



Neutral Citation Number: [2019] EWHC 73 (Admin)

Case No: CO/1444/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 January 2019

Before :

MR JUSTICE DINGEMANS

Between :

Chief Constable of the British Transport Police	<u>Claimant</u>
- and -	
Police Appeals Tribunal	<u>Defendant</u>
- and -	
Kerry Reynolds	<u>First Interested Party</u>
Independent Office for Police Conduct	<u>Second Interested Party</u>

Stephen Morley (instructed by **Simons Muirhead & Burton LLP**) for the **Claimant**
Guy Ladenburg (instructed by **Reynolds Dawson solicitors**) for the **First Interested Party**

Hearing date: 16th January 2019

Approved Judgment

Mr Justice Dingemans:

Introduction

1. This is the hearing of a claim by the Claimant, the Chief Constable of the British Transport Police (“the Chief Constable”) for judicial review of a decision of the Defendant the Police Appeals Tribunal, (Corinna Ferguson (Chairperson), Deputy Assistant Commissioner Richard Martin and Michael Downes), (“the Appeals Tribunal”). Oral reasons for the decision of the Appeals Tribunal were given on 21 February 2018 and written reasons were given on 1 March 2018.
2. The Appeals Tribunal had allowed an appeal from that part of the judgment of a police misconduct panel (Eileen Herlihy (Chairperson), Superintendent William Jordan and Henry Gordon) (“the panel”) which dealt with the issue of sanction. The panel, having found that the First Interested Party, Police Constable Kerry Reynolds (“PC Reynolds”) was guilty of gross misconduct and misconduct, directed that PC Reynolds should be dismissed from his office as a constable. Having allowed the appeal against sanction the Appeals Tribunal directed that PC Reynolds should be given a final written warning.
3. There is no statutory right of appeal for the Chief Constable from the decision of the Appeals Tribunal. This explains why the claim is brought as a claim for judicial review of the decision of the Appeals Tribunal. Permission to apply was granted on 27 June 2018. The Chief Constable contends that the Tribunal made public law errors and reached an irrational decision. The Second Interested Party, the Independent Office for Police Conduct (“IOPC”) which was previously known as the Independent Police Complaints Commission (“IPCC”), has made written submissions supporting the Chief Constable. The claim is resisted by PC Reynolds who contends that the decision of the Appeals Tribunal was both lawful and right.

An outline of the circumstances giving rise to the proceedings against PC Reynolds

4. On 18 February 2016 PC Reynolds was on duty as a behavioural detection officer (“BDO”) at Kings Cross station with other officers of the Behavioural Detection Unit (“BDU”) in the Piccadilly line ticket hall area of Kings Cross station. The BDU is a specialist unit deployed to address the heightened threat of terrorist attack. As the name suggests the BDU assesses the behaviour of individuals at transport hubs.
5. The attention of members of the BDU was drawn to Mr N, an 18 year old man described as a young man of slim build. PC Reynolds spoke to Mr N. Findings of fact show that Mr N swore and told PC Reynolds that he did not have any identification on him and admitted that he had travelled to Kings Cross without a ticket. Mr N reported that he was waiting for a friend who might give him money to continue his journey.
6. PC Reynolds placed his hand on Mr N’s shoulder. Mr N reacted to this contact and made contact with PC Reynolds. There was an altercation and Mr N was taken to the ground by 3 police officers including PC Reynolds. Mr N resisted and shouted and swore and kicked. At some stage Mr N was on top of one of the other police officers. In the course of the altercation PC Reynolds punched Mr N twice on his right

shoulder and used about 5 knee strikes on Mr N's back. Mr N was handcuffed and arrested for disorderly behaviour, assaulting a police officer, fare evasion and resisting arrest.

7. There is CCTV footage showing what occurred. The first knee strike took place at 12:38:46, followed by the 2 punches and then 3 knee strikes. The 5th and last knee strike was at 12:39:04. The period from the first knee strike to the last was therefore 18 or 19 seconds. PC Humes stepped forward and told PC Reynolds to calm down. PC Reynolds replied saying words to the effect "Andy, piss off, he's a piece of shit". Later in the police van PC Reynolds said to PC Humes "Sorry for shouting at you, Andy, but he is a piece of shit and he got what he deserved."
8. The initial investigation into the incident involving Mr N was carried out by PC Crisp, a probationary constable, under the supervision of his tutor constable PC Ross. PC Crisp was concerned about PC Reynolds' use of force and Mr N was bailed. The next day PC Reynolds approached PC Crisp and challenged the decision to grant Mr N bail. PC Reynolds told PC Crisp that PC Reynolds wanted to see the CCTV footage. PC Ross intervened and PC Reynolds replied using words to the effect that "What they don't know won't hurt them".
9. During the course of the investigation into PC Reynolds his mobile telephone was seized. This showed that after discovering that he was being investigated PC Reynolds sent a Whatsapp message on 23 March 2016 to friends (which included 2 police officers) describing Mr N as "a nasty piece of shit". On 24 March 2016 PC Reynolds had sent a message to a friend describing Mr N as a "piece of shit scumbag". PC Reynolds had also sent the statements made by other members of the BDU to his personal mobile telephone in contravention of the British Transport Police "Use and management of IT & Communications System Policy".

Relevant guidance to police officers

10. The Association of Chief Police Officers Personal Safety Manual sets out information to police officer in the use of techniques when encountering violent or potentially violent situations. There is a diagram showing that police officers should gather information, identify risks, consider powers, identify actions, take action and review what has happened.
11. Police officers are taught how to use dysfunction strikes, which are blows to muscle which causes interruption to the working of a muscle, and distraction strikes, which diverts the attention of a person who is struck from what they are doing.

The offence of fare evasion

12. The summary offence of fare evasion is committed when "someone has attempted to travel on a railway without having previously paid the fare and that had the intent to avoid the payment", contrary to section 5(3)(a) of the Regulation of Railways Act 1889.
13. Section 24 of the Police and Criminal Evidence Act 1984 provides that "if an offence has been committed, a constable may arrest without a warrant (a) anyone who is guilty of the offence". An officer may only arrest if he has reasonable grounds for

believing that an arrest is necessary. 9 grounds of necessity are set out. They include ascertaining the name of the person and the address of the person.

Disciplinary rules, panels and Appeal Tribunals

14. The Railways and Transport Safety Act 2003 (“the Act”) provides a power to the British Transport Police Authority to make regulations to provide for disciplinary action against police officers. The British Transport Police (Conduct) Regulations 2015 (“the Conduct Regulations”) provide for Standards of Professional Behaviour set out in schedule 1. Misconduct is defined by regulation 3 as “a breach of the standards of professional behaviour” and gross misconduct is defined as “a breach of the standards of professional behaviour so serious that dismissal would be justified”.
15. The standards of professional behaviour are set out in schedule 1 of the conduct regulations. So far as is material they provide:

“Authority, respect and courtesy: Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy. Police officers do not abuse their powers or authority and respect the rights of all individuals.

Use of force: Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.

Orders and instructions: Police officers only give and carry out lawful orders and instructions. Police officers abide by police regulations, force policies and lawful orders.

Confidentiality: Police officers treat information with respect and access or disclose it only in the proper course of police duties.”
16. Regulation 35 of the Conduct Regulations provides that the panel will have the following outcomes available to them: dismissal without notice; dismissal with notice (not available for gross misconduct); final written warning; written warning; and management advice.
17. The College of Police Guidelines on Outcomes identifies aggravating factors which are factors indicating a higher level of culpability or harm. These include factors such as “serious physical or psychological impact on the victim” and “vulnerability of the victim”. Mitigating factors are those “tending to reduce the seriousness of the misconduct”. They include “any element of provocation, threat or disturbance which may have affected the officer’s judgment, eg in relation to the use of force in the heat of the moment” and “acting pursuant to a legitimate policing purpose or in good faith, ie a genuine belief that there was a legitimate purpose but getting things wrong”.
18. The Police Appeal Tribunal Rules 2012, as applied by the British Transport Police Appeals Tribunals Regulations 2015, provide for appeals to an Appeals Tribunal. One of the grounds of appeal is “*that the finding or decision to impose disciplinary action was unreasonable*”, pursuant to rule 4(4)(a). The Appeals Tribunal conducts a review of the panel’s decision, and the appeal is not a rehearing. It has no power to remit the matter to the panel if the ground on which the appeal has been allowed is

that the decision was unreasonable as appears from regulation 22 of the Police Appeal Tribunal Rules.

Relevant provisions of the law

19. It is established that the Appeals Tribunal may only allow an appeal and substitute its own determination if it concludes that the panel's decision was unreasonable, see *R(Chief Constable of Wiltshire Police) v Police Appeals Tribunal (Woolard)* [2012] EWHC 3288 (Admin) at paragraphs 32-34.
20. This Court may intervene to quash an unlawful decision made by a public body such as the Appeals Tribunal. It is established law that a public body is not entitled to make a decision that is so unreasonable that no reasonable public body could have made that decision. The Court must consider whether the decision of the Appeals Tribunal was vitiated by error of law or was so far outside the range of decisions legitimately open to the Appeals Tribunal as to be unlawful, see *R(Williams) v Police Appeals Tribunal* [2016] EWHC 2708 (Admin). It is established that both panels and Appeals Tribunals are specialist Tribunals. This means that the Court will obviously give proper weight to the views and decisions of the panels and Appeals Tribunals.
21. A Court has a judicial discretion about whether to grant relief. If the claimant is successful in judicial review proceedings but the court considers that it is highly likely that the outcome for the claimant would not be substantially different even if the unlawful decision by the public body was set aside the court must refuse to grant any relief except in exceptional public interest cases, see sections 31(2A and B) of the Senior Courts Act 1981.

Proceedings before the panel

22. Matters were referred to the IPCC and it was recommended that misconduct proceedings should be brought against PC Reynolds. PC Reynolds was served with a notice pursuant to regulation 21 of the Conduct Regulations alleging breaches of the Standards of Professional Behaviour as to: Use of force; Authority Respect & Courtesy; Duties and Responsibilities; Honesty and Integrity; Confidentiality; Orders and instructions and duties and responsibilities. There were 4 main allegations which were: the arrest and use of force; abusive language describing Mr N; involvement in the investigation; and discussing the allegations. PC Reynolds denied the breaches.
23. A misconduct hearing took place from 8 to 12 May 2017 before the panel. The Appropriate Authority, the IPCC and PC Reynolds were all separately represented. At the beginning of the hearing certain allegations in the regulation 21 notice were withdrawn.
24. The panel heard oral evidence from: Mr N; PS Morrison; PC Mayaski; PC Humes; PC Swindlehurst; PC Crisp; PC Ross and PC Reynolds. The panel had also seen various documents including other statements, character evidence, the expert report of Martin Graves on the use of force and the CCTV.
25. The panel produced a written determination called the Misconduct Proceedings Determination. The panel set out a table containing the regulation 21 notice showing what was "proven" and "not proven". The outcome was "dismissal without notice".

The panel stated “we find that the allegations amount to breaches in standards of professional behaviour in the following manner: use of force; authority, respect and courtesy; confidentiality; orders and instructions”. No aggravating factors were identified.

26. The panel then set out their findings. So far as material the panel “generally found Mr N to be a credible witness, he did not deny his swearing, he admitted he had no ticket, he was consistent in his claim that he had no ID and admits that he did resist the arrest during which he says he was shouting, kicking and swearing”. The panel said “we find from our examination of the CCTV that it is PC Reynolds who first makes physical contact with Mr N by placing his left hand on Mr N and that Mr N reacts to this contact by pushing at PC Reynolds.” The panel rejected the evidence of various members of the BDU about whether Mr N had lunged and rejected PC Reynolds’ evidence that Mr N had first grabbed PC Reynolds’ shoulder, although it is apparent that the panel did not consider whether the police officers were describing events after PC Reynolds’ hand on the shoulder and Mr N’s actions after that.
27. The panel did not find on their consideration of the evidence that PC Reynolds was “following the National Decision Making Model and that he knew what powers he was using” when he laid his hand on Mr N’s shoulder. This was because PC Reynolds had not explained to Mr N that a consequence of not giving his identification was that he might be arrested and because PC Reynolds said “he had not fully made a decision as to how he was going to deal with him at that stage”. The panel said “we are not persuaded that Mr N was likely to be arrested for fare evasion when PC Reynolds touches him”.
28. It appears that a critical part of the determination by the panel was as follows: “In PC Reynolds’ original MG11 statement he states that he punched Mr N twice on the right shoulder in an attempt to gain control of his right arm. In his MG14 typed statement of 21 April 2016 he states that his primary concern was as to whether or not Mr N had anything in his hands at the time that he delivered the distraction blows ... PC Reynolds’ claim is now that the initial strikes were deployed to release PC Mayaski from a position of disadvantage as Mr N was briefly on top of him. We observe on the CCTV and it is accepted that prior to the two hand strikes there is a knee strike and we can clearly see that PC Mayaski was under Mr N for seven seconds”. The panel noted that PC Reynolds’ account of the reason for the use of force was not consistent. The panel noted that PC Reynolds (and other members of the BDU) had failed to note that PC Mayaski was under Mr N for a time. The panel found that PC Reynolds had no genuine fear that Mr N might have a weapon, given that Mr N had opened his rucksack and turned out his pockets in response to earlier requests.
29. The panel noted that “we can observe seven strikes from 12:38:45 to 12:39:04, a total of nineteen seconds. We consider the number of strikes in such a short period of time was excessive and disproportionate to the threat and allowed no time for reassessment of it or to allow Mr N to comply with the use of force. We observe that Mr N is a slim, young man who is being restrained by three considerably heavier and larger officers who are also assisted by a fourth female officer”. The panel found the force to be excessive and said “we do not accept the claim that PC Reynolds was only applying force at 25-30%. From the CCTV both the punches and the knee strikes are powerfully applied and in applying the knee strikes the officer’s leg is extended a long

way back before force is applied. This is likely to have resulted in the application of a greater degree of force than if the knee had only been extended a shorter distance”.

30. The panel noted that PC Humes had told PC Reynolds to calm down and that was recorded in his pocket notebook. The panel noted that PC Swindlehurst formed the view that she would have made an assessment after the first strike.
31. The panel considered that the expert report from Martin Graves was detailed but part speculative because it suggested that Mr N was trying to escape which was not evidenced by the CCTV or witness accounts and that he had exceeded his area of expertise and that his evidence did not change their view about the number of strikes.
32. In respect of the second allegation the panel then found that PC Reynolds had spoken to PC Humes as alleged, relying in part of the coincidence of wording used in PC Reynolds’ messages. Some of the other allegations relating to the communications were found proved. The panel found gross misconduct in respect of what had been said to PC Humes, and misconduct in respect of the words used to members of the public.
33. In respect of the third allegation relating to PC Crisp these were found proved and found to amount to misconduct.
34. In respect of the fourth allegation the panel found that PC Reynolds had acted in breach of standards of confidentiality in relation to some of his communications and that this amounted to misconduct.
35. The panel then noted in mitigation the character evidence and recorded that PC Reynolds had risked his life to save a distressed member of the public and had no previous findings of misconduct and had the support of colleagues. So far as sanction was concerned the panel recorded “Use of force is a very serious matter which erodes the public confidence in the police. Having taken all the circumstances into account and balancing the mitigating factors and in considering the available outcomes we are of the view that the actions and failings in this case are not compatible with continued employment with the BTP”. The regulation 21 Notice was annexed to the determination.

Proceedings before the Appeals Tribunal

36. PC Reynolds appealed to the Appeals Tribunal pursuant to the Police Appeals Tribunals Rules 2012. The Chair of the Appeals Tribunal was required to determine “whether the appeal has a real prospect of success ...”. Permission to appeal was granted on 4 October 2017 on the issue of whether the sanction was unreasonable, and whether findings of misconduct in relation to private text messages were compatible with PC Reynolds’ right to a private life.
37. The hearing of the appeal took place on 21 February 2018. At the end of the hearing the Appeals Tribunal announced that it had decided to dismiss the appeal in relation to private text messages, but allow the appeal on the basis that the sanction was unreasonable. The Appeals Tribunal substituted a decision to impose a final written warning. The written statement of the determination of the Appeals Tribunal was dated 28 February 2018.

38. In the written determination the Appeals Tribunal identified that an appeal was not a rehearing and could only succeed if the appellant could show that the finding or disciplinary action imposed fell outside the range of reasonable findings or sanctions in the circumstances of the case, noting that the Appeals Tribunal was not entitled to substitute its own view unless it had already concluded that the panel's approach or findings were unreasonable.
39. The Appeals Tribunal recorded that the panel's findings of fact stand, "supplemented by the factual summary in the Respondent's Response to the Grounds of Appeal and our own viewing of the CCTV footage." The Appeals Tribunal then set out the relevant circumstances. The Appeals Tribunal recorded that PC Reynolds "first made physical contact with Mr N by placing his left hand on Mr N's shoulder. Mr N reacted to this contact by pushing the Appellant. There followed an altercation during which all three officers took Mr N to the ground. Mr N resisted this and was shouting, kicking and swearing. During this incident the Appellant punched Mr N twice on his right shoulder and used approximately five knee strikes in the area of Mr N's back or shoulder."
40. The intervention of PC Humes and the details of the investigation carried out by PC Crisp, together with the other actions of PC Reynolds, were then set out.
41. The Appeals Tribunal then summarised the findings of the panel before turning to the grounds of appeal.
42. The Appeals Tribunal dealt with the complaint relating to the messages sent by PC Reynolds and concluded that there was no error in approach by the panel.
43. The Appeals Tribunal then turned to the decision to dismiss recording that PC Reynolds argued that the decision to dismiss fell outside the range of outcomes reasonably available to the panel. The Appeals Tribunal noted that it had been invited by both parties to watch the CCTV footage. Having done so the Appeals Tribunal recorded that: "there can be no doubt that some use of force was justified" recording that Mr Morley argued that this was not accepted by the panel, which was an analysis not accepted by the Appeals Tribunal. Other relevant findings by the Appeals Tribunal were: "it is not clear whether the misconduct panel reached a view as to what level of force would have been reasonable or how far over the line the appellant's conduct was"; "the panel's comment that the number of strikes in a short period of time allowed no time for a re-assessment ... in fact it is clear from the CCTV footage that there was a gap of nine seconds between the first three strikes ... and the remainder"; and "the panel did not find that the appellant lost his temper or lost control of the situation".
44. The Appeals Tribunal recorded that there was no challenge to the findings of gross misconduct and noted that gross misconduct was defined as "a breach of the standard of professional behaviour so serious that dismissal would be justified". The Appeals Tribunal noted that cases in which dismissal fell outside the range of reasonable responses would be rare.
45. The Appeals Tribunal then recorded that "the Appellant's conduct was at the lower end of the spectrum of excessive use of force" recording that "the Appellant was in a dynamic situation, having to make quick judgments about how to deal with a young

man who was uncooperative and, ultimately, physically aggressive ... Throughout the eighteen or nineteen second period when the strikes were applied Mr N was flailing and kicking, seeking to avoid being detained. The Appellant went too far, but he did not lose control or engage in gratuitous violence.” The Appeals Tribunal noted that there was no significant harm caused by PC Reynolds’ conduct and that Mr N had said that the strikes were not very painful. The Appeals Tribunal recorded that Mr N had reported a sore leg and a cut hand when being checked into custody but that there was no suggestion that those injuries were caused by PC Reynolds.

46. The Appeals Tribunal also recorded that this was a brief one-off episode in PC Reynolds’ 14 year career, and there were no other reports of excessive force. The Appeals Tribunal recorded that there were no aggravating factors and PC Reynolds had spent several minutes speaking to Mr N trying to gain his co-operation before the altercation took place. The Appeals Tribunal recorded that the panel had placed too much weight on the fact that the incident was triggered by PC Reynolds “touching Mr N and they appear to have been unduly influenced by the fact that they rejected his account of the reason for using force. Neither was a central consideration. The circumstances were evident from CCTV footage and clearly demanded some use of force”.
47. Having referred to the other findings against PC Reynolds the Appeals Tribunal noted that they were matters capable of being addressed by warnings. The Appeals Tribunal “accept the point ... that the public expect police officers to be able to deal with difficult and uncooperative teenagers without resorting to excessive force, but the findings against the Appellant were ultimately very limited. The misconduct did not relate to his approach to the interaction with Mr N overall and nor was there any finding that he or any other officer acted unlawfully by seeking to detain Mr N.”. The Appeals Tribunal substituted a final written warning.

The issues

48. I am grateful to Mr Morley on behalf of the Chief Constable and Mr Ladenburg on behalf of PC Reynolds for their helpful written and oral submissions. In written submissions on behalf of the Chief Constable Mr Morley submitted that the Appeals Tribunal acted unlawfully and made public law errors and was irrational in that: (1) it failed to properly understand the panel’s findings in relation to the initial use of force; (2) failed to properly understand the panel’s finding in relation to the amount of force used; (3) failed to understand its own role; (4) wrongly concluded that there were no aggravating factors; and (5) failed to understand the seriousness of the other allegations. In written submissions the IOPC adopted the Chief Constable’s submissions and submitted that the Appeals Tribunal misunderstood the panel’s finding in relation to the initial use of force and the amount of force, and came to unreasonable and irrational conclusions about the seriousness of the conduct.
49. In written submissions on behalf of PC Reynolds Mr Ladenburg submitted that the Appeals Tribunal was right to find that the panel’s decision was unreasonable and substitute its own decision on sanction. It is submitted that the Appeals Tribunal was right to find that the use of some force was justified, and was entitled to infer that the panel had considered that some force was justified because it had considered the strikes excessive and disproportionate rather than simply unlawful, noting that the panel had not made a clear finding that there was unlawful force on initial contact.

PC Reynolds submits that the Appeals Tribunal properly directed itself as to its role, that there were no aggravating factors as set out in paragraph 4.67 of the College of Policing Guidance on outcomes in police misconduct proceedings and that the Appeals Tribunal decision on sanction was appropriate.

50. The issues were further refined in the course of oral argument. It is apparent that the real issues for my decision are whether:
- (1) the Appeals Tribunal made an error of law in setting out its approach to the appeal;
 - (2) the Appeals Tribunal acted irrationally and unlawfully by misunderstanding the panel's findings in relation to the initial use of force or amount of force used;
 - (3) the Appeals Tribunal acted irrationally by concluding that there were no aggravating factors;
 - (4) the Appeals Tribunal acted irrationally by failing to understand the seriousness of the other allegations found proved by the panel; and
 - (5) what, if any, relief ought to be granted if any of the grounds are made out.

No error of law by the Appeals Tribunal in its approach to the appeal – issue 1

51. I can discern no error of law made by the Appeals Tribunal in its approach to its powers on the appeal. On the contrary there was a careful consideration of the powers of the Appeal Tribunal when limited permission to appeal was granted as set out in the rule 11 determination dated 4 October 2017. Further there was an accurate and succinct summary of the applicable law governing the basis on which the Appeals Tribunal might act in paragraph 8 of the determination of the Appeals Tribunal.
52. Mr Morley was unable in oral submissions to identify any relevant error of law in the legal approach identified by the Appeals Tribunal. His complaint is that the Appeals Tribunal did not follow the proper legal approach in practice, but that is a different point and requires an analysis of the decisions of the panel and Appeals Tribunal.

Irrational finding that the panel had found the use of force justified – issue 2

53. The judgment of the panel discounted the evidence of PC Reynolds because of contradictions in his evidence. The panel also identified that PC Reynolds had not decided to arrest Mr N and that the use of force in placing his hand on Mr N's shoulder was unlawful. These were permissible findings which could not be challenged before the Appeals Tribunal. However the panel did not analyse what occurred next in terms of whether the use of force by PC Reynolds was permissible. There was no analysis of whether Mr N's reaction was simply to push away the unlawful hand on his shoulder, or whether Mr N went beyond permissible self defence in pushing PC Reynolds. There was no analysis of the reactions of the other officers and whether their intervention in the light of Mr N's reactions was lawful or unlawful. There was no analysis of the fact that one of the police officers was shown by the CCTV for a period of time trapped underneath Mr N in relation to whether this meant that force might lawfully be used against Mr N to free that officer. As was

identified in argument all that the panel had done was to reject PC Reynolds' explanations for the use of force (which, as already noted, was a permissible approach to take given the inconsistencies) and to reject some evidence from some of the other police officers but had not made any further findings about what was demonstrated by the CCTV. The panel needed to make those further findings in order to determine whether PC Reynolds was "acting pursuant to a legitimate policing purpose", as set out in the College of Policing guidance on outcomes. Even if the panel had concluded that Mr N was acting in reasonable self defence and that his contact with PC Reynolds was lawful, meaning that the response of the other officers and PC Reynolds to that contact was unlawful, it was still necessary to identify what was shown by the CCTV to see whether there was "any element of provocation, threat or disturbance which may have affected the officer's judgement, eg, in relation to the use of force" as identified in the College of Policing guidance on Outcomes. In that respect it might be thought that a relevant issue to determine was whether PC Reynolds was using dysfunction or distraction techniques in punching Mr N in the shoulder and using the knee strikes. It was also relevant to note the absence of injury caused by PC Reynolds.

54. In those circumstances in my judgment the Appeals Tribunal was acting lawfully and rationally in concluding, in effect, that the approach of the panel had been unreasonable and to consider these matters for itself noting the dynamic situation in which PC Reynolds found himself.
55. In its judgment the Appeals Tribunal said, at paragraph 35(a) "There can be no doubt that some use of force was justified. Mr Morley argued that this was not accepted by the Misconduct panel, but reading their decision as a whole it is clear that they proceeded on that basis ... In the absence of any finding that either the initial contact or the decision to detain Mr N were unlawful, the only reasonable conclusion is that it was necessary to use some force against Mr N."
56. In my judgment there are two important difficulties with this passage. The first is that the conclusion that the panel proceeded on the basis that some force was justified is not apparent from a reading of the judgment of the panel. It is true that the panel did refer to the number of strikes being "excessive and disproportionate to the threat and allowed no time for re-assessment of it" but that followed a passage where the panel had set out the inconsistencies between PC Reynolds' accounts and rejected his explanation. The panel had said nothing to indicate that the force was lawful and it is reading too much into the words "excessive and disproportionate" to suggest that the panel found that the use of force was justified. The second difficulty is that the Appeals Tribunal stated that there was no finding by the panel that the initial contact was unlawful and that the only reasonable conclusion is that it was necessary to use some force against Mr N. This is not a fair reading of the determination of the panel because the panel found in terms "we are not persuaded that Mr N was likely to be arrested for fare evasion when PC Reynolds touches him". In circumstances where it is common ground that PC Reynolds did not exercise any powers to arrest Mr N and did not say to Mr N that he was under arrest for fare evasion then there was no lawful basis for PC Reynolds placing his hand on Mr N's shoulder. As I have already noted the panel did not then go on to analyse what then occurred.
57. In these circumstances in my judgment the Appeal Tribunal acted irrationally and made an error of law by finding that the panel had found that PC Reynolds' use of

force was justified, when no such finding had been made by the panel, and by failing to reflect the panel's finding that PC Reynolds had not exercised any power of arrest.

The Appeals Tribunal were right to identify that there were no aggravating factors – issue 3

58. The Appeals Tribunal recorded that there were no aggravating factors such as those set out in the College of Policing Guidance on Outcomes, other than the abuse of position inherent in any use of force case. It might be noted that the panel made a similar finding.
59. Mr Morley was unable to identify any of the aggravating features set out at paragraph 4.67 of the College of Policing Guidance as being present in this case. In my judgment the Appeals Tribunal approach to the aggravating factors was reasonable and right.

The Appeals Tribunal did not act irrationally by failing to understand the seriousness of the other allegations found proved by the panel – Issue 4.

60. There is nothing in the materials before me to show that the Appeals Tribunal acted irrationally in failing to consider all the circumstances of the gross misconduct and misconduct proved against PC Reynolds. The determination on sanction is for the Appeals Tribunal if the Appeals Tribunal has concluded that the decision of the panel on outcome was unreasonable. However in circumstances where it is apparent that it will be for the Appeals Tribunal to consider again this issue on the appeal I say nothing more about that.

What if any relief ought to be granted – issue 5

61. As noted above this is not an appeal, and I am not at liberty to impose the sanction or outcome that I consider appropriate in this case because my function on this judicial review is only to audit the legality of the relevant decision making. As appears above I consider that the Appeal Tribunal acted irrationally and made an error of law by finding that the panel had found that PC Reynolds' use of force was justified, when no such finding had been made by the panel, and by failing to reflect the panel's finding that PC Reynolds had not exercised any power of arrest. However as appears above I also identified failings on the part of the panel to consider material facts relevant to outcome or sanction in its determination.
62. Mr Morley submitted that I should quash the decision of the Appeal Tribunal and restore the sanction of dismissal without notice because the Appeal Tribunal should have upheld the sanction imposed by the panel. Mr Ladenburg submitted that I should find that the error made by the Appeal Tribunal would not have affected the Appeal Tribunal's decision to impose a final written warning and that I should therefore exercise my discretion to refuse relief to the Chief Constable.
63. I am wholly unable to say that the Appeals Tribunal should have upheld the sanction imposed by the panel. This is because it is for the Appeal Tribunal to consider all of the relevant circumstances of the use of force, whether it was lawful and even if it was not lawful whether there were proper policing purposes to be served by the use of

force, for example freeing another police officer, together with any issues of provocation, threat or disturbance.

64. For similar reasons I am unable to say that it is highly likely that the outcome for the Chief Constable would not have been substantially different if the error by the Appeals Tribunal had not occurred. This is because the Appeals Tribunal may have decided still to allow PC Reynolds' appeal against the sanction of dismissal, but it may not have done. That will be for the Appeals Tribunal to determine.
65. I will therefore quash the decision of the Appeals Tribunal and remit PC Reynolds' appeal against the outcome imposed on him by the panel back to the Appeals Tribunal.

Conclusion

66. For the detailed reasons set out above in my judgment: (1) the Appeals Tribunal set out the correct approach to the exercise of its powers; (2) the Appeal Tribunal acted irrationally and made an error of law by finding that the panel had found that PC Reynolds' use of force was justified, when no such finding had been made by the panel, and by failing to reflect the panel's finding that PC Reynolds had not exercised any power of arrest. However as appears above I also identified failings on the part of the panel to consider material facts in its determination on sanction; (3) the Appeal Tribunal was right to identify that there were no aggravating factors such as those set out in the College of Policing Guidance; (4) the Appeal Tribunal did not act irrationally by failing to understand the seriousness of the matters proved; and (5) I am unable to say that the Appeals Tribunal should have upheld the decision of the panel, or that the public law errors made by the Appeals Tribunal would have had no effect on its decision on outcome or sanction. I will therefore quash the decision of the Appeals Tribunal and remit PC Reynolds' appeal against the outcome imposed on him by the panel back to the Appeals Tribunal.