

Report by a tribunal constituted under section 21 of the Courts Reform (Scotland) Act 2014 to report into the fitness for office of a judicial office holder.

1 Introduction

1.1 This tribunal is constituted under section 21 of the Courts Reform (Scotland) Act 2014 and is governed by the Fitness for Judicial Office Tribunal Rules 2015. Its task is to investigate whether a judicial office holder (JOH) is unfit for office because of misbehaviour and submit a report to the First Minister. Following an investigation carried out by Lord Burns, the tribunal required to consider allegations made by three persons, B, C and D. These were framed by the investigating officer into five grounds, namely:

- 1 On [REDACTED] 1999 at the [REDACTED] he did put his hand inside the clothing of B and touch her naked breast;
- 2 (i) in late 2001 or early 2002 at [REDACTED] Court he did kiss C, [REDACTED] [REDACTED] on the lips, and (ii) in [REDACTED] or [REDACTED] 2004 at [REDACTED] [REDACTED] Court he did squeeze the buttocks of C, [REDACTED];
- 3 On [REDACTED] 2018 in the [REDACTED] Court [REDACTED], [REDACTED], [REDACTED], he did touch D, [REDACTED] at [REDACTED], on the cheek;
- 4 On [REDACTED] 2018 at [REDACTED] Court he did:
 - (a) when he was alone in his chambers with D (i) make an inappropriate remark by saying to her “--- much as I would love to chat to your pretty face all day, I’m sure you have better things to do” and (ii) hug her inappropriately causing his face to linger on her shoulder; and
 - (b) in a corridor area pat her twice on the bottom over her clothing;
- 5 On [REDACTED] 2018 on a train travelling between [REDACTED] and [REDACTED] he did touch D on the leg.

1.2 The tribunal is aware that it was constituted after a judge of the Court of Session quashed the decision of a previous tribunal which considered only matters spoken to by D. However it has approached its task wholly of new and without reference to any of that history or previous evidence and decisions. It has reached its conclusions only on the basis of the evidence put before it and the submissions made by the presenting officer and counsel for JOH.

1.3 The tribunal decided that an evidential hearing was required. This took place over five days in January 2024. The presenting officer led evidence from B, C and D. Counsel for JOH led evidence from JOH and three others (two of whom by WebEx). Each witness took the oath or affirmed, and, if so advised, were subject to cross examination. The presenting officer and counsel for JOH agreed that the tribunal could also have regard to the contents of a joint

bundle, which included statements, photographs and productions, and also to a number of affidavits.

1.4 After the conclusion of the hearing the tribunal took time to reach its conclusions on the key issues, namely whether any of the grounds had been established, and if so whether this amounted to misbehaviour on the part of JOH. If yes the tribunal had to consider whether as a result JOH was unfit for judicial office. In terms of the 2015 Rules the presenting officer and JOH had to be given the opportunity to see and comment on a draft of the tribunal's findings in fact, though not other matters. This procedure was followed. This is the tribunal's finalised report and is submitted to the First Minister.

2 Standard of proof and other general matters

2.1 The 2014 Act and the 2015 Rules are silent on the question of standard of proof in proceedings of this kind. However both the presenting officer and counsel for JOH submitted that the appropriate standard is the civil one of proof on the balance of probabilities. The tribunal agrees and has approached its task on that basis. It also accepts that no burden of proof rests on JOH. It is for the presenting officer to lay sufficient evidence before the tribunal, failing which the tribunal cannot make a finding of unfitness.

2.2 In *Re Chief Justice of Gibraltar* [2009] UKPC 43 Lord Phillips explained that the civil standard had been adopted, see paragraphs 16 and 17. He observed that there is a public interest in the removal of judges who are unfit for office. In matters of this nature it is not primarily a matter of punishing a judge for misconduct. Nonetheless we recognise that there is a heavy responsibility when considering whether to make a finding which can lead to interference in a judge's security of tenure, not least when it involves conduct of the kind alleged here. Before upholding any of the grounds, we consider that it is necessary to be satisfied that this is justified by evidence of quality and weight, or as it is sometimes put, of sufficient cogency; and which has been subjected to careful scrutiny. We also accept that the more improbable the event, the stronger the evidence required to tilt the balance to a positive finding. And, as invited by counsel for JOH, we have had in mind that in respect of historic complaints, relevant evidence may well have been lost or no longer available.

2.3 During the parties' submissions there was some discussion as to whether, on a basis akin to the doctrine of mutual corroboration in criminal cases, support for the evidence of one witness in respect of one allegation could be derived from the evidence given by another witness speaking to a separate ground. We do not require to address this matter as we have not made use of any such approach when deciding on the facts. We consider that, consistently with section 1 of the Civil Evidence (Scotland) Act 1988, it is open to us to hold that something is proved on the basis of the evidence of one credible and reliable witness.

2.4 We also record our agreement with the views expressed by Lord Burns at paragraph 26 of his report to the effect that grounds 1 and 2 are separate and independent of each other and of the other grounds. As a matter of competency, and notwithstanding that they concern

alleged conduct before judicial appointment, each is potentially capable of leading to a finding that JOH is unfit for office. Both parties accepted that this is correct.

3 Findings in respect of the five grounds

3.1 Ground 1

A summary of the evidence regarding ground 1

3.1.1 B has alleged that on [REDACTED] 1999 at a [REDACTED] party at the [REDACTED] JOH put his hand inside her clothing, including her bra, and touched her naked breast. This is the first ground investigated by the tribunal.

3.1.2 B says that it happened early in the evening when she was sitting at the bar having her first drink. She recalled a couple of people at the bar and others elsewhere in the [REDACTED], including [REDACTED]. She felt a hand on her right shoulder which moved down under her bra. The person had bad breath. She grabbed the wrist and twisted it. It was JOH (who was then a solicitor). She knew him [REDACTED]. She was shocked and shouted "Fuck off". He walked away. There is no suggestion that anyone at the bar or in the room noticed what happened. At no time has she confronted him about this. She made no formal complaint. She stated that it has worried her that for many years she did nothing about this.

3.1.3 B is unsure whether she told her husband, [REDACTED], though perhaps not, as it would have upset him. She did tell a friend, [REDACTED] she thinks the next day. In this regard [REDACTED] has told the police that in the early 2000's she had a conversation with B in a corridor outside [REDACTED] in [REDACTED] Court. She asked B how she had got on at a recent night out [REDACTED], [REDACTED], at which a lot of lawyers were present. B replied – "Fine, except (JOH) grabbed my tit."

3.1.4 In [REDACTED] 2018 B gave a statement to the police. She described JOH as "sleazy". She could not recall where or when the groping incident happened. Reference was made to a pub or the [REDACTED]. The period 1992 – 2000 was mentioned. Subsequently she searched through pocket diaries which she had retained and noticed an entry in the 1999 diary on Saturday [REDACTED] which recorded "(JOH) GROPED ME" with a line drawn to a reference to a named [REDACTED] at the [REDACTED] recorded in the diary for the night before. She then told the police that she could identify the place and date. When various differences between her police statement and her evidence were drawn to her attention, B said that while she could not recall all the details, she could clearly remember the grope.

3.1.5 In her police statement B said that she had been told by a friend that at a legal dinner she had been groped by JOH and that it had been witnessed by a solicitor who made a joke about it. From the information before the tribunal it is apparent that both that friend and the solicitor deny that anything of this nature occurred. The friend was horrified when B told her that she had given her name to the police. For her it was ridiculous. B insists that she was told

this but her friend did not want to speak to the police about it. B also informed the police that another friend said that JOH had once crawled between her legs. While the tribunal does not have a statement from this person, it does have a copy of a social media message from her to JOH in which she tells him that he did not deserve any of this. JOH denies both matters.

3.1.6 When interviewed by Lord Burns, the investigating officer in these proceedings, B said that she could not find her 1999 diary. When giving evidence to this tribunal she stated that subsequently she found the diary and she still had it. Her evidence was interrupted to allow her to go home to look for it. The next day she returned with the diary. She objected to JOH's counsel's request that he and only he look at the diary for the four weeks before and the four weeks after [REDACTED] 1999 in order to see if there was any pattern as to how entries were made. As a result parties and the tribunal have only a copy of the diary for the week commencing [REDACTED] 1999.

3.1.7 JOH has always denied ever having been in the [REDACTED]. He first became aware of the identity of the [REDACTED] on the second day of B's evidence when her diary was produced. It transpires that he was [REDACTED] and JOH is clear that he did not attend his [REDACTED] party. The [REDACTED] who B thought was in the [REDACTED] that night has given evidence to the tribunal denying that he was present.

3.1.8 When asked when the entry on the page for the Saturday was made, B said that she thought that it was on that Saturday or the following day. She did it to have a record of the incident. During cross examination she resisted the suggestion that she made it when, after speaking to the police, she was going through her diaries. On being asked whether she was challenging JOH's assertion that he had not attended his [REDACTED] party, B said that if it turns out that it was at another time - it was another time. It might be possible that it did not happen at that event, though she would be surprised. However, if it happened at another occasion, "fair enough". It was put to B that in that event the entry in the diary could not have been made at or near the time. She replied that she might have got it all wrong – but the incident definitely happened.

A summary of the parties' submissions on ground 1

3.1.9 The presenting officer submitted that B was clear as to what happened and who did it. She was angry and felt violated. She had produced the diary entry which she says was made more or less at the time. Shortly afterwards she told a friend, namely [REDACTED]. She probably did not tell her husband. If she had, it is likely he would have confronted JOH.

3.1.10 Counsel for JOH submitted that it was clear from her evidence that while B recalled being groped, she was entirely dependent on the diary for the context, including where and when. Her evidence as to that context was undermined by a number of inconsistencies or signifiers of an unreliable memory. For example she was vague and uncertain in her police statement as to where and when it occurred. B told the tribunal that she sat for a while after the incident then went home. However in her police statement she said she stayed there for

the evening, not mentioning it so as not to ruin the night. She had volunteered that there was heavy drinking at the event and her evidence that the grope occurred during her first drink was perhaps aimed at thwarting any suggestion that consumption of alcohol might have affected her memory. Given the description of what happened and B's reaction, it is unlikely that no one would have noticed. The [REDACTED] she said was present has contradicted her recollection.

3.1.11 B said that she thought that she made the diary entry on [REDACTED] or [REDACTED] 1999. The question was posed that if she did it then, rather than years later when she looked through her diaries – why did she accept that she might have got it all wrong? It was an evening of heavy drinking some 25 years ago. Might she have mistaken the event or the person responsible, or both? [REDACTED] speaks to being told about a groping incident at a later and different occasion. And there is good reason to question B's statements regarding other alleged misconduct by JOH towards third parties.

3.1.12 JOH has always maintained that he did not attend the event, and now that he knows the identity of the [REDACTED] he is clear he did not attend his [REDACTED] party.

3.1.13 In short, while it was not contended that B was being deliberately untruthful, the submission was that at this remove in time there are sufficient doubts and uncertainties as to the quality of her evidence to render it unreliable on the specifics in ground 1. In other words the tribunal should not exclude the possibility that she is mistaken.

Discussion regarding ground 1

3.1.14 The case being investigated by the tribunal is that formulated by the investigating officer. That is the case JOH has to answer. Thus so far as B's allegation is concerned, the question is not whether at some time at some event B was groped by JOH, but whether on a balance of probabilities ground 1 is made out, namely that it happened in the [REDACTED] on [REDACTED] 1999.

3.1.15 JOH's counsel drew attention to a number of matters which we agree cast doubt on the reliability of B's evidence. The tribunal considers that B was clear and confident on what might be called the core allegation, but was less sure on the details, for example where and when it occurred. We agree that for this she was wholly dependent on the entry in the diary. If she made it having looked through the diary long after the event, perhaps to give the police more detailed information, but misremembering the actual event, that would be consistent with [REDACTED] evidence and JOH's denial of being there. We cannot say for sure that is what has happened here, but we are not prepared to hold that the entry was made contemporaneously.

3.1.16 Essentially for the reasons given by counsel for JOH, the tribunal is not satisfied that ground 1 has been established.

3.2 Grounds 2(i) and 2(ii)

A summary of the evidence regarding grounds 2(i) and 2(ii)

3.2.1 C, who was then a [REDACTED], has alleged that in late 2001 or early 2002 at [REDACTED] Court JOH kissed her on the lips (ground 2(i)). In addition in [REDACTED] 2004 at [REDACTED] Court he squeezed her buttocks (ground 2(ii)). She states that both events were unexpected, unwelcome and without her consent.

3.2.2 At the time C was a [REDACTED] in [REDACTED]. JOH was an experienced and established practitioner. She states that she began to receive unwanted attention from him. He would come too close and in a low voice say things such as: you are a very attractive woman; looking lovely today; too much makeup today; or that lipstick is too dark. In a statement C told the police that she found him creepy.

3.2.3 Late one afternoon towards the end of 2001/early 2002 they were the last people in [REDACTED] at [REDACTED] Court. C stated that without any lead up or warning JOH walked up to her and kissed her full on the mouth. The kiss was very unwelcome and unexpected. She walked away. In a statement C told the police that she was shocked and disgusted. She felt unsafe around him. Being inexperienced and him so senior she did not know what to do. She confided in her mother who advised making a light-hearted comment to him, but making it clear that his attentions were unwanted. C did this in the company of her employer at the time, who was [REDACTED] and [REDACTED]. In particular during a conversation outside [REDACTED] she said "JOH keeps kissing me". This was inaccurate – there had been only one kiss but she was nervous. Her employer was surprised and JOH looked angry. Subsequently her employer said that JOH had denied this, though she seemed sceptical as to his response. In recent times C's mother has given a statement to the police in which she said that she has no recollection of the conversation about the kiss.

3.2.4 C stated that after the kiss JOH stopped speaking to her though they continued to see each other on a regular basis. She did not speak to him either – while awkward this was preferable to his unwanted attentions. It was a largely male [REDACTED], and this happened before the "me too" movement. It did not occur to C to make a formal complaint. She was more concerned to stop it happening again.

3.2.5 As to the second part of the complaint, C said that in [REDACTED] 2004 just before lunchtime C and JOH were the only people in the [REDACTED] at [REDACTED] Court. He struck up a normal conversation which C thought might be the start of a new chapter between them. However, as she was preparing to leave, he walked round the room, stood in front of her and with a sinister smile on his face reached round and squeezed her bottom. C told the police that this incident was quite fleeting, a very brief thing. Nothing was said. C left the room irritated, but she did not regard it as seriously as the kiss.

3.2.6 In about 2007 JOH [REDACTED] where C was a [REDACTED]. She [REDACTED] and she recollects saying to her line manager that she thought that JOH was [REDACTED] because he had a grudge against her. This was said in passing – it was not a formal complaint. Her line manager

has no recollection of this, and could find no mention of it in documents such as performance appraisal reports.

3.2.7 In [REDACTED] 2018 C was on a [REDACTED] when she met D [REDACTED]. D told her that she had left [REDACTED] because of something involving JOH. C said to her – “Oh that sleaze-ball”. Having told D what happened to her, after an initial decision not to do so, she agreed to give a statement to the police.

3.2.8 In cross examination it was put to C that she did not give the police a time of day for the kissing incident. Furthermore she did not mention the second conversation with her employer to the investigating officer. She stated that her meeting with Lord Burns was a question and answer session with him directing the topics. She knew that he had read her police statement in which reference was made to the conversation with her employer. She denied being mistaken about it and the squeeze of her bottom in [REDACTED]. The latter was not a pat on the back.

3.2.9 In his evidence JOH stated that he had little or no recollection of C. The last time he would have seen her was when he was [REDACTED], though he had no recollection of her [REDACTED]. He would never say anything intended to be offensive or sexual. He did not kiss her. He would be delighted to be able to say that it was a birthday kiss but he simply does not recall C. He had no recollection of ever being in a court with C. They would not be the last people in court. He stated that it sounds “bonkers”. When asked to elaborate, JOH said that he meant that he had no explanation and was being asked to prove a negative. He has no diaries or court sheets to consult as to his movements at a particular time. He said that he had not been confronted by her in the presence of her employer, nor by her employer alone. He did not recall seeing C in [REDACTED] Court. He did not touch her bottom. [REDACTED]. He considered that C’s line manager would have spoken to him about any concerns raised by C, but that did not happen.

A summary of parties’ submissions on grounds 2(i) and 2(ii)

3.2.10 The presenting officer suggested that C’s evidence was clear and consistent with her previous accounts. There is no good reason to doubt her credibility and reliability, or to conclude that she is mistaken as to the essential matters. After such a long gap her mother could well have forgotten about the kiss conversation.

3.2.11 It was submitted by counsel for JOH that at this remove in time C’s evidence lacks the necessary cogency for the proof of serious complaints which could have extremely adverse consequences for JOH. Both she and JOH were doing their best to tell the truth. That JOH has no recollection of the events does not make it more likely that they happened. It is just as possible that C has misremembered the nature of whatever it was that occurred.

3.2.12 Counsel suggested that it was inherently improbable that in a [REDACTED] would approach [REDACTED] and kiss her on the lips. Evidence that might have been available at

the time, for example to check on people's movements or [REDACTED], is now not to hand. C's mother has no memory of the conversation with her daughter. And in respect of her suggested involvement, the tribunal does not have an account from C's employer at the time.

3.2.13 Similar comments were made with regard to the [REDACTED] Court allegation. It is odd that C did not tell her employer about it. She did not tell a senior [REDACTED] what happened. She told Lord Burns that she considered it a minor incident which suggests that it may have been no more than a pat on the back.

3.2.14 C's memory might have been influenced by her discussion with D in [REDACTED] 2018. It is noteworthy that C's line manager has no recollection of her concerns as to JOH [REDACTED] [REDACTED]. In her evidence C's concerns regarding this came across as less serious than is suggested by the account in her police statement. Overall the tribunal should not be satisfied that the evidence as to the two allegations is accurate.

Discussion of grounds 2(i) and (ii)

3.2.15 The tribunal considers that C was an honest and trustworthy witness. Her evidence was clear, coherent and cogent. Her manner was calm, confident and straightforward. By contrast, in his evidence on these matters JOH appeared guarded and defensive, in the main holding to the position that he lacked any recollection of C. This seems odd given that they were [REDACTED] at the [REDACTED] and she [REDACTED] when he was [REDACTED].

3.2.16 Having carefully considered the submissions to the contrary, we have concluded that there is no good reason to question the reliability of C's evidence. We do not consider that the occurrence of such events is implausible, especially in the absence of the stricter climate prevailing today. We believe that a [REDACTED] faced with this behaviour by a senior and established practitioner may well not have wanted to tell others or make a formal complaint. C's evidence as to JOH invading her space and making inappropriate comments was delivered in an entirely believable way, as was the rest of her account on the key matters. We note the careful response from JOH – namely that he would never say anything *intended* to be offensive or sexual (our emphasis). And we see no reason why they could not be alone in the court at the end of business.

3.2.17 That C's mother has no recollection of her daughter mentioning the kiss is not of such significance as to cast substantial doubt on the substance of her account. And likewise that her line manager has no memory of something peripheral to the two grounds. It is true that we do not have evidence from C's employer at the time, and we cannot speculate on what it might have been. Looking at matters in the round we do not regard its absence as undermining our view as to the reliability of C's evidence. It is possible to point to differences on points of detail in her previous accounts of events, but again there is nothing which calls her evidence on the essentials into question. We can understand that C considered the bottom squeeze to be less

significant than the kiss on the lips, but it is plain it was unwelcome and wholly inappropriate. We have no reason to attribute these matters to her conversation with D when they met at [REDACTED]. On the contrary it explains why many years later she decided, somewhat reluctantly, to speak to the police.

3.2.18 We consider it highly unlikely that C is misremembering what happened to her. We are satisfied that grounds 2(i) and 2(ii) have been established. We find that in late 2001 or early 2002 at [REDACTED] Court, while they were alone in a courtroom and without any warning or lead up JOH kissed C on the lips. This was unexpected and unwelcome. C did not consent to this. She felt unsafe around JOH. Being inexperienced and JOH being so senior she did not know what to do. It did not occur to her to make a complaint.

3.2.19 We also find that in or about [REDACTED] 2004, while C and JOH were alone [REDACTED], JOH walked up to C and with a sinister smile reached around her and squeezed her buttocks. Again there was no warning or lead up. It was unwelcome and unexpected – there was no consent on C’s part. C was irritated but did not regard this incident to be as serious as the kiss.

3.3 Grounds 3, 4 and 5

The evidence concerning grounds 3, 4 and 5

3.3.1 We shall deal with all the grounds spoken to by D together. We will begin with a summary of D’s evidence.

D’s evidence

3.3.2 D states that on [REDACTED] 2018 in [REDACTED] Court [REDACTED] JOH (by now a sheriff in [REDACTED] put the palm of his hand on her cheek (ground 3). On [REDACTED] 2018 in his chambers when alone with her he said “Much as I would love to chat to your pretty face all day, I’m sure you have better things to do” (ground 4(a)(i)) and hugged her inappropriately causing his face to linger on her shoulder (ground 4(a)(ii)). Shortly thereafter in a corridor area near the sheriff’s library D asserts that he patted her twice on the bottom as she passed through a door he was holding open for her (ground 4(b)). Finally on [REDACTED] 2018 on a train journey from [REDACTED] to [REDACTED] he placed his hand on the inside of her leg above the knee (ground 5).

3.3.4 D first came across JOH in [REDACTED] Court where she was [REDACTED]. She had some professional dealings with him. In early 2018 she took up a post as a [REDACTED] in [REDACTED]. She continued to live in [REDACTED] and, if not in [REDACTED] would commute two days a week [REDACTED] taking the train. For the rest she worked in [REDACTED]. By this time JOH was a sheriff in [REDACTED] though he also remained resident in [REDACTED]. [REDACTED] They often sat together on the same morning train and would chat about a range of topics. On [REDACTED] 2018 there was

an exchange of emails about a case they had discussed. D [REDACTED] JOH [REDACTED] [REDACTED]. On the commute he would say that she was his [REDACTED]. On one occasion when D was acting [REDACTED] she mentioned a [REDACTED] Dinner which JOH could attend (he did not do so). Another time she assisted him by lending him her mobile phone when he had left his on the train. Once she offered him a lift to [REDACTED] – in the event the lift was not required. Subsequently D began to take an earlier train which was cheaper. JOH still used the later train. At some point they exchanged telephone numbers.

3.3.5 On [REDACTED] 2018 a technical problem delayed [REDACTED] D [REDACTED] in the [REDACTED]. In her evidence she stated that having left the building for a short period, on her return she encountered JOH in a public area and she apologised for what had happened. He placed the palm of his hand on her cheek and told her not to worry. D did not react. She thought it odd – misplaced. She told her line manager [REDACTED] about it and also the other [REDACTED]. There was no formal complaint. [REDACTED] [REDACTED]. In the following weeks JOH was on holiday and D spent a month working in [REDACTED] in [REDACTED].

3.3.6 On [REDACTED] 2018 D [REDACTED] before JOH. The business concluded before lunch but another matter required to be dealt with [REDACTED]. D was sitting in [REDACTED] when the bar officer said that JOH wanted to see her in his chambers. She asked what it was for but the bar officer did not know. He escorted her there. JOH said that the bar officer could leave, which he did, and D should take a seat. He stood up and walked round his desk. D stood up with her hand out; however contrary to her expectation JOH hugged her. She was surprised – it had not happened before. She hugged him back. He returned to his seat on the other side of the desk and she sat down.

3.3.7 JOH asked where she had been and how she was. He just wanted to say hello. D mentioned that she was taking the earlier train. JOH spoke of having been in London. [REDACTED] [REDACTED] There was no talk of the day's business. At this stage D was feeling fine but she was busy and keen to get back to her work. JOH said something along the lines of: "Much as I would like to sit and talk to your pretty face all day, I realise you have better things to do". According to D she was again hugged by JOH with his face lingering in line with her cheek. She was becoming worried and she broke the hug. She said that she needed to go. JOH then sat on a table in his room and stared out of the window. D was by now in a panic, shaking and her face had reddened. She did not have a pass to get out [REDACTED]. (In fact a pass was only required for entry, not exit, but D did not know this.)

3.3.8 There was silence in the room for what to D seemed a long time, then JOH escorted her down a corridor passing other chambers and the sheriffs' library. She was still concerned, feeling that something was not right. They came to a heavy door hinged on the left which opened outwards. According to D, JOH while standing to the right held the door partially open with his out-stretched right hand. She recognised the stairwell beyond which gave her some comfort and she quickly pushed the door further open. As she went through D says that

with his left hand JOH firmly patted her on the left side of her bottom twice. She ran down the stairs, almost falling. They took her to a public part of the building. JOH did not follow her. Over lunch she told a colleague that JOH had patted her bottom. That afternoon [REDACTED] arrived and the day's business was completed without incident.

3.3.9 The next day, while they were both having a smoke in the office car park, D told her line manager ([REDACTED]) about what had happened. His focus was on whether she was alright, and he agreed not to tell anyone else about it. She told the other [REDACTED] the following week, making it clear that she did not want the matter taken further. [REDACTED] promised not to escalate it. On [REDACTED] D received an email from JOH about a case. She replied in accordance with [REDACTED] advice. [REDACTED] said that she had broken her promise having told the [REDACTED]. The following day the three met and [REDACTED] took a note of D's account as to what happened on the [REDACTED].

3.3.10 On [REDACTED] asked D to come to [REDACTED] the next day to assist in [REDACTED]. She caught her by now usual early train at [REDACTED]. She sat at the back of the first carriage in an airline style double seat next to the window. She said that as the train pulled out JOH appeared from the doors behind her. He was out of breath and sat beside her saying that he had been looking for her. He was the last person she wanted to see. Amongst other things they talked about [REDACTED] which she considered unusual, though she was not going to [REDACTED]. D said that at one point JOH placed his left hand on the inside of her right leg just above the knee. She did not say anything but thereafter she kept her rucksack on her lap.

3.3.11 When she reached [REDACTED], rather than [REDACTED], D had a meeting with [REDACTED] and [REDACTED]. She was told that [REDACTED] was involved and that there would be an official complaint. D was extremely upset and angry. Her wishes in the matter had been ignored. It had been untrue that she was to carry out work in [REDACTED] that day. She was moved to the [REDACTED].

3.3.12 On [REDACTED] D received a FaceTime call from JOH. She did not answer. By then the complaint had been made. She reported the call. D spoke of meeting C at the [REDACTED] in [REDACTED] 2018 and their conversation. She got to know B when they both worked in [REDACTED]. [REDACTED].

3.3.13 In cross examination D accepted that JOH has a great interest in the law. She did not use his first name in direct conversation with him after he became a sheriff. On the train they would discuss families, holidays and colleagues. She agreed that the [REDACTED] comment was jocular banter. Colleagues knew about the travelling arrangements. When put to her that her relationship with a sitting sheriff was unusual, D said that it should probably be avoided. There was an unusual degree of familiarity, but they had a commuting relationship, not a friendship.

3.3.14 She realised the date of the hand on cheek incident when shown a [REDACTED]. It occurred in a public part of the building, namely the reception. She was surprised that her line manager has no recollection of being told about it. Previously

a defence agent had patted her on the arm and she had asked whether the two incidents were an “██████ thing”. When it was put to her, she denied that she was misremembering what happened.

3.3.15 Under cross examination regarding matters on ██████, D accepted that she and JOH had not seen each other for some weeks. There was nothing uncomfortable about the initial conversation. However the second hug was different from the first. It was pointed out that in ██████ note of the ██████ meeting there was no mention of time passing while JOH stared out of the window. Nonetheless that had always been her position. One would need to ask ██████ why it had not been recorded. She could still remember the eerie silence. It was not possible that JOH sat on the table before the second hug.

3.3.16 D was taken through photographs of the corridors she was led down by JOH. Passages from her evidence to the first tribunal were put to her. Much of the focus was on the mechanics of the door being opened and whether JOH was on her left or right as she exited. D insisted that he was on her right, and that that had always been her position. (JOH’s evidence was that he held the door open with his back thus he was on her left as he “ushered her through”.) D accepted that she told the first tribunal that she walked through the door, whereas now her recollection is that she was running, or at least moving quickly; though she had to stop to push the heavy door open sufficient for her to pass through.

3.3.17 It was put to D that previously she said JOH was holding the door. She said he was holding the door. When various points of detail were raised, D said that she did not record every minute detail. She did not agree that it was inevitable that there would be some contact between them. She felt two firm pats on the bottom which she thinks were deliberate. Subsequently in her evidence she said that she was sure. Counsel drew her attention to a passage in ██████ note of the meeting on ██████ which indicates some uncertainty as to whether JOH would have known that it was her bottom he touched. She had the opportunity to revise that part, but did not do so.

3.3.18 As to the train journey on ██████, D accepted that JOH spoke with his hands. With regard to an email exchange with ██████ the following day, D said that she did not mention the touching because she did not trust either him or ██████. She felt that she had been brought to ██████ under false pretences and the complaint concerned the events of ██████. She did tell her union representative and a colleague.

A summary of JOH’s evidence on grounds 3, 4, and 5

3.3.19 When a ██████ in ██████, JOH knew D reasonably well though they did not socialise. They had dealings ██████ in which they were both involved. He was delighted to be appointed a sheriff in ██████. He loved researching legal matters. It became a regular thing that he and D would sit together on the morning train to ██████. They used each other’s first name and would speak of anything and everything. D did not think she was with someone special. There would be jocular banter such as the “██████████” remark.

The relationship was friendly and professional. D assisted when he lost his phone and once she offered him a lift to [REDACTED]. JOH is tactile, and will hug both male and female friends. By way of example he commented that the previous afternoon he patted his solicitor's female assistant on the shoulder when saying cheerio. That kind of thing probably happened with D.

3.3.20 Turning to the allegation of touching D's cheek, he first learned of it when interviewed in connection with the first tribunal. He has no recollection of [REDACTED] nor of meeting D in connection with it. He imagines that any apology [REDACTED] would have been given in chambers. The location mentioned is a public area. Anyone could have seen him touching her face.

3.3.21 Regarding the allegations as to events on [REDACTED], he had not seen D for some weeks and wanted to find out how she had got on [REDACTED]. He had [REDACTED] and knew she had been excited about being involved. He often arranged meetings in chambers, for example to speak to a former colleague. D seemed happy to be there. There was a brief hug. They talked of her time in [REDACTED] and why she agreed with [REDACTED]. There was discussion [REDACTED] and whether she could find out what was happening – he said no. D was in his chambers for less than ten minutes.

3.3.22 At a point when they were both speaking he went round his desk to say that he would see her on the train. He leaned back against the table as D explained that she was taking an earlier train because it was cheaper. As to the "pretty face" remark, perhaps D misheard something he said while they were over-speaking. He did not and would not say that. He did not stare out of the window. She said that she had to go but did not know how to get out of the sheriffs' part of the building. There was another brief hug and he said that he would show her. If she had known the way he would have stayed in his chambers.

3.3.23 Having walked down a couple of corridors and passed the sheriffs' library he pushed the handle down with his left hand and put his shoulder to the door. With his left hand on the handle he leaned against the door and waved or ushered D through the door. She was on his right. He then let the door close. He always used his left hand to open that door. He considered D's description as being almost physically impossible. She could not run or sprint out with him on the right. She did not push the door open. JOH does not believe he made contact with her, but if he did it was accidental as he waved her through. Beyond the door was a public area. The library and sheriffs' chambers were nearby.

3.3.24 The [REDACTED] in a normal manner, and similarly in respect of [REDACTED] JOH the following week. At the time of the email exchange on [REDACTED] and [REDACTED] JOH was unaware of D's concerns. It was a natural follow on from the discussion the previous week. On [REDACTED], because of anticipated heavy traffic attending the [REDACTED], JOH decided to take an earlier train. In the event he made an even earlier train than intended, saw D, and sat beside her. He was unaware of any difficulty and they conversed in a normal fashion. He did not place his hand on her leg and leave it there for any period of time. He has a habit of moving his hands about

and, though he has no recollection of it, he may have touched her leg. At no point was there any reaction from D and he has no recollection of a rucksack being placed on her lap.

3.3.25 Under cross examination JOH accepted that he did not tell the first tribunal about having been interviewed by the police under caution in respect of B and C's allegations. This was because he understood that the then investigating officer was of the view that they were not relevant. Furthermore they were not raised during the proceedings.

3.3.26 JOH stated that he did not recall meeting D in the [REDACTED] when she apologised for what had happened. The hug on her attending at his chambers on [REDACTED] was the first hug between them. Previously he had never been in a situation to hug her. He wanted to find out how [REDACTED]. In cross examination it was suggested that the "pretty face" comment was sleazy. JOH considered that while some would find it offensive, others would take it as complimentary. However it was not the sort of thing he would say, and he did not say it. Society is very different today. When D was telling him about her taking an earlier train he stopped at the end of the table in his room. He may have put his hands on it. This lasted a minute or two.

3.3.37 JOH is right handed. He accepted that the heavy door at the end of the corridor door could be opened as described by D – indeed another sheriff had confirmed that he used his right hand. He had mentioned that he made a sweeping gesture, which he described as guiding someone. If he made contact with D, it was accidental. It could have been on the back or top of the bottom.

3.3.28 On [REDACTED] JOH did not know that D would be on that train. He did not say that he had been looking for her. When his previous statements were put to him he stated that he had to respond piecemeal as matters arose. The FaceTime call occurred by accident when he was trying (at the request of his solicitor) to take a screenshot of a previous message while preparing a response to the initial complaint.

A summary of the parties' submissions on grounds 3, 4, and 5

3.3.29 The presenting officer suggested that D had been consistent throughout. While perhaps in itself not a serious incident, the touching of her cheek was an invasion of her personal space. The [REDACTED] confirms that there was a reason for her to apologise. There is no basis for a conclusion that she is mistaken as to what happened. The same applies to the "pretty face" remark. D has always been consistent on this matter. The talking over each other explanation is not persuasive. JOH thought some might take it as a compliment. The first hug in chambers was unexpected – the second was unwelcome and inappropriate. Why was he hugging her at all, let alone twice? He had never hugged her before. Her discomfort grew during the subsequent period of silence.

3.3.20 As she left the sheriffs' part of the building JOH patted her twice on the bottom. JOH's account of the mechanics of opening the door and their relative positions differs from that of D. Why would he open a heavy door with his non-dominant hand? D then ran down the stairs. She was disturbed and disorientated. Almost immediately she told a colleague who has confirmed her account of the conversation. Having reported to her line manager and others, her anxiety that there be no formal complaint is understandable.

3.3.31 As to the touching on the train, D is clear that it was deliberate. However the presenting officer commented that it is possible that it was accidental and it was her by now heightened concerns as to JOH which prompted her to place a rucksack on her lap. The tribunal might find it difficult to choose between the differing accounts as to the opening words when they met.

3.3.32 Counsel for JOH stated that it is not suggested that D is being deliberately untruthful. However she is unreliable on key aspects. By contrast JOH was a palpably reliable witness and should be preferred on disputed issues. Unlike D, his evidence is wholly consistent with his previous statements, those of others, and with the documentary material. By [REDACTED] D and JOH had a friendly relationship. This explains the invitation to chambers; why he hugged her; email exchanges; and the conversation on the train on [REDACTED].

3.3.33 Until the [REDACTED] was obtained D gave various dates for the cheek touching incident. Her line manager does not recall being told about it. It was not included in [REDACTED] note of [REDACTED]. It is not clear as to what it was D was apologising for – a technical issue or the [REDACTED]? It is improbable that JOH would have touched her cheek in a public place.

3.3.34 With regard to [REDACTED], D's evidence has evolved over time. She had no concerns regarding the first hug. The [REDACTED] note states that there was nothing untoward or awkward about it, but Lord Burns was told that she felt awkward. Regarding the allegations of subsequent events in the chambers D's line manager says that he was not told of those concerns. As to the colleague spoken to over lunchtime it is not obvious that he was told of inappropriate conduct while they were together in JOH's room. The [REDACTED] note makes no mention of JOH staring out of the window while perched on the table. D gave contrary evidence to the tribunal as to when the discussion as to the train and cheaper tickets took

place. That it was shortly before the end of the conversation was consistent with her police statement and the [REDACTED] note.

3.3.35 Turning to the events at the door leading to the stairwell, counsel submitted that D's account of deliberate contact should be rejected. Her evidence as to her speed as she approached the door varied. Her account of JOH holding it open with an out-stretched hand is unlikely. If, as she says, she took the door from him to pass through, they would have to be close to each other. On her account of restricted space and her being in a panic, some physical contact between them was likely. It is difficult to reconcile D's evidence with the [REDACTED] note, her police statement and her statement to Lord Bracadale. The [REDACTED] note reveals uncertainty on her part as to whether the contact was deliberate. At the previous tribunal initially she said the door opened inwards. When this was corrected she continued to insist that JOH was on her right. She then said she ran towards the door and pushed it.

3.3.36 By contrast JOH's account was plausible and reliable. It was how he always opened the door. One can readily imagine the ushering gesture with his right arm. This was an area where others might appear at any moment. Their relations [REDACTED] that afternoon and the following week were normal, as was the tone of the email exchange on [REDACTED] and [REDACTED].

3.3.37 With regard to the train journey on [REDACTED], JOH's explanation of why he was on the earlier train was straightforward and supported by another sheriff. The explanation for not telling [REDACTED] that JOH touched her leg when he prepared an addendum to the first note makes no sense. By this time [REDACTED] had made a complaint about JOH. Her union representative had advised her to cooperate [REDACTED], and did not recall being told by D about touching on the leg.

Discussion of grounds 3, 4, and 5

3.3.38 The attack on the reliability of D's evidence was based on differences in certain aspects of D's accounts of events over the years and the failure of others to back her up on certain matters. We consider that when over a long period D has had to explain events to a large number of people, including under lengthy questioning by the first tribunal, it is almost inevitable that it will be possible to point to divergences on points of detail. That is normal and entirely understandable. Sometimes it might be explicable by an incomplete record of what D said, or a failure to ask her about a particular matter. Anyone subjected to what D has undergone will often be anxious, possibly over-anxious, to try to replicate what she has said on previous occasions. She might become frustrated by detailed questions on matters which seem to her peripheral to the main issues, for example as to how exactly JOH opened the door. Third parties may simply have failed to recall all or some of what they were told.

3.3.39 Total consistency on every detail over the years is not a necessary element for a finding that D's evidence before us was reliable. It can however be noted that, for example regarding the events of [REDACTED], the earliest recorded account on the essential matters, namely [REDACTED] note of [REDACTED], is in large measure consistent with D's evidence and the terms of ground 4. D gave

her evidence in a calm, cogent and straightforward manner which gave us no cause to doubt it's trustworthiness. It is plain that she did not report events in his chambers out of a vengeful desire to do down JOH. Instead it is apparent that what has upset her most was her superiors' decision to escalate matters to a formal complaint. At no stage was it suggested that she is making things up. The question comes to be: when regard is had to all the evidence, including that of JOH, is there good reason not to accept her various complaints?

3.3.40 As to the events on [REDACTED], our findings can be set out as follows. D was not particularly taken aback by the first hug in chambers, albeit she was not expecting anything more than a handshake. The conversation proceeded in a normal manner until the "pretty face" remark. We accept her evidence on that. We were struck by JOH's observation that some might find it complimentary. It betrays a lack of appreciation of how wrong it is generally, and in particular in the context of that meeting. We do not find the over-speaking explanation persuasive. This wholly inappropriate remark set the scene for the second hug which we accept was lingering and materially different from the first. D spoke compellingly to the effect it had on her. She did not return the hug and eventually had to break it. By now JOH should have realised that he had behaved badly, which could explain an awkward period of silence before he agreed to escort D out of the private part of the building.

3.3.41 In the past much focus has been placed on the mechanics of how the door beyond the sheriffs' library was opened by JOH and where he was standing when D passed through. We do not consider it necessary to attempt to resolve what we see as an unimportant detail. We are satisfied that both explanations are practicable. Furthermore, whichever way the door was opened and whether JOH was on her left or right side, it was entirely possible for D's bottom to be patted twice. We accept that D went down the stairs convinced that JOH had patted her bottom. She reported it more or less immediately to a colleague and it was the main focus of her concerns as reported to her superiors and others. The more difficult question is whether we can be satisfied that such contact was deliberate.

3.3.42 JOH's evidence was that he held the door open and ushered or waved D through. He did not think he made contact with her, but if he did it was accidental. [REDACTED] note of [REDACTED] records D as saying that, having asked herself the question, she "guessed" the contact was deliberate. D took advantage of the opportunity to revise the note and make certain changes, but she did not alter this part. We are unable to be sufficiently confident that the contact was deliberate on JOH's part. By this stage D would have been upset by the events in chambers, and might readily have perceived a perhaps clumsy attempt to usher her out as something more sinister.

3.3.43 We take a similar approach to ground 5 which relates to the alleged touching on the leg during the train journey on [REDACTED]. JOH is someone who "speaks with his hands". We agree with the presenting officer that it is possible that the touching was accidental and that it was D's heightened concerns or perceptions which have influenced her characterisation here. If the matter was of real significance it is puzzling that she did not add it to the addendum to [REDACTED] note when she had the chance. She seems to have been more concerned about JOH being on her early train and in her perception that he was looking for her. As to

catching that train, JOH's explanation was entirely reasonable and supported by another sheriff.

3.3.44 This leaves ground 3, namely the cheek touching incident in the reception area of [REDACTED] Court. Suffice to say that we have no good reason to doubt D's evidence. It is supported to an extent in the statement of a colleague [REDACTED] who says that D told her that JOH touched her cheek. It was not supported by another colleague, [REDACTED], being the other person D said she had told. The context was explained [REDACTED]. JOH's evidence of him touching his solicitor's assistant confirms him as a tactile person who could well do this kind of thing. He himself has no recollection of the meeting, something which is entirely understandable. He asserted that any apology would have been tendered at an earlier meeting in chambers, but we see no difficulty with it being done, or repeated, when by chance they met later.

3.3.45 In respect of these grounds we make the following findings. On [REDACTED] 2018 in the reception area of [REDACTED] Court, in response to an apology from D, JOH placed the palm of his hand on her cheek and said something along the lines of – "Not to worry". On [REDACTED] 2018 when alone in his chambers with D, JOH hugged D for the first time. This surprised D but she was not anxious about it. After a conversation D said that she had to leave. JOH said – "Much as I would love to chat to your pretty face all day, I am sure you have better things to do", or words to that effect (though whatever the exact words they included a reference to D's pretty face). Thereafter there was a second longer hug with JOH's face lingering on or near D's shoulder. This hug was not reciprocated and caused D concern. She became worried as to what was happening. She broke the hug. During a period of awkward silence in the room D was in a state of anxiety. JOH guided her out of the private part of the building. When she passed through a door D felt what she considered to be two deliberate pats on her bottom. The tribunal is unable to conclude that the contact was deliberate. D did not wish there to be a formal complaint and remains very upset that despite promises her wishes were not respected. On [REDACTED] 2018 D and JOH met on the train to [REDACTED]. Again the tribunal is unable to conclude that any touching of D's leg was deliberate.

3.3.46 Although the matter is not included in any of the grounds, for completeness we record that we accept JOH's evidence that the FaceTime call on [REDACTED] was accidental.

Summary

3.3.47 The tribunal finds that grounds 2(i) and (ii); 3; and 4(a)(i) and (ii) have been established.

4 Findings on misbehaviour and fitness for office

4.1 The tribunal has to decide whether its positive findings demonstrate misbehaviour on the part of JOH. If the answer is yes in respect of all or any of the proven conduct, it is then

necessary to determine whether the consequence is that in our view JOH is unfit for judicial office. Along with his Rule 15.1 response, JOH lodged submissions on these issues. They can be summarised as follows.

4.2 With regard to what amounts to “misbehaviour” for these purposes, it was contended that it is behaviour which is inimical to the proper performance of the judicial office holder’s duties or that gives rise to a perception of corruption or brings the office into disrepute. However the proven conduct concerning D was at most inappropriate; it does not meet the high threshold for misbehaviour. The context was a relationship between JOH and D which had aspects of a friendship.

4.3 It was accepted that the conduct in respect of C is more serious, but it occurred two decades ago before JOH was a sheriff. It is historic behaviour which has not been repeated. The tribunal should conclude that it does not impact upon the present-day reputation of the office in question. Seen in this way it is not misbehaviour.

4.4 With regard to the test for unfitness for office, and in the event that the tribunal did find misbehaviour, reference was made to observations of Lord Hope and others in *Re Chief Justice of Gibraltar*, the decision of the Privy Council mentioned earlier. The conduct must be of such gravity that only dismissal is appropriate. The submissions on misbehaviour were relevant in this context. It was submitted that it would not be open to recommend unfitness solely on the basis of the findings concerning D, nor, given the passage of time, because of the behaviour towards C. It was noted that there is a body of evidence speaking to JOH’s abilities as a sheriff, his good character and his dedication to the office.

4.5 The tribunal has given careful consideration to these submissions. We have noted that the Guidance on Judicial Ethics in Scotland makes it clear that integrity and propriety are necessary qualities of a judge.

4.6 The section on integrity reads

“6.1 Judges however require to accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour, which other people may not experience. Thus judges should avoid situations which might reasonably be expected to lower respect for their judicial office...Behaviour which might be regarded as merely unfortunate, if engaged in by someone who is not a judge, might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.”

4.7 In relation to propriety, the guidance continues

“7.1 A judge should avoid impropriety and the appearance of impropriety in all of that judge’s activities. As a subject of constant public scrutiny, a judge should accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. As already stated, a judge should conduct himself or herself in a way that is consistent with the dignity of judicial office.”

4.8 We consider that “misbehaviour” is an ordinary word which does not require much elaboration or redefinition. In the present context the alleged conduct will require to have some bearing on the person’s ability to discharge his functions, for example as potentially undermining the judge in the eyes of the public or bringing the office into disrepute, see *Re Chief Justice of Gibraltar* at paragraphs 202/3. Many instances of bad or improper behaviour by a judge might also be described as inappropriate conduct, and *vice versa*. The submission for JOH comes close to merging the concepts of misbehaviour and unfitness for office. However plainly there are degrees of misbehaviour, and it will always be necessary to decide whether it is of sufficient gravity to justify a finding of unfitness for office.

4.9 We consider that each of the findings in respect of grounds 2, 3, and 4 are properly described as misbehaviour on the part of JOH. Furthermore, with the exception of the touching of D’s cheek, they each amount to serious improper conduct on the part of JOH. They include indecent assaults perpetrated on a junior colleague. In respect of both ground 2 and the proven parts of ground 4, JOH took advantage of his greater seniority to assert his dominant position. We do not accept JOH’s minimisation of the seriousness of his conduct towards D. In the privacy of his chambers he abused the trust of [REDACTED] in a manner which caused her alarm and distress.

4.10 Turning to the next question, not every episode of misbehaviour will render a judge unfit for office. At paragraph 263 of *Re Chief Justice of Gibraltar* Lord Hope said

“There is not much guidance in the authorities as to how the circumstances of this case should be approached. *Therrien v Minister of Justice* [2001] 2 SCR 3 was a case of misbehaviour. The judge was faced with a complaint that he had failed to disclose information that was prejudicial to him to the members of the committee to select persons qualified for appointment as judges. In para 147 Gonthier J said that the public’s confidence in its justice system was at the very heart of the case:

‘Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.’”

4.11 We have asked ourselves the same question, recognising that interference with a judge’s security of tenure is a serious matter. The misbehaviour and the resultant concerns must be of sufficient gravity to justify removal from office.

4.12 Our findings on grounds 2 and 4 raise manifest and serious concerns as to the character and integrity of JOH. They are wholly contrary to the standards of conduct and probity expected of anyone holding judicial office. The public rightly expect that the considerable powers vested in a judge will be exercised by people with high personal standards. Standing the nature and gravity of our findings we cannot say that JOH would have the confidence of

those appearing before him. In our view his continuance in office would be likely to impact on public trust in the due administration of justice in our courts and bring it into disrepute.

4.13 We accept that the passage of time since the assaults on C, and the fact that JOH was not then in office, are relevant factors to be taken into account. However he was a mature adult at the time. The conduct reflects extremely badly on his character and trustworthiness, and if known of would surely have been an impediment to appointment. We do not consider that the impact on his fitness for office is significantly diminished by the factors relied on by JOH. Indeed we regard the upholding of both parts of ground 2 as sufficient in itself for a finding of unfitness for judicial office.

4.14 Returning to the question posed in the *Therrien* case, we answer it in the affirmative. In our unanimous view JOH's misbehaviour renders him unfit for judicial office and we report accordingly.

A handwritten signature in black ink that reads "John M. Campbell". The signature is written in a cursive, slightly slanted style.

The Rt Hon Lord Malcolm

Chair of the Tribunal