Neutral Citation Number: [2021] EWHC 2774 (Admin)

Case No: CO/2011/2021

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 18 October 2021

Before:

MR JUSTICE JOHNSON

- -

Between:

BENJAMIN THOMAS **Appellant**

- and -

THE EDUCATION WORKFORCE COUNCIL **Respondent**

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- -

Mr Andrew Faux (instructed by the Reflective Practice) for the Appellant
Ms Kitty St Aubyn (instructed by Kingsley Napley LLP) for the Respondent

Hearing date: 7 October 2021

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Approved Judgment

Mr Justice Johnson:

1. When the Appellant was informed by email that his application for a teaching post was unsuccessful, this response was sent from his email account:

> "Go fuck your self😉".

The Appellant appeals against the Respondent's decision that this amounted to unacceptable professional conduct, meriting a reprimand.

The facts

2. The Respondent is the independent regulator for the education workforce in Wales. The Appellant registered with the Respondent as a further education teacher in April 2015. In December 2019, he applied for a job as a sports lecturer at Coleg Gwent. He attended for interview. At 4.03pm on 17 December 2019, a human resources administrator at Coleg Gwent emailed the Appellant to say that he had not been selected for further consideration. At 4.19pm the reply email ("the December email") set out above was sent from the Appellant's email account on his mobile phone.

3. Ms Walker, a human resources co-ordinator at Coleg Gwent, sent an email reply to the Appellant saying that his response was inappropriate and unacceptable, and that Coleg Gwent would not welcome any further applications from him. The Appellant did not respond. After making a telephone enquiry of the Respondent, Ms Walker forwarded the email correspondence to the Respondent so that it could decide whether to pursue the matter further.

4. The Respondent did not progress the matter until June 2020. It is said that the delay was due, in part, to the Covid-19 pandemic, which resulted in the Respondent closing its offices from 20 March 2020.

5. On 4 June 2020, the Respondent contacted the Appellant by email and asked him to confirm his email address. He did so. On 8 June 2020, the Respondent informed the Appellant that a referral in relation to him had been received from Coleg Gwent and provided a copy of the Respondent's disciplinary procedures and rules, and a guidance note. It did not, at this stage, set out the allegation against him.

6. On 2 October 2020, the Appellant was told by email that his case had been "listed for investigation." Again, no details were given of the allegation that had been made against him. The Appellant replied and said that this was the first he had heard of a case against him. He asked for further details. On 15 October 2020, the Appellant was informed that the case related to the email he had sent to Coleg Gwent on 17 December 2019. The Appellant responded to suggest that Coleg Gwent had acted unlawfully by retaining his "private details".

7. On 23 October 2020, the Appellant was informed that the case would be considered by the Respondent's Investigating Committee ("IC") on 1 December 2020. The following day (after initially saying he was unable to open the email) the Appellant asked for details of the Respondent's complaints procedure. He said that the process was "over the top" and that there were "some utterly unnecessary invasions of privacy." Ultimately, after extensive exchanges of emails, the Appellant submitted his response

to the allegation on 18 November 2020. He complained about the fact that the case had been referred for investigation, the late notification of the allegation and the lack of "useful detail" in the notification. He said that he found it "very difficult to recall this incident", that there was "the distinct possibility that the email was sent maliciously by someone accessing my email account" and "I refute sending [the email]."

8. On 1 December 2020, the IC found that there was a case to answer and referred the case to a Fitness to Practise Committee ("FPC"). On 10 March 2021 the Appellant was informed that the hearing of the FPC would take place on 5 May 2021.

9. The Appellant provided a written response to the allegation. He again complained about the way in which the Respondent had dealt with the matter. He did not accept that he had sent the email. He said that he never used emojis in work or professional conversations. He said that if he had sent the December email then it was probably "sent in error" and that it must have been meant for someone else. Alternatively, he said, the email might have been sent by someone maliciously using his phone without telling him. In the further alternative, he said, it was possible he "did send it deliberately in an emotional strop at not getting the job." He said that this was "least likely" because he was even tempered.

10. The Appellant's assertion that he did not use emojis in work or professional correspondence was undermined when, a few days later, he ended an email to the Respondent with the same "winking emoji" that had been used in the December email.

11. The Appellant said that he would not be able to attend the FPC hearing via Zoom. The Respondent made arrangements to enable the Appellant to attend the Respondent's premises where a workstation would be made available for him to attend a remote hearing. The Appellant confirmed he would do that.

12. On 21 April 2021, the Appellant sent an email stating that it was highly unlikely that he would attend the hearing, because he had no confidence in the FPC and because there had not been a fair process. He sent a further email later the same day stating that the main reason he would not attend the hearing was "due to the stress and anxiety caused by the EWC's handling of this case." He also said "I would be more likely to attend if my state of mind showed improvement in future. Though I don't know when/if this would happen." The Appellant had been asked whether he sought a postponement or whether he was content for the hearing to proceed in his absence. He did not explicitly answer either question. The Appellant was sent an email with instructions as to what to do if he chose to attend the hearing.

13. The Appellant's email correspondence was rude and confrontational. For example, in one email to the Respondent he wrote: "I've noted you've personally been embarrassing yourself giving out presentations which your clown car of a fitness to practice department then contradicts in its own operations… You really are appealingly bad at your jobs…"

14. The hearing took place on 5 May 2021. The Appellant did not attend. At the outset of the hearing the presenting officer made an application that the FPC should proceed in the Appellant's absence. The FPC was correctly informed that the Appellant had been informed of the hearing in good time, that the Appellant had said that he would not be attending because of stress and anxiety, that there was no medical evidence to suggest

he was unfit to attend, and there was no indication as to when the Appellant might feel able to attend. The FPC was then given (accurate) legal advice as to the power to proceed in the Appellant's absence. After retiring to consider the matter, the FPC ruled that it would proceed in the Appellant's absence. It was satisfied that the Appellant was aware of the proceedings and had voluntarily waived his right to participate. It noted that there was no medical evidence to suggest that he was unable or unfit to attend, there was no request for an adjournment, no purpose would be served in adjourning the case, and it was in the public interest, and the Appellant's own interest, for the matters to be resolved without further delay.

15. The hearing then proceeded. It is clear from the transcript that the FPC was scrupulous to ensure fairness to the Appellant. It recognised that he denied the allegations, and it reviewed his correspondence to seek to elicit all of the points that he had sought to make. The FPC heard evidence from Ms Walker who said that she had been "quite shocked" at the language used in the email and "the evident lack of respect and professionalism." She said that the original recipient of the December email had worked in the human resources department at Coleg Gwent for 25 years and had "never, ever experienced anything close to that response" and had been "very, very upset." She was closely questioned over the possibility that the email had been sent by someone other than the Appellant.

16. The FPC concluded that the email had been sent by the Appellant:

> "the Committee noted that the email was part of a chain of emails between Mr Thomas and the College. The email appears to have been sent some 16 minutes after the email from the College to Mr Thomas was received, and included the automated 'tagline': "sent from my iPhone". The Committee considered it unlikely that someone would have accessed Mr Thomas' iPhone, as suggested by him, to send this email to the College. In reaching this conclusion the Committee considered that [iPhones] are generally quite secure and require a passcode to access the owner's email accounts.
>
> The Committee considered it unlikely that the email had been sent in error given the proximity in time to the email from the College confirming that Mr Thomas had been unsuccessful in his application for the position of Lecturer at the College.
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> The Committee also considered it unlikely that the sender of the email was anyone other than Mr Thomas. The Committee noted that Mr Thomas has admitted a propensity to use [emojis] in his correspondence, which gives weight to the allegation that the email was sent by Mr Thomas himself.
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> Whilst there was a possibility that the email was sent as per one of the hypotheses put forward by Mr Thomas, the Committee considered this to be unlikely. On the balance of probabilities, the Committee considered that the email was sent by Mr Thomas on 17 December 2019."

17. The FPC made findings that the email had been sent by the Appellant in his professional capacity as an applicant for a professional role with Coleg Gwent, and that the recipient was an employee within a professional organisation. In that context, it found that the Appellant's conduct in sending the December 2019 email was inappropriate, offensive and that it crossed professional boundaries.

18. The FPC found that this amounted to unacceptable professional conduct:

> "The Committee considered the language used by Mr Thomas in his email to be wholly inappropriate and unacceptable in a professional capacity. It noted the witness evidence of Ms Walker who had clearly been affected by the content of the email. It also took account of the evidence, albeit hearsay, that [the recipient] had been upset by the email.
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> The Committee took into account the fact that it was considering a single, isolated incident; however, having regard to the inappropriateness of the email, it considered that, on balance the threshold for unacceptable professional conduct had been crossed. There was clearly a degree of moral blameworthiness in sending an offensive and inappropriate email of this nature in a professional capacity.
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> This was a communication from a registered person to a professional body within an educational setting.
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> On balance, the Committee was therefore satisfied that Mr Thomas's conduct… below the standard expected of a registered person and amounted to unacceptable professional conduct."

19. It considered that it was not sufficient to impose no disciplinary order:

> "The Committee first considered whether to close the case without making a disciplinary order. It had regard to the fact that the Committee's finding of unacceptable professional conduct is in itself a serious matter. However, the Committee concluded that such an outcome would not be appropriate given the findings in this case. There were no exceptional circumstances to justify closing the case without making an order, nor would it be in the public interest to do so. As such, the Committee decided that a sanction should be imposed."

20. The FPC concluded that a reprimand should be imposed:

> "The Committee took into account all of the circumstances. It noted that no learners had been directly impacted by the conduct. It also noted Mr Thomas' previous good history and the lack of repetition of the conduct since the email that was sent in December 2019. In terms of the severity of the conduct, the Committee considered that, although it crossed the threshold of

> unacceptable professional conduct, it was not at the most serious end of the spectrum of such conduct.
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> Taking account of all of the circumstances, the Committee concluded on balance that a reprimand was an appropriate and proportionate sanction, weighing the interests of the public against those of Mr Thomas.
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> The Committee considered that a reprimand would be a sufficient sanction to uphold public trust and confidence in the profession and was sufficient to protect the public interest."

The appeal

21. The Appellant appeals on the grounds that:

    (1) The FPC was wrong to proceed in the Appellant's absence, and doing so was such a procedural irregularity as to make the outcome unjust.

    (2) The FPC failed sufficiently to consider the concerns that the Appellant had raised in correspondence about the procedures that had been adopted, and was wrong to conclude that the Appellant was the author of the email.

    (3) The FPC was wrong to find that sending the email amounted to unacceptable professional conduct and that it warranted a reprimand.

    (4) There had been a failure to disclose to the Appellant that a senior employee of the Respondent was a governor at Coleg Gwent.

The statutory framework

22. The relevant framework comprises:

    (1) The Education (Wales) Act 2014 ("the 2014 Act").

    (2) The Education Workforce Council (Main Functions) (Wales) Regulations 2015 ("the 2015 Regulations").

    (3) The Disciplinary Procedures and Rules 2017 ("the 2017 Rules").

    (4) The Code of Professional Conduct and Practice for registrants with the Education Workforce Council ("the Code of Conduct").

23. The Respondent was established by section 2 and schedule 1 of the 2014 Act. By section 9, it is required to maintain a register of "registered persons". By section 15, read with regulation 19 of the 2015 Regulations, a person who is not registered may not provide education in, or for, a further education institution (subject to exceptions that do not apply here).

24. Section 24 of the 2014 Act requires the Welsh Ministers to publish a code specifying the standards of professional conduct and practice expected of registered persons. The Code of Conduct, published in accordance with the section 24 duty, provides that

registered persons commit to upholding certain identified key principles, including collaborative working. These include an obligation to "communicate appropriately and effectively with all involved in the education of learners" and to respond to feedback "positively and constructively." By regulation 3(1) of the 2015 Regulations, "unacceptable professional conduct" means conduct which falls short of the standard expected of a registered person.

25. By section 26 of the 2014 Act, the Respondent must carry out such investigations as it considers appropriate in cases where it is alleged that a registered person is guilty of unacceptable professional conduct. After carrying out such an investigation, it must decide what further action to take in respect of the case. If it considers that there may be a case to answer, then it may hold a hearing in respect of the case. At a such a hearing, it may determine whether the registered person is guilty of unacceptable professional conduct. If so, it may make a disciplinary order, meaning (in increased sequence of seriousness), a reprimand, a conditional registration order, a suspension order, or a prohibition order.

26. The Welsh Ministers are, by section 28, authorised to make further provision about the Respondent's functions under section 26. This power has been exercised, hence the 2015 Regulations. By regulations 20 and 22, the Respondent is required to establish ICs and FPCs. ICs are responsible for carrying out the Respondent's functions under section 26. FPCs are responsible for determining cases that are referred by an IC. By regulation 34, the Respondent may make provision as to the procedure to be followed by FPCs. That procedure is set out by the Respondent in its "Disciplinary Procedures and Rules 2017" ("the 2017 Rules").

27. Rules 4 and 5 of the 2017 Rules set out the scope of the obligation to investigate referrals. The starting point is that all referrals must be investigated. There are exceptions. These include certain cases where the referral was received from a person other than the registered person's employer (for example, where the matter has not been reported to the registered person's employer and local procedures for complaint resolution have not been exhausted, or where the complaint is not considered capable of amounting to an allegation of unacceptable professional conduct).

28. Rule 6 requires that where a referral is forwarded to an IC a notice of investigation is sent to the registered person. Rule 9 provides that an IC may decide whether there is a case for the registered person to answer, and, if so, forward the referral to a FPC. In such a case, rule 12 requires that the registered person is sent a notice of proceedings, setting out, amongst other matters, the date, time, and place of the hearing.

29. By regulation 30, the Appellant was entitled to attend the hearing. Rule 16 of the 2017 Rules makes provision for cases where the registered person does not attend the hearing. If the FPC is satisfied that the registered person has been notified of the hearing in accordance with the 2017 Rules then, after taking account of any representations, it may either proceed in the person's absence or adjourn the hearing.

30. Section 32 of the 2014 Act gives rise to a right of appeal to the High Court against a disciplinary order. The approach that should be taken to such an appeal has been addressed, in detail, in a number of authorities. These were recently collected and distilled by the Court of Appeal (Macur, Nicola Davies and Lewis LJJ) in *Sastry v*

General Medical Council [2021] EWCA Civ 623 at [19]-[39]. For the purposes of this case, it is sufficient to apply the following principles:

(1) Permission to appeal is not required – there is a route of appeal as of right (section 32).

(2) The appeal is limited to a review of the decision of the FPC, unless the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing (CPR 52.21(1)).

(3) A review of a decision may engage with the merits of the decision. It can involve a more intrusive examination of the merits of the decision than a claim for judicial review under CPR 54. A review under CPR 52 is not limited to a test of the rationality of the decision in the sense explained in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (*Dupont de Nemours (EI) & Co v ST Dupont (Note)* [2003] EWCA Civ 1368 [2006] 1 WLR 2793 CA *per* May LJ at [94]).

(4) In reviewing the merits of a decision that conduct amounts to "unacceptable professional conduct" or that a particular sanction should be imposed, appropriate weight should be given to evaluative assessments made by a specialist regulator.

(5) The degree of weight that is appropriate depends on all the circumstances of the case.

(6) If, after according appropriate weight to the evaluative assessment of a specialist regulator, the appeal court concludes that its decision was wrong or unjust, then the appeal must be allowed (CPR 52.21(3)).

(7) The decision of the High Court is final and may not be appealed (section 32(4)).

31. Principles (4) and (5) derive from more expansive statements in the authorities as to the respect and deference that it is appropriate to accord to decisions of a professional regulator, including on issues of primary fact. I have deliberately stated them, for the purposes of this case, in a more restrictive form than is justified by the authorities because I do not (for the reasons given in paragraph 38 below) consider it appropriate to accord significant weight to the FPC's primary findings of fact in the particular circumstances of this case.

32. Mr Faux did not suggest that this was an appropriate case to exercise the power to undertake a rehearing. The appeal therefore proceeded as a review.

The appeal

Decision to proceed in the Appellant's absence

33. The Appellant contends that the FPC's decision to proceed in his absence was internally contradictory. On the one hand, it relied on the absence of medical evidence. On the other hand, it found that it would be contrary to the Appellant's own interests for the case to be delayed further. Further, he says it was unfair to draw an "adverse inference" from the lack of supporting material because the Appellant had not been warned that this might happen. It was also wrong to proceed on the basis that the Appellant would

not attend an adjourned hearing, because the Appellant had said that an improvement in his health might lead to his attendance. The FPC acted unfairly, he argues, because it asked Ms Walker questions that went beyond the ambit of her witness statement. The Appellant could not deal with Ms Walker's answers to these questions, because he was not present.

34. I reject this ground of appeal. The FPC proceeded with conspicuous fairness and care. There is no contradiction or other flaw in its reasoning. Its observation about the lack of medical evidence was accurate and apt. It did not draw an adverse inference. It relied on the direct evidence that was before it. Nor did it reject the Appellant's contention that he was suffering from stress. The FPC accepted that the Appellant was suffering from a degree of stress – that is why it considered that it was in the Appellant's own interests for the matters to be brought to an end.

35. There was medical evidence that the Appellant had suffered a traumatic extradural haematoma in 2010, and that, according to the Appellant, this had a continuing impact on his memory. However, there was no evidence that the Appellant was medically unfit to attend the hearing.

36. The Appellant did not therefore have a good reason for not attending the hearing. There was no basis to believe that he would attend a future hearing. His assertion that he would be "more likely" to attend in the future if his "state of mind showed improvement" was too vague and caveated to enable the FPC to conclude that he would do so.

37. The FPC did not act unfairly in asking Ms Walker additional questions (and permitting the presenting officer to ask questions). It was the Appellant's choice not to be present at the hearing. If he had attended the hearing then he would have had the opportunity of asking Ms Walker questions, or objecting to any questions from the FPC, or responding to evidence given by Ms Walker. Moreover, the questions that were asked of Ms Walker were, to a considerable extent, designed to ensure that the Appellant's case was fairly put to the witness – they were questions that the Appellant had drafted himself. Thus, for example, it was put to Ms Walker that it might be difficult for the Appellant to recall the detail, given that he had not been informed about the matter for 10 months. It might be said that this was not a question that Ms Walker was in a position to answer, but it was not unfair to the Appellant that the question was asked, and it did not amount to a procedural or other irregularity in the proceedings that rendered the FPC's decision unjust.

Findings of fact

38. I do not consider that it is appropriate, in the circumstances of this case, to give any significant weight to the FPC's findings of fact. Although it heard oral evidence from Ms Walker, the disciplinary case was effectively based on the documentation (and, in particular, the email exchange of which the December email was one part). The primary fact finding that was required did not involve any regulatory or subject area expertise, and nor did it involve an evaluation of oral testimony. I am in as good a position as the FPC to make the necessary findings of primary fact.

39. The FPC's finding that the December email was sent by the Appellant was inevitable on the evidence. That is so, for the clear, cogent and compelling reasons that the FPC gave. The email was sent from the Appellant's email account. There was no evidence

(beyond his untested assertion) that the email had been sent by anyone other than him, or that it had been sent "in error." It is inherently unlikely, given the timing of the email, its provenance, and its positioning within a contiguous email chain, that it was sent by anyone other than the Appellant, or that it was sent accidentally. The Appellant had initially denied outright that he had sent the email, but later accepted that it was possible that he had done so (by the time of this hearing his position had moved further: I understood that he now accepts that he probably did send the email). The Appellant did not provide any evidence (beyond assertion) that could support any alternative finding.

40. In respect of the wider concerns that the Appellant raised about the process, he does have grounds to complain about the delay before he was informed of the detail of the underlying allegation. The matter had been referred to the Respondent within days, yet it was only some 10 months later that the Appellant was informed of the detail of the allegation. There is no justification for a delay of that length. The Covid-19 pandemic only resulted in real disruption from late March 2020 (so 3 months after the matter had been referred to the Respondent). Even then, it is difficult to discern why such disruption as was caused to working practices prevented the Respondent from notifying the Appellant of the detail of the allegation for a further 7 months. The Respondent did write to the Appellant in June 2020. There is no apparent reason (and again, none has been put forward) why the Appellant could not have been informed of the detail of the allegation at that point. There is obvious benefit in early notification, and obvious vice in delay. Notification of investigation by a regulator is likely to cause concern and anxiety, and this may be exacerbated if details of the allegation are not provided. Moreover, early notification of an allegation of this nature is likely to make it easier for the regulated person to respond. Delay risks causing prejudice and unfairness.

41. The Appellant has also correctly drawn attention to an apparent discrepancy between published (but non-statutory) guidance as to the circumstances in which the Respondent will refer a case for investigation, and what happened in the present case. Thus, its published guidance gives as examples of the sorts of case that might be referred for investigation those where the registered person has been dismissed for tampering with examination coursework, or an inappropriate relationship with a learner, or assaulting a learner. It states that "[o]nly the most serious examples of breaches of the Code will be referred to a public hearing." The Appellant says, with some justification, that on any view his conduct does not reach this level.

42. The Appellant also seeks to argue that the case should never have been referred for investigation, and that exceptions to the obligation to refer applied (including that his employer had not been informed). He also says that the Respondent became a slave to its own procedures, so that when he sought to complain about the way in which the Respondent had dealt with the case, he was provided with information about the complaint's process, rather than being told that these were matters he could raise at the hearing. In this last respect, the Appellant's complaints are without any foundation. It is hardly surprising that when he asked to complain he was provided with information about the complaints process, but the Respondent also made it clear to him that he could raise any of these matters in the course of the proceedings.

43. The Appellant does not now suggest that the delay or other matters about which he makes complaint were such as to render the proceedings an abuse of process. Nor has he shown that they amount to any other form of irregularity that make the proceedings unjust. The requirement that a matter should not be referred until it is first investigated

by a registered person's employer was not, here, engaged because the incident had not taken place in the course of the Appellant's employment, and in any event he did not, at the relevant time, have a registered employer. The process that was adopted by the Respondent followed the statutory requirements and the 2017 rules.

44. These matters do not therefore provide a basis for allowing an appeal from the FPC's finding of unacceptable professional conduct meriting a reprimand.

Finding of unacceptable professional conduct, and sanction

45. Mr Faux focussed his submissions on this ground of appeal. He recognised that the email was "not inconsequential." He fairly acknowledged that it had caused upset to the recipient. However, he relied on the "high threshold" that is required for a finding of "unacceptable professional conduct" which is not met by behaviour that is "trivial, or inconsequential, or a mere temporary lapse, or something that is otherwise excusable, or forgivable" – see *Khan v Bar Standards Board* [2018] EWHC 2184 (Admin) *per* Warby J at [36].

46. Mr Faux's submission was that it was disproportionate that a single isolated ill-judged email, sent in the heat of the moment, had resulted in a referral to the Respondent, an onward referral to the FPC, a finding of unacceptable professional conduct, and a reprimand. The practical consequence is an impediment to the Appellant's future employment because putative employers are likely to be deterred from engaging him when they learn of the reprimand from his responses to standard screening questions. Mr Faux argues that this engages the Appellant's rights under Article 8 of the European Convention on Human Rights. A reprimand can only be justified if it is a proportionate interference with the Appellant's right to respect for private and family life. The FPC had not addressed the question of whether a reprimand is a proportionate response.

47. Neither party advanced full argument on the question of whether these disciplinary proceedings amount to an interference with the Appellant's right to respect for private life. Both parties argued that it was not necessary to determine that issue. I agree. If a reprimand is disproportionate, then it follows axiomatically that it was wrong to impose a reprimand, irrespective of whether Convention rights are engaged. That is because the FPC approached the case (in accordance with published guidance on the imposition of sanctions) by considering whether it was sufficient to impose "no disciplinary order" before then moving up the scale of disciplinary orders, and, at each stage, only moving to the next most serious sanction if any lesser sanction would not be sufficient. The correct application of this approach necessarily ensures that the sanction ultimately imposed is proportionate. Conversely, if the sanction imposed was disproportionate then it necessarily follows that the FPC did not correctly apply its own test.

48. The FPC was right to find that the language used by the Appellant was "wholly inappropriate and unacceptable in a professional capacity." It was entitled to give weight to evidence that the recipient of the email had been upset, and to find "a degree of moral blameworthiness in sending an offensive and inappropriate email of this nature in a professional capacity." Having made these findings, the FPC was entitled to make the evaluative assessment that the threshold for unacceptable professional conduct had been crossed.

49. The fact that the conduct that is here in question concerns a few words in an email written in a matter of seconds does not prevent it from amounting to unacceptable professional conduct. Warby J was not, in *Khan*, espousing an inflexible rule that a "temporary lapse" could never amount to unacceptable unprofessional conduct. In the same paragraph he observed that it is "perhaps unhelpful" for the test "to be tied too firmly to particular phraseology." A "temporary lapse" is an example of conduct that might not reach the threshold, but everything will depend on the particular facts. The consistent theme in the authorities is that a degree of "opprobrium" or "moral culpability" is required. Where that requirement is satisfied, conduct cannot be regarded as a "mere temporary lapse" in the *Khan* sense. Here, the FPC was entitled to find that there was a degree of "moral culpability".

50. The FPC considered not making a disciplinary order. It recognised that the finding of unacceptable professional conduct is, in itself, a serious matter. It took account of the Appellant's previous good history, the lack of repetition, and the fact that no learners had been directly impacted by the conduct. It also rightly recognised that although the Appellant's conduct "crossed the threshold", it was not at the most serious end of the spectrum of such conduct. Ultimately, however, the FPC concluded that such an outcome would not be appropriate or in accordance with the public interest. Rather, it considered that a reprimand was a sufficient sanction to uphold public trust and confidence in the profession and to protect the public interest.

51. I do not consider that there is any flaw in this reasoning. The FPC had regard to all relevant factors and did not consider any irrelevant factors. According appropriate weight to the FPC's specialist regulatory role, but recognising that ultimately it is for the appellate court to review its decision on the merits, I do not consider that the sanction imposed was disproportionate or that its findings were otherwise wrong.

52. That is not to say that it will always be appropriate or proportionate to issue a reprimand in response to conduct akin to the sending of the December 2019 email. If, for example, the Appellant had (in response to Ms Watson's justified rebuke) apologised, expressed remorse or had (in response to the FPC) demonstrated insight as to his departure from the required standards, then an altogether different response might have been justified.

Failure to disclose that a senior employee of the Respondent was a governor at Coleg Gwent

53. In the course of these appeal proceedings, the Respondent informed the Appellant and the Court that a senior employee of the Respondent was also a governor at Coleg Gwent. Understandably, it considered it appropriate to make this disclosure as a matter of transparency and as part of its duty of candour. The senior employee in question has made a witness statement in these proceedings, fully disclosing the very limited administrative extent of her involvement in the Appellant's case. In the main, that was limited to the provision of written advice to the Appellant about the Respondent's complaints procedure.

54. There was, however, no reason to disclose these matters within the disciplinary proceedings. The individual concerned had no role in the decision-making process. The FPC acted entirely independently. It was unaware that a senior employee of the Respondent was a governor of Coleg Gwent, and it therefore cannot have been influenced by that relationship. As Ms St Aubyn pointed out, there were reasons not to tell the FPC that a senior employee of the Respondent was a governor at Coleg Gwent.

That was not relevant to any issue in the proceedings, and it may have risked creating a perception that the FPC might be inappropriately influenced by the fact of the relationship. I do not consider that the non-disclosure of this information amounts to an irregularity in the proceedings, and it has not caused any injustice.

Outcome

55. The FPC conducted a fair hearing. It has not been shown that it was wrong to conclude that the Appellant sent the email or that this amounted to unacceptable professional conduct warranting a reprimand. Nor has it been shown that there was any irregularity in the proceedings or that the outcome was unjust. The appeal is therefore dismissed.