



Neutral Citation Number: [2022] EWHC 3076 (Admin)

Case No: CO/4760/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 02/12/2022

Before :

MRS JUSTICE ELLENBOGEN

Between :

**THE KING ON THE APPLICATION OF THE
CHIEF CONSTABLE OF WEST MIDLANDS
POLICE**

Claimant

- and -

POLICE MISCONDUCT PANEL

Defendant

P.S. SARAH SRIVASTAVA

**Interested
Party**

Alison Hewitt (instructed by **Joint Legal Services West Midlands Police**) for the **Claimant**

The Defendant did not appear and was not represented

Sharon Bahia (instructed by Cartwright King Solicitors) for the **Interested Party**

Hearing date: 5 November 2021

APPROVED JUDGMENT

Mrs Justice Ellenbogen DBE :

Introduction

1. With the permission of Steyn J, the Chief Constable of West Midlands Police applies for judicial review of the decision of the police misconduct panel ('the Panel'), relating to the interested party, PS Srivastava ('the Officer'), by which it found that the Officer had breached three standards of professional behaviour; was guilty of gross misconduct; and should receive a final written warning by way of sanction. The three grounds for review are that the Panel erred in law and/or acted irrationally in:
 - 1.1. finding that the Officer's conduct (a) had not breached the standard of professional behaviour relating to "Equality and Diversity" (as had been admitted by the Officer); and (b) had "only just" breached the standard relating to "Authority, Respect and Courtesy";
 - 1.2. its assessment of the seriousness of the Officer's misconduct (in relation to specific aspects of her conduct and overall); and
 - 1.3. whether by reason of the errors asserted in grounds 1 and 2, or otherwise, imposing a final written warning, rather than dismissal, as the sanction.
2. The Panel has not filed an Acknowledgement of Service and does not seek to participate in these proceedings. By Order of Steyn J, served on 18 May 2021, any person wishing to contest the claim was to have served detailed grounds, together with any written evidence to be relied upon, by 22 June 2021, with provision being made for the Claimant to apply to serve evidence in reply within 21 days thereafter. Skeleton arguments were to be filed no later than 14 days in advance of the substantive hearing. In fact, on 15 October 2021, the Officer filed 'Grounds for Contesting the Claim', dated 21 July 2021. On 2 November 2021, she applied for permission to rely upon those grounds, together with two annexes comprising certain commendations and awards and character references. No skeleton argument (subject to the outcome of that application), or explanation for the failure to comply with Steyn J's orders, was provided. Pragmatically, the Claimant has raised no objection to the Officer's application, or to her participation, by counsel, at the hearing of its application. As the issues raised by the Officer inevitably required consideration and the Claimant did not seek to serve evidence in reply, I granted permission to the Officer, as requested. That was not to condone the Officer's cavalier approach to court orders, which is to be deprecated.

The facts

3. On 5 and 6 October 2020, the Panel conducted a police misconduct hearing, remotely, announcing its decisions orally at the conclusion of the hearing and, on 15 October 2020, in writing. The hearing was conducted under the Police (Conduct) Regulations 2012 ('the 2012 Regulations') and had been convened in the following circumstances. In November 2019, the Officer had been working in the Force Intelligence Bureau ('FIB'), supervising a team of four officers/civilian staff. On Friday, 8 November 2019, she had attended an internal interview by West Midlands Police for a supervisory role within a serious organised crime and exploitation (SOCEX) pilot hub. The interview panel had comprised two inspectors from within the intelligence department, one of whom being DI Lisa Sambrooks, deputy head of tactical intelligence. The interview had been conducted by reference to a 'competency value framework'. Under the heading 'emotional awareness',

the Officer had been asked to *'Give an example of how you considered a range of values and needs when making a decision that affects a group of people'*. In response, she had stated that there had been an occasion on which members of her team had made discriminatory comments to a transgender officer which she had challenged, giving an account of her management of the situation, in which she had said that she had asked the transgender officer how that officer would like the incident to be addressed and had facilitated an apology; had arranged diversity training for her team members and had documented her actions in their pocket notebooks, setting a three-month review period to monitor their ongoing behaviour; had left leaflets concerning transgender issues around the workplace for colleagues to read; and had arranged for the transgender officer to make a presentation to the team on transgender issues.

4. Later that day, DI Sambrooks had telephoned the Officer to inform her that she had been unsuccessful in her application and that the interviewing panel had been concerned about the transphobic incident and that it had not been escalated. DI Sambrooks asked the Officer to provide greater detail and state when the incident had occurred, indicating that she intended to contact the transgender officer (for whom she had managerial responsibility). In response, the Officer had said that the incident had been 'very recent' but that it would not be necessary for DI Sambrooks to intervene as everything was now fine. On the morning of Monday, 11 November 2019, DI Sambrooks had been present at the Officer's workplace. The Officer had approached her and said that there would be no need for the transgender officer to be spoken to because she (the Officer) 'may have slightly embellished' her account. When questioned further, the Officer had admitted that the transphobic incident had not occurred and that her account at the interview had been entirely untrue.
5. The matter was referred to West Midlands Police Professional Standards Department ('the PSD') and the Officer was interviewed on 9 January 2020. Thereafter, she was served with a Regulation 21 Notice alleging the matters summarised above and the breach of four of the Standards of Professional Behaviour, namely:
 - (i) Authority, Respect and Courtesy, a Standard which requires you to act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy,
 - (ii) Equality and Diversity, a Standard which requires you to act with fairness and impartiality and not discriminate unlawfully or unfairly,
 - (iii) Honesty and Integrity, a Standard which requires you to act with honesty and integrity at all times, and
 - (iv) Discreditable Conduct, a Standard which requires you to behave in a manner, whether on duty or off duty, which does not bring discredit on the police service or undermine public confidence in policing.'
6. In her Regulation 22 Notice in response, the Officer admitted: (1) the alleged facts, save that she did not accept that her false account had been planned prior to the interview; (2) breaching all four standards of professional behaviour; and (3) that her behaviour had amounted to gross misconduct.

7. A misconduct hearing was arranged for October 2020. In an e-mail sent on 28 September 2020, the legally-qualified Chair of the Panel, Mr Callum Cowx, asked the Appropriate Authority to provide ‘*a short opening note explaining how it intends to put its case against the officer Honesty and Integrity speaks for itself, but please explain how the remaining three standards have been breached. The opening note should also explain why the misconduct is said to be gross misconduct. Also, will the AA argue that dismissal is the appropriate outcome?*’ Counsel for the Appropriate Authority provided an Opening Note, dated 30 September 2020, paragraphs 6 to 10 and 24 to 29 of which stated as follows (sic):

‘6. As outlined above PS Srivastava has made full admissions as to the facts and that such conduct amounts to gross misconduct. This is enough to make a finding of gross misconduct and proceed to outcome. For the avoidance of doubt the Standards of Professional Behaviour alleged to have been breached are:

- (i) Authority, respect and courtesy;*
- (ii) Equality and diversity;*
- (iii) Honesty and integrity and*
- (iv) Discreditable conduct.*

7. In concocting a story about demeaning behaviour towards a transgender colleague and her dealing with the same (see allegations 1(a) to (g) of the Regulation 21 Notice), PS Srivastava failed to treat her transgender colleague with respect and courtesy. Further, she undermined her colleagues by alleging that they had made inappropriate comments about their transgender colleague. In so doing she did not treat them with respect and courtesy. Further, in using this example she purported to show her leadership skills which was an abuse of her authority. In any event the conduct of PS Srivastava was a breach of the standard of authority, respect and courtesy which she admits.

8. In concocting a story about demeaning behaviour towards a transgender colleague and her dealing with the same, PS Srivastava breached the standard of equality and diversity. She did not treat her transgender colleague fairly and such conduct would amount to directly discriminatory behaviour in that she would not have singled out this colleague had they not been transgender. This colleague was unfairly and wrongly highlighted and their life story used to seemingly gain an advantage in interview. The story also imputed that such a colleague may have been the victim of inappropriate behaviour because of their transgender status which would only serve to unnecessarily add to the distress of those with this status. In any event the conduct of PS Srivastava was a breach of the Standard of equality and diversity which she admits.

9. In concocting a story about demeaning behaviour towards a transgender colleague and her dealing with the same, PS Srivastava breached the

standard of honesty and integrity. Whilst it is admitted that the breach of this standard was not in an operational role, the standard makes clear that police officers are to act honestly, act with integrity and not to compromise or abuse their position. PS Srivastava committed the act of dishonesty in her professional role as a police officer and when placed under pressure to provide an example she chose to lie. In so doing PS Srivastava failed to act with honesty and compromised and abused her position. In any event the conduct of PS Srivastava was a breach of the Standard of honesty and integrity which she admits.

10. In concocting a story about demeaning behaviour towards a transgender colleague and her dealing with the same, PS Srivastava breached the standard of discreditable conduct. PS Srivastava's actions brings discredit to the police service and would undermine public confidence. Firstly, PS Srivastava purported to use the life story of a transgender colleague for her personal benefit in circumstances which were entirely false. Members of the transgender community may be alarmed to learn of such a fact. Secondly, the lie would perpetuate a false notion that a member of the transgender community was bullied by colleagues. This would serve to undermine the faith and trust members of such community may have in the police generally. Thirdly, to lie about the conduct of one's colleagues in such a way is entirely discreditable. In any event the conduct of PS Srivastava was a breach of the Standard of discreditable conduct which she admits.

...

Outcome

24. The AA considers that the only appropriate sanction in this matter is dismissal without notice. The panel will have recourse to the College of Policing's, 'Guidance on outcomes in police misconduct proceedings.'

25. Paragraph 3.17 and Regulation 35(10) states that where the panel determines the officer shall be dismissed the dismissal must be without notice. Before determining the issue of sanction the panel must have regard to the officer's record of police service, they may receive evidence from any witness who evidence would, in their determination, assist them and must allow the parties to make written or oral representations (paragraph 3.18).

26. The three stages in determining sanction are (Fuglers LLP v Solicitors Regulation Authority [2014] EWHC 179 (Admin) per Popperwell J at [28]):

- (i) Assessing the seriousness of the misconduct;*
- (ii) Keeping in mind the purpose of imposing sanctions and*
- (iii) Choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.*

27. *In assessing seriousness of the proven conduct, the panel will have reference to:*

- (i) *The officers culpability for the misconduct;*
- (ii) *The harm caused by the misconduct;*
- (iii) *The existence of any aggravating factors;*
- (iv) *The existence of any mitigating factors.*

28. *PS Srivastava was entirely to blame for the lie perpetuated. It was her decision to concoct such a story which she did in the pressure of an interview. The AA does not allege that the conduct was planned, but it was intentional, deliberate and targeted. PS Srivastava also perpetuated the lie based on her seniority i.e. as an example of how she assisted her team with equality and diversity issues. Of note in this case is the discriminatory conduct of PS Srivastava in using her transgender colleague's status. Paragraph 4.53 states, "Cases where discrimination is conscious or deliberate will be particularly serious. In these circumstances, the public cannot have confidence that the officer will discharge their duties in accordance with the Code of Ethics." Whilst the AA does not serve any evidence as to whether the lie caused PS Srivastava's colleagues distress, the potential for harm in such a case is obvious. At paragraph 4.57 it states, "...Harm will likely undermine public confidence in policing. Harm does not need to be suffered by a defined individual or group to undermine public confidence." Paragraph 4.59 states: "Where no actual harm has resulted, consider the risks attached to the officer's behaviour, including the likelihood of harm occurring and the gravity of harm that could have resulted."*

29. *The aggravating features of this case are that:*

- (i) *PS Srivastava abused her position of seniority in using the example she did. It was only because of her seniority that she could use such an example;*
- (ii) *When she was telephoned later that day by DI Sambrooks, PS Srivastava perpetuated the lie;*
- (iii) *In using the example PS Srivastava discriminated against her transgender colleague;*
- (iv) *In so acting PS Srivastava committed multiple breaches of the Standards of Professional Behaviour.'*

8. In addition to Mr Cowx, the Panel comprised Superintendent Maria Fox, West Midlands Police; and Mr Noor-ul Khan, independent panel member. Both the Appropriate Authority

and the Officer were represented by counsel, in the case of the Officer being Ms Sharon Bahia, who also appeared before me. The hearing bundle included evidence from all three members of the interviewing panel, including their contemporaneous notes; two memoranda by DI Sambrooks, respectively dated 11 and 24 November 2019; and the transcript of the Officer's interview by the PSD, on 9 January 2020.

9. In the verbatim transcript of the Panel hearing with which I have been provided, at the outset of the hearing the following exchange is recorded between the Panel Chair and counsel for the Appropriate Authority, Mr Fernando (transcript, pages 3 and 4, with hesitations omitted):

'CC: Now before, and I propose to read the Regulation 21 Notice into the record in a moment, but before doing that there is just one point I need to make Counsel aware of because you may want to turn your mind to submissions in due course. So the panel notes that Sergeant Srivastava accepts her wrongdoing which is apparent from the papers. She accepts that the four standards of behaviour alleged to have been breached, she accepts that she breached those and she accepts that her misconduct amounts to gross misconduct. Now we've reminded ourselves of Regulation 33 and the panel may accept those admissions in terms of reaching a finding against the officer, however in this case we feel that we would rather reserve our judgement and decide on the evidence and we feel that is, this is appropriate for the panel to consider all of the evidence and consider submission from the Appropriate Authority on behalf of the officer. So we're not simply going to accept the officer's view of whether or not this is gross misconduct and whether all four standards of breach. We will reserve that answer to ourself. So I raise that now just [so] you have time if you wish [to] address me in more detail when it comes to closing speeches. So unless there's anything else, is there anything else either party wishes to raise at this point?

.....

CC: Perfect, thank you. Right Mr Fernando is there anything that you'd like to mention before we go to the Regulation 21 Notice?

PF: Sir just so I can clarify your - as I understand from this in your initial summary you're not accepting the officer's admissions pursuant to Regulation and therefore won't be making your finding pursuant [to] Regulation 33(14)(b) and we are proceeding on the basis that you may make admission you may make findings on the basis of 33(14)(a), is that correct?

CC: Yes, correct.

PF: Very good, thank you sir.'

10. The Panel received oral evidence from the Officer and submissions from both counsel. At page 23 of the transcript (with hesitations removed), the Chair is recorded as having stated, on 5 October 2020:

'... so the panel have had time to consider the question of finding and we have reached a decision on that. So there is no factual dispute in this case that the officer admitted to telling a lie during effectively what was a job interview and on the 8th of November it's admitted that she fabricated an answer to a competency based question. The Appropriate Authority is content that the officer's conduct breaches four separate standards of behaviour and they are; Honesty and Integrity, Discreditable Conduct, Equality and Diversity and Authority, Respect and Courtesy and in fact the officer accepts that all four of those standards mentioned were breached. However, the panel having considered the facts of the case, again there's no dispute as to the facts, against those four standards finds that the standard regarding Equality and Diversity is not breached on the basis that merely [citing] a person with a protect[ed] characteristic in an answer to a question is not sufficient to breach that standard. There was no evidence for example of any discriminatory behaviour or anything else which the panel would consider to be a breach of that standard. Turning to Authority, Respect and Courtesy, we do consider that standard to have been breached in this case but only just. We find that that the breach there was tenuous in nature and on the basis that the officer showed a lack of respect towards her colleagues by using them as an example in the job interview in the way that she did. We do find them, we do accept that the standards regarding Honesty and Integrity and Discreditable Conduct are clearly breached on the facts of this case. The panel then turn to consider whether or not the misconduct amounts to gross misconduct. The officer in fact in her Regulation 22 Notice accepts that her conduct was gross misconduct and in this case the panel agrees with that assessment that the conduct is indeed gross misconduct for the following reasons; Sergeant Srivastava is a Supervisor, she was a Supervisor at the time of the job interview and one can expect to the public and expect even higher standards of behaviour from a Police Supervisor and on this occasion she failed to demonstrate that level of leadership and fell short of the standards expected. Whilst there was no financial gain to be had from the lies that she told there was an element of professional gain and gain potentially at the expense of her colleagues who were also competing for the same position. It is accepted that there was no premeditation in this case, no prior planning, but the panel did note and did give adverse weight to the fact that this was an elaborate concoction, an elaborate account concocted during the course of the interview. And finally the panel did take note as well to the delay in admitting the lies to DI Sambrook. So again on that basis the panel does find gross misconduct. So if we're ready, if we can turn to submissions on outcome...'

11. The Panel's oral conclusions as to outcome were communicated the following day when the hearing was reconvened. The Chair stated (again, with hesitations removed):

'The panel yesterday found that you had breached the standards of professional behaviour relating to Honesty and Integrity, Discreditable Conduct and Authority, Respect and Courtesy and taken together the panel found that those breaches amounted to gross misconduct and that was our finding yesterday. I then, after that part of the hearing we heard submissions from Counsel and then we retired to consider the appropriate outcome in this

case. Now [in] cases of gross misconduct, dismissal is an appropriate outcome and the Appropriate Authority argue that dismissal was the appropriate outcome in this case, I should say I'm giving you verbal reasons of now Sergeant Srivastava but for Counsel's benefit I will follow up with more detailed written reasons in the notice. So the Appropriate Authority's case was that dismissal was the appropriate outcome in this case, however, the law in the form of Regulation 35B at the Police misconduct, I'm sorry Police Conduct Regulations 2012, permits a misconduct panel to consider a range of options and indeed the Home Office Guidance on outcomes produced by the College of Policing requires a misconduct panel to consider a range of options. So to put it another way dismissal is not mandatory and it's not automatic in cases of gross misconduct. Now in this case we can tell you that the panel thought long and hard about whether you should be dismissed or whether some lesser sanction would meet the purpose of the Police disciplinary regime. Without doubt and we want to make this very clear Sergeant Srivastava that the panel found that your behaviour was reprehensible and serious but the question to be determined by the panel was how serious your gross misconduct was. The role of the panel of course is to act with impartiality and without emotion and the panel must also follow a clear [defined] process as identified by Mr Justice [Poplewell] in the case of Fuglers LLP versus the SRA which is the 2014 case. That case is not about Police misconduct but about Solicitor's misconduct but that case was adopted and confirmed in the 2018 judicial review case into Police misconduct and a case which is commonly referred to as Rosco so the case law clearly defines a process that the panel must follow in reaching an outcome and that process can be defined as a three stage process.

The first stage is for the panel to assess seriousness so it's not enough for the panel to find that the misconduct was serious we have to decide how serious. Having decided the question of seriousness we then have to go on to consider the purpose of imposing sanctions and in particular the purpose of the Police disciplinary regime and then having done that the panel then has to decide what the appropriate sanction is to fulfil those functions and it must settle on the least serious sanction which appropriately fulfils those functions. So the law and Home Office Guidance requires a panel to decide as I said the least serious sanction available to meet the purposes of the disciplinary regime. So it was within those parameters that the panel approached its task in determining the appropriate sanction. So first of all we looked at seriousness again it's not enough to say that a breach was serious, we have to decide how serious and to do that we have to follow a number of steps in sequence, we looked at culpability, we looked at harm, we looked at any aggravating factors and then any mitigating factors. Now again we must stress the panel in no way minimises your behaviour and our assessment of seriousness in no way condones your lack of Honesty and Integrity that you displayed in the interview on the 8th of November 2019. But addressing the question of culpability was specifically looked at in a number of factors as set out in the Home Office Guidance. We looked at whether or not you intended to cause any harm and we'll come on to harm in a moment but whether or not there was an intent to cause harm to anyone or to public perception. We determined that there was no such intent. Was there any element of targeting a victim in

this case, so whilst a person was identified in the example you gave we didn't feel that that constituted targeting in the commonly understood sense of the word and it was accepted by the Appropriate Authority that there was no evidence of planning in this case, there was no suggestion at the hearing that you went into the interview with this lie in mind. We then considered whether or not any of the especially serious types of Police misconduct as set out in the Home Office Regulations were featured in this case, such as operational dishonesty, misuse of data protection, criminal offending and again the answer to that question was no, however we did find that your culpability was raised by the fact that you are a Sergeant, you're a Sergeant, a Supervisor who should have set yourself even higher standards than the average Constable when you approached the interview in the way that you did, so in that sense we felt that your culpability was raised. So having looked at culpability and in the round we assessed that your level of culpability on a range of low [to high] we set it at medium, the medium level of culpability.

We then turn to the question of harm, again we thought very carefully about what harm was caused or might have been caused by your behaviour, there was any real harm or whether there was the potential harm either to individuals or to public perception. We reached the conclusion that there was no actual harm done in this case to the individuals that you cited in your example and no actual harm to public perception, however we did find that there was clearly the potential for harm to individuals, the potential for harm to public perception and to public confidence. We did think very carefully about the possible harm that that could have been imparted to the transgender colleague that you mentioned in your interview and we judged that perhaps if this matter had come to light then that individual's feelings could have been hurt by what you said in the interview. And likewise there was some element of putting or something we considered some elements of putting your colleagues in jeopardy of a PSD investigation and possibly disciplinary action, however on the facts of this case we judged that the risk of that was very low in that we found that you wouldn't have allowed that to happen and indeed you did confess to your lies to DI Sambrook when that looked to be a possibility that she might investigate the matter further. So there was some element of harm in terms of harm to public confidence and public perception, what we judged that the public would take a dim view of an officer who lies at an interview in order to secure a job for themselves. There was no element though of any financial gain, it was in effect to secure a sideways move. So whilst public confidence in the Police service and in you might have been harmed to a degree, we didn't put it in the same category as operational, dishonesty or operational misconduct which we judged would have a more significant impact on public confidence. So again when it came to assessing [overall] the degree of harm we judged it to be at the medium level.

We then went on to consider any aggravating features and we couldn't identify any factors that could be considered aggravating, we were very conscious not to double count factors, aggravating factors which had been considered as part of the culpability and the harm assessments. We then turned to any mitigating factors, we gave you credit for the fact that this was a single episode of very brief duration and we also took into account that you demonstrated remorse in your interview for your actions and that was

repeated throughout and repeated again in your evidence to the panel yesterday. Finally we did consider your personal mitigation, we did take note of your long and good service and we took note of the character references that were produced on your behalf. But as a panel we felt that we could give little weight to that character reference and also evidence of good character, because one can expect officers with your length of service to produce evidence of such good character and of course guidance dictates that misconduct panels should give little if any weight to such good character evidence. And so in terms of your personal mitigation, whilst creditable we can say that that had no impact at all on our assessment of seriousness and the eventual outcome upon which we set.

We then moved on to stage two of the process and considered the purpose of the Police disciplinary regime which you will know is maintaining public confidence in and the reputation of the Police service, upholding the high standards in Policing and deterring misconduct and also protecting the public. We considered those purposes very carefully, we decided that the least serious sanction which would appropriately meet all of those above purposes was a Final Written Warning and not dismissal. So that is our decision that you will be issued with a Final Written Warning. Now we should say this that we recognise that that decision may be a disappointment to West Midlands Police, which clearly sets the very highest standards and it quite rightly expects the very highest standards of its officers. It may also come as a disappointment to colleagues that know you that you haven't been dismissed in the knowledge of the of the breaches that we found against you. But we [reiterate] that we found your conduct to be reprehensible and it's also worth noting that if the 2020 Regulations applied to this case, which they do not of course, it is most likely that you would have lost your rank at the very least. We also say this to others who may who might be aware of your particular case, who might be minded to act in the same way, these, those individuals should not regard this particular outcome, this particular sanction as in any way setting a precedent. You came very close to dismissal but on the guidance that we are required by law to follow on the specific facts of this case, we arrived at the sanction I've already mentioned which is one of a Written Final Warning. So that is our decision on outcome and as I said before will of course in due course issue a written set of reasons on our on our decision on outcome. Is there anything further from Counsel that I need to be made aware of before I we terminate these proceedings?'

12. The written notification of the outcome of the misconduct hearing and the Panel's reasons was dated 15 October 2020. Under the heading, 'Preliminary Matters', the Panel stated:

'In your Regulation 22 response to the Regulation 21 Notice of Allegations you accepted that your behaviour amounted to breaches of the Standards of Professional Behaviour relating to Authority, Respect and Courtesy, Equality and Diversity, Honesty and Integrity, and Discreditable Conduct. In the same response, you accepted that your behaviour amounted to gross misconduct. At the hearing, the AA sought to rely upon your acceptance of the alleged breaches of the four Standards of Professional Behaviour cited and that your conduct amounted to gross misconduct. However, the Panel reminded itself

of Regulation 33(14)(b) of the Police (Conduct) Regulations 2012 which empowers a police misconduct Panel to find that an officer's conduct amounts to misconduct or gross misconduct if the officer admits that is the case. The wording of Regulation 33(14)(b) clearly indicates that the power is permissive and not obligatory. Having read the evidence in the case the Panel decided that it was best placed as a professional Panel to judge the degree of misconduct and would, therefore, determine for itself the issues of misconduct or gross misconduct after considering all of the evidence and submissions from counsel, and in accordance with Regulation 33(14)(b). Having decided to rely upon the Regulation 33(14)(a) route to finding, counsel were given the opportunity to make submissions on what they considered to be the appropriate level of misconduct.'

13. The Panel summarised its factual findings and reasons as follows:

'The Panel took into account all of the evidence contained in the AA's bundle. Live evidence was given by you.

At the conclusion of the factual hearing, submissions were made by Mr Fernando on behalf of the AA and by Miss Bahia on your behalf.

*The Panel found the facts underpinning the allegation **Proved** on the basis of the witness evidence, your own admissions to DI Sambrooks on 11th November 2019 and in your PSD interview on 9th January 2020.*

The Panel found the conduct described in the allegation amounted to clear breaches of Honesty and Integrity and Discreditable Conduct and a breach of Authority, Respect and Courtesy, albeit tenuous on the basis you showed a lack of respect for others by fabricating a lie which involved them. The Panel did not find that your behaviour amounted to a breach of the Equality and Diversity Standard of Professional Behaviour. Whilst the fabricated example you gave involved a person with a protected characteristic, you did not act in a discriminatory way towards that person or towards the transgender community, or in any other way which offended against the Equality and Diversity Standard of Professional Behaviour.

The Panel found that your conduct amounted to Gross Misconduct for the following reasons:

- *You displayed a clear lack of honesty and integrity by telling a lie in an internal job interview. The fact you were a Sergeant and in a leadership role made your misconduct more serious.*
- *Whilst not planned, the lie was elaborate.*
- *Whilst your motive was not one of financial gain, as the role you competed for was at the same rank, you did seek to gain professionally by securing a job at the expense of other applicants.*
- *Delay in confessing to the lie. The first opportunity to admit to wrongdoing was after the interview when telephoned by DI Sambrooks, however you*

confessed to her at the next available opportunity when you met her face to face on 11th November 2019.'

14. Having so found, the Panel set out the outcome and its reasons therefor. Given the nature of the grounds of review, those bear setting out in full:

'Counsel for the AA made submission to the Panel that the appropriate outcome for your behaviour was dismissal because of the elaborate nature of the lie, the fact you perpetuated the lie when called by DI Sambrooks later on the same day as the interview, the risk of harm to others cited in the lie, namely the transgender colleague who could have been alerted to it and those you claimed had made inappropriate remarks and who were put at risk of investigation. Mr Fernando also highlighted the multiple breaches of the Standards of Professional Behaviour and also pointed out that when you were put under pressure you chose to lie, the suggestion being a possible propensity to lie on other occasions and in other circumstances.'

Miss Bahia spoke on your behalf. She submitted the Panel should look at the totality of the breaches not the fact a number of the Standards were breached by the same set of facts. Miss Bahia invited us to consider a less serious outcome than dismissal and reminded us that each case must be decided on its own facts. Miss Bahia described your conduct as a single, unplanned lie told in a moment of panic in a stressful situation. Miss Bahia asserted that the lie was not as elaborate as suggested by the AA because you used part of a genuine example when you arranged for Equality and Diversity awareness training for colleagues in a previous role, and weaved that into the lie about the transgender colleague. Addressing the issue of harm, Miss Bahia argued that there was no genuine risk of harm to your colleagues as you would never have allowed DI Sambrooks to pursue any follow up action, and indeed you confessed to the lie when this appeared to be a possibility. Miss Bahia submitted that you had displayed genuine remorse and referred to your previous good character and long service.

In his submissions, Mr Fernando reminded the Panel that when deciding on outcome, it must adhere to the College of Policing Guidance on Outcomes in Police Misconduct Proceedings, and follow the 3-stage approach to reaching the appropriate sanction. The Panel followed that staged approach as it is required to do.

The Panel reminded itself that the outcome imposed can have a punitive effect, therefore it should be no more than is necessary to satisfy the purpose of the proceedings. It reminded itself that it must consider less severe outcomes before more severe outcomes, always choosing the least severe outcome which deals adequately with the issues identified, while protecting the public interest. The Panel understood that if an outcome is necessary to satisfy the purpose of the proceedings, it must impose it even where this would lead to difficulties for the individual officer.

The Panel followed the three-stage approach as follows:

Stage 1: Assess Seriousness.

Stage 2: Remind itself of the Purpose of the Police Misconduct Regime.

Stage 3: Determine the sanction most appropriate to the Purpose.

Seriousness

The Panel agreed that your misconduct was serious and so serious that dismissal might well be justified, however it reminded itself that dismissal is not automatic when gross misconduct is proved. Whether or not dismissal or some lesser sanction is appropriate will depend on the facts of the case having assessed the level of seriousness.

In assessing seriousness, the Panel decided that the gravamen (or most serious aspect of your wrongdoing) was your breach of honesty and integrity by concocting a false example in the interview for the role of SOCEX supervisor.

The Panel assessed the level of seriousness in your case by following the four-stage approach as laid down in the College of Policing Guidance on Outcomes.

Stage 1: Assess Culpability.

Stage 2: Assess Harm.

Stage 3: Consider Aggravating Factors.

Stage 4: Consider Mitigating Factors.

Culpability

It was agreed you were culpable for your actions, but to what degree? This was determined by considering the culpability sub-factors in the Guidance:

- *Intentional or Deliberate? Your misconduct was obviously intentional and deliberate. However, the Panel was not satisfied that you intentionally or deliberately set out to cause harm to your colleagues or to the reputation of WMP.*
- *Targeting. There was no evidence of targeting a particular victim in this case. Whilst your lie referred to an identifiable individual, that reference did not amount to targeting.*
- *Planning. The AA did not assert that you had planned to lie before the interview.*
- *Abuse of Trust/Responsibility. The Panel did consider this to be a factor which elevated your culpability. You were and are a Sergeant and therefore a supervisor. WMP and the public expected you to maintain even higher standards than the already high standards expected of a Constable.*

By behaving as you did you failed to live up to your position of responsibility as a leader.

- *Especially Serious. Your actions did not fit into any of the types described as especially serious in the Guidance.*

Having considered all of the sub-factors above, the Panel assessed the degree of culpability in your case as Medium.

Harm

The Panel found that your behaviour did not cause actual harm but created the potential for harm, both in terms of harm to your colleagues and to the reputation of the force and the police service.

The Panel found that the potential for harm to your colleagues, whilst serious if it ever materialized, was unlikely to so materialise because you would have intervened in precisely the way you did by owning up to the lie as soon as it appeared DI Sambrooks might take further action to investigate the fabricated episode of inappropriate behaviour.

In terms of potential harm to the reputation of the force and the wider police service, the Panel assessed that ordinary members of the public would take a dim view of your behaviour, but would distinguish it from more serious forms of misconduct such as operational dishonesty or other misconduct in the execution of one's duties. On the facts of your case, this reduced the degree of potential harm to reputation of the police service and public confidence.

Therefore, whilst the Panel concluded there was the potential for some harm, the facts of this case did not lead it to conclude serious harm would result.

*For the above reasons, the Panel assessed the potential harm caused as **Medium**.*

Aggravating Factors

In considering what aggravating features might be present the Panel referred to the non-exhaustive list in the Guidance and considered them alongside the facts of your case. The Panel found there were no aggravating factors which had not already been counted as part of its assessment of culpability and harm, namely planning, targeting, taking deliberate steps, seeking personal (or professional) advantage or abuse of trust and position.

It was suggested by the AA that the breach of multiple Standards of Professional Behaviour was an aggravating feature in your case. The Panel rejected that contention. Whilst the Panel found your behaviour amounted to breaches of three separate Standards, the breaches did not arise from multiple instances of misbehaviour but a single and very limited act. In your case a breach of Honesty and Integrity would inevitably also be labelled Discreditable Conduct, and the lie which formed the subject of the

aforementioned breaches led to a third breach (albeit tenuous) of Authority, Respect and Courtesy because of the disrespect demonstrated towards colleagues. Therefore, the panel concluded there were not multiple breaches of any substance, but a single proven allegation which satisfied multiple definitions and which the Panel had to consider holistically.

No additional aggravating features were identified by the Panel, therefore it determined there were no further aggravating features of significance to which it could give weight.

Mitigating Features

The Panel referred to the non-exhaustive list of mitigating factors set out in the Guidance on Outcomes and found the following to be present in your case:

- *Misconduct confined to a single episode or brief duration. A single admitted instance of lying to a single question in an internal job interview.*
- *Evidence of genuine remorse, insight and/or accepting responsibility for one's actions. The Panel accepted that you displayed genuine remorse in your PSD interview and repeated this in your evidence to the tribunal.*

Overall Assessment of Seriousness

The Panel assessed your misconduct as a relatively serious instance of dishonesty, but distinguished between a lie told in answer to a question put to you in an internal job interview which did involve promotion, and lies told in an operational policing capacity.

Whilst the Panel deemed your conduct to be reprehensible and questioned how you might stand up to pressure in the future, there was no evidence to suggest you had any propensity to be untruthful when executing your duties. Such a propensity would demand protection for the public, and protection in the form of dismissal. But your 27 years of unblemished service in demanding front line investigative roles revealed no evidence that might suggest a tendency towards dishonesty in an operational context and the complexion of the lie you told was insufficient to suggest you would do the same in an operational context.

Your behaviour had the potential to undermine public confidence to a degree, but as an example of gross misconduct it fell some way short of the worst cases of gross misconduct dealt with by a Police Misconduct Hearings.

Applying the staged process to the facts, the Panel assessed your misconduct as follows:

*Culpability – **Medium.***

*Harm – **Medium.***

*Aggravating Features – **None.***

Mitigating Features – Two identified mitigating factors. A single episode of limited duration and remorse.

Overall, the Panel assessed seriousness as falling somewhere close to the middle of the range of the seriousness spectrum and certainly not at the upper end.

The Purpose

Having assessed seriousness, the Panel reminded itself of the purpose of the police misconduct regime before deciding on the appropriate sanction. The threefold purpose is of course as follows:

- *Maintaining public confidence in and the reputation of the Police Service.*
- *Upholding high standards in policing and deterring misconduct.*
- *Protecting the public.*

Deciding Sanction

As required by the Guidance on Outcomes, the Panel moved to the third stage of the sanction process by considering the least serious outcome available to it that would meet the threefold purpose of the misconduct regime.

The degree and nature of your misconduct was so serious that neither Management Advice nor a Written Warning were deemed sufficient to meet the requirements of maintaining public confidence in the police service and to provide effective deterrence against further misconduct.

The Panel then had to decide whether a Final Written Warning was sufficient to meet the purpose of the misconduct regime or whether only dismissal would meet the purpose. In assessing seriousness, the Panel decided that your gross misconduct fell short of the most serious forms of police misconduct and although the general public would not condone your behaviour, the Panel did not find that dismissal was necessary to meet the threefold purpose. In particular the Panel deliberated on your ability to continue in an investigative capacity and whether you posed a risk of harm to the public which could only be averted by dismissal. On this point the Panel reminded itself of the clear distinction drawn in the Home Office Guidance on Outcomes between operational dishonesty and dishonesty in other contexts. The Panel considered very carefully whether your lying in an internal job interview indicated a genuine risk to the public that you would be tempted to act dishonestly in an operational capacity, but the Panel was satisfied that whilst your behaviour was reprehensible, a single instance, on the facts of this case, was insufficient to establish a propensity towards dishonesty or untruthfulness. Therefore, the Panel determined dismissal was not necessary to protect the public.

Considering the questions of maintaining public confidence in and the reputation of the police service, the Panel reminded itself of its findings in relation to harm in that the public would certainly take dim view of your misconduct, but would regard it as less serious than other forms of misconduct. The Panel decided public concern could adequately be met by a Final Written Warning.

In terms of upholding high standards in policing and deterring misconduct, WMP has clearly and publicly demonstrated that it sets and expects the highest standards by bringing gross misconduct proceedings against you. Your experience of these proceedings and the sanction of a Final Written Warning are sufficient to deter others from attempting to repeat your behaviour. Your colleagues will also understand, as explained in the Panel's oral reasons given to you on 6th October 20, that you were very close to dismissal.

Taking its assessment of seriousness into account, the Panel concluded that a Final Written Warning was a proportionate response to your misconduct, which sufficiently meets all three aspects of the misconduct regime's purpose.

Your behaviour was inconsistent with the office of Constable and the rank of Police Sergeant, but in all the circumstances of the case and having applied the approach directed by the Guidance on Outcomes, the Panel decided that dismissal with or without notice were not the least serious sanctions available to adequately protect the public interest and confidence in the police. It was considered that a Final Written Warning is sufficient to mark your misconduct as unacceptable and will provide the required deterrence against future misconduct.

Personal Mitigation

Personal mitigation in the form of good character references was considered by the Panel after determining seriousness and in accordance with Part 6 of the Guidance on Outcomes. The Panel recognised the comments made about your contribution to the Police Service, particularly in the field of public protection, and whilst the positive remarks about your good conduct and character went to your credit, they did not affect the Panel's assessment of seriousness or its decision on outcome in this case.

RIGHT OF APPEAL

You have a right of appeal against the outcome under the following circumstances:-

- a) the finding or outcome was unreasonable;*
- b) there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action; or*

c) there was a breach of the procedures or other unfairness which could have materially affected the finding or decision on outcome.

*Should you wish to appeal this must be done to the Police Appeals Tribunal by writing to the Police and Crime Commissioner, West Midlands Office for Policing and Crime **within ten working days** beginning with the day after receipt of this notice. Please note that the tribunal can increase any outcome imposed as well as reduce or overturn the decision of the panel. You have the right to be legally represented at the appeal hearing.*

...'

15. The Officer did not exercise her right of appeal. On 18 December 2020, the Claimant issued his claim form in these proceedings.

The Grounds of Review: the parties' submissions

Ground 1

16. On behalf of the Claimant, Ms Hewitt submitted that the Panel had erred in law and/or reached an irrational decision in finding that the Officer's conduct had not breached the Standard of Equality and Diversity (as she had admitted) and had 'only just' breached the Standard of Authority, Respect and Courtesy.
17. Ms Hewitt pointed to the nature of the lie told by the Officer and submitted that the Panel had failed to take account of the fact that the question posed at interview had not called for an example relating to discrimination, or involving a person having a protected characteristic. Not only had the Officer lied, but she had concocted a detailed story concerning discriminatory behaviour, for personal benefit, and knowing that the characteristic in question (described as 'transgender') had been one upon which the Force had then been focused. For her own purposes, the Officer had identified and named the transgender officer, by reason of his protected characteristic, as being the victim of discrimination, even though it had been foreseeable that the untrue story would have had a significant adverse impact upon that officer, if known. Ms Hewitt submitted that, thereby, the relevant officer had been the victim of direct (but no other form of) discrimination. She expressly did not submit that the Officer had discriminated in any way against her allegedly transphobic colleagues, whom, it is said, had simply been treated with a lack of courtesy and respect, albeit very serious. Furthermore, it was submitted, the Officer had alleged that readily identifiable (in particular by DI Sambrooks) members of her team, for whom she had had supervisory responsibility, had behaved in a discriminatory and transphobic manner, even though it had been foreseeable that such allegations could cause them serious reputational or other harm. That had constituted a serious breach of trust. The gravity of her conduct had been appreciated at the time, as had been clear from her answers in interview, on 9 January 2020. Had such matters been given consideration and due weight, no reasonable panel properly directing itself would have failed to find a breach of the Equality and Diversity standard and/or a significant failure to have shown respect and courtesy to colleagues.
18. On behalf of the Officer, Ms Bahia noted the admissions made in the Regulation 22 response. She acknowledged the importance of the Equality and Diversity standard, but submitted that, on the facts of the case, the Panel's conclusion that it had not been breached

was readily understandable. The central question, she submitted, was what had been the Officer's purpose and intention in mentioning the transgender officer in interview? That had been to give examples of her leadership qualities and to convince the interview panel that she had been aware, in a work environment, of people's differing needs when working within a team. Whilst the word 'discrimination' had not appeared in the question being answered, the clear purpose of that question had been to elicit the type of example given. Different values and needs, ordinarily, would lead to the identification of a person having a particular characteristic, which could be of any protected form. As the Panel had recognised, citing someone who has a protected characteristic is not sufficient to breach the standard. Whilst the example given had been fabricated, it had demonstrated how the Officer would have dealt with someone having a protected characteristic appropriately, in accordance with the standards of professional behaviour. The story had been adapted from an outdated genuine example, as had been detailed by the Officer in the course of her interview on 9 January 2020 and unchallenged by the Appropriate Authority; it was unfair to describe it as having been the concoction of a detailed story. Ultimately, and irrespective of whether the misconduct in question ought also to have been considered to have constituted a breach of the Equality and Diversity standard, that would have added nothing to its gravity. A breach of that standard would not have led, automatically, to a finding that the misconduct in question had been more serious. Both sides of the argument had been ventilated before the Panel which had reflected and reached a reasonable conclusion.

19. As to the Authority, Respect and Courtesy standard, the Panel clearly had been swayed by the Officer's explanation, during interview by the PSD, that she had informed members of her team about her lie, who had stated, *'You stupid idiot, what have you done that for?'* They had not themselves sought to contact the PSD, or to take the matter further. There had been no direct breach of the relevant standard and no member of staff had been identified by name. The Panel had assessed the gravity of the Officer's actions as a whole. The gravamen of her conduct had been the fact that she had lied, in order to elevate her position. It was that which had been held to have constituted gross misconduct.

Ground 2

20. Here, Ms Hewitt submitted that the Panel's assessment of the overall seriousness of the Officer's misconduct as having been somewhere close to the middle of the range had been an error of law and/or irrational. It is said that her culpability ought to have been assessed as high and that the Panel's underassessment of the overall gravity of her conduct itself had flowed from a series of individual underestimates:

- 20.1. Its assessment of culpability had placed too little weight on the Officer's rank, position of trust in relation to her team, and the nature of the lie (as described in Ground 1);
- 20.2. Its assessment of harm had followed an erroneous finding that there had been no actual harm (as distinct from no evidence of the latter), albeit that some members of the Officer's team had been aware of her conduct and had told her that she had been a 'stupid idiot'; had left out of account the risk of real (at least reputational) harm which the junior colleagues would have suffered had DI Sambrooks (and the other interview panel members) accepted the Officer's story as true and DI Sambrooks accepted her statement that no further action was needed; had failed to take account of any risk of harm to the transgender officer; and had failed to recognise the significance of the fact that the dishonest act had been committed by

the Officer whilst on duty and at work; had involved lying to more senior officers and incriminating the junior colleagues whom she supervised; and had been for her own personal gain. In those circumstances, the properly informed public would not merely have taken 'a dim view', but a more serious view of the Officer's conduct. The Panel ought to have considered the gravity of the particular breach, rather than where it had fallen in a spectrum of possible acts of misconduct;

- 20.3. Its conclusion that there had been no aggravating factors had left out of account the nature of the relevant dishonesty (as described in Ground 1);
 - 20.4. Its identification of a single incident of lying, in response to a single question in an internal job interview, as a mitigating factor had double-counted matters already taken into account and further, had minimised significantly the dishonesty in question, which had been elaborate and multi-layered and, albeit that the Officer had immediately recognised that her dishonesty had been 'very bad', she had reinforced it whilst 'mulling over' what to do, admitting the truth in a piecemeal fashion, three days later. The Panel's conclusion that the misconduct in question did not indicate a tendency towards operational dishonesty had not been explained (acknowledging that that point had not been raised in the grounds of review).
21. Ms Bahia submitted that the Panel had taken account of submissions from both sides as to the approach which it ought to adopt in assessing the misconduct in question and been directed to the relevant parts of the Guidance on Outcomes in Police Misconduct Proceedings then in force, published by the College of Policing ('the Guidance'). In that context, she observed:
- 21.1. each case must turn on its specific facts;
 - 21.2. there could be no legitimate criticism of the Panel's consideration of both culpability and harm when assessing the seriousness of the Officer's misconduct; the Panel had been at pains to stress that it in no way minimised her behaviour, or lack of honesty and integrity; it had balanced her role as a sergeant, in a position of trust, with the fact that her conduct had not been planned or deliberately targeted - this had been conduct with unintended consequences, in the moment of a stressful and unique interview environment in which it was difficult to conclude that the Officer reasonably could have foreseen the harm;
 - 21.3. the misconduct had not fallen within any of the specific categories which would increase the Officer's culpability;
 - 21.4. the Panel had been well aware of the fact that the Officer's colleagues had been aware of her conduct, had been made aware of their reaction to it, in which context noting that no 'actual harm' had occurred. Whilst DI Sambrooks had been aware of the identity of the individuals in the Officer's team, the rest of the interview panel had not;
 - 21.5. as soon as the Officer had become aware that DI Sambrooks intended to speak to the transgender officer, she had stated that that officer was unaware of the matter in question and, subsequently, had confessed, thereby reducing any risk of harm. DI Sambrooks' role as a senior officer in FIB inevitably had meant that the matter

would be taken forward. Furthermore, nothing could have been held against any of the allegedly transphobic colleagues, absent investigation, meaning that the risk of reputational harm to those officers had been limited;

- 21.6. the level of harm had been correctly assessed by the Panel because the risk of harm had been balanced with the absence of aggravating factors;
- 21.7. the lie had been told in the moment and had taken on a life of its own, as the Panel had recognised by its characterisation of that lie;
- 21.8. the Panel had received evidence in relation to the risk of operational dishonesty, following cross-examination of the Officer to that effect, and had reached its conclusion in that context;
- 21.9. whilst the Officer had not immediately admitted to lying, she had made full and frank admissions prior to formal interview, demonstrative of her genuine remorse.

Ground 3

22. Ms Hewitt submitted that, whether by reason of the errors identified in Grounds 1 and 2 or otherwise, the Panel's decision as to outcome had constituted an error of law and/or been irrational. Acknowledging that the Panel had made no 'structural' error in its approach to sanction, she criticised the Panel's application of the Guidance to the facts. The Panel had placed too much significance on the fact that the dishonesty in question had been non-operational, given that the circumstances and nature of the lie had related entirely to the Officer's role and performance as a police sergeant; had assessed the effect on public confidence by comparing the Officer's conduct with other 'more serious' but unspecified examples of misconduct, rather than by reference to the standards which all officers are expected to meet and, perhaps, a sliding scale of dishonesty; and had failed to dismiss the Officer, notwithstanding its (correct) finding that her behaviour had been *'inconsistent with the office of constable and the rank of police sergeant'*. The test which ought to have been applied had been whether the Officer's conduct had been at a level incompatible with ongoing service as a police officer.
23. By way of general conclusion, Ms Hewitt submitted that the Panel's conclusion that the Officer had come 'very close' to dismissal indicated that the errors identified by the three grounds of review had been material to the outcome. She sought an order quashing the Panel's decision and mandating reconsideration of the matter by a differently constituted panel, at a fresh hearing.
24. Ms Bahia submitted that a finding of gross misconduct does not automatically lead to dismissal. The facts had been fully aired and agreed by the parties. Whether or not the Equality and Diversity standard had been breached, the overall outcome would not have been affected, as, even on the Appropriate Authority's case, the conduct impugned had not been deliberate or targeted. Following careful consideration, the Panel had come very close to dismissing the Officer, itself indicative of its view of the gravity of her misconduct, and had clearly had in mind the purpose of the proceedings and the issue of public confidence. Having assessed the seriousness of the Officer's conduct, on a spectrum of other misconduct entailing dishonesty and lack of integrity, it had been entitled to take account

of her considerable personal mitigation, which had included 27 years' experience with no prior misconduct proceedings; limited sickness absence; the fact that her conduct had been completely out of character; the fact that she had worked in extremely demanding areas, involving family abuse and child deaths, in unusual circumstances, completing two degrees whilst working to enhance her work capabilities; and her commendations, awards and character references. A final written warning had been the most serious sanction short of dismissal which could have been imposed. The case had required and received careful, balanced consideration of all factors and the decision taken by the Panel could not be said to have been beyond that which was reasonable in all the circumstances. It could not be said that dismissal had been the only available sanction.

25. It followed, submitted Ms Bahia, that the claim for judicial review ought to be dismissed.

Discussion

The legal framework

26. The law is not in dispute. As it applied when the 2012 Regulations (since revoked) were in force, the approach to be adopted by a police misconduct panel was comprehensively set out by Eady J, at paragraphs 29 to 53 of her judgment in *R (Chief Constable of West Midlands Police) v Police Misconduct Panel and Officer 'A'* [2020] EWHC 1400 (Admin), which I reproduce, gratefully, below:

'Overview

29. Pursuant to regulation 3(1) of the Police (Conduct) Regulations 2012, by finding Officer A guilty of gross misconduct, the Panel had concluded that his conduct was so serious that dismissal would be justified, albeit that it could impose a lesser sanction of management advice, written warning or final written warning (regulation 35(3)(b)).

30. It is common ground between the parties that, although the Panel thus had a discretion as to the appropriate sanction in Officer A's case, it was required to exercise that discretion in accordance with the structure identified in the Guidance (see *R (on the application of the Chief Constable of Greater Manchester Police) v Police Misconduct Panel* 13 November 2018, per HHJ Pelling QC at paragraph 14). Moreover, to the extent it considered it appropriate to depart from the structure of the Guidance, the Panel was required to explain why it had done so (see *R (on the application of the Chief Constable of Northumbria Police v Police Misconduct Panel* [2018] EWHC 3533 (Admin), per HHJ Kramer at paragraph 75).

31. At paragraph 1.3, the Guidance itself explains that it:

“...does not override the discretion of the person(s) conducting the meeting or hearing. Their function is to determine the appropriate outcome and each case will depend on its particular facts and circumstances. Guidance cannot and should not prescribe the outcome suitable for every case.”

32. That said, it does provide (see paragraph 1.4):

“...a general framework for assessing the seriousness of conduct, including factors which may be taken into account. These factors are non-exhaustive and do not exclude any other factor(s) that the person(s) conducting the proceedings may consider relevant.”

33. The purpose of the police misconduct regime is also made clear in the Guidance; paragraph 2.1 setting the context, as follows:

“Police officers exercise significant powers. The misconduct regime is a key part of the accountability framework for the use of these powers. Outcomes should be sufficient to demonstrate the individual accountability for any abuse or misuse of police powers if public confidence in the police service is to be maintained. They must also be imposed fairly and proportionately.”

34. Then, at paragraph 2.3, the three-fold purpose is explained:

- Maintaining public confidence in and the reputation of the police service
- Upholding high standards in policing and deterring misconduct
- Protecting the public.”

35. This articulation of the purpose of professional disciplinary proceedings is drawn from the case-law; specifically, in relation to the police, the Guidance refers to the decision of the House of Lords in *R (Green) v Police Complaints Authority* [2004] UKHL 6, at paragraph 78, where Lord Carswell stated:

“Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner of which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded”.

36. At paragraph 2.10 of the Guidance, it is noted that misconduct proceedings are not designed to punish police officers, with reference being made to *Raschid v General Medical Council* [2007] 1 WLR 1460, where, at paragraph 18, Laws LJ had observed:

“The panel is then centrally concerned with the reputation or standing of the profession rather than the punishment of the doctor.”

37. That said, at paragraph 2.11, the Guidance acknowledges:

“The outcome imposed can have a punitive effect, however, and therefore should be no more than is necessary to satisfy the purpose of the proceedings. Consider less severe outcomes before more severe outcomes. Always choose the least severe outcome which deals adequately with the issues identified, while protecting the public interest. If an outcome is necessary to satisfy the purpose of the proceedings, impose it even where this would lead to difficulties for the individual officer.”

38. ...in determining the appropriate outcome, [the panel] is required to adopt a three-stage approach, as laid down by Popplewell J (albeit in the context of solicitors' disciplinary proceedings) in *Fuglers LLP v SRA* [2014] EWHC 179 (Admin), at paragraph 28, as follows:

“There are three stages to the approach which should be adopted by a solicitors' disciplinary tribunal in determining sanction. The first stage is to assess the seriousness of the misconduct. The second stage is to keep in mind the purpose for which sanctions are imposed by such a tribunal. The third stage is to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question”.

That three-stage approach is set out at paragraph 4.2 of the Guidance.

Stage 1: Seriousness

39. In *Fuglers*, at paragraph 29, Popplewell J went on explain that in assessing seriousness (the first stage):

“In assessing seriousness the most important factors will be (1) the culpability for the misconduct in question and (2) the harm caused by the misconduct. Such harm is not measured wholly, or even primarily, by financial loss caused to any individual or entity. A factor of the greatest importance is the impact of the misconduct upon the standing and reputation of the profession as a whole. Moreover the seriousness of the misconduct may lie in the risk of harm to which the misconduct gives rise, whether or not as things turn out the risk eventuates. The assessment of seriousness will also be informed by (3) aggravating factors (eg previous disciplinary matters) and (4) mitigating factors (eg admissions at an early stage or making good any loss). ...”

These considerations are set out in the Guidance at paragraph 4.4.

40. At paragraphs 4.5-4.9, the Guidance advises that, when considering outcome, a panel should:

“4.5 ... first assess the seriousness of the misconduct, taking account of any aggravating or mitigating factors and the officer's record of service. The most important purpose of imposing disciplinary sanctions is to maintain public confidence in and the reputation of the policing profession as a whole. This dual objective must take precedence over the specific impact that the sanction has on the individual whose misconduct is being sanctioned.

4.6 Consider personal mitigation such as testimonials and references after assessing the seriousness of the conduct by the four categories above.”

Recognising:

“4.7 There may be overlap between these four categories and/or imbalances between them. Low-level culpability on the part of a police officer, such as a failure to respond in good time to an incident, can result in significant harm.

Equally, an officer may commit serious misconduct which causes minimal harm to individuals or the wider public but may still damage the reputation of the police service.

4.8 Carefully assess the officer's decisions and actions in the context in which they were taken. ...

4.9 Weigh all relevant factors and determine the appropriate outcome based on evidence..."

41. The Guidance also addresses the assessment of culpability, explaining at paragraph 4.10:

"Culpability denotes the officer's blameworthiness or responsibility for their actions. The more culpable or blameworthy the behaviour in question, the more serious the misconduct and the more severe the likely outcome."

42. It is observed, however, that certain forms of misconduct are to be considered "especially serious" (paragraph 4.15), relevantly providing (paragraph 4.51) that this will include "Discrimination" (citing race as one of the relevant protected characteristics in this regard) and stating that:

"Discrimination towards persons on the basis of any of these characteristics is never acceptable and always serious."

43. The Guidance goes on to explain that:

"4.52 Discrimination may involve language or behaviour. It may be directed towards members of the public or colleagues. It may be conscious or unconscious.

4.53 Cases where discrimination is conscious or deliberate will be particularly serious. In these circumstances, the public cannot have confidence that the officer will discharge their duties in accordance with the Code of Ethics.

4.54 Unconscious discrimination can, however, also be serious and can also have a significant impact on public confidence in policing."

44. In addressing the question of harm, the Guidance acknowledges that this might be considered in various ways. It might be relevant to consider (for example) the type of harm caused or risked; the persons affected; or the effect on the police service or public confidence (see paragraph 4.57). The Guidance then advises that the panel should:

"4.58 Assess the impact of the officer's conduct, having regard to these factors and the victim's particular characteristics.

4.59 Where no actual harm has resulted, consider the risks attached to the officer's behaviour, including the likelihood of harm occurring and the gravity of harm that could have resulted." and notes:

“4.60 How such behaviour would be or has been perceived by the public will be relevant, whether or not the behaviour was known about at the time.”

45. At paragraph 4.65, however, it is further noted that:

“Where gross misconduct has been found, however, and the behaviour caused or could have caused, serious harm to individuals, the community and/or public confidence in the police service, dismissal is likely to follow. A factor of the greatest importance is the impact of the misconduct on the standing and reputation of the profession as a whole.”

46. The Guidance also provides advice as to the approach panels are to adopt to aggravating and mitigating factors. It notes that:

“4.66 Aggravating factors are those tending to worsen the circumstances of the case, either in relation to the officer’s culpability or the harm caused.” and that:

“4.67 Factors which indicate a higher level of culpability or harm include: ... any element of unlawful discrimination ...”

47. As for mitigating factors, the Guidance explains that:

“4.70 Mitigating factors are those tending to reduce the seriousness of the misconduct. Some factors may indicate that an officer’s culpability is lower, or that the harm caused by the misconduct is less serious than it might otherwise have been.”

48. And various examples of mitigating factors are given, including whether the misconduct was confined to a single episode or was of brief duration; whether there was any element of provocation; whether the officer had made open admissions at an early stage; whether there was evidence of genuine remorse, insight and/or an acceptance of responsibility (paragraph 4.71).

Stage 2: Purpose

49. Having assessed seriousness, the panel is required to turn to the second stage and to remind itself of the purpose for which sanctions are imposed; as explained in *Fugler*, at paragraph 30: “At the second stage, the tribunal must have in mind that by far the most important purpose of imposing disciplinary sanctions is addressed to other members of the profession, the reputation of the profession as a whole, and the general public who use the services of the profession, rather than the particular solicitors whose misconduct is being sanctioned.”

50. In *Bolton v The Law Society* [1994] 1 WLR 512 (another case involving solicitors’ disciplinary proceedings, but which is also referenced in the Guidance), at p 518H, Sir Thomas Bingham MR (as he then was) observed that: “The second purpose is the most fundamental of all: to maintain the

reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission. ... A profession's most valuable asset is its collective reputation and the confidence which that inspires."

Stage 3: Determination of Sanction Most Appropriate to Purpose

51. It is thus, having first assessed the seriousness of the misconduct in issue, and then reminded itself of the purpose of disciplinary sanctions, that the panel will be able to carry out the third stage of the process and determine, given the seriousness of the conduct, which category of sanction most appropriately fulfils that purpose.'

The approach to be taken by the Administrative Court

27. In *R (Chief Constable of Northumbria Police) v (1) Police Appeals Tribunal (2) Barratt* [2019] EWHC 3352 (Admin) [21], Freedman J observed:

'21. The correct approach to be taken by the Administrative Court on a claim for judicial review of a PAT's decision is that stated by Burnett J in *R (CC of Dorset) v PAT & Salter* [2011] EWHC 3366 (Admin) (emphasis added):

"[9] Proceedings in the Administrative Court seeking to challenge the decision of a Police Appeals Tribunal do not arise by way of appeal, but by way of a claim for judicial review. In those circumstances, a claimant in judicial review proceedings must establish a public law error before the decision of that Tribunal could be quashed."

"[25] Absent another error of law on the part of the Police Appeals Tribunal its decision on sanction could be interfered with only on classic *Wednesbury* grounds, in short that on the material before it no reasonable Tribunal could have reached the conclusion that it did."

The Administrative Court should guard against the misuse of its jurisdiction by Chief Constables seeking to mount what are effectively "undue leniency" appeals to decisions of misconduct panels or PATs.'

28. The analysis in *Salter* applies equally to a decision of a police misconduct panel.

29. Against that background, I turn to consider the grounds of review.

Ground 1

30. Whilst, in submissions, little emphasis was placed by the Claimant upon the Officer's own admission that the Equality and Diversity standard had been breached, it is right to note that, under regulation 33(13) of the 2012 Regulations, it was for the panel conducting the misconduct proceedings to review the facts of the case and decide whether the conduct of the Officer amounted to misconduct, gross misconduct or neither. Furthermore, as may be

seen from the passage cited at paragraph 9 above, no objection was raised at the time to the adoption of that approach by counsel for the Appropriate Authority.

31. In my judgment, Ground 1 takes as its flawed fundamental premise the assumption that the fact that misconduct may be considered to constitute a breach of more than one standard of professional behaviour inevitably indicates that its gravity is increased. In fact, the focus of a misconduct panel, under regulation 33(13)(b) of the 2012 Regulations, is on the conduct itself and whether, if proven, it would amount to misconduct, gross misconduct, or neither. By Regulation 3, misconduct is defined to mean ‘a breach of the Standards of Professional Behaviour’ and gross misconduct to mean ‘a breach of the Standards of Professional Behaviour so serious that dismissal would be justified’. Thus, in circumstances in which the Panel found the Officer to have been guilty of gross misconduct, there is a certain sterility to a ground of review which focuses on the label to be applied to the conduct in question, rather than on its gravity per se.
32. In my judgment, on the facts before it, the Panel’s conclusion that *‘whilst the fabricated example you gave involved a person with a protected characteristic, you did not act in a discriminatory way towards that person or towards the transgender community, or in any other way which offended against the Equality and Diversity Standard of Professional Behaviour’* was one which was reasonably open to it. The lie told by the Officer cited a fictitious example of discriminatory treatment and the Officer’s asserted response to it, but the conduct itself (ie the telling of that lie) did not constitute direct gender reassignment discrimination, contrary to section 13 of the Equality Act 2010, against the transgender officer (being the only form of discrimination asserted by the Claimant). The Officer had put forward an example in order to illustrate the relevant competency, in answer to a question which she had reasonably interpreted to have called for an example of that type (were a genuine example able to be given). She had not, thereby, treated her transgender colleague less favourably than she had treated, or would have treated, others because of a protected characteristic. There had been no ‘treatment’ of that individual (who had not been made aware of the lie told by the Officer). In my judgment, the flaw in the Claimant’s reasoning is to equate discriminatory treatment of that officer in the example given (portraying that individual, in Ms Hewitt’s words, as ‘the victim of the story’), with less favourable treatment of that same individual in reality, or to view the latter as inexorably flowing from the former. The issue arising was not one of unequal treatment, though, had it been so, on one view, in being made the subject of the example given, all members of the Officer’s team had been treated unfavourably and the allegedly transphobic officers had been treated less favourably in their portrayal than had the transgender officer.
33. In any event, however, paragraph 4.51 of the Guidance stated that *‘Discrimination towards persons on the basis of any of these [protected] characteristics is never acceptable and always serious’* and paragraph 4.55 had noted the degree of overlap between the particular types of misconduct and the need to take care to avoid ‘double counting’ factors which had been identified as being relevant to the assessment of seriousness. Albeit having concluded that the conduct in question had not been discriminatory, the Panel had concluded that the conduct in question had been serious, indicating the lack of material difference to its conclusions which a finding of discrimination would have made.
34. Turning to the second limb of Ground 1, it had been reasonably open to the Panel to have concluded that the Officer had shown a lack of respect towards her colleagues by using them as an example in the job interview in the way in which she had done, but that such

breach had been tenuous. That conclusion was consistent with the reaction of the Officer's colleagues, none of whom had sought to take the matter further, when informed of the example which she had given. Here again, the Panel had been entitled to draw the implicit qualitative distinction between disrespectful and discourteous conduct directed at a particular individual and that of which such an individual might be said to be the subject. I also accept Ms Bahia's contention that the Claimant can draw little support for his position from the risk of reputational harm to the Officer's colleagues. No public law error can be said to arise from the Panel's finding that *'the potential for harm to your colleagues, whilst serious if it ever materialised, was unlikely to so materialise because you would have intervened in precisely the way you did by owning up to the lie as soon as it appeared DI Sambrooks might take further action to investigate the fabricated episode of inappropriate behaviour'*, from which it is clear that the risk in question had been identified and properly evaluated. DI Sambrooks' membership of the panel and the likelihood that (had the Officer not confessed to having invented the example given) an investigation would have been commenced which rapidly would have established the true position tend to the same conclusion.

35. Standing back, I am satisfied that Ms Bahia is right to submit that the gravamen of the Officer's conduct, recognised by the Panel, had been the fact that she had lied in order to elevate her position. The fact that such conduct could be argued to have constituted a breach (tenuously or otherwise) of more than one professional standard, did not, without more, alter its substantive nature, or inevitably increase its gravity, in particular in circumstances in which the Panel had found the Officer's conduct to have amounted to gross misconduct. The Claimant has come nowhere near demonstrating a public law error in the Panel's consideration or determination of the professional standards breached, or in its findings as to the extent of that breach. Ground 1 fails.

Ground 2

36. As to the Panel's assessment of the seriousness of the Officer's misconduct, I bear in mind that the Claimant expressly disavowed any suggestion of structural error, i.e. of any failure by the Panel systematically to have assessed culpability, harm caused, aggravating and mitigating factors, as indicated by the Guidance. In such circumstances, demonstrating a public law error is no easy task.

Culpability

37. All of the factors now prayed in aid by the Claimant had been advanced before the Panel. The weight to be attached to each such factor was, classically, a matter for it to assess, having regard to all of the available evidence. The Officer had not been responsible for operational dishonesty, as defined at paragraph 4.26 of the Guidance (being *'dishonesty in connection with a police operation'*). In accordance with paragraph 4.29 of the Guidance, it had fallen to the Panel to, *'examine the circumstances of the case with care by reference to the four categories for assessing seriousness outlined above'*. That is what it did. Its findings in relation to (adopting its language) the culpability sub-factors were permissible and appropriate. It expressly found the Officer's rank, and the facts that she had been in a leadership/supervisory role and had acted for professional gain, to have aggravated her dishonest misconduct. No public law error is demonstrated in the Panel's consideration of the Officer's rank, position of trust, or the nature and purpose of the lie which she had told.

Harm

38. I regard the distinction advanced between an absence of actual harm and an absence of any evidence of actual harm as specious; in the absence of any evidence of actual harm, the

Panel had been entitled to find that there had been no such harm. Indeed, had there been evidence of actual harm, one would have expected it to have been drawn to the Panel's attention and to the attention of this Court. I have discussed, above, the limited risk of actual harm eventuating to the Officer's colleagues, even if the Officer had not confessed her wrongdoing, which risk could only have been reduced by her confession. Contrary to Ms Hewitt's submission, it is clear from the oral reasons given that the Panel had taken account of the harm which might have been caused to the Officer's transgender colleague: *'We did think very carefully about the possible harm that... could have been ... imparted to the ... transgender colleague that you mentioned in your interview and we judged that perhaps if this matter had come to light then that individual's feelings could have been hurt by ... what you said in the interview.'* The Panel had given separate consideration to the risk of harm to the West Midlands Force and to the wider Police service. It is not to be criticised for having had regard to the spectrum of misconduct which could have had that effect. That it had had in mind other forms of dishonesty, in particular, is clear from its reference to 'operational dishonesty' in that context. Having correctly identified the misconduct in question, its constituent elements and context, the weight to be attached to such matters and the overall assessment of harm was for the Panel to determine, based upon its experience and in the circumstances of the case.

Aggravating factors

39. This challenge inevitably fails, based as it is on the flawed premise of ground 1.

Mitigating factors

40. The Claimant's contention of double-counting is not made out and misunderstands the Panel's decision. On the first occasion on which reference had been made to 'a single and very limited act' it had been in rebuttal of the Claimant's position that the breach of multiple professional standards ought to be considered an aggravating factor. The Panel's position was pithily explained thus, *'...the panel concluded there were not multiple breaches of any substance, but a single proven allegation which satisfied multiple definitions and which the Panel had to consider holistically.'* That conclusion did not oblige it to ignore the nature of the Officer's act, as it had found that to be, when considering the mitigating factors, having regard to the Guidance. Indeed, it would have been wrong to have disregarded a factor expressly identified at paragraph 4.71 of the Guidance as indicating a lower level of culpability or harm. The Claimant's contention that the Panel had not explained its finding that there was no indication that the Officer would be tempted to act dishonestly in an operational capacity is simply wrong. It had done so on two occasions in its written notification, dated 15 October 2020:

'...there was no evidence to suggest you had any propensity to be untruthful when executing your duties. Such a propensity would demand protection for the public, and protection in the form of dismissal. But your 27 years of unblemished service in demanding front line investigative roles revealed no evidence that might suggest a tendency towards dishonesty in an operational context and the complexion of the lie you told was insufficient to suggest you would do the same in an operational context.'; and

'On this point the Panel reminded itself of the clear distinction drawn in the Home Office Guidance on Outcomes between operational dishonesty and dishonesty in other contexts. The Panel considered very carefully whether your lying in an internal job interview indicated a genuine risk to the public that you would be tempted to act dishonestly in an operational capacity, but the Panel was satisfied that whilst your behaviour was

reprehensible, a single instance, on the facts of this case, was insufficient to establish a propensity towards dishonesty or untruthfulness.'

All of the other criticisms made by the Claimant go to the weight of the various factors which, it is clear from the Panel's oral and written reasons, it had had in mind. In my judgment, they constitute no more than a disagreement with the Panel's assessment and disclose no public law error in the Panel's approach or conclusions.

41. Ground 2 fails.

Ground 3

42. In so far as this ground is dependent upon the merit in Grounds 1 and 2, it necessarily fails. Thus, in accordance with *Salter*, the sanction imposed by the Panel can only be interfered with on *Wednesbury* grounds. Little remains of Ground 3 by way of free-standing criticism, and that which does expressly attacks the weight attached to the various factors relevant to sanction which it had fallen to the Panel to balance. Here again, rightly, it is not suggested that the Panel omitted to follow the steps set out in the Guidance, which obliged it to consider less severe outcomes before those which were more severe (paragraph 7.4) and noted that each case would depend upon its particular facts and that regard ought to be had to all relevant circumstances when determining the appropriate and proportionate outcome to impose (paragraphs 1.3 and 7.7). Having assessed the seriousness of the Officer's misconduct and addressed the purpose of imposing sanctions, the Panel chose the sanction which, in its considered and explained view, most appropriately fulfilled that purpose for the seriousness of the conduct in question, observing that the Officer had come 'very close to dismissal'. A finding of gross misconduct did not compel her dismissal (see regulations 35(1)(a) and 35(3)(b) of the 2012 Regulations¹) and the Panel cogently explained its views that: (1) the proportionate sanction was a final written warning; and (2) dismissal (with or without notice) was not the least serious sanction available by way of required deterrent or adequately to protect the public interest and confidence in the police. That approach was consistent with paragraph 2.11 of the Guidance (set out above). Furthermore, as paragraph

¹ '35 Outcome of misconduct proceedings

- (1) Subject to the provisions of this regulation, the person or persons conducting misconduct proceedings in the case of an officer other than a senior officer may –
- (a) impose any of the disciplinary action in paragraph (3)(a) or (b) or (7)(b) as appropriate; or
 - (b) ...
- ...
- (3) The disciplinary action is –
- (a) ...
 - (b) at a misconduct hearing or a further hearing held under regulation 34(1)(b)—
 - (i) management advice;
 - (ii) written warning;
 - (iii) final written warning;
 - (iv) dismissal with notice; or
 - (v) dismissal without notice.
- ...'

1.3 of the Guidance made clear, *‘The guidance does not override the discretion of the person(s) conducting the meeting or hearing. Their function is to determine the appropriate outcome and each case will depend on its particular facts and circumstances. Guidance cannot and should not prescribe the outcome suitable for every case.’*

43. No public law error is demonstrated. Ground 3 does no more than mount an undue leniency appeal and, as such, seeks to misuse the jurisdiction of the Administrative Court (see *R (Chief Constable of Northumbria Police) v (1) Police Appeals Tribunal (2) Barratt* [21], cited above). It follows that it fails.

Disposal

44. All grounds of review having failed, the Claimant’s application for judicial review is dismissed.