‘Professional “misconduct” & “incompetence” in teaching: can these categories be legitimately distinguished?’

Abstract

This paper is based on a research project conducted for the General Teaching Council for England (GTCE) in the year before its abolition to examine 30 or so disciplinary cases that fell into both 'misconduct' and 'incompetence' categories. The research was designed to address the following issues:

• how and where the boundary between issues of competence and issues of conduct is drawn;
• whether this has been done with reference to definitive guidelines and explicit evidential criteria;
• whether there are procedural implications for the new regulatory system in instances where ‘misconduct’ is masking ‘incompetence’ or where ‘incompetence’ could instead be construed as ‘misconduct’;
• whether there are intrinsic challenges in identifying and/or defining the distinction between competence and conduct in professional practice which may turn out to have policy implications.

These issues, together with more detailed research questions, were used to create a data extraction framework. GTCE's case-files for the 'hybrid' cases were accessed (with due care for security and confidentiality) and the material for all 30 completed cases was subjected to a preliminary data sift. The framework was iteratively modified in the early stages. Ten cases were selected for full data extraction, and the detailed material on file – correspondence, records of formal lesson observations, reports, witness statements, etc. – was analysed.

The paper presents and discusses the findings from that analysis and draws out some implications and challenges for policy in the post-GTCE context where regulatory functions are split between the Secretary of State for Education in cases of gross professional misconduct and teachers’ employers in cases of serious professional incompetence.
1. Introduction: the Context

The premise of this paper is that teaching is intrinsically one of the most complex of human activities, not reducible to a set of competences, not describable in the military discourse of targets and deliverables, not a job like any other. Thirty years ago, Her Majesty’s Inspectorate put in very plain terms the central challenge in teaching – how to ‘satisfy two seemingly contradictory requirements. On the one hand it has to reflect the broad aims of education which hold good for all children, whatever their abilities and whatever the schools they attend. On the other hand it has to allow for difference in the abilities and other characteristics of children.’ Professional practice is complex because of its inherent ethical and intellectual dilemmas, for whose resolution no government policy or initiative can ever be sufficient. What is demanded daily of each and every teacher is to be creative, empathic, endlessly inventive and responsive; what is needed is shared expertise, collectively-held values, depth of experience, specialisms of subject and role, and a framework of articulated and espoused standards that form a bulwark against political whim at national or institutional level.

I suppose I feel particularly strongly, since the abolition of the General Teaching Council for England was announced, that the wider questions of professionalism in teaching, what it means, how it is enacted, invoked and sustained – and where the responsibilities for all these lie – have become urgent as well as profoundly important. The abolition of the GTCE means that teaching is the only major profession in England, and England the only country in the UK, that has no independent professional body and no common code of values and practice to safeguard teaching as a service in the public interest instead of putting it under political control. I believe that this matters not only for teachers but also – and even more crucially – for young people, as well as their parents and the wider public.

Furthermore, it seems to me that the decision to close down the GTCE is only one of many failures of imagination on the part of successive governments in their educational policy-making. The result of such failures is that the inherent complexities of teaching, and therefore its actual practice, continue to be misunderstood and underestimated.

The specific policy decision addressed by this paper is the proposal by the Department for Education (enabled when the 2011 Education Bill received Royal Assent) that when the GTCE ceased to function the Department would investigate only cases of gross misconduct or criminality. Professional incompetence is now to be dealt with by a teacher’s employer through performance management and capability procedures. Whilst I have no doubt that some teachers and headteachers welcome this apparent simplification of regulatory procedures, on the grounds that the GTCE created too much bureaucracy and added a layer of unnecessary and unwanted accountability, the research project that I undertook for the GTCE in 2011 throws doubt on whether the new system can be made to work effectively and fairly. The findings also shed some light on how we might (re-)interpret ‘professionalism’ when the idea is viewed from the perspective of serious professional incompetence and/or gross professional misconduct.

2. Origins of the Research Project

As a regulator, the GTCE investigated and heard 2000-plus cases of professional incompetence and/or misconduct over the ten years from 2001–2011. This casework constitutes a unique body of potential evidence about the definition and practice of professionalism in teaching – paradoxically, through the gathering of information concerned with identifying and dealing with instances of poor professional practice and/or unacceptable professional behaviour.

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1 Para 141B of the Bill.
I retired from the GTCE in 2008, but returned in 2011 on a temporary basis to help create an archive of policy and research papers. One of the pieces of work I undertook, with two GTCE colleagues, was a small research study on a sample of the competence/conduct cases. A year previously, in the summer of 2010, the GTCE had committed resources to undertaking a research study, using qualitative analysis of the cases that had been referred to the GTCE on grounds of serious professional incompetence, to explore the factors and context that might have contributed to a teacher being dismissed or resigning in the face of possible dismissal because of the standard of his/her teaching. The purpose of the study at that time was to add to the evidence about factors that contribute to unsatisfactory teaching and, by extension, to provide another perspective on how the quality of teaching might be improved.

Some initial work was done within the terms of that proposal; however, as the GTCE’s casework files were scrutinised in detail a separate issue began to be identified: the files turned out to include a number of ‘hybrid’ cases, that is, cases that either contained allegations of both incompetence and misconduct, or the referral was initially for incompetence but turned out to involve misconduct, or vice versa. At the same time, as mentioned above, the government published its intentions with regard to the regulation of teachers after the abolition of the GTCE. Thereafter the study took a revised course for the rest of its duration.

I should say at this point that I recognise that it may strike some people as distasteful to frame a discussion of professionalism in negative terms, that is, by focussing on those relatively few practitioners who fell short of the expected standards. But in my view it is important to pursue this a little further because the findings from the project raised some serious questions about how government perceives teachers and teaching, and about how professionalism will – or will not – be safeguarded in future.

3. The Casework Material and its Limitations

Over the period 2001–2011, there were 207 referrals for incompetence to GTCE and 1841 for misconduct. As this material was scrutinised for the purposes of the initial research study, it emerged that 32 referrals had been made to the GTCE which could readily be identified as ‘hybrid’ cases:

- some contained allegations of both misconduct and incompetence (and were then directed to a hearing before either the Professional Conduct Committee or the Professional Competence Committee, depending on the recommendation of the Investigating Committee);
- some were initially referred as incompetence cases but, on the evidence submitted, turned out to involve misconduct as well as, or instead of, competence issues;
- conversely, some were initially referred as misconduct cases but, on the evidence submitted, turned out to concern incompetence as well as, or instead of, conduct issues.

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2 Information provided by GTCE Professional Standards Team 11 May 2011.

3 These cases were identified as ‘hybrid’ because their classification had been a clear problem; but there were probably many more cases where there had at one stage or another been some ambiguity about the allegation and/or evidence. Purely for reasons of time/resource, it was not possible to examine all 2000+ case files.
Because the Department for Education’s intention to treat the two types of case as distinct and separable raised questions about identification and definition, it was these hybrid referrals covering both competence and conduct allegations which came to be the focus of the study.

Whilst the casework material was extensive and detailed, it had limitations as an evidence-base:

- the number and type of referrals to the GTCE did not necessarily represent the incidence of misconduct or – more especially – of incompetence nationally (see Morrell et al.) and so GTCE casework cannot be said to constitute a representative sample of how, why and how many teachers fell short of professional standards;
- for the same reason, it was not possible to infer any national patterns or trends from the over- or under-representation of certain ethnic or other groups in the referrals;
- the breadth and depth of material collected was different in each recorded case, ranging from one to five box-files of evidence, and varying from basic records to verbatim transcripts of hearings;
- the material was not compiled as research material, i.e. it was not collected and collated with the kind of systematic framework used in case study research, for example; necessarily, it was quasi-legal material, comprising a collection of administrative/clerical notes and pro formas, correspondence, internal school reports, school policies, interview notes, outcomes of lesson observations, minutes of meetings, records of counselling interviews, etc. – some of this material was emotive and partis pris, not neutral; some degree of selection and interpretation was therefore unavoidable in conducting the data extraction and analysis;
- all the material was in hard copy (some of it handwritten) and therefore not susceptible to electronic extraction/analysis using research software.

The casework material was consequently labour-intensive to analyse, and was not easily conducive to making useful and/or valid comparisons between cases; nor to distinguishing cause and effect in individual cases. A balance had therefore to be struck between the amount of effort required to derive evidence from the material (especially within the considerable constraints of time and resource available – see ‘Time/task allocation’ below), and the desirability of drawing on this unique resource for its potentially important policy implications.

4. Aims and Scope of the Research

Although the 32 referrals that could clearly be identified as ‘hybrid’ were a minority (under two per cent) of the total referrals to the GTCE, they raised a number of prima facie questions:

- **how and where the boundary** between issues of competence and issues of conduct was drawn by the referring party (usually the employer) as well as by the GTCE;
- whether this was done with reference to definitive guidelines and explicit evidential criteria or through the exercise of professional judgement, or both;
- whether there were procedural implications for any new regulatory system in instances where ‘misconduct’ is masking ‘incompetence’ or where ‘incompetence’ could instead be construed as ‘misconduct’ – especially if incompetence is being dealt with at a different level of the system from misconduct;
whether there are *intrinsic challenges* in making a hard-and-fast distinction between competence and conduct in professional practice – in other words, whether the distinction between ‘can’t do’ and ‘won’t do’ is always a hard and fast one.

The aim of this study was to contribute some *prima facie* evidence on these questions, and to weigh up whether it is the *identification* or the *definition* of incompetence/misconduct (or a combination of both) that is likely to be problematic.

The study did not revisit the judgements, procedures or decisions of the GTCE or any other party; nor did it attempt to engage with the substantial body of research on factors affecting teachers’ and teaching effectiveness, important though that evidence-base is, or with the wider literature on professional standards, qualifications and competences, and on the attributes of good teachers.

*Technical Note*

The issue of how cases referred to the GTCE were classified as ‘misconduct’ or ‘incompetence’ needs a little explication. When a referral to the GTCE was made, it was normally recorded as either a conduct case or a competence case, although some cases were recorded as both. During the case preparation process undertaken by administrative staff for consideration by an Investigating Committee allegations might have emerged that were relevant to the other category of transgression. It was then the responsibility of the Investigating Committee to decide:

- whether there was sufficient *evidence* to support the allegations and, if there was, whether the allegations were of a sufficiently serious nature that there was a likelihood of a Hearing Committee reaching a finding of unacceptable professional conduct or serious professional incompetence (if not, the IC would have recorded ‘no case to answer’)

  *and/or*

- in which category the evidence was *strongest or most serious*.

The Investigating Committee might also decide that there was a case to answer based on the evidence but that the case should be discontinued as it was not in the public interest to proceed. However, this happened only in exceptional circumstances, usually related to a serious medical condition suffered by the teacher.

If a case proceeded, it was forwarded to one or other of the two Hearing Committees. The Hearing Committee reached a decision about whether there was a finding or not; and subsequently – if there was a finding – decided upon the level of sanction (reprimand, conditional registration order, suspension order, prohibition order) or that there was ‘no sanction’. A case might be returned to the Investigating Committee for reconsideration if new evidence was received by the GTCE.

There are caveats to this summary, however, owing to some system discrepancies as to how cases were originally recorded on receipt (for example, in some older cases one set of allegations was listed under both headings) and/or how they were subsequently considered at Investigating Committee stage.
5. **Preliminary Questions for Investigation**

The preliminary questions for investigation through this study were as follows:

*Does the documentation indicate whether:*

- the teacher concurred or not with the assignment of his/her case to ‘misconduct’ rather than ‘incompetence’ or *vice versa* (regardless of whether s/he assented to the charge);
- there are any instances in which it is clear that a referral was made under the wrong category at the outset;
- by contrast, there were any referrals which it was hard for the Investigating Committee to assign with no overlap or ambiguity to either ‘misconduct’ or ‘incompetence’;
- referring parties had some trouble in deciding whether a case was one of ‘incompetence’ or of ‘misconduct’; if so, was this because the guidance they received was insufficiently clear? If not, then does the documentation suggest other explanations for how ‘incompetence’ came in these instances to be construed as, or conflated with, ‘misconduct’ or *vice versa*?
- there appear to be particular issues or factors at school level (such as pupil demographics or negative OfSTED inspection report) or at individual level (such as a clash of pedagogical ideologies or difficult relationships with managers/leaders and/or peers) which might have served to make an unambiguous classification more difficult to assign;
- a teacher’s health or personal circumstances were implicated in such a way as to suggest that there were issues affecting his/her ability to teach of which the school should have been aware and which should have been addressed;
- misconduct was in effect a dramatic or culminating ‘presenting problem’ that masked, or else drew acute attention to, an underlying and undiagnosed incompetence;
- there were issues surrounding school performance management and/or capability procedures – not procedural correctness so much as their effectiveness in identifying and remediating a problem of competence or conduct;
- overall, there may be a set of common, or overlapping, factors that predispose a teacher to being referred to the GTCE for misconduct when the appropriate referral would have been incompetence, or *vice versa*.

These questions were used to create a data extraction framework (see Appendix 1).

6. **Method**

**Sampling**

At the time of analysis, two of the 32 hybrid referrals were still pending, leaving 30 referrals that could be analysed. The criteria for sampling were as follows:

- time and resources permitting, it was proposed that full data extraction/analysis would be conducted on up to 12 of the 30 available hybrid referrals (i.e. over one-third);
- an initial data sift (items shaded in yellow on the framework) was conducted to establish key data for each of the 30 referrals;
• from these, the 12 referrals would be selected to attempt a distribution of competence / conduct referrals that had subsequently been re-assigned to the other category together with referrals that contained both categories of allegation at the outset;

• the 12 referrals would also, as far as possible, be selected to cover the tariff of decisions and sanctions available in a proportional way \(^4\);

• it was also necessary to ensure that there was sufficient evidence on file in the referrals chosen to warrant analysis.

**Time/task allocation**

Initially, three days were allocated to the initial data sift; one day was allocated to reading and full data extraction for each case; with a further five days for analysis and writing-up.

In the event, the data sift and the identification of cases for full data extraction turned out to be more complicated than anticipated because of the nature of the material on file. The implications of this are reported in the Findings section below. Operationally, it meant that the notional task/time allocated needed to be spread over an extended time period since, for security reasons, files had to be retrieved and transferred under strict protocols. The team had already received the Investigating Committee files on all (or almost all) of the hybrid cases, but for the full data extraction the Hearing Committee files also needed to be accessed. Difficulty in identifying an appropriate sample of competence/conduct cases added to the time taken.

Ultimately, full data extraction was able to be carried out on ten (rather than 12) case files.

**Sample of cases**

During the data sifting, it was noticed that an apparently high proportion – around 37 per cent – of cases had resulted in a ‘no case to answer’ (NCA) decision; that is, over one-third of all the hybrid cases referred to the GTCE had been found insufficient in terms of the quality and/or quantity of evidence provided. A comparison was then undertaken with the proportion of cases referred to the GTCE solely on the grounds of competence and resulting in NCA. This was even higher, at 45 per cent, and so the sample was selected to include around 40 per cent of NCA cases. (A possible explanation of these percentages is offered below in the Findings section.) The profile of the final sample of cases selected for full data extraction was as follows, in terms of referral category (Table 1) and of gender (Table 2):

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\(^4\) i.e. no case to answer; no sanction; reprimand, conditional registration order, suspension order, prohibition order; no finding.
Table 1. Profile of cases selected for data extraction, by category of referral

<table>
<thead>
<tr>
<th>Category of Referral</th>
<th>Percentage (number) of all hybrid cases</th>
<th>Percentage (number) of sampled cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case resulting in No Case to Answer</td>
<td>40 (12)</td>
<td>40 (4)</td>
</tr>
<tr>
<td>Case referred to Competence Committee</td>
<td>26.7 (8)</td>
<td>30 (3)</td>
</tr>
<tr>
<td>Case referred to Conduct Committee</td>
<td>26.7 (8)</td>
<td>30 (3)</td>
</tr>
<tr>
<td>Case discontinued</td>
<td>6.7 (2)</td>
<td>0 (0)</td>
</tr>
</tbody>
</table>

Table 2. Profile of cases selected for data extraction, by gender

<table>
<thead>
<tr>
<th>Gender</th>
<th>Percentage (number) of all hybrid cases</th>
<th>Percentage (number) of sampled cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male teachers</td>
<td>53 (16)</td>
<td>60 (6)</td>
</tr>
<tr>
<td>Female teachers</td>
<td>47 (14)</td>
<td>40 (4)</td>
</tr>
</tbody>
</table>

The sample of selected cases also covered teachers at different stages of their career, ranging from a teacher in his/her first full year of teaching to a headteacher.

We were fairly confident, therefore, that the sample was a reasonable reflection of the ‘hybrid’ group as a whole, even though there was insufficient time/resource to analyse a full range of such data, such as age, ethnicity, locality, type of school, subject area, etc., for all hybrid cases.

**Data extraction**

Full data extraction was carried out on the ten cases in order to identify the key factors in each case. The data extraction framework given at Appendix 1 was iteratively modified in the early stages to ensure efficient and adequate capture of salient data.

It emerged during this process that simply documenting the key factors was not quite sufficient to capture the convoluted nature of the cases; and so it was decided to provide a summarising commentary on the particular features that had led them to be ‘borderline’ or ‘hybrid’. These were used to create the ‘scenarios’ discussed below.

**Security**

Because of the confidential and sensitive nature of the material, case files were retrieved and transferred from storage to the GTCE London office under strict security protocols. All hard copy files under analysis were kept securely locked in the GTCE office; files were removed from this storage only for the purpose of data extraction/analysis and only while data extraction/analysis was actually being done. All such work was done on site in the GTCE office – at no time was any such material removed from site.
All electronic files relating to the material, such as lists of cases with names and dates, were held on the GTC internal file system and were password-protected. At no time were any such electronic files copied onto movable data storage systems, nor sent to any external party by e-mail.

All data extraction and analysis was anonymised, through the assignation of a unique numerical ID for this specific purpose (which was different from the original case number).

**Analysis and report-writing**

The analysis focused on providing answers to the questions above (or else stating that there was insufficient evidence to arrive at credible answers). Other themes or issues that became apparent during data extraction were added into the analysis.

7. **Research Findings**

The findings emerged at three successive stages: of collating administrative information, of initial data sifting and of full data extraction.

**Evidence from administrative information**

As noted above, the first stage data sift, which was being undertaken for the purpose of identifying a suitable sample of cases for full data extraction, was a more complicated procedure than anticipated. For example, we had wanted to identify cases on the basis of the type of allegation that predominated in the initial referral, but the GTCE case files were organised on the basis of which Committee had subsequently considered the case (if the case had gone to hearing rather than being assessed as a ‘no case to answer’ by the Investigating Committee). To complicate matters further, in some instances the Hearing Committee to whom the case had been referred decided that the referral needed to be heard by the other Hearing Committee.

On the one hand, as noted above, these difficulties contributed to the delay in selecting the sample and then in accessing the appropriate Hearing Committee case files. On the other – and more significantly – the absence of a single straightforward administrative categorisation was the first indication of the challenge there might be in identifying a case as one of either incompetence or conduct (whatever the original referral).

**Evidence from initial data sifting**

In many cases, it was time-consuming to find the information that would provide answers to the analysis questions. The reasons for Investigating Committee decisions were not always documented, so the rationale for assigning a case to either of the two Hearing Committees or for finding that there was no case to answer needed to be inferred.

It became apparent as the initial data sift was conducted that schools often found the categorisation of a teacher’s alleged misdemeanour difficult. We began to get the impression that the evidential threshold for a referral of incompetence might be higher than that for misconduct – in the sense that incompetence needs to be evidenced over a sustained period of time whereas a single occurrence of misconduct might be sufficient to trigger a referral.

It also began to emerge that, although the finding of ‘no case to answer’ might have been arrived at by the Investigating Committee at the initial stage, there were other circumstances that might have led to a NCA finding. In some instances, for example, the Presenting Officer had recommended referral back
to the Investigating Committee before the case came to the Hearing Committee because new evidence countering the allegation(s) had been submitted by the teacher; in other cases, it was the submission of medical evidence about a teacher’s physical or mental health that led to such a finding, whether or not there was evidence to support the allegations of incompetence or misconduct.

*Evidence from full data extraction*

The difficulty of finding the relevant information that would provide answers to the analysis questions was even more pronounced when the team started full data extraction. One characteristic of this kind of material was the level of minutiae in the file notes, such as long chains of e-mail exchanges, discursive written accounts by both parties (and by third parties also), teacher’s lesson plans, and so forth. The arrangement of material within sections of the files was often reverse-chronological or by date in which documents had been received, rather than in a sequence with a research logic. This not only made it arduous to analyse but also seemed to be symptomatic of what might be called an inability to ‘see the wood for the trees’ by the protagonists. This may partly explain why referrals for issues of professional incompetence were re-assigned by the GTCE, either initially or at a later stage of the procedure, to misconduct – and, occasionally, *vice versa.*

Added to this rather confusing layering of evidential material was a lack of clarity about which criteria, if any, were being used to make a referral. Contexts and reasons for referrals on grounds of competence were varied and multiple. Schools made reference to the OfSTED Framework, local authority guidelines, the teacher’s job description or contract, schemes of work or, more rarely, the then Professional Standards Framework; quite often no reference point was cited.

The material did permit some important insights into the background of cases, however, such as the fact that there was often a protracted sequence of factors, actions (or failures to act) and consequences; it was the – sometimes gradual, sometimes precipitous – accumulation of these into a culminating event that had triggered the referral.

We grouped the more common factors and features into some typical referral scenarios, which appeared in the original report. Appendix 2 presents a more developed set of scenarios which were subsequently commissioned by the Department for Education to assist in training for members of the new Professional Conduct Hearing Panels.

8. **Conclusions and Policy Implications**

The exercise described above was necessarily a limited one; nonetheless, it allowed us to surface aspects of the regulatory process that we felt needed to be better understood and supported in future. The conclusions we reached were as follows:

- The process of identifying and analysing a sample of clearly identifiable ‘hybrid’ cases confirmed the hypothesis that there were problems in assigning some referrals unambiguously and solely to either professional incompetence or misconduct. There were indications that this was a problem of definition as well as one of identification or procedure. There is also a possibility that these cases were the tip of the iceberg, since professional staff and Council Members of the GTCE were familiar with other cases in which ambiguities of evidence and/or allegation had emerged at some stage in the referral process.

- One reason for the lack of clarity in schools (or even the GTCE) being able to assign referrals unequivocally to competence or conduct was the fact that the manner in which an issue of unacceptable professional practice manifested itself may not have been the real or chief or sole
underlying problem. The material revealed that there was often a chain or a web of events involving a combination of personal, professional, health and other issues that led up to the one that triggered the referral.

- In many schools teachers still work in isolated classroom environments and competence issues can take some time for the school to perceive and address, let alone commit time and resources to gathering sustained and detailed evidence. It might have been expected that incompetence would have been initially identified through performance management processes but little indication of this came to light in the data extraction. Yet the documentation in some instances suggested that a teacher’s line manager and/or colleagues had had concerns, even if these were only articulated with hindsight. So there would seem to be a case for drawing schools’ attention to the potential of performance management to identify and deal with competence issues at a stage prior to formal capability.

- Even when concerns had been expressed by the teacher’s line manager, almost all the evidence submitted to GTCE about incompetence was gathered as a result of the requirements of a formal capability procedure – that is, most, if not all, teachers referred to the GTCE on grounds of competence had either been dismissed or resigned prior to dismissal as a result of capability procedure. At the time of writing the report, employers had a duty to refer a teacher who has been dismissed, or resigned prior to dismissal, to the Council. Under the proposals in the 2011 Education Bill, employers would have the duty merely to consider referring such a teacher (para 141D); and this made us question whether all cases of teachers who are causing concern will be subjected to proper scrutiny.

- By contrast, it may take only one instance of unacceptable behaviour to enable a referral to be made on the basis of conduct. If a teacher’s lack of competence remains unaddressed, it can lead to, or be manifested in, conduct that is professionally inappropriate. Moreover, misconduct is often more visible than incompetence and as such it compels the school to take action. An example might be a teacher who is not using ongoing assessment to monitor pupils’ progress and to inform his/her teaching – a competence issue; but if s/he then fails to complete formal pupil assessments such as marking coursework, it becomes a problem which the school can, and must, address rapidly as one of non-compliance, and this can be construed as a conduct issue. A lack of competence that culminates in a conduct issue is on the whole easier for the school to document and harder for a teacher to contest.

- Another reason for the ambiguity may have been the absence of explicit and agreed criteria to be used as a reference point: as noted earlier, in referring a teacher to the GTCE schools made reference to the OfSTED Framework, local authority guidelines, the teacher’s job description or contract, schemes of work, the Professional Standards Framework, or else cited no reference point. (A minor point to note is that, if the JD is taken as the main reference point, this may contain clauses which superficially have little or no bearing on professional practice but nonetheless have contractual force – such as a duty to keep the stationery cupboard stocked.)

- The nature of the evidence presented in both competence and conduct cases was complex, often immensely detailed and sometimes disturbing; the administrative and intellectual resources required to collate, record, read, analyse and come to a fair judgement about any individual case were considerable. Expertise in regulatory case-work was built up, individually and collectively, over time and through the in-depth experience of comparing and contrasting a body of different cases. GTCE Council Members were supported by legal advisers and a team of officers and administrators.
Arising from these conclusions are some generic issues that have policy implications, as summarised below.

**Unintended outcomes**

In cases of competence referrals, the material indicates in more than one case that a school had reached a compromise agreement with the teacher such that, if s/he agreed to resign prior to dismissal via a capability procedure, the school would write a letter of reference to support the teacher’s application for a post in another school. If the evidence was contestable or if new evidence was submitted, a decision on the case might take many months to finalise, and in that time the teacher could continue to teach. This suggests that it might be wise to consider in future whether and how interim suspension orders might be instituted and deployed.

In several cases, it seemed clear that the decision by an employer to refer a teacher to the GTCE on the grounds of misconduct was a pragmatic one, because the evidence required to arrive at a credible allegation of misconduct was less onerous to collect and verify than that for incompetence. This has possible consequences for the way that the profession is perceived, if – as indeed has happened so far – there are many more referrals for misconduct than for incompetence. Secondly, and more importantly, it poses the challenge of whether the nature of incompetence will be accurately diagnosed and its causes understood in future by school leaders and the profession, and of whether appropriate professional learning and development provision will be identified. Finally, if in future there are cases of alleged misconduct referred to the Secretary of State which are found on investigation to concern incompetence, it needs to made clear what arrangements will be in place to deal with these.

**The need for expert collective judgement**

The evidence indicates that issues of professional incompetence and misconduct may be very hard to distinguish and to keep separate. Schools’ views about the nature and seriousness of the allegation were not always upheld by the GTCE’s Investigating Committee; and even at the GTCE level a few cases were re-assigned more than once. GTCE decisions were arrived at on the basis of expert collective judgement, accumulated over time and supported throughout by legal advice, about the balance of evidence and whether this indicated that the teacher’s actions or failures to act had occurred mainly through wilfulness or mainly from incapacity. Council Members also had to strike the appropriate balance between ensuring that the careers of teachers who had committed perhaps uncharacteristic and minor professional misdemeanours were not summarily terminated and safeguarding the educational and pastoral interests of young people. In the cases examined, these had clearly been difficult judgement calls to make.

**Quality of teaching and teachers nationally: standards, consistency and fairness**

The findings provide additional support for a key claim made in the GTCE’s submission to the House of Commons Public Bill Committee on the Education Bill (GTCE 2011), as follows: ‘devolving the regulation of teacher competence to school- and headteacher-level risks sacrificing coherence and consistency, increasing variability and decreasing transparency’. The evidence from this small project raised questions about how the government’s decision to separate regulatory responsibilities and powers – with employers responsible for overseeing serious professional incompetence and government responsible for regulating serious professional misconduct – can be made to work in a coherent and equitable manner.
In particular, consideration needs to be given as to how the regulatory function at school-level is being adequately exercised and supported, so as to ensure system-wide consistency and fairness. One of the principal purposes of regulation is to safeguard the standards of teaching in the interests of pupils and in the longer-term public interest. On the basis of the evidence presented here, there must be some doubts about the capacity of a local and unsupported regulation system to fulfil this function in future. That some schools were not able to follow the referral procedures appropriately must be a concern. Even in the current context, 73 per cent of senior leaders in schools believe that there is not enough freedom to dismiss poorly performing teachers (Lewis and Pyle 2010). If schools are to be competent to hold a large part of the responsibility for assuring the quality of the nation’s teaching and teachers, and to do so in a consistent, transparent and equitable way, more consideration must be given to how professional incompetence can be addressed with greater confidence and expedition.

**Resources to support schools**

In fairness to children and young people, the new system must be able to deal with incompetence where it occurs, and put in place adequate targets and sanctions. This is now, in contrast with when the GTCE was the regulator, a local and largely unsupported function. Since the evidential basis for incompetence appears to have a higher threshold than that for misconduct, it is a moot point whether schools will be able and willing to commit the necessary resources to keeping meticulous records and gathering rigorous evidence necessary for identifying incompetence. The report by NatCen (Morrell *et al.*, 2010) also made the point that the scope for dispute, including with teacher unions, may act as a disincentive to headteachers in pursuing cases. The evidence and discussion above suggests very strongly that headteachers and employers need training and ongoing support – including professional legal support and administrative resources – if they are to arrive at clear and uncontestable judgements. It is not clear whether schools fully understand and are able to meet the complex responsibilities that are required of them in the discharge of their regulatory duties; the way the new performance management and capability procedures are implemented needs to be fit for the purpose of supporting these duties, and in particular to provide clear criteria and reference points for arriving at judgements. Schools also have a moral duty to support teachers to address areas of professional weakness before these lead to formal allegations.

**‘Fitness to practise’ as a more useful concept**

The findings give further weight to the notion of the indivisibility of teaching as an ethically-informed professional practice. By its nature, teaching entails making nuanced decisions in both the short-term and the long-term interests of pupils, and using experience and expertise to resolve the dilemmas that are intrinsic to educating young people. ‘Competence’ and ‘conduct’ may be distinguishable in theory (although even that must be open to question), but these borderline cases indicate that making straightforward judgements about whether and how to allocate actual failings of teacher professionalism to one or the other category is very difficult – and likely done on pragmatic rather than principled grounds.

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5 Some interesting findings emerged when teachers were asked if they agreed that there was not enough freedom for schools to dismiss poorly performing teachers (Table 10). Over half of all teachers agreed that this was the case (57 per cent either agreed or strongly agreed, Table 10) and less than a quarter of respondents (21 per cent) took the opposing view. The responses of primary and secondary teachers were similar but there were notable differences between the responses of senior leaders and class teachers. Seventy three per cent of senior leaders, compared to 52 per cent of classroom teachers, considered that there was not enough freedom to dismiss poorly performing teachers.’ (page 9)
I think the research revealed an irreducible ambiguity – evident in these particular cases but latent in all others – between so-called ‘misconduct’ and ‘incompetence’ in teaching. It would be truer to reality, fairer to teachers and better for pupils to regulate teaching on the basis of a holistic code that acknowledges that values, skills and competences are inseparable. In other professions, the concept of ‘fitness to practise’ – covering suitability, professional standing and health as well as competence and conduct⁶ – recognises the indivisible nature, as well as the many-sidedness, of professional practice. The GTCE argued strongly for such a concept to shape regulation and inform the professional codification of values and practice for teaching. The Secretary of State’s decision to revert to a structural divorce of professional capacity from professional values and behaviour, denies, whether intentionally or not, something fundamental about the kind of activity teaching is.

Some possible preventative measures by schools

Whilst a strong regulatory system will always be necessary to safeguard the minimum standards of professional practice and to secure public trust, there are steps that schools can take as preventative measures to avoid some of the issues that manifest themselves in individual incompetence or misconduct cases. In some of the cases that were examined, the school may have been as much at fault as the individual; certainly there were indications that some schools could have done more or acted sooner or with more efficacy in intervening on – and possibly preventing – the problem that ended as a referral.

Some steps schools could take include:

- The day-to-day isolation of teachers in classrooms – which may be a source of insufficient professional learning and stimulus as well as the reason incompetence remains invisible – can be mitigated, and their professional development greatly enhanced, through encouraging a whole-school culture of collaborative professional learning, through mentoring/coaching, peer observation, research-informed practice, and the other components of ‘professional learning communities’.

- A greater coherence between the Teachers’ Standards, performance management processes, and the provision for induction and early and continuing professional development, needs to be created by each school, in recognition of its own particular context and staffing complement. Where necessary, these structures and processes need also to be carefully aligned with the capability procedure.

- The school needs to make clear to all staff its commitment to supporting and modelling professional practice: as a minimum, through full compliance with employment law (for example, by actively preventing bullying of one member of staff by others); and, as the optimum, through establishing a fully-developed professional culture underpinned by the kind of principles that used to be enshrined in the GTCE’s Code of Conduct and Practice.

⁶ This holistic concept is not to be confused with either ‘licence to practise’ or ‘fitness to teach’, which are more limited.
In conclusion, teaching ought to be a profession into which individual teachers are inducted through a variety of means, amongst them a coherent regulatory framework grounded in an explicit code of values and practice that is independent of both national government and individual schools. The move towards local and ‘branded’ professionalism that is an inevitable accompaniment of the current fragmentation of the school system cannot be in the interests of teachers or young people, and is to be deplored.

BIBLIOGRAPHY AND REFERENCES


## APPENDIX 1. DATA EXTRACTION FRAMEWORK

<table>
<thead>
<tr>
<th>Case ID: CC</th>
<th>Details</th>
<th>Commentary, especially re-type/extent of material</th>
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<td>Reason for referral (dismissal, resignation/retirement prior to dismissal, other)</td>
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<td>Compromise agreement</td>
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<td>Reason for dismissal (or resignation/retirement prior to dismissal)</td>
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<td>Initial category for referral (Competence / Conduct)</td>
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<td>Finding of Investigating Committee (Competence / Conduct / No case to answer)</td>
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<td>Decision of Hearing Committee: Outcome / Sanction</td>
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<td>Any further comments / Recommendation</td>
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<td><strong>Teacher details</strong></td>
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<td>Phase (primary/secondary/other)</td>
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<td>Role/pay scale</td>
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<td>How long in role</td>
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<td>How long in particular school</td>
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<td><strong>School context factors mentioned in material</strong></td>
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<td>Professional development opportunities</td>
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<td><strong>Individual factors mentioned in material</strong></td>
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<td>Unexpected increase in teacher’s workload and/or unsought additional responsibilities imposed</td>
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<td>Unexpected change in personal circumstances</td>
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<td>Lack of support from school for personal circumstances</td>
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<td>Unwillingness to take up professional development opportunities before problem emerged</td>
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<td>Clash of pedagogical ideologies and/or difficult relationships with managers/leaders and/or peers</td>
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<td>Unwillingness to acknowledge problem</td>
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<td>Any other individual factors mentioned</td>
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<tr>
<td><strong>Circumstances surrounding referral mentioned in material</strong></td>
<td><strong>Type and extent of material</strong></td>
<td><strong>Commentary, especially re distinction between ‘incompetence’/‘misconduct’</strong></td>
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<td>What initiated concerns? (complaints from students/parents/staff; lesson observations; prolonged absences; etc.)</td>
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<td>What explicit criteria were used by school to make assessment of ‘misconduct’ (if applicable)?</td>
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<td>What explicit criteria were used by school to make assessments of ‘incompetence’ (if applicable)?</td>
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<td>What specific allegations were made?</td>
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<td>What evidence was brought forward? Was the evidence ambiguous about competence / conduct?</td>
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<td>Question</td>
<td>Details</td>
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<td>Is there any evidence that the referral arose from or was identified by the performance management process in school?</td>
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<td>If the referral was for misconduct, was any support offered before dismissal procedures were instigated? Of what kind?</td>
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<td>If the referral was for incompetence, was any support offered before a capability procedure was instigated? Of what kind?</td>
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<td>If a capability procedure was instigated, what targets were set as a result of it?</td>
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<td>What kind of support was offered as a result of capability procedure?</td>
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<td>Did the teacher take up the offered support?</td>
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<td>Did the teacher raise any issues of discrimination on grounds of gender, ethnicity, disability, sexual orientation, or any other unfair treatment?</td>
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<td>Did the teacher raise a formal grievance on these or other grounds?</td>
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<td>If the referral was for incompetence, at what point did any issues of misconduct emerge?</td>
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<td>If the referral was for misconduct, at what point did any issues of incompetence emerge?</td>
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<td>Did the teacher at any time dispute the classification of incompetence/misconduct (as distinct from rejecting the allegations)?</td>
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<td><strong>Other relevant factors</strong></td>
<td><strong>Details</strong></td>
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<tr>
<td>Any evidence of ‘competence’ or ‘conduct’ in different context</td>
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<td>Any other relevant factors</td>
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APPENDIX 2. SCENARIOS PREPARED FOR DfE TO SUPPORT PROFESSIONAL CONDUCT HEARING PANEL TRAINING

This suite of four scenarios has been created to support Panel decision-making in cases that *prima facie* involve elements of serious professional incompetence (over which the Panel has no jurisdiction) as well as of unacceptable professional misconduct.

**Note 1:**
According to the GTCE’s Disciplinary Procedure Rules 2008, **serious professional incompetence** was defined as ‘demonstrating a level of competence which falls seriously short of that expected of a Registered Teacher, taking into account the relevant circumstances’. In the same legislation, **unacceptable professional conduct** was defined as ‘conduct which falls short of the standard expected of a Registered Teacher within the meaning of paragraph 8(1) of Schedule 2 of the Education Act 1998 and is behaviour which involves a breach of the standards of propriety expected of the profession’.

Under the new Teachers Disciplinary Regulations, the Teaching Agency will be empowered to act on behalf of the Secretary of State in making arrangements for dealing with referrals for misconduct; whilst cases of alleged professional incompetence will be dealt with by employers.

**Note 2:**
Research conducted for the GTCE in 2011 indicated that cases which had been referred to the GTCE with elements of both incompetence and misconduct were particularly challenging to adjudicate. The following brief scenarios have been prepared with reference to some of the cases that were the subject of the research but with personal details omitted or fictionalised in order to preserve confidentiality.

**Note 3:**
A series of questions is offered at the end of this document for panellists to consider based on the skeleton evidence presented in the scenarios.

### SCENARIO 1

1. **Context**
The case – referred to the GTCE by the Local Authority as employer – concerned a teacher in a secondary school who had been dismissed from post.

2. **Allegation(s) at time of referral**
The case was referred on grounds of incompetence, misconduct and relevant criminal convictions.

3. **Grounds for referral**
Serious professional incompetence was alleged because the teacher had failed to:

   - achieve ratings of ‘satisfactory’ or above in lesson observations – including a poor assessment in an OfSTED inspection;
   - meet departmental deadlines;
   - improve communication with colleagues;
• improve attendance at staff briefings;
• improve punctuality to lessons;
• follow schemes of work as specified by the head of department.

Unacceptable professional conduct was alleged because the teacher had failed to:

• attend staff INSET day without prior notification;
• set cover work during absence;
• make appointments for parents’ evening;
• ensure that Yr 11 adequately prepared for examinations;
• attend and teach Year 13 lessons;
• arrive punctually for school trip to supervise pupils;

and

• had left school on at least one occasion without a valid reason.

Additionally, nine offences related to driving were included in the referral, including:

• driving while disqualified (three offences);
• driving an uninsured vehicle (three offences);
• driving while under the influence of alcohol (two offences).

4. **Any additional issues emerging during case handling/hearing**

There were problems contacting the teacher at the address held: letters were not responded to nor collected from the Post Office. A search agency was commissioned to find a current or new address for the teacher. Even after these efforts, the teacher could not be located and the hearing took place in the teacher’s absence and without representation (for example, by a designated member of a teachers’ union).

5. **Assessment of evidence**

Before the case could come before a Hearing Panel, the investigating team was required to consider whether:

• there was sufficient evidence for the particulars;
• there was a realistic prospect of a Hearing Panel making a finding;
• it was in the public interest to proceed.

The preliminary investigation found that there was a case to answer. There was credible evidence of serious professional incompetence: the documentation on file showed that the school’s capability process had been followed through and the teacher had not made the necessary improvements, despite the opportunities provided over a length of time. Similarly, the evidence regarding professional misconduct was strong enough to merit a finding. The investigating team also decided to refer the driving offences as being ‘relevant’, since there were several of these and at least some appeared to have happened while the teacher was driving to and from school. There was therefore, in the view of the investigating team, a realistic prospect of a finding of serious professional incompetence, unacceptable professional conduct and relevant conviction(s). It was decided to refer the case to a Conduct Panel, whose members were also able (under the GTCE regulations) to deal with matters of incompetence.
6. **Adjudication and finding**

The decision reached by a Hearing Panel was a staged process, supported by the advice of an independent legal adviser. Panel members needed to decide:

- first, whether the facts were found;
- secondly, whether the facts amounted to serious professional incompetence and/or unacceptable professional misconduct;
- thirdly, having considered the previous history and character of the teacher, any mitigating circumstances and any previous disciplinary order imposed on the teacher, whether a sanction should be imposed.

In this case, the Conduct Panel judged that the teacher’s absence and the lack of any statement or representation posed risks in terms of their reaching inappropriate conclusions. Panel members were advised by the Legal Adviser that they ‘must proceed with great care and caution and with close regard to the overall fairness of the proceedings’.

The Panel was able to receive statements from witnesses, including the school’s headteacher. Members decided that some of the allegations of serious professional incompetence could not be fully investigated, given the teacher’s absence at the hearing and lack of any written statement. However, the detailed lesson observation records showed a consistent lack of planning and inadequate management of the structure and process of lessons over a period of time. The documentation for the internal capability procedure indicated that support and opportunities had been provided to the teacher but that the necessary improvement had not taken place. The Panel decided that the evidence for unacceptable professional misconduct was more robust and that allegation was upheld in its entirety; members also found that the motoring offences were serious and relevant.

7. **Sanction**

The tariff of sanctions available to the GTCE included suspension orders, conditional registration orders and reprimands, as well as prohibition orders. Conditional registration orders were commonly used in incompetence cases, as they allowed for the practice of the teacher to be subject to the successful completion of a retraining requirement; suspension orders with conditions were also used in some incompetence cases, as they removed the teacher from practice until they had met the conditions, usually involving retraining. Any sanction was noted on the Register of Teachers so that prospective employers could check details; if and when the order expired, it was marked as such.

For these reasons, the Panel would have preferred in this case to impose a conditional registration order, but this was impossible in the circumstances owing to the teacher’s absence. A suspension order was therefore imposed for six months with immediate effect.
SCENARIO 2

1. **Context**
The case – referred to the GTCE by the Local Authority as employer – concerned a teacher in a primary school who had resigned from post prior to dismissal.

2. **Allegation(s) at time of referral**
The case was referred on grounds of incompetence and misconduct.

3. **Grounds for referral**
Unacceptable professional conduct was alleged because the teacher had failed to:

   - inform staff of the whereabouts of a Year 2 pupil during a fire drill;
   - on more than one occasion, prevent a pupil leaving the classroom and make every effort to find the pupil subsequently.

Serious professional incompetence was alleged because the teacher had failed, despite consistent monitoring and support, to meet the development targets that had been set in seven separate areas of children’s learning, behaviour and well-being.

4. **Any additional issues emerging during case handling/hearing**
The case papers included documentation about the teacher’s subsequent employment elsewhere in the education system (i.e. not in a maintained primary school). The teacher asserted that s/he was not planning to return to school teaching in future but wished to pursue a career in teaching further education students.

The teacher admitted that the allegations were true, but did not accept that the actions amounted to serious professional incompetence. The teacher did not attend the hearing in person and was represented by a designated official from a teachers’ union.

The documentation showed that an agreement had been reached between the referring school and the teacher, such that a positively-worded employer’s reference was supplied by the headteacher.

5. **Assessment of evidence**
Before the case could come before a Hearing Panel, the investigating team was required to consider whether:

   - there was sufficient evidence for the particulars;
   - there was a realistic prospect of a Hearing Panel making a finding;
   - it was in the public interest to proceed.

The preliminary investigation found that there was a case to answer, but that the allegations of misconduct should be re-assigned to incompetence. The case was accordingly referred to a Competence Panel.

6. **Adjudication and finding**
The decision reached by a Hearing Panel was a staged process, supported by the advice of an
independent legal adviser. Panel members needed to decide:

- first, whether the facts were found;
- secondly, whether the facts amounted to serious professional incompetence and/or unacceptable professional misconduct;
- thirdly, having considered the previous history and character of the teacher, any mitigating circumstances and any previous disciplinary order imposed on the teacher, whether a sanction should be imposed.

The case file seen by the Panel contained testimonies submitted by teacher from previous colleagues, parents, friends and the current employer, together with records of lesson observations conducted in the past which were all rated as 'good'.

The evidence also included detailed submissions from the referring school’s headteacher, the Primary Adviser and a Consultant, which comprised both contemporary and retrospective reports recording the lack of planning, teaching methods that were unsuitable for the least able pupils, inadequate assessment, inefficient use of time and resources, and unsatisfactory pupil outcomes. The consultant, who had been invited specifically for the purpose of supporting the teacher, found several lessons to be unsafe and unsatisfactory, with children fighting, showing distress, being bullied, using scissors and playing with electrical equipment without supervision. The consultant recorded one lesson as ‘the worst I have ever witnessed – I had to intervene and stop the lesson’; even so, the teacher appeared to be ‘unaware of the gravity of the situation’. The adviser’s report concluded that ‘I have never known a teacher to be given so much help to improve and yet remain such a poor teacher’. The headteacher’s submission claimed that the school had provided a great deal of support and additional teaching resources (such as supply cover while the teacher was receiving coaching); the teacher had also been assigned to a different and less challenging class.

The teacher’s weaknesses and difficulties all seem to have surfaced or developed after the teacher returned from a one-year teaching exchange programme abroad; prior to that the teacher’s record over 27 years of service appears to have been satisfactory.

The Competence Panel found the allegations of serious professional incompetence to be true. They commented that the testimonials and character references submitted by the teacher were not relevant in terms of mitigating the finding of incompetence: the modest degree of improvement shown by the teacher was unsustainable without the very high level of resource provided by the school, which could not be maintained.

7. **Sanction**

The tariff of sanctions available to the GTCE included suspension orders, conditional registration orders and reprimands, as well as prohibition orders. Conditional registration orders were commonly used in incompetence cases, as they allowed for the practice of the teacher to be subject to the successful completion of a retraining requirement; suspension orders with conditions were also used in some incompetence cases, as they removed the teacher from practice until they had met the conditions, usually involving retraining. Any sanction was noted on the Register of Teachers so that prospective employers could check details; if and when the order expired, or evidence was submitted that the condition had been fulfilled, it was marked as such.

In this case, the Panel imposed a conditional registration order, comprising five days’ training on behaviour management. The Panel judged that the testimonials were pertinent to the decision
about which sanction to impose – thus the Panel felt it was safe not to issue a suspension or prohibition order because of the teacher’s previous good record.

**SCENARIO 3**

1. **Context**
The case – referred to the GTCE by the Local Authority as employer – concerned a teacher in a secondary school who had resigned from post prior to dismissal.

2. **Allegation(s) at time of referral**
The case was referred on grounds of serious professional incompetence – however, the allegations on file were of both serious professional incompetence and unacceptable professional conduct.

3. **Grounds for referral**
   Serious professional incompetence was alleged because the teacher, as head of department, had failed to:
   
   - establish good communications within the department;
   - establish effective performance management practices;
   - maintain and enhance staff morale;
   - produce and consult colleagues on a departmental action plan;
   - produce departmental rotation and class groupings;
   - compile a departmental handbook;
   - develop a departmental behaviour policy;
   - design and deliver specific subject modules;
   - establish appropriate target-setting/student tracking strategies;
   - support students’ efforts towards and secure their performance in GCSE examinations.

   Unacceptable professional conduct was alleged because the teacher, as head of department, had:
   
   - shown inappropriate conduct towards departmental colleagues and other staff;
   - harassed and bullied pupils, both in school and out of school.

4. **Any additional issues emerging during case handling/hearing**
The teacher did not admit the allegations and urged mitigation due to stress and ill-health. The case file shows that the teacher took six months’ sick leave following the first complaint received in school; a further five weeks’ sickness absence followed an in-school review meeting, and a third after a problem with a student arose. The teacher also precipitately left, on grounds of ill-health, a meeting with the local authority HR officer about continuing failures. Eventually, the teacher resigned from post without returning to school.

   The notes also show that the teacher subsequently took up employment at a different school within the same local authority. The file contains documentation that appears to be a compromise agreement between the teacher and the referring school.
5. **Assessment of evidence**

Before the case could come before a Hearing Panel, the investigating team was required to consider whether:

- there was sufficient evidence for the particulars;
- there was a realistic prospect of a Hearing Panel making a finding;
- it was in the public interest to proceed.

The preliminary investigation found that there was a case to answer, and that there was sufficient evidence for the allegations of both serious professional incompetence and unacceptable professional misconduct to be upheld. Because the case predominantly involved competence allegations, however, it was referred to a Competence Panel.

6. **Adjudication and finding**

The decision reached by a Hearing Panel was a staged process, supported by the advice of an independent legal adviser. Panel members needed to decide:

- first, whether the facts were found;
- secondly, whether the facts amounted to serious professional incompetence and/or unacceptable professional misconduct;
- thirdly, having considered the previous history and character of the teacher, any mitigating circumstances and any previous disciplinary order imposed on the teacher, whether a sanction should be imposed.

The case file scrutinised by the Panel contained a large amount of material reporting on or otherwise concerning incidents that had taken place over a period of five years, including detailed documentation from the headteacher and deputy headteacher, and a representative of the local authority; letters of complaint received by the senior leadership team from parents and from departmental colleagues were also available for scrutiny. These latter alleged a range of difficulties with the head of department, such as:

- communication problems and a lack of common themes across the different topics;
- lack of preparation for OfSTED inspection;
- meetings with no agenda;
- lack of appropriate IT resource.

Some staff felt they had not received support for their own long-term sickness; some reported being bullied and harassed; and more than one noted that there had been complaints from pupils about the head of department in relation to coursework. Also on file were letters from several pupils alleging serious verbal threats of physical violence towards them, which they had found intimidating. A particular incident occurred in the local town in front of a pupil’s mother, and was thus felt by the headteacher to be putting the school’s reputation at risk.

Notes of the capability proceedings – including an action plan and formalisation of support from both the local authority Welfare team and Occupational Health – also showed that OfSTED had singled out the subject area as unsatisfactory in terms of departmental leadership and coordination. The head of human resources in the local authority had identified five areas where improvement was needed; the teacher had filed a complaint against that colleague.

The teacher’s own submission was also substantial: it included testimonials received from colleagues in the referring and previous schools, as well as from a pupil and parents; the
teacher’s Threshold Assessment form; notes of altercations and difficulties with two colleagues; notes of meetings with line manager(s), etc.

Members of the Competence Panel found that there was clear and compelling evidence that the teacher was failing to lead the team effectively; but they were not satisfied that there was evidence of failure to manage students’ learning effectively. Moreover, although they believed the allegations of misconduct to be serious, they found that the evidence on file fell short of the standard required. The Panel reached a finding of serious professional incompetence.

7. Sanction
The tariff of sanctions available to the GTCE included suspension orders, conditional registration orders and reprimands, as well as prohibition orders. Conditional registration orders were commonly used in incompetence cases, as they allowed for the practice of the teacher to be subject to the successful completion of a retraining requirement; suspension orders with conditions were also used in some incompetence cases, as they removed the teacher from practice until they had met the conditions, usually involving retraining. Any sanction was noted on the Register of Teachers so that prospective employers could check details. If and when the order expired, it was marked as such, and could be taken into account in any future regulatory proceedings.

In this case, the Competence Panel decided to issue a reprimand, a sanction that was current for two years. The Panel’s reasons for imposing a sanction cited the teacher’s stress and illness on the one hand, balanced against the teacher’s lack of insight into her/his failings and the lack of any expression of regret on the other.

SCENARIO 4

1. Context
The case – referred to the GTCE by the Local Authority as employer – concerned a teacher in a primary school who had resigned from post after illness absence and prior to dismissal.

2. Allegation(s) at time of referral
The case was referred on grounds of incompetence and misconduct.

3. Grounds for referral
Unacceptable professional conduct was alleged because the teacher had:

- failed to adhere to school’s behaviour policy by determining own sanctions;
- demeaned and undermined pupils by so doing.

Serious professional incompetence was alleged because of the teacher’s unsatisfactory performance in:

- planning, content and delivery of lessons;
- marking and assessment of pupils’ work;
- fulfilling the role of subject coordinator;
- management and deployment of teaching assistants;
• preparation and use of appropriate resources and classroom displays.

4. **Any additional issues emerging during case handling/hearing**

The teacher signed for the first letter of notification from the GTCE but did not respond to it, and neither signed for nor responded to any subsequent letter. A search agency was commissioned to find a current or new address for the teacher, and discovered evidence of the teacher’s continued residence at the recorded address.

Because of the amount of evidence submitted, the case could not be completed at the first hearing and was adjourned for a later date. The teacher was represented by a designated official from a teachers’ union at the first hearing, but not at the second; the teacher attended neither of the hearings.

In response to the capability proceedings, though not in any submission to the GTCE, the teacher pleaded ill-health and had been absent due to ill-health for several periods in the relevant employment. A final period of illness resulted in the teacher never returning to the school.

5. **Assessment of evidence**

Before the case could come before a Hearing Panel, the investigating team was required to consider whether:

- there was sufficient evidence for the particulars;
- there was a realistic prospect of a Hearing Panel making a finding;
- it was in the public interest to proceed.

The preliminary investigation found that there was a case to answer; they believed there was a real prospect of the allegations in relation to both sets of issues to be proven and to amount to unacceptable professional conduct and serious professional incompetence respectively. The case was referred to a Conduct Panel.

6. **Adjudication and finding**

The decision reached by a Hearing Panel was a staged process, supported by the advice of an independent legal adviser. Panel members needed to decide:

- first, whether the facts were found;
- secondly, whether the facts amounted to serious professional incompetence and/or unacceptable professional misconduct;
- thirdly, having considered the previous history and character of the teacher, any mitigating circumstances and any previous disciplinary order imposed on the teacher, whether a sanction should be imposed.

The case notes available to the Panel indicated that the teacher was experienced as a teacher in the independent sector and the senior leadership team had welcomed the teacher’s application because they believed that s/he would be an asset to the school. However, as time went on, it became apparent that the teacher was not prepared to fit in with and follow the school’s ethos and procedures. Each time a meeting to discuss the issues with the headteacher was called, the teacher was absent. The headteacher’s submission noted that the disciplinary process had begun as a capability procedure, which would have triggered the provision of whatever support was required. When the teacher rejected the offered support on the grounds that it
was unnecessary and inappropriate, the matter then became a question of conduct. The headteacher then sought advice from the human resource team of the local authority.

Included in the statements made by the senior leadership team were the following concerns:

- complaints had been received from parents about arbitrary and unreasonable punishments meted out to children by the teacher; the complaints had been sent or said to the teacher but had come to light only on the headteacher’s investigation, through interviews as well as actual sight of the letters;
- such punishments included children being sent out of class unsupervised, in direct contravention of school policy;
- when interviewed, some children appeared still very distressed, frightened and anxious about the teacher, with vivid memories of what had happened if they made even trivial mistakes; again, the teacher’s behaviour contravened the school’s explicit policies about encouraging positive behaviour, supporting pupils’ self-esteem and getting the right balance between incentives and sanctions;
- the teacher had taken several sickness absences at short notice and for long periods.

As serious concerns over the teacher’s professional competence emerged, lesson observations were instituted and pupils’ progress analysed by the senior leadership team. This analysis revealed that in mathematics only two pupils had made progress between the start of year and mid-year tests; lesson observation records noted that there was no differentiation and that marking was inadequate. A similar pattern was apparent in literacy work. The teacher was given opportunities to observe colleagues but this had made little or no difference to her/his performance. The weekly and termly planning documents, which the teacher had a duty to provide for colleagues, including teaching assistants, had failed to materialise, and pupil assessment records were sometimes wholly missing. When the teacher pleaded ill-health as the reason for not being able to undertake planning and marking outside directed hours, the senior leadership team referred the matter to Occupational Health.

The headteacher remarked that the teacher’s case had consumed large amounts of time in meetings, discussions, support, observations and keeping written records, and that this had had a negative impact on other staff. The pupils had also suffered disrupted schooling as a result.

Members of the Conduct Panel found that there was clear and compelling evidence of both unacceptable professional conduct and serious professional incompetence; the only allegation not to be upheld was that concerning the management and deployment of teaching assistants. The Panel further noted that the ill-health of a teacher can be a relevant consideration if there is medical evidence that the condition relates specifically to the alleged incompetence. In this case, there were no formal medical reports, only medical certificates, and no further information was volunteered by the teacher. The Panel argued that, since the teacher consistently refuted the allegations of incompetence, it would have been illogical to urge or to accept a plea of ill-health in mitigation.

7. Sanction

The tariff of sanctions available to the GTCE included suspension orders, conditional registration orders and reprimands, as well as prohibition orders. Conditional registration orders were commonly used in incompetence cases, as they allowed for the practice of the teacher to be subject to the successful completion of a retraining requirement; suspension orders with conditions were also used in some incompetence cases, as they removed the
teacher from practice until they had met the conditions, usually involving retraining. Any sanction was noted on the Register of Teachers so that prospective employers could check details; if and when the order expired, it was marked as such.

The Hearing Panel noted that the teacher – being absent from both hearings and submitting no documentation – had shown neither insight nor remorse. The Panel accordingly imposed a suspension order, current for 18 months, with specific conditions: the teacher was required to undertake relevant and substantial training in:

- teaching and learning methodologies;
- behaviour management.

The selected training courses or other provision would require the Registrar’s prior approval.

The suspension order prohibited the teacher from being employed in a school as a teacher until evidence was submitted of satisfactory completion of both training requirements; the teacher’s registration eligibility could be reinstated only on those conditions. The teacher could, of course, choose to return unhindered to employment as a teacher in the independent sector.

KEY QUESTIONS TO CONSIDER

For each of the cases above, Panellists are invited to consider the following issues:

i. Are there any reasons why you might have disputed:
   - the initial classification or the re-assignment (if applicable) of the allegations?
   - the decision about whether the case should be heard as a misconduct or as an incompetence case?

ii. Based on the very skeleton evidence presented here, are the findings of unacceptable professional conduct (where applicable) sufficient to merit a prohibition order within the new regulations?

iii. If a prohibition order would not be merited on grounds of misconduct, how credible and serious do you consider the evidence and/or finding of professional incompetence (where applicable) to be?

iv. Are there any reasons why – had it still been possible to do so – you feel you would like to have imposed a higher, or a lower, sanction than that actually awarded?

v. Do you have any reasons to believe that the case is sufficiently disquieting to make it desirable that the public interest be even more securely protected?

vi. Ideally, how would you like to articulate your collective judgement on the case?
vii. Ideally, what additional actions – or recommendations for action by other parties – would you like to be able to take?

viii. Is there any further guidance on the disciplinary procedures or processes that you would welcome from the Teaching Agency/Secretary of State for Education?

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