Neutral Citation Number: [2020] EWHC 1400 (Admin)

Case No: CO/4124/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM DISTRICT REGISTRY
(Remote Hearing by Skype for Business)

Date: 04/06/2020

Before :

MRS JUSTICE EADY

- -

Between :

R (on the application of CHIEF CONSTABLE WEST MIDLANDS POLICE)	**Claimant**
- and -	
PANEL CHAIR, POLICE MISCONDUCT PANEL	**Defendant**
-and-	
OFFICER 'A'	**Interested Party**

- -
- -

Ms O Checa-Dover (instructed by **Joint Legal Services, for Staffordshire and West Midlands Police**) for the **Claimant**
Mr J Butterfield QC (instructed by **Cartwright King, Solicitors**) for the **Interested Party**

Hearing dates: 19 May 2020

- -

Approved Judgment

Mrs Justice Eady

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 am on Thursday 4 June 2020.

MRS JUSTICE EADY:

Introduction and Preliminary Points

1. Pursuant to permission granted by Chamberlain J on 3 March 2020, this is the hearing of an application for judicial review brought by the Chief Constable of West Midlands Police, the Claimant, against the Decision on Outcome reached by the Police Misconduct Panel ("the Panel") following a gross misconduct hearing concerning the interested party, Officer A.

2. Given restrictions necessitated by the current Coronavirus pandemic, and with the agreement of the parties, the hearing of the appeal took place by video (using Skype for Business); it remained, however, a public proceeding and the hearing, its mode and its timing, was published in the cause list, giving an email contact for any person who wished to "attend".

3. At the time of the events relevant to these proceedings, Officer A worked in the Claimant's covert surveillance unit "(the Unit"). At all previous stages, to protect his identity and that of other officers in the Unit, it was agreed that the Interested Party should be referred to by the use of the pseudonym "Officer A" and that other officers from the Unit should be similarly anonymised. That course was similarly adopted in these proceedings, albeit no Order under CPR 39.2(4) had been made in this respect prior to the hearing. Having been addressed on this question at the outset of the hearing, I am satisfied that the nature of the Interested Party's work in the Unit, and that of other officers, was such as to give rise to a legitimate fear of danger, including a potential threat to life, so that the non-disclosure of his identity, and that of his former colleagues, continues to be necessary. I am further satisfied that, balancing his, and their, interests with the need for a fair trial in this matter, and with the broader public interest in open justice, such an Order is proportionate and best secures the administration of justice in this case.

4. Officer A's gross misconduct hearing commenced on 23 September 2019 and the Panel's Decision on Facts was given on 26 September 2019, followed by its Outcome Decision the same day. Officer A's conduct was found by the Panel to have breached the Standards of Professional Behaviour, and to have amounted to gross misconduct. The Panel's Decision on Outcome was that Officer A should be made subject to a final written warning.

5. It is common ground that, in reaching its Decision on Outcome, the Panel was required to have regard to the Guidance on Outcomes in Police Misconduct Proceedings published by the College of Policing ("the Guidance"). It is the Claimant's case, however, that the Panel: (1) unlawfully failed to exercise its discretion in accordance with the structure identified in the Guidance; (2) unlawfully failed to give proper consideration to the actual harm caused by the proven racist comments and behaviour; (3) placed unlawful weight on Officer A's mitigation, contrary to the Guidance; and (4) reached an irrational decision. The Claimant asks the Court to make a quashing Order in respect of the Panel's Decision on Outcome.

6. The Interested Party contends that the Claimant is wrong in each of these criticisms. In any event, he submits that, save for a finding of irrationality (in a public law sense), it could not be said that any such procedural error would have affected the overall

conclusion reached, and it would only be if the Panel's Decision on Outcome was found to be irrational that the Court should make the quashing Order sought and, even then, the appropriate course would be to remit this matter to be re-determined by the same Panel.

The Facts and the Panel's Decisions

7. Officer A is a long-serving police officer, who joined the service in January 2003. I have read his service record and the numerous letters in support that he submitted to the Panel and it is apparent that Officer A has received a number of commendations, awards and letters of gratitude during his service and is well thought of by many with whom he has worked.

8. At the time of the events in issue, Officer A was working in the Unit, which was divided into three work teams: Red, Blue and White. Officer A was an informal leader of the Blue Team; Officer B held a similar position in the Red Team. The allegations before the Panel related to a covertly recorded conversation between Officers A and B, in the Unit office, on 5 April 2018.

9. Having heard evidence from Officers A and B and from others, including Officer L (Police Sergeant L held a supervisory role in the Unit), the Panel concluded that the Unit was badly managed: the three teams were expected to work collaboratively but there was a culture of cliques forming and it appeared that three officers from black and minority ethnic ("BAME") backgrounds (Officers C, E and F) had started "*an exclusive clique*" across the boundary of the Red and Blue Teams. In turn, Officers C, E and F were unhappy at the way they were treated in respect of the allocation of work, on-call duties, training opportunities and overtime, but did not trust the management enough to complain. The Panel found that unresolved grievances were thus proliferating in the Unit.

10. It was against this background that, on the morning of 5 April 2018, Officer E left his mobile 'phone on 'record' when he left the Unit office with Officers C and F. Although Officer E contended this had been inadvertent, the Panel disagreed, finding that this was likely to have been done to collect evidence of the problems in the Unit.

11. A transcript of the mobile 'phone recording was before the Panel; there was no substantive dispute as to its content. At the start of the recording, Officers C, E and F are to be heard having a conversation about Asian food, weddings and other matters; Officers A and B are present. When Officers C, E and F then leave, Officers A and B immediately enter into a conversation about them, albeit the conversation goes on for over 45 minutes and also covers a number of other issues and grievances.

12. After subsequently listening to the recording of this conversation, Officer E reported the matter to the Claimant's Professional Standards Department, which duly led to an investigation into alleged breaches of Police Standards of Professional Behaviour. Following the Investigating Officer's report, on 9 August 2019 Notifications of Misconduct Proceedings were served on both Officers A and B, pursuant to regulation 21 of the Police (Conduct) Regulations 2012 ("the Regulation 21 Notice"). As against Officer A, it was contended he had been a willing participant in a conversation in which he had used racist, abusive, inappropriate, derogatory and offensive comments.

13. In his response, served under regulation 22 of the 2012 Regulations, Officer A essentially accepted that he had said that which was cited from the transcribed recording and - whilst disputing that some of the remarks were racist, inappropriate, derogatory or offensive - accepted he had thereby breached the Standards of Professional Behaviour. Officer A contended, however, that whilst this constituted misconduct, it did not amount to gross misconduct and he urged that it was necessary to have regard to the context in which his remarks had been made.

14. Relevantly, the Regulation 21 Notice had included the following allegations against Officer A (all arising from the recorded conversation):

> "9. … you describe Officer C, Officer E and Officer F as gangsters: 'He asked me if I'd go with him. Mate. I've never heard so much shit and bollocks in the last fucking twenty-five minutes come out of fucking three people's mouths. They are all gangsters. They all know gangsters, fucking fuck me.'
>
> 10. Officer B begins to complain about work and does not challenge your comments; you are heard to warn him that Officer C has returned to the office.
>
> 11. Once Officer C leaves, you and Officer B return to your conversation about problems within the team and in particular about Officer C, Officer E and Officer F leaving the office in a car together.
>
> 12. In response to Officer B saying '… Doesn't take three of them' to which you say 'It doesn't mate, but that will become common fucking practice now mate. It'll become common practice now because, mate, take this as a racist fucking comment if you like I don't care mate. When they start moving in streets they all live together. They don't want fucking amalgamating, mix with other people. When they work together, they don't want to work, mix. Do you know what I mean?' which prompted Officer B's agreement.
>
> 13. You said 'They'll form their own clan. Them pair did it straight away. Now they'll do it. When the next one comes in mate they'll do it. Yeh, yeh. Honestly mate.' This was in reference to Officer C, Officer E and Officer F and is taken to be a racist comment. ….
>
> 14. ….
>
> 15. ….
>
> 16. You then complained that Officer C, Officer E and Officer F did not always speak English in the office and whilst saying the following, you impersonated an Asian speaker: [*a lengthy passage from the transcript is then set out*] …

> 17. ….
>
> 18. … your conduct as a whole during the said conversation created an environment where it was acceptable for others to use and participate in racist, abusive, inappropriate, derogatory and offensive comments."

15. It was common ground that references to "*they*" (see paragraph 12) were to individuals of Asian ethnicity and the Panel found that, by suggesting "*when they start moving in streets they all live together"*, Officer A was drawing on, and adopting, a racist stereotype (see paragraph 4 of the Outcome Decision). As for the reference to "*the next one*" (paragraph 13), Officer A had explained in interview that this referred to a further BAME officer whose admission to the team was anticipated; he also accepted that he would not have said the same about a white officer joining the Unit.

16. In the Decision on Facts, the Panel found that paragraphs 9, 10, 11, and 12 of the Regulation 21 Notice were factually correct and undisputed and concluded that these allegations against Officer A were proven. Paragraph 13 was similarly undisputed and held to be factually correct; the Panel concluding:

> "25. We find it proved. He acknowledged in evidence that it was a racist comment, and we agree that this was an obvious, inappropriate racist comment which both Officer A and Officer B ought to have recognised at the time. We find proved that Officer A's words were racially inappropriate and offensive as alleged."

17. As for the matters set out at paragraph 16 of the Regulation 21 Notice, whilst factually correct, the Panel did not find the content of the remarks recorded to be racially offensive or inappropriate, but, at paragraph 28 of the Decision on Facts, held:

> "mimicking of an Asian accent, in the context of other comments, is racist behaviour by A, as he acknowledged in evidence,"

18. Having regard to the matters thus found proved against Officer A, the Panel concluded that the general allegation at paragraph 18 had also been made out (paragraph 30, Decision on Facts).

19. On that basis, the Panel found that Officer A had breached the Standards of Professional Behaviour: he had breached the Standards of Equality and Diversity, by making racist comments; of Authority, Respect and Courtesy, by criticising and insulting his colleagues; and had engaged in Discreditable Conduct, by doing those things in such a way that the public's confidence in policing would be undermined (paragraph 32, Decision on Facts).

20. Rejecting the submission that there had been an expectation of privacy, the Panel concluded (see paragraph 33, Decision on Facts) that:

> "Communicating inappropriate thoughts between serving officers on duty tends to reinforce and perpetuate an unhealthy and undesirable culture in the work place. We recognise that neither of these two officers would have acted as they did if they had known they were being recorded, or if there were people present who would be offended. There is some mitigation which tends to reduce the seriousness of the misconduct by each officer, but the degree of mitigation is limited."

21. Having:

> "regard to the obvious and serious potential for Officer A's conduct to undermine public confidence in the Police Service, which is essential to policing by consent, and to deter recruits from ethnic minorities,"

the Panel was clear that Officer A had been guilty of gross misconduct (paragraph 34, Decision on Facts).

22. In separately considering the appropriate outcome, the Panel referred to the "*unsatisfactory work environment*", apparently accepting Officer A's submission that this was a relevant consideration. The Panel opined that the recording had contained:

> "… a number of conversations about work gripes, largely spoken by you and Officer B, which were triggered by the decision of Officers C, E and F to go out together as a 3 person team to do a job which appeared to you to require only two people, when there was a backlog of urgent work to be done in the office. In stressful circumstances, you were, in your words, 'venting' or letting off steam. Although ready to speak out when necessary, you are not good at articulating your concerns. You started to apply racial stereotypes about your colleagues who were out of the office, and made inappropriate and racist comments. In the three hours of recording, there were several occasions when you used inappropriate language."

See paragraph 4, Outcome Decision.

23. The Panel referred to the fact that, in the subsequent investigation, Officer A had made full admissions and expressed regret. Although satisfied that Officer A had not intended to cause offence to any individuals, had believed he was speaking in private, and did not foresee any harm to the public or any likelihood of undermining public confidence in the Police, the Panel considered that his comments had been likely to prolong the "*toxic culture*" in the Unit, and had the potential to seriously undermine public confidence (paragraph 5, Outcome Decision).

24. Referring to what might be seen as personal mitigation relating to Officer A, at paragraph 6 of the Outcome Decision, the Panel made the following observations:

> "6. You have voluntarily undertaken Equality and Diversity training since then. We are satisfied that you are not a racist. When you 'shot your mouth off' you did not reveal an aspect of your character which was previously concealed. Instead, in anger, you said things you did not mean. An abundance of independent character evidence confirms that you have always been friendly and supportive to colleagues of all ethnic backgrounds, and have worked well in a diverse force serving a diverse community."

25. Reminding itself that the purpose of the police misconduct regime is not to punish an officer but to achieve the following aims:

> "• Maintaining public confidence in and the reputation of the police service
>
> • Upholding high standards in policing and deterring misconduct
>
> • Protecting the public."

the Panel noted that it was required to:

> "assess the seriousness of the misconduct, keep in mind the three-fold purpose, and choose the outcome which most appropriately fulfils that purpose, given the seriousness of the conduct in question."

See paragraph 7, Outcome Decision.

26. The Panel then expressly referenced the Guidance, recording that it had had regard to "*culpability, harm, aggravating factors and mitigating factors*" (paragraph 8, Outcome Decision), and then setting out its reasoning as follows:

> "9. Your culpability is high. Probably nothing is more important to West Midlands Police than its reputation for fairness and diversity. Undermining public confidence could destroy the ability of the Force to police by consent, and for that purpose to recruit diverse officers. There was a serious risk of harm to the reputation of the Police Service.
>
> 10. Your misconduct was not premeditated, however, and was limited to a single episode of relatively short duration. You are of good previous personal and professional character. There is no reason why you should be unable to continue to serve in the Police, so long as you are appropriately supported by proper supervision. Your misconduct occurred in circumstances where you were stressed by taking on responsibility for managing in the absence of effective supervision. It was provoked by an apparently inexplicable decision by three

> officers to leave the office instead of helping with the backlog of work.
>
> 11. The Appropriate Authority has submitted that dismissal is the only appropriate and proportionate outcome. Mr Butterfield on your behalf has submitted that dismissal is not necessary. We agree that no lesser sanction than a final written warning, such as management action, or a warning, could be justified in a case where public confidence is at stake.
>
> 12. We bear in mind that officers of your length of service and good character, with specialist skills, are a valuable resource who should be kept in West Midlands Police where possible. If we thought that you might be unable to remedy your misconduct, we would say that dismissal was inevitable, because there is no place in a modern Police Force for an officer whose conduct will harm the reputation of the Police and undermine public confidence. But we are impressed that you have taken steps to remedy your misconduct, and what we see as genuine remorse. BAME officers who have worked with you regarded you as a friend."

27. It was on that basis that the Panel concluded that the "*appropriate and sufficient outcome*" in Officer A's case would be a final written warning.

28. As for Officer B, the Panel had rejected any allegation that he had himself made racist or derogatory remarks but had found that he was also guilty of gross misconduct on the basis of his failure to challenge and/or report the remarks made by Officer A. He, too, was given a final written warning.

The Approach

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. As the Panel recognised at paragraph 7 of its Outcome Decision in Officer A's case, in determining the appropriate outcome, it 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 Grounds of Challenge – Submissions, Discussion and Conclusions

52. There is a degree of overlap in the grounds of challenge in this case. The first three grounds each contend that the Panel failed to properly follow the Guidance: by ground (1), it is said the Panel failed to follow the structured approach laid down; by ground (2), it failed to give proper consideration to the actual harm caused in this case; and by ground (3), it placed unlawful weight on Officer A's mitigation (unlawful, in that it was contrary to the Guidance). More generally, the Claimant says that the Panel's Outcome Decision was irrational in a public law sense, the conclusion reached being one that no reasonable panel could have arrived at on the same material (see, e.g. *Salter v Chief Constable of Dorset* [2012] EWCA Civ 1047 at paragraph 22).

53. It is common ground that the Panel was required to follow the three-stage structured approach laid down in the Guidance (and per *Fugler*). That said, as Mr Butterfield QC submits, this did not mean the Panel was required to exhaustively cite each consideration set out in the Guidance, or to ruminate upon each part, in order to demonstrate adherence to it. Equally, however, the mere fact that the Panel expressly referred to the structured approach laid down in the Guidance would not be, of itself, enough to demonstrate that it had applied that approach. The issue is one of substance rather than form. The Panel was not involved in a tick-box exercise but was required to apply the structured approach laid down as a way of ensuring that its Outcome Decision properly took account of all relevant matters and afforded the necessary primacy to public confidence. The question is whether the Outcome Decision, as explained in this case, demonstrates this.

54. It is the Claimant's case (ground 1) that the Panel's reasoning failed to evince any proper assessment of seriousness – the first stage in the structured approach it was required to apply. The Panel had found that Officer A had not only used racist language but had applied racist stereotypes and, in mimicking an Asian accent, had engaged in racist behaviour. There was, however, no indication that it considered that which the Guidance made clear, that discrimination because of the protected characteristic of race was a form of misconduct considered to be especially serious (paragraphs 4.15 and 4.51 of the Guidance) or that it took this into account as an aggravating feature (paragraph 4.67). Equally, the reasoning showed no appreciation of the actual harm caused by Officer A's conduct (grounds 1 and 2), failing to refer to the evidence from BAME officers in the Unit who attested to the very real difficulties they experienced in their work after learning of this conversation (it had been shared with others by Officer E). The Panel had also (ground 3) failed to follow the Guidance by giving such weight as it did to Officer A's personal mitigation, and (grounds 3 and 4) its apparent reliance on circumstantial mitigation was both inconsistent with its earlier treatment of the same issue at paragraph 33 of its Decision on Facts (where it had stated "*the degree of mitigation is limited*") and irrational (there was no basis for concluding that Officer A had been provoked into applying racist stereotypes). It was, further, irrational to conclude that a final written warning would maintain public confidence, particularly when this was the same sanction as applied in the case of Officer B (who had been guilty only of failing to report), and irrelevant to speculate as to whether Officer A was a racist.

55. For Officer A, it is objected that, as per paragraph 4.4 of the Guidance, seriousness is to be assessed *by reference to* four elements: there is no requirement that a panel set

out an analysis of each one individually – not least as it may not be possible to separately compartmentalise culpability from harm, and both may overlap with aggravating and mitigating factors - and no obligation to show express consideration of each. Although the Panel was required to adopt the three-stage approach laid down in the Guidance, the further provisions relating to seriousness were advisory rather than prescriptive – detailing how this element in the structure should be approached, not dictating a further structural requirement. In the present case, the Panel had set out the overall structure it was required to follow and it was possible to see it had engaged with each of the relevant factors identified within the seriousness assessment stage.

56. In my judgement, in determining seriousness (the necessary first step in deciding the appropriate outcome), the Panel was required to consider each of the four elements identified: culpability, harm and aggravating and mitigating factors. In some cases, it may be obvious that there were no aggravating features, or there was no mitigation, but these four elements identify the relevant considerations for an assessment of seriousness and it should be apparent that they have been taken into account.

57. In the present case, it is right to say that the Panel expressly referred to the four elements (paragraph 8, Outcome Decision) and stated that it found Officer A's culpability to be "*high*" (paragraph 9). It did not expressly refer to the recognition that discriminatory conduct is considered to be especially serious (paragraph 4.51 of the Guidance), but that could be said to be encompassed by its description of Officer A's culpability being "*high*" and by the Panel's express recognition of the importance of the West Midland Police Force's reputation for fairness and diversity. Equally, the Panel did not expressly refer to discrimination being an aggravating factor, but that could be seen as acknowledged by its finding that Officer A's conduct could "*destroy the ability of the Force to police by consent, and for that purpose to recruit diverse officers*" and that there was "*a serious risk of harm to the reputation of the Police Service*".

58. By construing the Panel's reasoning in this way, I am affording it a degree of latitude, but I think it would be wrong to necessarily expect cross-referencing to each relevant point within the Guidance and I accept that there was a degree of overlap between the matters to which the Panel had to have regard in this case and it would not have been appropriate to double-count particular factors. That said, I reject Mr Butterfield QC's suggestion that I should infer that, by its failure to refer to the conduct in this case as being especially serious, or as an aggravating factor, the Panel had found that it was not. That would suggest that the Panel had indeed failed to properly refer to the relevant sections of the Guidance in this regard – expressly identifying discriminatory conduct (which must include the use of racist stereotypes and racist language and behaviour) as especially serious - and had thus failed to take into account factors relevant to its assessment of seriousness in this case.

59. Although I consider it right to adopt a generous approach to the reasoning provided by a misconduct panel, the decision reached still needs to demonstrate engagement with the relevant factors identified on the evidence adduced in the particular case. In this instance, the evidence relevant to the assessment of harm did not just relate to the broader issues of reputational harm the Panel had identified (although those were very real and I acknowledge the importance this quite properly has for the Claimant); there was also evidence of actual harm suffered by BAME officers in the Unit who had

come to learn of Officer A's remarks and conduct and yet no indication that this was taken into account by the Panel at all.

60. For Officer A, Mr Butterfield QC contends this is an unfair criticism: the assertion of a shortcoming regarding a sub-factor (actual harm) of a subtopic (harm) which is part of an overall assessment of seriousness. I disagree. Although I accept that any consideration of harm is, by its nature, a multifaceted exercise, the Panel was required to have regard to that which was relevant to its assessment of harm in this case and that, on the evidence before it, included the impact of Officer A's conduct on other colleagues in the Unit.

61. It is right to say that there is a reference to the impact of this conduct on "*existing officers*" at paragraph 53 of the Panel's Outcome Decision in Officer B's case but this does not appear in the reasoning in relation to Officer A. Although the Panel acknowledges that Officer A's words "*were likely to prolong the toxic culture in the unit*" (paragraph 5, Outcome Decision), I cannot see that engages with what was said to be the actual harm done to BAME officers who had learned of Officer A's remarks.

62. Mr Butterfield QC further argues that the Panel was required to go no further than it did in this case because the evidence of actual harm had to be contextualised and there were good reasons for not simply accepting at face value the evidence of the BAME officers on this issue. On behalf of Officer A, Mr Butterfield QC suggests that "*the witness assertions involved so much that was overblown that it is not remotely speculative … to observe that approaching such evidence required caution – by contrast, it is an obvious feature, without which any approach to the evidence would be obliged to be stripped of proportion and common sense*" (paragraph 22, Skeleton Argument for the Interested Party). I cannot, however, accept this submission. The statements of the officers concerned certainly paint a very troubling picture of their experiences, but it does not appear to have been challenged and I cannot see that there is any proper reason for simply ignoring the evidence provided. It would be inappropriate for me to seek to form my own assessment of that evidence; that is obviously a matter for a misconduct panel. More specifically, however, it was a matter for the Panel in this case and I am satisfied it erred in its task in failing to demonstrate any engagement with that evidence in its assessment of harm.

63. I am also satisfied that the Panel erred in its approach to mitigation in this case. Although I agree that the Panel was entitled to take into account matters of contextual mitigation – the stress that it found Officer A was under having taken on some management responsibilities in the absence of effective supervision within the Unit – it had apparently previously found that this was "*limited*" (paragraph 33, Decision on Facts). Moreover, to the extent that the Panel found that Officer A's conduct was "*provoked*", I consider this sufficiently inexplicable as to be properly described as irrational. On the material before it, I cannot see how any reasonable panel could have concluded that the circumstances described by Officer A could have "*provoked*" him into using the racist stereotypes he used, or the mimicry of accents that the Panel found to be "*racist behaviour*".

64. As for the Panel's approach to Officer A's personal mitigation, I again agree that it was entitled to have regard to his early admissions and expression of regret and to the steps he had taken to address his behaviour. As the Guidance makes clear, however, having factored questions of mitigation into its assessment of seriousness, the Panel

was required to demonstrate that it had then undertaken the second step, and had reminded itself of the three-fold purpose of imposing a disciplinary sanction – maintenance of public confidence in, and the reputation of, the police service; the upholding of high standards in policing and the deterrence of misconduct; the protection of the public. Merely having referenced these aims at an earlier stage does not establish that the Panel took the further step of returning to the purpose of a disciplinary sanction before reaching its decision. On the contrary, the Panel's assessment at paragraphs 10-12 is focused almost entirely on the perspective of Officer A, rather than the broader, public-oriented concerns to which it was required to have regard. At most, there is a reference to the impact on public confidence in the future, if Officer A were unable to remedy his misconduct (see paragraphs 10 and 12 of the Outcome Decision), but this fails to address the question of public confidence given the misconduct that had already taken place. Ultimately, the reasoning provided demonstrates a consideration of sanction through the prism of Officer A's personal mitigation rather than the purposes to which the Outcome Decision was required to be directed.

65. For the reasons I have explained, I therefore consider that this challenge must be upheld. The Panel erred in its failure to adopt the approach laid down in the Guidance; in particular, in omitting to engage with the evidence on actual harm, and in failing to adopt the structured approach required and to return to the question of purpose after considering questions of personal mitigation. Certain of the Panel's conclusions are also properly to be described as irrational; specifically, its apparently inconsistent approach to the contextual mitigation and its finding of provocation.

Section 31(2)(a) Senior Courts Act 1981 and Outcome

66. I have considered whether, applying section 31(2)(a) Senior Courts Act 1981, I can be satisfied that the Panel would, in any event, have reached the same conclusion had it applied the correct legal approach. As Mr Butterfield QC accepted, where a finding of irrationality has been made, that cannot be so. Nevertheless, I have asked myself the question whether, if I were wrong in my findings of irrationality, section 31(2)(a) might apply in respect of my conclusions on the Panel's errors of approach under the Guidance. It is, however, impossible for me to conclude that the Panel might have imposed the same sanction had it applied the approach laid down by the Guidance. First, because I cannot guess at its findings on the evidence of actual harm or its assessment of how that might impact upon seriousness in this case. Second, because I am unable to see that, after considering issues of personal mitigation, the Panel's reasoning demonstrates any engagement with the purposes for which it was imposing the sanction in relation to the conduct that had occurred (as opposed to the possibility of Officer A's future conduct).

67. In the circumstances, I am bound to quash the Outcome Decision in this case. The determination of the appropriate outcome – the sanction that, given the seriousness of the conduct in issue, best fulfils the purpose of the police misconduct regime – is not for this Court but is properly to be undertaken by a misconduct panel. Officer A's case must be remitted and the question is whether that should be to the same or a different panel. I do not doubt the professionalism of those involved and can see the advantages of maintaining the same Panel. Where, however, findings of irrationality have been made, then I consider that real difficulties inevitably arise in ensuring confidence in the process if this is not remitted to a freshly-constituted Panel. My

Order will therefore provide that the Defendant's Outcome Decision is quashed and that this matter is remitted to a different Police Misconduct Panel for determination of Outcome given the finding of gross misconduct that has already been made. That Panel will have the benefit of the findings already made in this matter; it will be guided by my Judgment as to the approach it is to adopt but the determination of penalty will be for the Panel and nothing I have said should be taken as suggesting the decision it ought to reach in that regard.