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Case No: CO/1594/2021 AC-2021-LON-000888

IN THE HIGH COURT OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2023

Before :

MR JUSTICE LAVENDER

- -

Between :

Nicholas Barnes

Claimant

- and -

Chief Constable of Thames Valley Police

Defendant

- -
- -

Alisdair Williamson KC and **Colin Banham** (instructed by **Hempsons**) for the **Claimant**
John Beggs KC and Aaron Rathmell (instructed by **Guy Lemon**) for the **Defendant**

Hearing date: 4 May 2023

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. The Claimant, Nicholas Barnes, who was a probationary constable with the Thames Valley Police from 7 January 2019 to his discharge on 2 June 2021, challenges the Defendant's decisions:

   (1) to bring proceedings against the Claimant under Regulation 13 of the Police Regulations 2003 ("the Police Regulations"); and

   (2) to discharge the Claimant as a probationary constable.

2. The Claimant's primary contention is that these decisions were unlawful, irrational and/or unfair because the matter giving rise to his discharge, namely his telling a racist joke while on duty on 15 April 2020, had already been the subject of misconduct proceedings pursuant to the Police (Conduct) Regulations 2020 ("the Conduct Regulations") and those proceedings had resulted in a decision by a misconduct panel ("the Panel") on 26 February 2021 that he should be given a written warning, rather than a decision that he should be dismissed.

(2) Background

3. The Claimant's term as a probationary constable was initially for 2 years from 7 January 2021, but it was extended to 7 June 2021. The Claimant told the joke to colleagues at High Wycombe police station. Several of them reported the matter to a police sergeant. An inspector spoke to the Claimant and he apologised to his colleagues on the following day. An investigation was commenced and on 4 May 2020 a notice was served on the Claimant pursuant to regulation 17 of the Conduct Regulations. It is unnecessary to set out the detail of the investigation and the subsequent misconduct proceedings, but it is relevant to note that:

   (1) The Claimant made a statement in which he accepted that he knew before he told the joke that it was inappropriate and racist. Indeed, he waited until senior offices had left the room before telling the joke.

   (2) It was alleged that the Claimant's conduct amounted to gross misconduct and it was decided that there should be a misconduct hearing.

   (3) The Claimant accepted that he was guilty of misconduct, but denied that he was guilty of gross misconduct.

   (4) It was accepted that, apart from the racist joke, there were no other concerns about the Claimant's performance.

   (5) The Claimant relied on a number of very positive character references.

4. In its decision of 26 February 2021 the Panel said:

"FINDING: Misconduct."

5. In the following section of its report, entitled "FULL ACCOUNT OF REASONS FOR THE FINDING", the Panel said, inter alia, as follows:

> "6. He has tried to make amends for this deeply inappropriate behaviour and the Panel has read a number of references from his friends and colleagues, which suggest that he is empathetic and respectful to others and that this conduct was out of character for him.
>
> 7. The Officer has fully cooperated in the investigation and has provided full responses to the Notices served upon him, expressing his regret and remorse at every stage.
>
> 8. The Panel finds that this was a single isolated error of judgment, but extremely serious nevertheless."

6. In the next section of its report, entitled "STANDARD(S) OF PROFESSIONAL BEHAVIOUR DEEMED TO HAVE BEEN BREACHED", the Panel said:

> "The Panel finds that the following standards have been breached:
>
> **Equality and Diversity**
>
> The joke told was utterly unacceptable, and the conduct clearly fell below this standard, as it showed no regard for difference and diversity, or the need to act with fairness and impartiality.
>
> **Authority, Respect and Courtesy**
>
> The joke included racist, abusive and offensive language, and was perceived to be offensive by colleagues who heard it. The conduct fell short of acting with self-control, awareness of difference and tolerance, and treating everyone with respect and courtesy.
>
> **Discreditable Conduct**
>
> PC Barnes has recognised that if the community he serves were to learn of this incident, it would have extremely negative and long-lasting consequences for the police who work in the specific local area and would bring discredit to the police force and undermine confidence in fair and equitable policing. Reputation takes years to build up but can be lost in an instant, and the Panel recognises that police forces have worked hard over the years to eradicate any impression of ingrained racist attitudes. Officers are rightly held to higher standards than other members of the public owing to their training and positions of power and influence. This was a clear breach."

7. The Panel continued:

> "The Panel has considered the relevant factors when assessing seriousness as set out in the College of Policing Guidance. In terms of culpability, the Officer is entirely blameworthy for considering that the joke was a suitable one to be told to his policing colleagues. There was

> a degree of deliberate thinking and reflection prior to telling it, a period of waiting for the right moment as he saw it, and we have taken account of some of the build-up and cajoling by colleagues.
>
> The Panel notes that discrimination towards others is never acceptable and always serious. Having read all of his references however, we accept that the Officer is not a person who ordinarily behaves in a discriminatory fashion, but on the contrary usually shows empathy and respect towards others. Harm was caused to policing colleagues, who felt offended and revolted, but more importantly, there was a serious risk of harm to public confidence if the circumstances were to become known. The Panel cannot ignore the depth of national concern about such issues as perceived racism within the police.
>
> The most significant mitigating factors are the Officer's open admissions at an early stage and throughout the proceedings, his evidence of genuine remorse, insight and taking of responsibility for his actions without blaming anyone else or any other factors.
>
> Upon initial consideration, this conduct passes the threshold for Gross Misconduct and dismissal. However, the Panel has considered the Officer's actions immediately after the incident very carefully and is able to make a finding of Misconduct owing to the powerful combination of mitigating factors, which reduce the seriousness of his behaviour. We have accepted that this was an isolated incident of short duration, was not targeted at any specific individual, and the Officer has done everything in his power to apologise and make reparation. We have been encouraged and influenced by the maturity and insight he has shown since this incident took place, and the learning he has undertaken, together with his offer to assist with the learning of more junior colleagues."

8. In the next section of its report, entitled "DISCIPLINARY ACTION IMPOSED", the Panel said as follows:

> "The Panel accepts that this was an isolated and single lapse and error of judgment in the early part of the Officer's policing career, and that his reports and references so far are all positive. The Panel also accepts that the Officer has learned from the episode and spent time over the past year developing himself and his attitudes and has undertaken counselling. He has tried to carry on with his job to the best of his ability. We trust that he will continue to use the learning he has gained to develop himself further and achieve the potential that others have recognised in him, and to assist colleagues and student officers in putting equality and diversity at the forefront of serving the community.
>
> Taking account of all the circumstances and our reasoning as set out above, the Panel imposes a Written Warning, which will remain in force for a period of 18 months."

9. On 17 March 2021 the Claimant was invited to a hearing to be held on 1 April 2021 in accordance with paragraph 3.5 of the Thames Valley Police's guidance entitled *Regulation 13 – Managing the Performance of Student Officers:*

Operational Guidance/Procedure. The material served on the Claimant in connection with that hearing was the same material as had been relied on in the misconduct proceedings.

10. The hearing in fact took place on 7 May 2021 and the Claimant's probationary period was extended to accommodate this. Superintendent Baillie conducted the hearing. The Claimant attended the hearing and was represented by a Police Federation Friend.

11. Superintendent Baillie submitted a report dated 19 May 2021 to the Defendant which included the following:

(1) Superintendent Baillie said:

> "I questioned PC Barnes on one aspect where he made two comments in April 2020 that I found irreconcilable. He admitted the nature of the 'joke' was racist and inappropriate, yet he said that he was not a racist. Seeing in his written evidence that he had been to counselling himself to try and understand why he said it that day when it doesn't reflect his views, I wanted to understand this to form a view on whether he is 'likely to become a well conducted officer'. PC Barnes stated he is still unclear as to why he said what he said but admitted that he hadn't really taken on board at that point what was required of him (mentally) in the role, and has inappropriately used humour in the past to deal with things and now realises this is wrong."

(2) Later, Superintendent Baillie said:

> "I also questioned PC Barnes in relation to how he would manage his return to policing with both his colleagues and the public should he be retained within Thames Valley Police. I also enquired with Sgt Westbrook over the public confidence aspect and the sentiment of his colleagues. PC Barnes recognises there is a risk that he will be identifiable as an officer who has been accused and found guilty of a racist comment in a misconduct hearing, and has clearly given it thought as to how he would respond if accused of this in his duties. He provided a mature and considered response. …"

(3) In the conclusion to her report, Superintendent Baillie said as follows:

> "The role of the Regulation 13 Hearing is to hear and assess:
>
> - The amount of remedial development and support that has been provided to the officer.
> - The efforts made by the officer to attain the necessary standards.
> - The likelihood that, with additional time, the officer would reach the necessary standards to be an efficient and well-

> conducted constable fitted physically and mentally to the office of constable.
>
> Due to PC Barnes's otherwise excellent performance, this Regulation 13 hearing and the Misconduct Hearing before that has focused on one incident only and not a course of conduct or a progressive performance issue. As such, this comes down to a matter of whether this one incident provides a view of this officer that means he is not likely to become a well-conducted officer. Having heard all the evidence, I have made a determination to recommend to you that PC Barnes is not dismissed."

12. The Defendant personally considered this report and decided on 2 June 2021 that the Claimant should be discharged. The Defendant did not invite any further comment or submissions from the Claimant, did not hold a hearing himself and did not read the transcript, or listen to the recording, of the hearing before Superintendent Baillie.

13. The Defendant's decision included, inter alia, the following:

(1) Having referred to the Panel's decision, the Defendant said:

> "I would make the observation that there were a significant number of police witnesses to the incident, which no doubt assisted with his admission and remorse is not unexpected given what has followed."

(2) The Defendant said as follows in relation to the Panel's decision:

> "It is fair to say that this finding came as a surprise to the Appropriate Authority and given the officer is within his probationary period and the seriousness of behaviour, the matter was referred to Learning and Development for consideration under Regulation 13."

(3) The Defendant then considered, and dismissed, the Claimant's submission that it was not open to him to proceed under Regulation 13. In doing so, the Defendant said that he respected the findings made by the Panel.

(4) The Defendant then set out the test to be applied under Regulation 13.

(5) The Defendant continued:

> "The language and behaviours exhibited on that day were racist. He was not ignorant to that fact but continued with his behaviour anyway. He completely disregarded the impact on his colleagues. He has received significant training about the standards of behaviour expected. He will be fully aware of the perception of racism that continues to be levelled at the Police Service, 'institutional' or direct. I also note that on his

> submission to the Misconduct Panel at page 59 the officer states, *that 'this experience has left me deeply humbled and has been a steep learning curve for me. I have learnt more than ever the importance of being politically correct and sensitive in all situations and that there are no safe places or times to use unacceptable language such as I did'.*
>
> I find these comments particularly troubling. Not behaving in a racist manner in terms of words or deeds is not about being politically correct or of safe places. His use of such terms suggests a belief in forced compliance."

(6) Then the Defendant said:

> "I also noted from Supt Baillie's report that in the Regulation 13 hearing PC Barnes *'stated he is still unclear as to why he said what he said but admitted that he hadn't really taken on board at that point what was required of him (mentally) in the role, and has inappropriately used humour in the past to deal with things and now realises this is wrong.'*
>
> I do not accept that this racist 'joke' can properly be described as an inappropriate use of humour. It is much more serious than that. The fact that he is still unclear why he said what he said is a matter of concern for me in assessing what this conduct tells me about the likelihood of him becoming a well conducted officer.
>
> I have to place my concerns in the context of the findings of the Misconduct Panel that there was evidence of "genuine remorse" and "insight", which was a factor in their decision. However, while their decision is about an assessment of the behaviour itself, and the appropriate sanction, the decision for me under Regulation 13 is more forward-looking and I have to decide what the conduct tells me about the likelihood of PC Barnes becoming a well conducted constable.
>
> I do believe that PC Barnes' conduct is highly relevant to that question. In my view, a well conducted constable must be able to command the confidence of colleagues, the organisation generally and – most importantly – the diverse communities which we serve. To my mind, the telling of a racist 'joke' of this nature is obviously relevant to those issues. It also shows an extremely concerning mindset."

(7) The Defendant addressed the issue of potential unfairness by saying as follows:

> "In considering that question in the round, I also note that by all accounts PC Barnes' behaviour and performance has otherwise been unquestionable and indeed many of the testaments from colleagues and indeed supervisors are positive. There can be no dispute that, were it not for this incident and what it

> demonstrates about PC Barnes, there would have been no question about his appointment being confirmed at the end of probation.
>
> I also must give weight to the fact that Superintendent Baillie, who conducted the Regulation 13 hearing, has recommended that I should not dismiss PC Barnes. She has reached the conclusion that it would be 'unfair and inconsistent' to do so. I have given significant weight to that view, and I have considered the question of fairness.
>
> In circumstances where the only conduct in question is that which has already been the subject of misconduct proceedings, which did not result in dismissal, I fully understand and respect the view presented, that to dispense with the officer's service under Regulation 13 may be unfair (irrespective of the legal position).
>
> However, I conclude that if I am satisfied that PC Barnes is not likely to become a well conducted constable, I may fairly decide to dispense with his services under Regulation 13. I do not believe that such a decision would be 'inconsistent' with the findings of the misconduct panel as both processes ask different questions.
>
> I have also noted the point made by Superintendent Baillie that since the incident it would appear that the additional training to PC Barnes has not been provided by the organisation but has been undertaken by him on his own initiative. Again, this goes to his credit, but (a) training has been previously provided and (b) in my view it should not take any special training to understand the grossly offensive nature of this racist 'joke' and the implications of telling it."

(8) Finally, the Defendant set out his conclusion as follows:

> "In conclusion, the simple question that I have to answer is do I believe that a student officer in training, who so blatantly displays such racist views as evidenced by his 'joke', and despite all his training to date, is fitted [sic] physically or mentally for the office of constable or not likely to become an efficient or well conducted constable.
>
> I conclude that the behaviours of PC Barnes are so at odds with being a well conducted constable that, despite his remorse and self-reflection, and despite his otherwise unquestionable performance, I am satisfied that he is not likely to become a well conducted constable. I also conclude that, notwithstanding the findings of the misconduct panel faced with a different question, it would not be unfair or inconsistent to dispense with his services under Regulation 13."

(3) The Law

(3)(a) Police Discipline

14. Regulation 4(1) of the Conduct Regulations provides as follows:

> "Subject to paragraph (6), these Regulations apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct, gross misconduct or practice requiring improvement."

15. Regulation 14 requires the appropriate authority (i.e. the chief constable of the relevant police force, who usually acts through the force's standards department) to carry out a "severity assessment", i.e. an assessment:

> "… whether the conduct which is the subject matter of the allegation, if proved, would amount to misconduct or gross misconduct or neither …"

16. "Gross misconduct" and "misconduct" are defined in regulation 2(1) as follows:

> ""gross misconduct" means a breach of the Standards of Professional Behaviour that is so serious as to justify dismissal;"
>
> ""misconduct", … , means a breach of the Standards of Professional Behaviour that is so serious as to justify disciplinary action;"

17. Regulation 14(5)(a) provides that, where the appropriate authority assesses that the conduct, if proved, would amount to misconduct or gross misconduct, the matter must be investigated.

18. Regulation 23 provides for the decision whether, in the light of the investigator's report, misconduct proceedings should be brought. There are two forms of misconduct proceeding: a misconduct hearing and a misconduct meeting. Regulation 23(10) provides as follows:

> "Where the appropriate authority determines under paragraph (1), (2) or (3) to refer the case to misconduct proceedings—
>
> (a) having determined that the officer concerned has a case to answer in respect of gross misconduct, those proceedings must be a misconduct hearing;
>
> … , and
>
> (d) having determined that the officer has a case to answer in respect of misconduct … , those proceedings must be a misconduct meeting."

19. Regulation 41(15) provides as follows:

> "The person or persons conducting the misconduct proceedings must review the facts of the case and decide whether the conduct of the officer concerned amounts—
>
> (a) in the case of a misconduct meeting, to misconduct or not, or
>
> (b) in the case of a misconduct hearing, to misconduct, gross misconduct or neither."

20. Regulation 42 deals with the outcome of misconduct proceedings. It provides that:

    (1) The only disciplinary actions available following a misconduct meeting are a written warning or a final written warning.

    (2) Dismissal is an available disciplinary action following a misconduct hearing where it has been decided that an officer's conduct amounts to gross misconduct, or where the officer's conduct amounts to misconduct and either a final written warning was in force or the decision was based on conduct arising from more than one incident.

21. Dismissal has the effect of barring the dismissed officer from any police or law enforcement work in England and Wales for 5 years or more: see Part 4A of the Police Act 1996 and the Police Barred List and Police Advisory List Regulations 2017.

22. There is no provision enabling a chief constable to appeal against a decision of a misconduct panel, but a chief constable is able to apply for judicial review of such a decision: see *R (Chief Constable of Thames Valley Police) v Misconduct Panel* [2017] EWHC 923 (Admin).

(3)(b) Probationary Constables

23. Regulation 13(1) of the Police Regulations ("Regulation 13") provides as follows:

> "Subject to the provisions of this regulation, during his period of probation in the force the services of a constable, may be dispensed with at any time if the chief officer considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable."

24. Unlike dismissal, discharge does not have any barring effect.

(3)(c) The Conduct Guidance

25. Section 87(3) of the Police Act 1996 provides as follows:

> "It shall be the duty of every person to whom any guidance under this section is issued to have regard to that guidance in discharging the functions to which the guidance relates."

26. That duty applies to Home Office Guidance entitled *Conduct, Efficiency and Effectiveness: Statutory Guidance on Professional Standards, Performance and Integrity in Policing* published on 5 February 2020 ("the Conduct Guidance"). Chapter 4 of the Conduct Guidance is entitled "Legal Framework and Forms of Proceedings". Paragraphs 4.82 to 4.92 are headed "Officers on Probation". Paragraphs 4.87 to 4.91 state as follows:

> "4.87 Probationary officers are subject to the procedures concerning investigations and disciplinary proceedings. The chief officer has discretion whether to use the disciplinary procedures or the procedures set out at Regulation 13 of the Police Regulations 2003 (Discharge of probationer) as the most appropriate means of dealing with a misconduct matter.'
>
> 4.88 Particular consideration should be given to allegations of gross misconduct which ordinarily should be subject to disciplinary proceedings rather than the Regulation 13 route.
>
> 4.89 However, where allegations of misconduct (rather than gross misconduct) are made, the chief officer may instead consider whether the circumstances of the matter merit consideration under Regulation 13 rather than under misconduct procedures. In exercising this discretion due regard should be given to whether the student police officer admits to the conduct or not. Where the misconduct in question is not admitted by the student police officer then, in most if not all cases, the matter will fall to be determined under the misconduct procedures.
>
> 4.90 Whilst an officer who had passed probation may have been subject to a misconduct meeting in such circumstances and would unlikely face dismissal (unless they are facing multiple counts or had existing warnings in force) the chief officer may determine that a potential breach amounting to misconduct during a probationary period would demonstrate that the officer is not fitted to become an efficient or well conducted constable, inspector or superintendent.
>
> 4.91 It is important to bear in mind the principles of public interest, particularly where public confidence and matters involving members of the public are involved, that due process is followed, including the transparency of hearings being held in public and the rights of complainants and interested persons to attend proceedings under the Conduct Regulations."

27. Earlier guidance was contained in paragraph 9.38 of Home Office circular number 31 of 1985, which stated as follows:

> "The provision for a chief officer to dispense with the services of a constable during his period of probation should not be used as an alternative means of dismissing a probationer where he should properly be charged with an offence against discipline. Where disciplinary proceedings are appropriate and justified, they should be brought; where they are not brought, a probationer should not be left with the impression that he has been suspected of an offence and given no chance to defend himself at a disciplinary hearing."

28. These words were repeated in Home Office circular 8/2005 ("Guidance on Police Unsatisfactory Performance, Complaints and Misconduct Procedures"), which was the guidance in force when a number of the cases referred to below were decided: see *R (Kay) v Chief Constable of Northumbria Police* [2009] EWHC 1835 (Admin) (*"Kay"*), at paragraph 31.

(3)(d) Authorised Professional Practice: Vetting

29. Police officers are subject to a number of vetting regimes, both on recruitment and subsequently, depending on the roles which they perform. Although those regimes are not directly relevant to the present case, I was referred to paragraph 8.50.1 of *Authorised Professional Practice: Vetting*, published by the College of Policing, which provides as follows:

> "Following the conclusion of a misconduct hearing or meeting where the officer, special constable or member of staff is not dismissed but has been issued with a written warning or a final written warning, a review of vetting clearance should be carried out. The review includes a consideration of the applicant's suitability to maintain the level of clearance held and to continue in the post they occupy."

30. This paragraph was considered by Eyre J in his judgment in *R (Victor) v Chief Constable of West Mercia Police* [2023] EWHC 2119 (Admin) ("*Victor*"). (That judgment was handed down after the hearing in this case and I did not hear submissions on it. I prepared this judgment without reference to that judgment, which was only recently drawn to my attention. I refer to it only for the sake of completeness.)

(3)(e) Authorities on when it is Inappropriate to use Regulation 13

31. There are a number of cases in which it has been argued that a chief constable who has discharged a probationary constable pursuant to Regulation 13 ought instead to have commenced misconduct proceedings, if the grounds for discharge consisted of an allegation or allegations of misconduct:

    (1) In some cases, it has been held that the chief constable ought to have commenced misconduct proceedings: see *R v Chief Constable of West Midlands Police ex p Carroll* (unreported) 10 May 1994, CA (*"Carroll"*); and *Kay*.

    (2) In other cases, where the misconduct was admitted, it has been held that the chief constable was not obliged to commence misconduct proceedings: see *R (Begley) v Chief Constable of West Midlands Police*

> [2001] EWHC 534 (Admin); [2001] EWCA Civ 1571; *R v Chief Constable of British Transport Police, ex parte Farmer* (unreported) 30 July 1999, CA (*"Farmer"*); *R (Khan) v Chief Constable of Lancashire* [2009] EWHC 472 (Admin) (*"Khan"*); *Ferriday v Chief Constable of Gwent* [2009] EWHC 2083 (Admin); *C v Chief Constable, Strathclyde Police* [2013] SLT 699 (*"C"*).

32. As to the basis for the decisions on the first category of cases:

(1) In *Carroll*, McCowan LJ said as follows:

> "As to paragraph 9.38 of the Home Office circular, it is saying that the provision for a chief officer to dispense with the services of a constable during his period of probation should not be used as an alternative means of dismissing a probationer where he should properly be charged with an offence against discipline. For my part, I consider that the appellant should have been charged with an offence against discipline, and it was not right to use the provision for dispensing with his services as an alternative means of getting rid of him.
>
> …
>
> Before this court, Mr Millar has put the matter in these alternative ways: he says that either this was an unreasonable decision of the Wednesbury sense by the Chief Constable, or alternatively, there was a breach of the duty of fairness to the appellant, in that he was denied the opportunity of proving himself to have been truthful in these matters before a disciplinary tribunal. For my part, I agree with both those ways of putting the matter."

(2) Rose LJ said:

> "That being so, in relation to a probationer, the conclusion is, in my view, inescapable that, contrary to the latter part of paragraph 9.38 of the Home Office circular, the chief constable's dismissal of the appellant left the impression that he had been suspected of an offence, but given no chance to defend himself at a disciplinary hearing. Accordingly, and for the reasons given by my Lord, I too would allow this appeal."

(3) Balcombe LJ said:

> "In my judgment, in failing to give Mr Carroll the opportunity to deal with those contested issues of fact by the means of a disciplinary hearing the Chief Constable broke the duty of fairness which, of course, is recognised by paragraph 9.38 of the Home Office circular."

33. As to the distinction between these two sets of cases:

(1) In *Farmer*, Henry LJ said as follows:

> "In conclusion, there are two separate dismissal procedures which govern probationers. The decision which to use is a decision for the employing force. Where the facts founding the complaint are not admitted, in most if not all cases the decision is likely to be that the question whether the charge is proved or not proved be decided under the disciplinary procedures."

(2) In paragraph 33 of his judgment in *Khan*, Elias J said:

> "The issue, it seems to me, is whether there was sufficient conflict over the relevant facts to make it unfair for the Chief Constable to make the judgment he did on the basis of the undisputed primary facts."

(3) Silber J agreed with this in paragraph 38 of his judgment in *Kay* and added:

> "… I would suggest that the test for determining if a case against a probationary police officer should be determined under regulation 13 or under the Conduct Regulations is whether there is such conflict over the facts relating to the misconduct relied on with the consequence that it would be unfair for the Chief Constable to make the judgment he did on the basis of the undisputed primary facts rather than giving the probationary police officer the protection to which he or she was entitled under the Conduct Regulations …"

34. There is, however, no authority which has considered the situation which arose in the present case, where the same matter gave rise to both misconduct proceedings, resulting in a finding of misconduct and a sanction falling short of dismissal, and a subsequent decision to discharge a probationary constable pursuant to Regulation 13. (*Victor* concerned a situation in which misconduct proceedings, in which gross misconduct was not alleged, were followed by a vetting review which resulted in the removal of the constable's vetting clearance, which in turn led to her discharge pursuant to Regulation 13.)

35. *C* is a case in which dismissal under Regulation 13 followed an investigation into an allegation of rape, but no misconduct proceedings were commenced, because the complainant declined to provide a statement for the purpose of misconduct proceedings. The officer was dismissed, not on the basis that he had raped the complainant, but on the basis of conduct towards the complainant and another which was not disputed.

36. That was the context in which Lord Drummond Young said as follows in paragraphs 20 to 22 of his judgment:

> "[20] The central question is whether the respondent was justified in considering the allegations against the petitioner under reg.13 of the Police (Scotland) Regulations 2004, or whether those allegations should

have been considered under the Police (Conduct) (Scotland) Regulations 1996 or an equivalent procedure. The Conduct Regulations set out detailed procedural requirements as summarised in para.9 above; these include a formal misconduct hearing at which the officer charged with misconduct has a right to legal representation. At that hearing evidence will normally be led, and such evidence will be subject to cross examination. Under reg.13, on the other hand, no procedures are specified. Nevertheless, the reg.13 procedure is clearly subject to the general legal controls that apply to administrative action, which include a right to know the nature of the complaint and a right to be heard in response to the complaint.

[21] In the first place, I am of opinion that the fact that allegations of misconduct were made against the petitioner but then dropped does not prevent the respondent from considering the same allegations, in whole or in part, under the reg.13 procedure. The two types of procedure are quite distinct. Regulation 13 involves a non-delegable duty imposed on the chief constable. Under the Conduct Regulations, however, the responsibility for investigating an allegation or complaint is imposed on an assistant chief constable (reg.5), who may appoint an investigating officer and may require that the officer under investigation should appear before a misconduct hearing (reg.6). (In the present case the duties imposed on an assistant chief constable were in fact carried out by a deputy chief constable, but nothing turns on this point.) The decision, made on 8 August 2011, not to proceed to a misconduct hearing but instead to proceed under reg.13 was a decision of the deputy chief constable; the respondent, as chief constable, played no part in that decision.

[22] Furthermore, the two procedures are concerned with different issues. The misconduct procedure is concerned with allegations that an officer has been guilty of misconduct as defined in Sch.1 to the Conduct Regulations. The reg.13 procedure, by contrast, is concerned with the question whether a probationary constable is not fitted to perform the duties of office of constable or ‘‘is not likely to become an efficient or well conducted constable’’. Those questions, especially the latter, are capable of raising much wider issues than misconduct. Nevertheless, it would be quite extraordinary if actual misconduct could not be taken into account in making a reg.13 assessment when other, lesser, matters could be. Nor does it matter that misconduct proceedings were considered and then dropped because the issues involved in the two types of proceeding are essentially different. In these circumstances, I am of the opinion that the decision of the chief constable as to whether to proceed under reg.13 cannot be constrained by any decision not to proceed to a misconduct hearing. In summary, two different decisions are involved, which are made for different purposes by different individuals and which may involve consideration of different material. On that basis, the decision to proceed by way of the reg.13 procedure cannot be challenged.”

(3)(f) Authorities on the Procedure under Regulation 13

37. The Police Regulations do not prescribe any particular procedure to be followed when a chief constable is considering whether to discharge a probationary constable pursuant to regulation 13. Lord Hailsham LC said as follows in *Chief Constable of the North Wales Police v Evans* [1982] 1 W.L.R. 1155 (*"Evans"*), at 1161E to 1162A:

> "… Once it is established, as was conceded here, that the office held by the appellant was of the third class enumerated by Lord Reid in *Ridge v. Baldwin* [1964] A.C. 40, 66, it becomes clear, quoting Lord Reid, that there is
>
> > "an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation."
>
> I regard this rule as fundamental in cases of this kind when deprivation of office is in question. I agree with the appellant's affidavit that " a formal hearing " may well be unnecessary if by that is meant an oral hearing in every case held before the chief constable himself. But this does not dispense a chief constable from observing the rule laid down by Lord Reid. It may well be also that part or all of the inquiry on the facts may be delegated to a subordinate official, as was done here by the appellant to the deputy chief constable, though, where this is done, the ultimate decision must not be delegated, and in my view, common prudence should dictate that the report by the delegated officer, in this case the deputy chief constable, or at least its substance, should be shown to the officer the subject of review and an opportunity afforded him to comment on it before the final decision is taken by the chief constable himself. This was not done here. Moreover, where there has been delegation, the delegated inquiry itself must be conducted in accordance with Lord Reid's rule, and, where it is not, the ultimate decision, even if not delegated, will almost certainly be vitiated.
>
> Apart from his self-misdirection on the scope of his discretion, in the present case the appellant clearly admitted in his affidavit that he had taken into account matters concerning the domestic life of the respondent, some of which, if properly put to the respondent, might perhaps, after his explanation had been given and heard, have influenced the decision as to whether the respondent was likely to become an efficient or well conducted constable. But some of the allegations were plainly erroneous and none, whether erroneous or otherwise, was ever put to the respondent at all in connection with the relevant inquiry, whether at the delegated hearing or otherwise. …"

38. *R. v The Chief Constable of the Thames Valley Police, ex parte Cotton* [1990] IRLR 344, CA is an example of a case in which material considered by the Chief Constable was not shown to the police officer concerned, but the process was not unfair because there was no substantial chance of any further observation on the officer's part in any way altering the final decision.

39. It was also held in *Evans* that, as one would expect, a chief constable can only exercise the power granted by Regulation 13 if he directs his mind to the criteria set out in Regulation 13: see *Evans* at 1161C (per Lord Hailsham LC) and 1171B (per Lord Brightman).

40. As to the application of those criteria, Silber J said as follows in paragraphs 12 and 13 of his judgment in *R. (Verity) v Chief Constable of North Yorkshire* [2009] EWHC 1879 (Admin); [2009] Po. L.R. 322 (*"Verity"*):

> "12. My starting point is that a Chief Constable can under reg 13 dispose of the services of a probationary constable if he considers for any of a variety of reasons that the probationary constable "is not likely to become an efficient ... constable". There is nothing in the wording of the regulation which shows that there should be any limitation on the word "efficient" or that it should be given anything other than its ordinary meaning. My understanding of the meaning of that word is consistent with that in the Compact Oxford Dictionary which is that "efficient" means "working productively with minimum wasted effort or expense".
>
> 13. It follows that in my view, a Chief Constable is entitled to dispense with the services of a probationary constable under reg 13 if he considers that he or she is not likely to work "productively with minimum wasted effort or expense". There would be numerous instances where that could possibly apply because of some aspects of the probationary constable's past. One instance might possibly be if the probationary constable had previously been, but no longer was, a leading member of the British National Party or had previously expressed views which showed hostility to a part of the community with the consequence that he or she could not be used for substantial parts of the work of a police officer in a multi-racial area. In such a case, the Chief Constable would have had information which would have entitled him to decide that there would be difficulties with the probationer police officer being able to deal with members of some or all ethnic minority communities. So those limitations on the work that the probationer could do might in appropriate circumstances mean that he could not work productively and so he would not become an "efficient" police constable."

41. *Verity* is an example of a case in which the grounds for discharging a probationary constable did not include any misconduct, or indeed any conduct, by the constable following his appointment as a constable. In addition, in paragraphs 23 and 24 of his judgment in *Verity*, Silber J said as follows:

> "23. … the ability to discharge under reg 13 depends not on whether on an objective basis the probationer would not become an efficient police constable but on whether the Chief Constable considers that he does. That means that the grounds for

> challenging the decision on factual grounds are limited to issues such as irrationality and Wednesbury unreasonableness on the part of the Chief Constable. …
>
> 24. Second, the Chief Constable must be allowed a substantial degree of deference as he, unlike a judge, knows what constables are expected to do and the risks that the claimant might constitute to children. …"

42. Silber J referred to the risks which the claimant in *Verity* might pose to children, because that was the issue in that particular case, but the point which he made about deference was clearly of more general application.

43. Silber J also said as follows in paragraphs 37 and 38 of his judgment in *Verity*:

> "37. In my view, there is no specific procedure which the Chief Constable had to follow when making a determination under reg 13. It is noteworthy that reg 13 itself contains no requirement of holding a hearing although of course, principles of fairness should apply first to enable the probationary constable to know why reg 13 is being invoked, second to understand what the case was against him; third to be able to make representations to the decision-maker and fourth to be told of the reasons for any decision. Each of those requirements was satisfied.
>
> 38. It is quite clear that reg 13 does not require oral evidence to be called or for the hearing to be in the form of a judicial hearing. It must be stressed that the task for the Chief Constable was not to see if the allegations were true but to ascertain whether the claimant would be an "efficient" constable. …"

(4) Issues

44. As I have said, the Claimant's primary case was that it was unlawful for the Defendant to discharge the Claimant pursuant to Regulation 13 when the sole basis for the decision to discharge him was an incident of professional misconduct which had been the subject of misconduct proceedings in which there had, in effect, been a decision not to dismiss the Claimant. In effect, the Claimant says that it was unlawful for the Defendant to consider this case under Regulation 13 at all.

45. The Claimant put his case in a number of ways. He alleged that:

(1) The decision was unlawful because it was contrary to paragraph 4.87 of the Conduct Guidance.

(2) The Claimant had a legitimate expectation that the Defendant would follow the Conduct Guidance.

(3) The Defendant was precluded from discharging the Claimant by cause of action estoppel.

(4) The Defendant was precluded from discharging the Claimant by issue estoppel.

(5) The decision was ultra vires.

(6) The decision was outside the purpose of Regulation 13.

(7) It was irrational to commence proceedings under Regulation 13.

46. The Claimant also contended that, even if it was open to the Defendant to bring proceedings under Regulation 13, the decision which he made was unlawful. Although it appeared from the Claimant's skeleton argument that he was contending that the decision was substantively irrational, Mr Williamson confirmed that this was a challenge to the procedure adopted by the Defendant, in that it was alleged that the Defendant relied on matters which had not been put to the Claimant, either in a hearing before the Defendant or in writing. It was suggested in the Claimant's skeleton argument that the Defendant should have clarified certain matters with Superintendent Baillie, but Mr Williamson confirmed that that was simply alleged to be another way in which the Defendant might have avoided the need to put matters to the Claimant, if the Defendant's concerns had been addressed by Superintendent Baillie to the Defendant's satisfaction.

47. There were issues as to the appropriate remedy, if I were to decide that the decision to discharge the Claimant was unlawful, but it was agreed that those issues would best be addressed, if they need to be addressed at all, after I had delivered judgment.

(5) What did the Panel and the Defendant Decide?

48. At the hearing, I invited submissions on the questions of precisely what the Panel and the Defendant decided, since those seemed to me to be potentially significant issues.

(5)(a) The Panel's Decision

49. The Panel decided that the Claimant was guilty of misconduct. As I have said, the Claimant had admitted that he was guilty of misconduct. Formally, the position was that:

(1) In deciding that the Claimant was guilty of misconduct, the Panel implicitly decided that he was not guilty of gross misconduct, i.e. that his breach of the Standards of Professional Behaviour was not so serious as to justify dismissal.

(2) The Panel having found that the Claimant was guilty of misconduct, but not of gross misconduct, it was not open to the Panel to impose the disciplinary sanction of dismissal on the Claimant.

50. The Panel then decided that the appropriate disciplinary sanction to impose was a written warning.

51. However, Mr Beggs submitted that the Panel appeared not to have structured its decision as it ought to have done, since it appeared to have taken account of personal mitigation at the misconduct stage, rather than at the sanction stage. Mr Beggs submitted that, given its reasoning, the Panel ought to have found that the Claimant's misconduct did amount to gross misconduct, but that dismissal was not the appropriate sanction, in the light of his personal mitigation. I did not understand Mr Williamson to dissent from this analysis. His submission was simply that, one way or another, the Panel had decided that the Claimant should not be dismissed.

52. The Panel's decision included a number of findings about the Claimant:

    (1) "… we accept that the Officer is not a person who ordinarily behaves in a discriminatory fashion, but on the contrary usually shows empathy and respect towards others."

    (2) The Claimant had provided "evidence of genuine remorse [and] insight …"

    (3) The Claimant had shown "maturity and insight" since the incident.

    (4) "The Panel also accepts that the Officer has learned from the episode …"

53. The Panel did not expressly address the question whether the Claimant was likely to become a well conducted constable. However, it is to be expected that, if the Panel had been of the opinion that the Claimant was not likely to become a well conducted constable, then the Panel would not have made the finding that it did, but would instead have found the Claimant guilty of gross misconduct and decided that the appropriate sanction was dismissal. What the Panel did say about the Claimant's future conduct was to express a degree of confidence, albeit with no certainty, saying:

> "We trust that he will continue to use the learning he has gained to develop himself further and achieve the potential that others have recognised in him, and to assist colleagues and student officers in putting equality and diversity at the forefront of serving the community."

(5)(b) The Defendant's Decision

54. The Defendant correctly identified the test to be applied under Regulation 13. That test has four limbs. A probationary constable can be dismissed if the chief constable considers that he is:

    (1) not fitted physically to perform the duties of his office;

    (2) not fitted mentally to perform the duties of his office;

    (3) not likely to become an efficient constable; and/or

    (4) not likely to become a well conducted constable.

55. It is clear from the conclusion to his decision that the Defendant based his decision on the fourth limb of this test, and only on the fourth limb. The Defendant concluded that the Claimant was not likely to become a well conducted constable. Mr Beggs submitted that there were suggestions or indications in the decision that the Claimant was not likely to become an efficient constable (for reasons akin to those considered in *Verity*), but the only limb of the test which the Defendant said was satisfied was the fourth limb and it would not be right to read into the decision a decision which the Defendant did not make.

56. A decision to discharge a constable under Regulation 13 does not have to be based on any misconduct at all on the part of the constable: see *Verity*. However, in the present case, the sole basis for the Defendant's decision that the Claimant was not likely to become a well conducted constable was the Claimant's misconduct in telling the racist joke. This was expressly recognised by the Defendant in the first paragraph of his decision, which I have quoted above.

57. The Defendant said that he respected the findings made by the Panel. I take that to mean that he accepted the Panel's finding that this was a case of misconduct, rather than gross misconduct. However, it is apparent from paragraph 4.90 of the Conduct Guidance that a decision to discharge under Regulation 13 can be based on misconduct which does not amount to gross misconduct.

58. The Defendant's decision contained a number of passages in which the Defendant commented on the Claimant's remorse, insight and mindset. In particular:

    (1) The Defendant observed that, given that there were a significant number of police witnesses to the incident, that "no doubt assisted with his admission".

    (2) The Defendant added that "remorse is not unexpected given what has followed".

    (3) The Defendant observed that the Claimant's use of terms such as "politically correct" and "safe place" in his submission to the Misconduct Panel was "particularly troubling" and "suggests a belief in forced compliance."

    (4) In relation to the statement in Superintendent Baillie's report that the Claimant had said in the Regulation 13 hearing that "he is still unclear as to why he said what he said", the Defendant said that this was "a matter of concern for me".

    (5) The Defendant said that the telling of a racist joke showed "an extremely concerning mindset".

    (6) The Defendant said that "a well conducted constable must be able to command the confidence of colleagues, the organisation generally and – most importantly – the diverse communities which we serve."

59. The Claimant also took issue with two other matters in the Defendant's decision:

    (1) The Defendant described the Claimant as someone "who so blatantly displays such racist views as evidenced by his "joke", and despite all his training to date". The Claimant submitted that this was an indication that the Defendant considered that the claimant generally held racist views. I do not accept this. In itself, the telling of the joke was undoubtedly a blatant display of racist views. Whether the Claimant generally held such views was a separate question.

    (2) The Claimant submitted that the reference by the Defendant to "the behaviours" of the Claimant indicated, given the use of the plural, that the Defendant had in mind more than just the single incident of the telling of the joke. I do not accept this. Decisions of this nature are not to be read as if they were statutes.

(6) Was the Defendant entitled to use Regulation 13?

(6)(a) Submissions

60. Mr Williamson submitted, in effect, that it was unlawful for the Defendant to commence proceedings under Regulation 13 given the particular circumstances of the present case, namely that:

    (1) The Defendant had chosen to commence misconduct proceedings, rather than proceedings under Regulation 13. It would have been open to the Defendant to commence proceedings under Regulation 13 rather than misconduct proceedings, because the facts of the misconduct were not disputed.

    (2) The grounds for the subsequent Regulation 13 proceedings were exactly the same as the grounds for the misconduct proceedings.

    (3) The Claimant had been at peril of dismissal in the misconduct proceedings and, Mr Williamson submitted, ought not to be exposed to the same peril on the same grounds before a different decision-maker.

61. Another feature of the present case worth noting in this context is that, as I have found, the Defendant's decision under Regulation 13 was based solely on the fourth limb of the condition precedent to Regulation 13.

62. Mr Williamson did not go so far as to submit that it could never be lawful to commence proceedings under Regulation 13 after misconduct proceedings had taken place. For instance, given the terms of paragraph 4.90 of the Conduct Guidance, I asked Mr Williamson whether it was his case that Regulation 13 could not be used where misconduct (but not gross misconduct) had been found at a misconduct meeting. He accepted that it may be in such a case that Regulation 13 could properly be used, perhaps because the officer had been disbelieved in the misconduct proceedings. However, he stressed that, in the case of a misconduct meeting, the officer would not have been at peril of

dismissal in the misconduct proceedings. He added that a misconduct meeting is held in private, whereas a misconducting hearing is held in public. (*Victor* is now an example of a case in which a misconduct meeting was followed by a Regulation 13 decision, but with a vetting review intervening.)

63. Mr Williamson relied, in particular, on the statements by Henry LJ in his judgment in *Farmer* that:

    (1) "… there are two separate dismissal procedures which govern probationers."

    (2) "The decision which to use is a decision for the employing force."

64. He submitted, in effect, that when the Defendant decided that misconduct proceedings should be brought, he made a once-for-all decision that (in the absence, presumably, of a material change in circumstances) that procedure, and only that procedure, should be used to determine whether Claimant should be removed from office by reason of his single act of misconduct.

65. By contrast, Mr Beggs submitted that:

    (1) The Defendant was entitled to take a decision pursuant to Regulation 13, which was a discretionary decision reserved expressly to him by Parliament and not excluded by the Conduct Regulations.

    (2) Recruitment, appointment, probation, confirmation and deployment of junior officers in the Defendant's police area are at the core of the Defendant's managerial and operational discretion, in respect of which the Defendant is accountable to the public.

    (3) The Regulation 13 proceedings were not a second round of "discipline" against the Claimant. The Defendant was concerned about the Claimant's proven misconduct, what it indicated about the Claimant's values and judgments and the practical implications for the Claimant's future service. These are all proper subjects for a decision under Regulation 13.

66. As I have already indicated, the Claimant put his case in a number of different ways. I turn to consider them, although it has to be acknowledged that there was considerable overlap between the submissions on the different ways of putting the case.

(6)(b) Breach of the Conduct Guidance?

67. As I have said, the Claimant submitted both that the Defendant's decision was unlawful because it was contrary to paragraph 4.87 of the Conduct Guidance and that the Claimant had a legitimate expectation that the Defendant would follow the Conduct Guidance. I do not consider that it is helpful to look at this issue in terms of legitimate expectation. That concept is unnecessary because the Defendant was obliged by section 87(3) of the Police Act 1996 to have regard to the Conduct Guidance in discharging the functions to which it relates.

I did not understand Mr Williamson to argue that the Claimant had a legitimate expectation that the Defendant would do more than he was obliged to do by section 87(3). The real issue in relation to the Conduct Guidance, therefore, is whether the Defendant failed in his duty to have regard to it.

68. Paragraphs 4.87 to 4.91 of the Conduct Guidance related not only to the Defendant's functions under the Conduct Regulations, but also to his conduct under Regulation 13. Those paragraphs do not expressly address the possibility (or otherwise) of proceedings under Regulation 13 following misconduct proceedings. However, Mr Williamson submitted, in effect, that it was implicit in them that what they term "a misconduct matter" should be dealt with either by misconduct proceedings or by proceedings under Regulation 13, but not by both. The relevant wording is as follows:

(1) The second sentence of paragraph 4.87 says that:

> "The chief officer has discretion whether to use the disciplinary procedures or the procedures set out at Regulation 13 of the Police Regulations 2003 (Discharge of probationer) as the most appropriate means of dealing with a misconduct matter."

(2) I note that this sentence: (a) uses "or" rather than "and/or" as the conjunction between the disciplinary procedures and the Regulation 13 procedure; (b) does not contain the words "or both" after the reference to Regulation 13; and (c) speaks of using the disciplinary procedures or the Regulation 13 procedure as "the most appropriate" means of "dealing with" a misconduct matter, which implies that one of them will be the single most appropriate means of dealing with a misconduct matter.

(3) Paragraph 4.88 says that allegations of gross misconduct (as in the present case) should ordinarily be subject to disciplinary proceedings "rather than" the Regulation 13 route. The words "rather than" are apt to exclude the Regulation 13 procedure when disciplinary proceedings are brought.

(4) The first sentence of paragraph 4.89 also uses the words "rather than" in the converse situation, where the Regulation 13 procedure is used "rather than" misconduct procedures.

(5) The third sentence of paragraph 4.89 says that where the misconduct in question is not admitted, then, in most if not all cases, the matter will fall to be "determined" under the misconduct procedures. The word "determined" indicates a final decision.

69. For these reasons, Mr Williamson submitted, in effect, that the Conduct Guidance indicates that, in a case such as the present, the "misconduct matter" should be "determined" by the disciplinary proceedings "rather than" the Regulation 13 procedure.

70. By contrast, Mr Beggs submitted that the relevant paragraphs of the Conduct Guidance do not preclude proceedings under Regulation 13 being commenced after the completion of misconduct proceedings. He submitted that:

    (1) Those paragraphs are really concerned with the question considered in cases such as *Farmer*, namely whether it would be unfair to an officer accused of misconduct to deprive him of the procedural protections inherent in misconduct proceedings in a case where the facts are disputed.

    (2) Those paragraphs simply do not deal with the question whether misconduct proceedings can be followed by proceedings under Regulation 13.

71. I do not consider that the relevant paragraphs of the Conduct Guidance can be interpreted as Mr Williamson proposes. The principal reasons for my conclusion are that:

    (1) Those paragraphs do not say expressly that Regulation 13 proceedings cannot be brought after misconduct proceedings.

    (2) Indeed, Mr Williamson acknowledged, having regard to the wording of paragraph 4.90, that, in an appropriate case, Regulation 13 proceedings could be brought after a misconduct meeting which resulted in a finding of misconduct.

    (3) Mr Williamson argued, in effect, that the Conduct Guidance means that Regulation 13 proceedings cannot be brought after misconduct proceedings if:

        (a) the grounds for the Regulations 13 proceedings were exactly the same as the grounds for the misconduct proceedings; and

        (b) the officer had been at peril of dismissal in the misconduct proceedings.

    (4) Again, however, this is not something which is expressly stated in the Conduct Guidance.

(6)(c) Estoppel

72. Mr Williamson referred to the constituent elements of cause of action estoppel as set out in paragraph 1.20 of *Spencer Bower and Handley: Res Judicata* (4th Edn.), which was cited by Lord Clarke in paragraph 34 of his judgment in *R (Coke-Wallis) v Institute of Chartered Accountants* [2011] UKSC 1 ("*Coke-Wallis*"), namely:

> "(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was— (a) final; (b) on the merits; (v) it determined a question raised in

the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem."

73. Mr Williamson submitted that all six of these constituent elements are present in this case. Mr Beggs took issue with that. He submitted that elements (v) and (vi) are not present in this case. In particular, in relation to element (vi), Mr Beggs submitted that, by exercising his discretion under Regulation 13, the Defendant was not entering into a legal dispute with the Claimant, to be determined by an independent body, but rather was the decision maker, exercising a power conferred on him in respect of the Claimant's probation. He relied on paragraphs 47 to 52 of Elias LJ's judgment in *Christou v Haringey London Borough Council* [2014] Q.B. 131 (*"Christou"*).

74. *Coke-Wallis* concerned two successive complaints made by the Institute of Chartered Accountants against Mr Coke-Wallis, each of which was to be determined by an independent disciplinary committee. The first complaint was dismissed by a disciplinary committee and the Supreme Court held that the second disciplinary committee was obliged to dismiss the second complaint on the grounds of cause of action estoppel. By contrast, *Christou* concerned two successive disciplinary proceedings commenced by an employer, neither of which was determined by an independent disciplinary committee.

75. The significance of this distinction between the two cases is apparent when one considers the nature of cause of action estoppel, as set out in paragraphs 40 and 41 of Elias LJ's judgment:

> "40. The twin principles underlying this doctrine have been often espoused: they are the need for finality in litigation and that a party should not be vexed by being twice subjected to the same litigation. Lord Maugham LC described them in these terms in *New Brunswick Railway Co v British and French Trust Corpn Ltd* [1939] AC 1 , 19–20:
>
> > "The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them."
>
> 41. There is no doubt that some domestic tribunals set up by contractual agreement will constitute judicial bodies whose determinations will be judicial in the relevant sense. The leading textbook on the subject, *Spencer Bower & Handley, Res Judicata,* 4th ed (2009), para 2.05 observes:
>
> > "Every domestic tribunal, including any arbitrator or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order, or statute, is a 'judicial tribunal' for present

> purposes, and its awards and decisions conclusive unless set aside.""

76. That is what led Elias LJ to say as follows in paragraphs 47 and 48 of his judgment:

> "47. I do not accept this submission. In my judgment it is wrong to describe the exercise of disciplinary power by the employer as a form of adjudication. The purpose of the procedure is not "a determination of any issue which establishes the existence of a legal right", as Lord Bridge put it in the *Thrasyvoulou* case [1990] 2 AC 273, nor is it properly regarded as "determining a dispute".
>
> 48. In the employment context the disciplinary power is conferred on the employer by reason of the hierarchical nature of the relationship. The purpose of the procedures is not to allow a body independent of the parties to determine a dispute between them. Typically it is to enable the employer to inform himself whether the employee has acted in breach of contract or in some other inappropriate way and, if so, to determine how that should affect future relations between them. It is true that sometimes (but by no means always) the procedures will have been contractually agreed, but that does not in my judgment alter their basic function or purpose. The employer has a duty to act fairly and procedures are designed to achieve that objective. The degree of formality of these procedures will vary enormously from employer to employer. But even where they provide a panoply of safeguards of a kind typically found in adjudicative bodies, as is sometimes the case in the public sector in particular, that does not alter their basic function. It is far removed from the process of litigation or adjudication, which is in essence where this doctrine bites."

77. I do not accept Mr Williamson's submission that *Christou* can be distinguished because it concerned a contractually agreed process, whereas the present case concerned a power conferred by regulation. In my judgment, the relevant distinction, as identified by Elias LJ, is between adjudication, to which the doctrine of cause of action estoppel applies, and other processes or procedures, to which it does not.

78. I agree with Mr Beggs' submission that the Defendant, in deciding whether or not to discharge the Claimant pursuant to Regulation 13, was not acting as a "judicial tribunal" for the purposes of the doctrine of cause of action estoppel. It follows that he was not precluded by that doctrine from deciding to discharge the Claimant. The same applies to the doctrine of issue estoppel.

79. Mr Williamson also referred to paragraph 45 of Mostyn J's judgment in *R (Mandic-Bozic) v British Association for Counselling and Psychotherapy* [2016] EWHC 3134 Admin; [2017] 154 B.M.L.R 159 ("*Mandic-Bozic*"), in which Mostyn J referred to the collateral attack doctrine. Mr Williamson

submitted that the Regulation 13 proceedings in the present case were a collateral attack on the decision of the Panel.

80. However, in paragraph 5 of his judgment, Mostyn J had summarised what he called the "magisterial exposition" of the legal principles on duplicative proceedings by Lord Sumption in paragraphs 17 to 26 of his judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160, which in turn, in relation to collateral attack, referred to paragraph 38 of Sir Andrew Morritt V-C's judgment in *Secretary of State for Trade and Industry v Bairstow; Re Queen's Moat House Plc* [2004] Ch 1. Those judgments make clear that the collateral attack doctrine is concerned with attempts to relitigate issues and that the basis for the doctrine is that a second action, by which a party seeks to relitigate an issue decided in an earlier action, can be an abuse of the process of the court in which the second action is brought.

81. For reasons which I have already given when considering the doctrine of cause of action estoppel, the present case does not involve an attempt to relitigate an issue, since the Defendant was not acting as a "judicial tribunal" when he commenced the Regulation 13 proceedings. Accordingly, the collateral attack doctrine did not apply.

(6)(d) Ultra Vires

82. I do not consider that it can be said that the Defendant acted ultra vires. Regulation 13 conferred power on the Defendant to discharge the Claimant if the condition precedent was satisfied and the Defendant concluded that it was, i.e. the Defendant considered that the Claimant was not likely to become a well conducted constable.

(6)(e) The Purpose of Regulation 13

83. Mr Williamson submitted that the Defendant used Regulation 13 to obtain a result which he had sought in, but did not get from the misconduct proceedings, i.e. the Claimant's dismissal, and that this was an improper use of Regulation 13, which was outside the purpose for which the power to discharge was conferred and subverted the proper purpose of Regulation 13. The premise for this submission was Mr Williamson's central submission, to which I have already referred, that when the Defendant decided that misconduct proceedings should be brought, he made a once-for-all decision that (in the absence, presumably, of a material change in circumstances) that procedure, and only that procedure, should be used to determine whether the Claimant should be removed from office by reason of his single act of misconduct.

84. I am not persuaded by that submission. I do not consider that it is supported by authority since, as I have explained, the authorities which Mr Williamson relied on were all dealing with a different issue, namely whether the chief constable should have commenced misconduct proceedings, with their procedural safeguards for the constable, rather than Regulation 13 proceedings. That is not an issue in this case, since the Defendant did commence misconduct proceedings. Nor, as I have explained, do I consider that the submission is supported by the Conduct Guidance or the doctrines of cause of action estoppel,

issue estoppel or collateral attack. I also bear in mind that Regulation 13 confers the power to discharge a probationary officer on the chief constable, who is responsible for the operation and management of the police force, rather than on a misconduct tribunal or a misconduct meeting.

(6)(f) Irrationality

85. In his skeleton argument, Mr Williamson submitted that no reasonable person would have made the decision to commence Regulation 13 proceedings. However, in reliance on this submission he relied on a number of matters which I have already dealt with, including the Conduct Guidance, *Farmer* and, in effect, his central submission. If I am right that those various matters did not preclude the Defendant from commencing Regulation 13 proceedings, then it is difficult to see that it was irrational for the Defendant to do so.

(7) The Conduct of the Regulation 13 Proceedings

(7)(a) The Parties' Submissions

86. Mr Williamson helpfully confirmed that if, contrary to his primary submission, the Defendant was entitled to commence the Regulation 13 proceedings, he did not complain about the conduct of those proceedings down to the point at which the Defendant received Superintendent Baillie's report. Mr Williamson submitted that the process followed thereafter by the Defendant was unfair, and therefore irrational, in that the Defendant relied on a number of matters, namely those listed in paragraph 58 above, which either had not been put to the Claimant or had been put to him, but had been answered by him to the satisfaction of the Panel and Superintendent Baillie, and the Defendant did not give the Claimant the opportunity to respond to those matters, either in writing or (preferably) at a hearing. Mr Williamson confirmed that it was his case that the Defendant should, at the very least, have sent a "minded to" letter to the Claimant in respect of these matters, although he submitted that a hearing would have been preferable.

87. Mr Beggs submitted that the Defendant did not rely on any new allegation or any new evidence when making his decision. In both the disciplinary proceedings and the Regulation 13 proceedings, the Claimant knew what the alleged misconduct was, he knew that dismissal or discharge was a potential outcome and he had a full opportunity to say what he wanted to say, either in witness statements or written submissions, in response to the allegation and on the subject of the appropriate outcome. Mr Beggs also submitted, by reference to paragraphs 36-37 of Silber J's judgment in *Verity* and paragraphs 26ff of Lord Drummond-Young's judgment in *C* that Regulation 13 proceedings do not require an oral hearing.

(7)(b) Decision

88. It is helpful to consider the context for the Defendant's decision. As Mr Beggs submitted, the Claimant knew what the alleged misconduct was, he knew what the potential outcome was and he was able to advance his case on those issues before the Panel. In relation to misconduct, although formally the Panel's

decision was that the Claimant was guilty of misconduct, rather than gross misconduct, there was, as I have noted, no dissent from Mr Beggs' submission that the Panel's decision was in substance that the Claimant was guilty of gross misconduct, i.e. a breach of the Standards of Professional Behaviour that is so serious as to justify dismissal, but that dismissal was not the appropriate sanction, in the light of his personal mitigation.

89. Thereafter, the Claimant had a further opportunity to advance his case on both misconduct and outcome in the Regulation 13 proceedings. Superintendent Baillie reported to the Defendant, but it was rightly not suggested that the Defendant was obliged to accept the recommendation contained in that report. If the Defendant had agreed with the recommendation in the report, it might well have been appropriate for him to say simply that he agreed with it. Where, however, the Defendant disagreed with the recommendation in the report, it was appropriate for him to give his reasons, which, ex hypothesi, involved a different assessment of the evidence from the assessment made by the Panel and by Superintendent Baillie.

90. In those circumstances, I do not consider that it was unfair or irrational in itself for the Defendant to explain in his decision why he took a different view of the evidence as to issues such as the seriousness of the misconduct and the extent of the Claimant's remorse and insight. The essence of the Defendant's reasoning was as follows:

> "I conclude that the behaviours of PC Barnes are so at odds with being a well conducted constable that, despite his remorse and self-reflection, and despite his otherwise unquestionable performance, I am satisfied that he is not likely to become a well conducted constable."

91. In my judgment, that is sufficient to dispose of the complaint made in respect of the matters set out in subparagraphs 58(1) to (4) above, which were observations on the evidence as to the Claimant's remorse, insight and mindset.

92. The remaining complaint concerns the Defendant's statement (referred to in subparagraphs 58(5) and (6) above) that:

> "In my view, a well conducted constable must be able to command the confidence of colleagues, the organisation generally and - most importantly – the diverse communities which we serve. To my mind, the telling of a racist 'joke' of this nature is obviously relevant to those issues. It also shows an extremely concerning mindset."

93. Mr Williamson submitted that the Defendant should not have referred to this issue without ascertaining what was the "mature and considered response" to Superintendent Baillie's questioning on this issue, which could have been done by asking Superintendent Baillie, by reading the transcript of that questioning or by inviting submissions from the Claimant.

94. However, I note that:

(1) In saying that the telling of a racist joke was obviously relevant to the Claimant's ability to command the confidence of others, the Defendant was saying no more than what the Claimant had himself acknowledged, as recorded in the passage from Superintendent Baillie's report quoted in paragraph 11(2) above.

(2) The Defendant's observation that the telling of the joke showed an extremely concerning mindset expressed a view which was not irrational in relation to the telling of the joke, either if that was seen in isolation or if it was seen in the context of the evidence as to the Claimant's insight, as to which the Defendant had already noted that the Claimant himself had said that he was still unclear as to why he had said what he had said.

(3) The Defendant went on in his decision to recognise that by all accounts the Claimant's behaviour and performance had otherwise been unquestionable and that he had received many positive testaments from colleagues and supervisors.

95. In all the circumstances, I do not consider that it was unfair or irrational for the Defendant to express himself as he did in his decision without making further enquiries or inviting further submissions.

(8) Conclusion

96. For these reasons, I dismiss the application for judicial review.

97. I express my thanks to all counsel and solicitors for their efforts, which enabled a number of complex issues to be presented both clearly and comprehensively.