extent to which he addressed the factors relevant to striking the balance. The fact that the decision was supported by the IM cannot in my view be irrelevant. The weight to be attached to it will also depend on the extent to which the IM has addressed the relevant factors in reaching his conclusion.

37. Mr Comb referred me to a number of cases where on their facts the ECRC has been quashed. I agree with Mr Skelt that these cases are fact specific and little is to be gained by an analysis of the facts in those cases so as to arrive at a supposed analogy with this case.

38. A good example of this is the case of RK [2013] EWHC 1555 (Admin) where a schoolteacher was acquitted of indecent assault of 4 children by touching them over their clothes. Coulson J quashed the ECRC which referred to these matters. However an examination of the decision shows that Coulson J found that the allegations were inherently unreliable [40], that the events occurred 9 or 10 years before [41], and that there was no detailed analysis of the impact on the Claimant [45]. In Coulson J's view this was a "huge failing". Furthermore Coulson J identified real inadequacies with the AT3 which recorded the process by which the decision was reached [56] – [59]. Finally it is to be noted that in his conclusions Coulson J suggested matters that the ECRC might contain [85] – [88]. Thus it is no part of Coulson J's decision that the ECRC could make no reference at all to the incident.

39. Similar points can be made about Langstaff J's decision in the case of C [2010] EWHC 1601 (Admin) where the Claimant wanted a job as a welding lecturer at a college of further education. A complaint had been made by his step daughter to the

effect that she had been abused by him between the ages of 5 and 15. The Claimant denied the allegations. No prosecution followed. The details were referred to in the ECRC. Langstaff J quashed the ECRC. However an examination of the decision shows that there was no obvious consideration of how a welding lecturer would come into contact with children in respect of whom there was some risk of abuse [28], that the decision maker had ignored objective evidence that the allegation was false [29] that there was no detailed consideration of proportionality [31] and that he took into account guidance which was flawed and which had been criticised in the Supreme Court decision in L's case [34].

4. Discussion and Assessment

40. I agree with Mr Comb that a convenient course is to consider the factors identified by Lord Neuberger in [81] of his judgment in L's case.

Reliability

41. Mr Comb submitted that the information was unreliable. He made the point that the allegation was not made for 14 months after the trip to Romania. It was made in the context of an investigation of a serious complaint made by SD against Mr Jarvis. The nature of the complaint was such that it would have had serious implications for the College itself. Furthermore the evidence relied on by the Chief Constable was hearsay in the sense that there is no evidence that they interviewed the complainants. He also relied on the Compromise Agreement and in particular the wording of the reference which the College agreed to provide. He pointed out that there was no evidence that SD had a propensity to make inappropriate remarks of the nature alleged.

42. The AT3 form shows the extent to which this question was considered. It was initially considered by Carrie White who pointed to the numerous witnesses and similar allegations from both staff and students (p3 of the AT3). The matter was reconsidered in the light of SD's representations. The officer referred to the independent witnesses and similar accounts, to SD's explanation that the complaints were made after he had made a complaint. However she pointed out that SD's behaviour had come to light prior to the complaint though no formal investigation took place. She concluded that the allegation was more likely to be true than false.

43. The matter was then considered by the DBS Manager Caroline Brigginshaw who agreed with the decision. She pointed out that 2 separate investigations had taken place, that the statements made by the students leant towards the conclusion that Mr SD did make the inappropriate comments and this was backed up by an independent witness.

44. This view was endorsed by the Chief Officer (Mr Madgwick) when he made his decision. He referred to the witness statements. Furthermore when he reviewed the matter in June 2014 he referred to the fact that the allegations had been corroborated and documentation received by the police demonstrated that they could be substantiated. He referred to the independent witness and concluded that the allegation was more likely to be true than false.

45. The question of credibility was also considered by the IM (p154). He referred to the investigation, the allegation of collusion, and the fact that SD was spoken to

immediately after the trip and the number of witnesses. The IM was satisfied the allegations were credible and more likely to have occurred than not.

46. I agree with the views of the Chief Officer, Carrie White, Caroline Brigginshaw and the IM that the incident is more likely to have occurred than not. My reasons largely echo their reasons. There are two members of staff and 9 students who corroborate the allegations. Although the email sent by one of the members of staff after the trip has not been disclosed it is to be noted that it referred to the inappropriate comments and according to the investigation report they were specifically raised with SD at the time. Whilst it is possible that there has been a conspiracy by the members of staff and the students to discredit SD it is to my mind more likely that their statements are correct.

Gravity

47. Mr Comb submitted that the allegations were not serious in nature. The remarks do not amount to a crime. There is no evidence that they caused any harm to anyone, whether vulnerable or otherwise. Mr Comb accepted that the remarks were offensive and inappropriate.

48. In the AT3 the remarks are described variously as “inappropriate” and “very inappropriate”. It is pointed out that there is a risk that any similar behaviour may cause alarm distress and discomfort to children he may come into contact with. In considering the review in June 2014 Mr Madgwick noted that Ms Mercer had considered the matter to amount to gross misconduct.

49. The matter is considered by the IM (154). He points out that SD was in a position of trust as a lecturer with responsibility for students some of whom were only 17. In his view that raised the seriousness of the matter. At p 155 he considers that the allegations go beyond “poor behaviour” and crosses the line.

50. I accept that there is no evidence of harm to the students on the trip. The investigation refers to them being surprised that a tutor would act in such a way, that they considered his behaviour inappropriate, strange and childish. However they did not feel in danger from him.

51. Nevertheless I agree that the remarks made by a lecturer in a position of trust of 17 year children in their presence are sufficiently serious to merit inclusion in an ECRC. I agree that there is a risk that any similar behaviour could cause distress, alarm and discomfort to any other children he had to supervise.

Relevance

52. SD was seeking a role working within the child workforce and specifically as a technician at a learning trust. [He has of course since applied for a job as a College Lecturer]. It is likely that he will have regular contact with children on a one to one or group basis.

53. In those circumstances I agree with the IM that the information is directly relevant to SD’s wish to work with children.

Lapse of Time

54. It is pointed out that the incident occurred nearly 4 years before the ECRC was issued in February 2014. Mr Comb submits that there is now no material to suggest that SD represents any form of risk to vulnerable people.

55. Whilst it is plain from the AT3 that the Chief Officer was aware that the date of the incident was the summer of 2010 there is no specific reference to lapse of time in the reasoning.

56. The matter is, however, specifically considered by the IM (154). In his view 4 years is not sufficient for these matters to be considered as aged. In time the matters will age and in the absence of additional information would become less significant.

57. This is, as Beatson LJ points out, a value judgment. Whilst I agree with the IM and (by implication) the Chief Officer that 4 or 5 years is not sufficient for the matters to become aged I should myself have thought that (in the absence of additional information) they will soon become aged.

Impact

58. Although there was unchallenged evidence before me as to what has happened to SD after 14th February 2014 both in respect of the job with Visual Learning Trust and with Preston College it is plain from [91] of Beatson LJ's judgment that save in exceptional circumstances I should not consider events that postdate 14th February 2014 in considering whether the disclosure was proportionate. Apart from all other considerations the failure to obtain the job with Preston College was as a result of a different ECRC from that challenged in this case.

59. It is however quite clear from the AT3 that the Chief Officer recognised that the disclosure would have a damaging effect on SD's employment prospects. This appears in a number of places in the AT3 [pp 8, 10, 14] and in the final paragraph of the wording of the disclosure itself.

60. The IM accepted (p155) that the presence of the information in the ECRC could have a negative impact on SD in relation to his application for employment.

61. In his oral submissions Mr Comb submitted that the Chief Officer had only paid "lip service" to the question of the impact on SD. I do not agree. The Chief Officer plainly recognised that the information would affect SD's employability. He could not know the extent.

62. In so far as this is one of the exceptional cases referred to in Beatson LJ's judgment it is plain that that the information has not made it impossible for SD to work with children. On the other hand it is plain that his application for a job at Preston College has been turned down as a result of what is assumed to be similar wording in a later ECRC. Thus, as recognised by both the Chief Officer and the IM there has been some impact on SD's employment prospects and private life.

The material in the ECRC

63. As noted above the Chief Officer modified the wording of the disclosure in the light of the submissions made by SD. The final version of the disclosure is limited. The two central paragraphs are factual and accurate. They set out the nature of the allegations (without giving details of what he is alleged to have said) and the

circumstances in which he is said to have made the comments. They set out that no criminal offence was committed. They set out quite fully the nature of SD's case as to why they are untrue. The remaining two paragraphs set out why the information ought to be disclosed. They identify SD's right to privacy and the reason why the Chief Officer considers that right to outweighed.

64. In the AT3 (page13) Mr Madgwick expresses the opinion that the disclosure is accurate, balanced and fair. In his report (p 153) the IM considered the disclosure is an accurate reflection of the information held by the police.

65. Mr Comb did not criticise the wording of the disclosure in his submissions.

66. I agree with the Chief Officer and the IM that the disclosure is accurate, balanced and fair.

Proportionality

67. It is common ground that the disclosure interferes with SD's right to privacy. It is also common ground that the legitimate aim is that of the protection of vulnerable people. SD was going to be working with children in the application for work for the Visual Learning Trust. Thus the crucial question is whether the disclosure was proportionate.

68. It is clear from the AT3 and the wording of the disclosure that the Chief Officer believed the disclosure to be reasonable and proportionate because it would enable a prospective employer to manage any potential risk of SD repeating the inappropriate conduct in the presence of any children.

69. The IM supported that view. He considered that there was a continuing risk to those people that SD would be responsible for in the Vision Learning Trust. He concluded:

> I am satisfied that the impact of a repeat of the types of incident described in the disclosure certificate would have a significant negative impact on the children you would be responsible for in the terms of the undermining of college discipline and/or causing distress to the children under your responsibility such as to outweigh the impact that disclosure may have on you.

70. I agree with that conclusion.

71. In my view this is a case where the Chief Officer has taken into account the relevant factors, has afforded SD the right to make representations and has modified the wording of the disclosure in the light of the representations. He has reached a conclusion on proportionality which in my view is entitled to considerable weight. I am conscious that I have to form my own view on proportionality in the light of the fact that this is not a merits review.

72. In all the circumstances I consider that the decision was proportionate and I would dismiss this application.