OUTER HOUSE, COURT OF SESSION

[2024] CSOH 57

P823/23

OPINION OF LADY DRUMMOND

in the Petition of

DEPUTY POLICE CONSTABLE (DESIGNATE) FIONA TAYLOR, QPM

Petitioner

for

Judicial Review of a decision of the Police Appeals Tribunal

Petitioner: Crawford KC,; Clyde & Co
Respondent: Dean of Faculty, Adam, Advocate; MacRoberts LLP

17 May 2024

[1] The petitioner, the Deputy Police Constable (Designate), seeks reduction of a decision by the police appeals tribunal of 7 July 2023 in which it made findings of misconduct and gross misconduct by the respondent and issued him with a final written warning.

[2] The respondent is CD, a Detective Constable in the Police Service of Scotland. In March/April 2022 he was served with seven allegations of misconduct. The allegations were that he had posted and received inappropriate images in a WhatsApp group and taken part in inappropriate discussions through WhatsApp messages and had made derogatory and

offensive comments or were complicit in others making such comments about fellow police constables:

"1. On 6th December 2015, you did behave in an inappropriate manner by posting an image to the WhatsApp chat group 'QUALITY POLIS' depicting an Asian male named 'Gayview Mahat'' with a comment 'Last Christmas I', and your conduct in so doing brought discredit on the Police Service or undermined public confidence.

2. On 6th December 2015, you were part of the WhatsApp chat group, 'QUALITY POLIS', you received a number of inappropriate images posted by other Constables and you did fail to report, challenge or take action against the conduct of other Constables which had clearly fallen below the Standards of Professional Behaviour, such as it was your duty so to do.

3. On or between 10th February and 17th July 2016, you did behave in an improper manner by taking part in discussions with others on WhatsApp chat group 'PC PIGGIES', concerning Constable A, c/o Police Scotland, and did make derogatory and offensive comments and/or were complicit in others making derogatory and offensive comments about said Constable A, including remarks regarding her being dyslexic, thereby failing to treat her with respect and courtesy.

4. On or between 10th February and 17th July 2016, you did behave in an improper manner by taking part in discussions with others on WhatsApp chat group 'PC PIGGIES', concerning Constable B, c/o Police Scotland, and did make derogatory and offensive comments and/or were complicit in others making derogatory and offensive comments about said Constable B, thereby failing to treat her with respect and courtesy.

5. On or between 10th February and 17th July 2016, you did behave in an improper manner by taking part in discussions with other on WhatsApp chat group 'PC PIGGIES', concerning Constable C, c/o Police Scotland, and did make derogatory and offensive comments and/or were complicit in others making derogatory and offensive comments about said Constable C, thereby failing to treat her with respect and courtesy.

6. On 20th March 2016, you did behave in an improper manner by taking part in discussions with other on WhatsApp chat group 'PC PIGGIES', concerning an unidentified female 'Camilla' and did make derogatory and offensive comments and/or were complicit in others making derogatory and offensive comments about said unidentified female being a lesbian and you did specifically comment, 'How's her muff diving rash' and 'She got a new do? She had a blokes chop at tulli', thereby failing to treat said unidentified female with respect and courtesy.

7. On 1st April 2016, you did behave in an improper manner and did take part in a discussion on WhatsApp chat group 'PC PIGGIES' and in response to a comment by another Constable of said chat group stating 'Done my first drug raid today, managed to get £8631 cash and 700 valies, 100g chinge and 130g heroin' you did comment 'Nice one Kev did you keep some for yersel' and your conduct in so doing brought discredit on Police Service or undermined public confidence therein."

[3] Misconduct proceedings were taken under the Police Service of Scotland (Conduct) Regulations 2014. On 28 June 2022 the Chief Superintendent determined that five allegations (allegations 1, 2, 3, 4 and 6) all amounted to gross misconduct. She did not uphold allegations 5 and 7. She determined that the respondent should be dismissed without notice.

[4] The respondent appealed. The appeal was determined by the Assistant Chief Constable without an oral hearing on 28 October 2022 and the respondent's appeal dismissed.

[5] The respondent next appealed under section 56 of the Police and Fire Reform (Scotland) Act 2012 to the Police Appeals Tribunal. The respondent accepted that allegations 1, 2, 3 and 4 were misconduct. He accepted that allegation 6 was gross misconduct. He proceeded with two grounds of appeal: (i) that the finding of gross misconduct in relation to allegations 1 to 4 was unjustified and unreasonable and (ii) that the sanction of dismissal without notice was disproportionate. The respondent sought reinstatement to the office of constable. He submitted that a written warning or a final written warning was sufficient in the circumstances.

[6] On 7 July 2023 the tribunal decided that the conduct in allegations 1 and 2 did not amount to misconduct. The tribunal found that the conduct in allegations 3 and 4 was misconduct and that the conduct in allegation 6 was gross misconduct. The tribunal reinstated the appellant and imposed a sanction of a final written warning.

Petitioner's submissions

Grounds of review

(1) Unfairness and procedural irregularity

[7] The petitioner invited me to reduce the decision.

[8] The petitioner submitted that the procedure adopted in any judicial or quasi-judicial proceedings must be fair and that parties must be given adequate notice of the issues they are required to address. Without notice, there is no opportunity to speak and no facility to be heard. One of the most fundamental rules of natural justice is the right of each party to be heard and informed of any point adverse to them that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is (*Hadmor Productions* v *Hamilton* [1983] 1 AC 191, p233B).

[9] An issue which the petitioner did not require to address before the tribunal was whether allegations 1 and 2 constituted misconduct. That was because it was a matter of admission by the respondent. The scope of the appeal was whether the conduct amounted to gross misconduct or merely misconduct. Because the respondent did not dispute that allegations 1 and 2 constituted misconduct, no submissions were invited or volunteered on the question whether the conduct did or did not constitute misconduct. If notice had been given, the point would have been addressed.

[10] It is for the respondent to determine the scope of the grounds of appeal and not the tribunal. Whilst it was submitted that it is unnecessary to decide the issue, it is highly questionable whether it is competent for the tribunal to expand the scope of the appeal as it did, to introduce an issue not before it which was the subject of an uncontested admission in an adversarial process. It is for the parties to frame the issues which the court is to

determine and not normally the court's business to investigate matters of admission or agreement (*Griffiths* v *TUI (UK)* [2023] 3 WLR 1204 at paragraphs 41, 42 and 52). This applies equally to a tribunal.

[11] It is impermissible for the judge, or tribunal, to seek to modify the issues. While the judge may encourage parties to do so, if they refuse the judge must respect their decision (per Lord Justice Dyson, paragraph 21, *Al-Medenni* v *Mars UK Ltd* [2005] EWCA Civ 1041. The place for the issues to be raised is in the pleadings (paragraph 22).

[12] The right to be heard - *audi alteram partem* - has been violated by the failure of the tribunal to give the petitioner any notice that it intended to address this new issue. By the time of discovering the issue, on receipt of the tribunal's decision, the opportunity to be heard had passed. The opportunity to be heard on the issues before the tribunal is "one of the oldest principles of what would now be called public law" (*Bank Mellat* v *HM Treasury* (No 2) [2013] UKSC 39; [2014] AC 700 at paragraph 29). It is rooted in the speech of Lord Mustill in *R* v *Secretary of State ex parte Doody* [1994] 1 A.C. 531 at p560. His Lordship made clear that in order to serve the right to make representations with a view to producing a favourable result, first the parties must know what it is they are to make representations about. Thus, for the right to be heard to be effective, there must be fair notice of the issues to be addressed.

[13] Rule 5(3)(a) of the Police Appeal Tribunals (Scotland) Rules 2013 prescribes that an appellant must set out fully the grounds of appeal. The respondent must set out, in reply, the basis upon which those grounds are opposed (rule 6(2)(a)). That is to provide notice to the parties of the issues. The introduction of a new issue by the tribunal is in breach of the substance and form of those rules.

[14] Section 57 of the 2012 Act requires the tribunal, before determining an appeal, to give the appellant and respondent a chance to make representations (whether by way of written submissions or oral hearing), and to consider such representations. The tribunal failed to give the petitioner an opportunity to make representations on whether the conduct amounted to misconduct, and did not consider any such representations, in breach of section 57.

[15] There having been a breach of natural justice by the petitioner having been denied an opportunity to be heard on a central issue, the decision may not be rescued, *General Medical Council* v *Spackman* 1943 ac 627 at p644. Had the issue been raised, the petitioner would and could have addressed the evidence differently and made submissions addressing why the conduct was, failing gross misconduct, misconduct. The decision that the conduct was not misconduct was bound to have infected the overall disposal of the appeal. When addressing disciplinary action the tribunal proceeded on the basis that its decision on allegations 1 and 2 were sound.

[16] In oral submission, in reply to the respondent's submission that no more required to be said on the question of the categorisation of the conduct, the petitioner submitted that was too simplistic an approach. Had the tribunal articulated its concerns that the conduct did not amount to misconduct, the petitioner would have made submissions about that. The petitioner would have addressed the contention that the behaviour did not amount to misconduct because the message was intended to be humorous rather than perceived ill will on grounds of race. The petitioner would have addressed the tribunal on the need nonetheless for the public to maintain public confidence in the police. The petitioner would have made submissions about the duty of officers to report receipt of offensive messages in light of the relevant guidance, notwithstanding and culture of non-reporting. It cannot be

said that it is absolutely clear that the same result would inevitably have been reached. The petitioner's representations may have been accepted or rejected, but it cannot be said that they would have inevitably been fruitless. These were messages categorised by the tribunal as inappropriate and distasteful with every prospect of them amounting to misconduct.

(2) Inadequate reasons re allegations 3 and 4

[17] The petitioner argued that there is a lack of adequate and comprehensible reasons on why allegations 3 and 4 did not amount to gross misconduct (*South Bucks District Council* v *Porter* (No. 2) [2004] 1 WLR 1953 at paragraph 36). The tribunal failed to explain why the test of gross misconduct was not met and the test of misconduct was met by reference to the definitions under the 2014 Regulations. In any event, the tribunal appeared to misconstrue the test for gross misconduct, stating it met a standard so "as to justify dismissal" (paragraph 16) when the test is that it "may" justify dismissal. The tribunal erred in law by applying a materially higher test. Whether gross misconduct *does* justify dismissal is relevant to the question of disciplinary action.

[18] There is no adequate explanation why the conduct was misconduct alone. The tribunal determined that the comments created a "hostile environment and were wholly inappropriate … were directed at individuals with whom the [respondent] worked or may well require to work with in the future". In oral submission it was submitted that it is unclear what differing criteria the tribunal used to distinguish between misconduct and gross misconduct. Allegation 2 (found not to be misconduct) described the posting of the images as "very inappropriate and distasteful" but allegations 3 and 4 (found to be misconduct) are similarly described as being "wholly inappropriate". Allegation 6 (found to be gross misconduct) described the comments as "vulgar, nasty and highly inappropriate".

It is unclear what the basis the tribunal used for differentiating between the categorisation of the behaviour as misconduct or gross misconduct. If a question of degree, it is difficult to decern from its reasoning what the basis for that is.

[19] In addition allegations 3 and 4 were before the tribunal (comprising the same membership) in an appeal in relation to another officer the previous day in the same terms, both officers having been involved in the making of those same comments. In the other decision letter, dated 6 July 2023, at paragraph 34, the tribunal acknowledged that one comment in particular was unquestionably sexist in nature and the images sent were derogatory and offensive. There is no acceptance in this decision letter by the tribunal that the same comment was unquestionably sexist in nature or the images derogatory and offensive. The tribunal has not adopted a consistent approach between the two appeals.

[20] Similarly the tribunal in its reasoning relied on the fact that the comments referred to in allegations 3 and 4 "were not collegiate" and were "far removed from the team building and supportive approach that the respondent should have adopted", but nonetheless did not amount to gross misconduct. The tribunal made similar references to comments not being collegiate when considering the sanction in relation to allegation 6, which amounted to gross misconduct. It was unclear what factors were relevant to culpability and what to sanction. The approach was inconsistent between allegations 3 and 4 on the one hand and allegation 6 on the other.

(3) Failure to have regard to relevant consideration: public confidence in the police

[21] The tribunal failed to have any regard to a material consideration, namely the need to maintain public confidence in the police. It is critical that the public, who are comprised of persons of different sexualities, gender and race, do not lack confidence in the police,

whether reporting crime or as suspects of crime. Rather, the assessment had regard only to considerations pointing in favour of the respondent. That is not a balanced assessment required to determine disciplinary action.

[22] What appears to be considered as a purpose or principle purpose of proceedings is for learning to take place (paragraph 44). It was recognised that was important, but the primary purpose of misconduct proceedings is to maintain public confidence in the police service.

[23] When considering allegation 6, gross misconduct, the tribunal does not address the purpose of the proceedings being to maintain public confidence. At paragraph 48, the tribunal states that a member of the public would not consider the errors of judgement so reprehensible that the respondent should be dismissed but would consider the conduct to be at the threshold of such a disposal. However, the question is not what the public thinks of how the respondent should be punished. The sanction should be imposed by reference to what is necessary to maintain the confidence of the public. There has been little if no consideration of what members of the public of different sexualities race and disability may have thought of the conduct were they to report it. The decision is vitiated by a failure to consider that matter.

Respondent's submissions

(1) Unfairness and procedural irregularity

[24] The respondent invited me to refuse the petition and to uphold his third to fifth pleas in law.

[25] Whilst the respondent conceded that his actions amounted to misconduct, that admission was not determinative of the question of misconduct which was for the tribunal alone. The tribunal was not bound to accept the parties' categorisation of the facts.

[26] The petitioner may be taken to have advanced in argument all factors that would be relevant to the tribunal's assessment of whether or not allegations 1 and 2 amounted to misconduct. It is not clear what more the petitioner might have said: the greater includes the lesser.

[27] The appeal was not restricted to a matter of law. It was a rehearing of the matter (*Rae* v *Strathclyde Joint Police Board* [2005] CSOH 131, [15]), as the tribunal correctly recognised at paragraph 40. The tribunal clearly considered the relevant facts in detail based on all the material placed before it. It concluded that the respondent's conduct in allegation 1 "was immature and could be as perceived as inappropriate" (paragraph 41). In so doing, it rejected the petitioner's submission that it was "essentially racist in nature and wholly inappropriate" (paragraph 41).

[28] For allegation 2, the tribunal accepted that the messages were "inappropriate and many extremely distasteful" (paragraph 41). However, the respondent was not a contributor to those messages. His failure was to challenge and report them. It was in that context that the tribunal concluded that obligation placed on him by the petitioner "place[d] far too onerous a task on [the respondent] in the real world". The tribunal described the messages as "very inappropriate and distasteful". The tribunal was best placed to make its own determination about the nature of the respondent's conduct based on the accepted facts before it and the applicable professional standards in their proper context (*Mooney* v *Secretary of State for Work and Pensions* 2004 SLT 1141, at 1150-1151). The decisions it reached regarding allegations 1 and 2 were ones it was entitled to make.

[29] There was no unfairness to the petitioner in taking the approach it did. All the relevant facts were placed before the tribunal. Parties had been given the fullest opportunity to address the tribunal on what it should make of those facts. Rule 15 gives a wide discretion to the tribunal as to how it should conduct a hearing, directing the tribunal to avoid formality in its proceedings. Having concluded that allegations 1 and 2 did not demonstrate misconduct, it was unnecessary to invite further submissions on whether misconduct was in fact made out. Parties could be taken to have said all they wished to say. There has been no identification of anything further that might have been submitted and no unfairness in proceeding in this manner. The petitioner having argued that allegations 1 and 2 demonstrated gross misconduct, there was no more to say on the question of misconduct.

[30] The decision would have been the same, even if the tribunal had convened a further hearing (*Malloch* v *Aberdeen Corporation* 1971 SC(HL) 85 at 118, per Lord Wilberforce; *King* v *East Ayrshire Council* 1998 SC 182 at 194, per Lord President Rodger; *Robertson, Petitioner* [2022] CSOH 45, per Lord Braid at [2]). The court should not act in vain where the error is not a material one (*VS* v *Secretary of State for the Home Department* 2017 SLT 977).

[31] There is no suggestion that the tribunal would have regarded the conduct as any more serious than allegations 3 and 4 (paragraphs 44 and 48). In the circumstances, it is implausible that the tribunal would have reached a different overall determination regarding sanction standing its assessment of the conduct in allegations 3, 4 and 6.

[32] If the court were to find in favour of the petitioner on the issue of procedural fairness alone, then it may raise a question about the appropriate disposal. It may only be appropriate to remit back to the tribunal to give the petitioner an opportunity to argue whether allegations 1 and 2 amounted to misconduct and nothing more. It would not be

appropriate to rip up the whole decision. The respondent requested that the court put the matter out by order to discuss the appropriate remedy in that event.

(2) Inadequate reasons re allegations 3 and 4

[33] The definitions of "misconduct" and "gross misconduct" were before the tribunal. Parties addressed the tribunal on the relevant case law. The comments regarding these allegations at paragraph 41 of the decision must be considered in light of the narration of the parties' submissions and further specific comments regarding these allegations in the "Sanction" section of its decision (paragraph 44). Read fairly, the tribunal's decision left no real and substantial doubt as to the reasons why it determined that it regarded allegations 3 and 4 as not amounting to gross misconduct (*Wordie Property* v *Secretary of State for Scotland* 1984 SLT 345). Allegation 6 contained offensive comments which fell into a different category for which clear reasons were given at paragraphs 41 and 45. The tribunal considered the sanction to be applied based on the context in which it occurred and the respondent's then limited service as a constable, his good character and impeccable service and subsequent training (paragraph 44).

(3) Failure to have regard to relevant consideration: public confidence in the police

[34] The tribunal considered the evidence led by the respondent and submissions of the parties which included the issue of maintaining public confidence in the police (paragraphs 17 [16], 22 and 28 to 36). The petitioner's submissions before the tribunal included a submission decision that if the appellant were not dismissed police confidence would have been undermined under reference to *Bawa-Garba* v *GMC* [2018] EWCA Civ 1879.

[35] At paragraph 47, the tribunal when considering whether a simple written warning might suffice, noted that the seriousness of the conduct required to be underlined both to the appellant and the public. That addressed the question of public confidence in the police. At paragraph 48 the tribunal considered what a reasonable member of the public would consider an appropriate response in relation to the seriousness of the appellant's conduct. These are clear references to the public at large, including the groups referred to in the messages.

[36] The test for overturning the decision of a specialist tribunal such as the tribunal on disposal is a high one. It was "pre-eminently a matter for the panel's expertise and judgment" (*Mallon* v *GMC* 2007 SC 426 at [30]). The test for interference is not close to being met.

Decision

The legal framework

[37] The disciplinary proceedings took place under Part 3 of the Police Service of Scotland (Conduct) Regulations 2014. Regulation 2 defines "gross misconduct" as meaning a breach of the standards of professional behaviour so serious that demotion in rank or dismissal may be justified. Misconduct is defined as meaning, unless the context otherwise requires, conduct which amounts to a breach of the standards of professional behaviour (but does not, unless the context otherwise requires, include gross misconduct).

[38] Where a misconduct allegation comes to the attention of the Deputy Chief Constable, she must assess whether the conduct would amount to misconduct, gross misconduct or neither. If after investigation she determines that there is a case to answer, she must refer the misconduct allegation to a misconduct hearing. The hearing must determine if it is

established that the conduct of the constable amounts to gross misconduct, misconduct or neither. Various disciplinary actions can be imposed including a verbal warning, a written warning, a final written warning, demotion in rank, dismissal with notice or dismissal without notice.

[39] Thereafter a constable may appeal against the determination and any disciplinary action ordered. That is an internal appeal. Where dismissal or demotion of rank is ordered, the constable has thereafter the right to appeal to a Police Appeals Tribunal.

[40] Under Schedule 1 to the 2014 Regulations standards of professional behaviour are defined and include:

- Honesty and integrity (constables are honest, act with integrity and do not compromise or abuse their position);
- Authority, respect and courtesy (constables act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy. Constables do not abuse their powers or authority and respect the rights of all individuals);
- Equality and diversity (constables act with fairness and impartiality. They do not discriminate unlawfully or unfairly;
- Discreditable conduct (constables behave in a manner which does not discredit the Police Service or undermine public confidence in it, whether on or off duty);
- Challenging and reporting improper conduct (constables report, challenge or take action against the conduct of other constables which has fallen below the Standards of Professional Behaviour).

[41] Under the 2013 Rules, the procedure at appeal must be determined by the tribunal which has the power to hear any new evidence or to rehear the evidence given at the misconduct hearing (rule 15). The tribunal must conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings; it must so far as appears to be appropriate seek to avoid formality in its proceedings.

[42] The appeal before the tribunal is not restricted to a point of law. It is a rehearing before the tribunal, not a review of the prior disciplinary decisions (*Rae* v *Strathclyde Joint Police Board and Others* [2005] CSOH 131 at paragraph 15). It follows that the tribunal does not have to take as its starting point the previous decision nor does it require to analyse the reasoning of the earlier decision makers or identify some error of law on their part. It may look at their reasoning, and may take it into account, but it is free to agree or differ from it. The tribunal can substitute its own view for that reached by the earlier decision maker. In doing that the tribunal does not have to explain why the earlier decision maker was wrong. It is free to decide how to categorise the conduct. But the reasons for its view will require to be adequate and the decision it reaches must be arrived at lawfully.

[43] The function of this court in these proceedings is a supervisory one. It is not an appeal on the merits. It is not for this court to substitute its judgment for that of the tribunal. Nor is it appropriate that this court engage in any evaluation of whether or not the respondent's behaviour amounted to misconduct, gross misconduct or neither. These are matters for the specialist tribunal. The decision of the tribunal may only be interfered with if the court is satisfied that the tribunal erred in law for example by taking into account irrelevant considerations, failing to take into account relevant ones, proceeding contrary to the rules of natural justice or procedural irregularity. The question for the court is whether

the tribunal reached a decision adopting a fair procedure and whether its reasons are adequate, intelligible and sufficient in the context and circumstances (*R (Chief Constable of Northumbria Police)* v *Police Misconduct Panel and M* [2022] EWHC 1217 at paragraph 26).

[44] In exercising its supervisory jurisdiction, the starting point is that the conclusion of the tribunal must be given proper respect. The court must take a modest line (*Mooney* v *Secretary of State for Work and Pensions* 2004 SLT 1141 (per Lord Brodie at p1151B). The court ought to recognise, and pay sufficient deference to, the expertise of the tribunal in its determination as to whether any allegations amount to misconduct or gross misconduct; *R (Campbell)* v *GMC* [2005] 1 WLR 3488 at paragraph 23; *Mallon* v *General Medical Council* 2007 SC 426 at paragraph 19. Sanction is also a question which is pre-eminently a matter for the tribunal's expertise; *Mallon* at paragraphs 29 to 30.

[45] The decision of the tribunal may only be interfered with if the court is satisfied that the tribunal erred in law. An error of law will occur where a tribunal has misdirected itself in law; entertained the wrong issue; proceeded upon a misapprehension or misconstruction of the evidence; taken into account irrelevant matters or failed to take account of relevant ones; or has reached a decision so extravagant that no reasonable tribunal, properly directing itself on the law, could have arrived at. An error of law cannot be said to have occurred simply where a tribunal has wrongly assessed the evidence in some way or weighed it in a manner with which a party disagrees *(SS* v *Secretary of State for the Home Department* 2010 CSIH 72 at paragraph 13).

[46] What is a relevant consideration is a matter for the court (*Tesco Stores Limited* v *Secretary of State for the Environment* [1995] 1 WLR 759 at p780). Where a statute is silent on what considerations to take into account, and what weight to place on those, the decision is only subject to challenge on *Wednesbury* irrationality grounds (*Re Findlay* [1985] AC 318

at p333). The decision in every case as to whether misconduct is gross has to be made by the tribunal in the exercise of its own skilled judgment on the facts and circumstances and in light of the evidence (*Mallon* v *General Medical Council*, paragraph 18.)

[47] The tribunal must provide reasons for its decision (rule 16(6)(b) of the 2013 Rules). The reasons for a decision must be intelligible and they must be adequate. The decision must leave the reader in no real and substantial doubt as to what the reasons for its decision were and what material considerations were taken into account (*Wordie Property Co Limited* v *The Secretary of State for Scotland* 1984 SLT 345 at 348). They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision (*South Bucks District Council* v *Porter (No 2*) [2004] 1 W.L.R 1953 at paragraph 36). It is necessary to read the decision as a whole, rather than to focus on specific passages in isolation (*Barakat* v *General Medical Council* [2013] EWHC 3427 (Admin) at paragraph 18).

[48] In the context of reasons challenges in police disciplinary cases, similar observations were made in *R (Chief Constable of Northumbria Police)* v *Police Misconduct Panel and M* [2022] EWHC 1217 at paragraphs 8 and, at paragraph 11, citing Stanley Burnton J in *R (Ashworh Hospital Authority)* v *Mental Health Review Tribunal for West Midlands* [2001] All ER (D) 135 (9 November 2001) at paragraph 77: reasons must be sufficient for the parties to know whether the tribunal made any error of law; it is unnecessary for the tribunal to set out the evidence and arguments before it or the facts found by it in detail; in assessing the adequacy of reasons, one must bear in mind that the decision will be considered by parties who know what the issues were. However, the reasons must sufficiently inform both parties as to the findings of the tribunal. A tribunal must also bear in mind that its decision may have to be considered by those who were not present at or parties to the hearing.

(1) Unfairness and procedural irregularity

[49] The respondent accepted before the tribunal that allegations 1 to 4 amounted to misconduct and that allegation 6 amounted to gross misconduct. The petitioner submitted all allegations were gross misconduct. The grounds of appeal focused on whether the conduct in allegations 1 to 4 should be classified as misconduct or gross misconduct and what was the appropriate sanction (see paragraphs 10, 17 and 38 of the decision). The tribunal decided that allegations 1 and 2 were not misconduct, that allegations 3 and 4 were misconduct and that allegation 6 was gross misconduct.

[50] The tribunal were entitled to take its own view of the conduct and reach its own conclusion about that on the evidence. Where the parties agreed that the allegations amounted to misconduct was there anything unfair in the tribunal finding that it did not, without giving the parties an opportunity to address that?

[51] The extent of the obligation to act fairly is informed by the context in which the procedure takes place including the procedural framework. The 2013 Rules require the appellant to set out the grounds of appeal and for the reply to set out the grounds of opposition (rule 6(2)(a)). Under section 57 of the 2012 Act the tribunal must give parties the opportunity to make representations and must consider their representations. The procedural context envisages that it is the parties that set the scope of the appeal and the tribunal that requires to give the parties the opportunity to be heard within that framework.

[52] Whilst tribunal proceedings are not court proceedings, they are nonetheless adversarial and the observations from *Griffiths* v *Tui (UK) Ltd* [2023] 3 WLR 1204 are pertinent. In an adversarial system, subject to case management, the parties frame the issues and it is not normally the court's business to investigate admitted facts. The judge's role is normally in determining the disputed issues which the parties present and on the basis of the evidence that the parties adduce (paragraph 41).

[53] In *Al-Medenni* v *Mars UK Ltd* [2005] EWCA Civ 1041, a claim for personal injury, there were two competing arguments about how the accident occurred. The judge disagreed with both parties' submissions and found it occurred as a result of a third different theory. The Court of Appeal held that the judge was not entitled to proceed on the third theory:

> "It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must accept that decision." (per Dyson LJ at paragraph 21).

[54] Whilst the tribunal did allow the parties to be heard on the points the parties' gave notice on, no notice was give on the prior question, namely whether there was a breach of

professional standards of behaviour at all, both parties having agreed there was. That was an approach that was on the face of it, contrary to the procedural safeguards within the tribunal's rules of procedure. It was also contrary to the adversarial system of justice that parties determine the scope of the appeal and not the tribunal. As is suggested by the English Court of Appeal, that may not necessarily mean that the tribunal's hands are always tied, it can invite and encourage parties to recast or modify the issues, and give parties an opportunity to make representations about that, without any unfairness arising.

[55] I am not convinced that there was nothing more for the petitioner to say had an opportunity to be heard been given on the prior question. Submissions on whether conduct in fact breached professional standards of behaviour and submissions as to whether the conduct was sufficiently serious that it may justify dismissal, would have had not only a different focus but different content. As the petitioner submitted, the petitioner could have addressed the standards themselves and particularly whether each example of behaviour reached the threshold required to breach it. For example, the petitioner could have addressed the tribunal on the question of whether a comment intended to be humorous nonetheless breached professional standards or whether a failure to report offensive messages constituted a breach, notwithstanding a culture of no reporting. That would have been a different submission from one on whether the breach was serious enough that it may justify dismissal.

[56] I do not accept the respondent's submission that the same result would have inevitably followed had such an opportunity been given. It cannot be known whether the tribunal's classification of allegations 1 and 2 would have remained the same had submissions been made about it breaching standards. It is conceivable the tribunal may have been persuaded to reach a different conclusion. Had the tribunal decided, as the

parties had agreed, that allegations 1 and 2 were misconduct, it is conceivable that four findings of misconduct and one of gross misconduct might have made a difference to the sanction imposed and a different overall determination. I do not consider a different outcome can be ruled out. That is enough to allow the challenge on this ground to succeed.

(2) Inadequate reasons re allegations 3 and 4

[57] I also uphold the petitioner's submissions that there is a lack of adequate reasoning as to why allegations 3 and 4 amounted to misconduct but not gross misconduct in terms of the 2014 definitions. I do not agree that the informed reader could understand the decision as to why allegations 3 and 4 did not amount to gross misconduct without difficulty. The reasons provided in paragraph 41 as to why the behaviour amounted to misconduct only were: that the comments "created a hostile environment", "were wholly inappropriate", were directed at colleagues, "not collegiate" and far removed from the "team building and supportive approach" that the respondent should have adopted. The respondent "did not exercise the self-control expected of him nor did he treat his colleagues with respect and courtesy".

[58] These are all criticisms of the respondent's conduct. It is unclear and the informed reader is left in real and substantial doubt from this reasoning as to what it is about the circumstances that made it misconduct but not gross misconduct. All of the reasoning suggests that it is a breach of professional standards but not why it lacked the seriousness that meant dismissal may be justified. I agree with the respondent's characterisation of the tribunal's decision as being an exercise in evaluation of the seriousness of the conduct. Nonetheless, parties must be able to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, which in this

context was why the behaviour was not serious enough that it may justify dismissal. The reasons must sufficiently inform both parties as to why the tribunal found that it was not (*Wordie Property Co Limited* v *The Secretary of State for Scotland; South Bucks District Council* v *Porter (No 2)).*

[59] There is some further reasoning given under the heading of sanction as regards seriousness, but by that stage the tribunal are addressing the question of sanction alone. It is unclear whether these are reasons that have lead the tribunal to categorise the behaviour as misconduct only, whether these have been taken into account in assessing the appropriate sanction only or indeed in both exercises.

[60] I agree with the petitioner's submissions about the inconsistencies between the tribunal's finding in the appeal which is the subject of these proceedings and a related appeal which considered the same allegations and the same messages in a decision made the day before on 6 July 2023. In the earlier appeal the same tribunal described one remark as "unquestionably sexist" and the images as derogatory and offensive. The tribunal's findings in relation to allegations 3 and 4 in the later appeal do not recognise the sexist nature of any of the comments nor the derogatory or offensive nature of the images, despite the fact the same comments and images were being considered. This too raises a real and substantial doubt about what the tribunal's reasons were for its decision.

[61] However, I do not accept that the tribunal have misconstrued the test for gross misconduct as being conduct that justifies dismissal rather than "may" justify dismissal. Paragraph 16, referred to by the petitioner, is contained in the respondent's submissions rather than the tribunal's reasoning. Whilst the tribunal did not set out the definitions of misconduct and gross misconduct under the 2014 Regulations, the petitioner did not point to any part of the tribunal's reasoning showing that the tribunal misconstrued the test.

(3) Failure to have regard to relevant consideration: maintaining public confidence in the police

[62] The parties' submissions fully addressed the importance of maintaining public confidence in the police. The tribunal sets out the petitioner's submissions on that at paragraphs 30 to 35. These included a submission that if improper behaviour on the part of police officers goes unchecked, and officers not held accountable in a suitable manner, public confidence in the police will be eroded under reference to *Bawa-Garba* v *GMC* [2018] EWCA Civ 1879.

[63] At paragraph 47, in considering the sanction, the tribunal noted that the seriousness of the conduct required to be underlined both to the appellant and the public. At paragraph 48, the tribunal explained what it thought a reasonable member of the public would consider to be an appropriate response in relation to the seriousness of the appellant's conduct. The tribunal took the view that the public would consider a final warning to be an appropriate means to hold the officer accountable. In light of those findings, it is sufficiently clear that tribunal did take into account the public's perception of the conduct and did ask whether the pubic would be satisfied with the sanction imposed. It seems tolerably clear that consideration of public acceptance of the sanction is required for the purposes of maintaining the public's confidence in the police. On a reading of the tribunal's decision as a whole, I am satisfied that the tribunal took that matter into account.

Remedy

[64] I have concluded that the tribunal proceeded unfairly when deciding on allegations 1 and 2. In addition, there was a failure to provide adequate reasons in relation to the finding

of misconduct in allegations 3 and 4. Most of the petitioner's arguments have succeeded. Parties agreed that since the remedy of reduction was ultimately a discretionary one (*King* v *East Ayrshire Council* 1998 SC 182; *Robertson, petitioner* [2022] CSOH 45) the matter should be put out by order for me to be addressed on that. I will do that. I reserve expenses meantime.

Postscript

[65] On 28 May 2024 at a by order hearing, I heard parties on the question of the appropriate remedy. Parties were agreed that the court should order reduction of the decision as craved. I heard competing arguments about whether the court should remit the matter to the same or to a differently constituted tribunal.

[66] The petitioner submitted that it should be remitted to a differently constituted tribunal. The errors identified by the court were significant errors going to the heart of the decision which was held to have taken into account irrelevant considerations and to have failed to provide adequate reasons. Without in any way seeking to impugn the integrity and impartiality of the tribunal which made the decision, that was necessary to avoid any perception of unfairness and damage to public confidence in the decision making process. In police disciplinary matters, in order to ensure public confidence in the police and the decision making process, it is important that the tribunal is, and is perceived to be, impartial and free from preconceptions (*Chief Constable, Lothian and Borders* v *Lothian and Borders Police Board* [2005] SLT 315 at paragraphs 74-75).

[67] The respondent submitted that the court should order that the matter be reconsidered by a differently constituted tribunal. There is a presumption against a freshly constituted tribunal (*HCA International Ltd* v *Competition and Markets Authority* [2015]

1 WLR 4341 per Vos LJ at paragraphs 66, 68-71, 96, 97, 99) unless that would cause reasonably perceived unfairness to the affected parties or would damage public confidence in the decision making process. There is no suggestion of actual or apparent bias and no reason to think the same tribunal would act unfairly. The absence of proper reasons is a matter best attended by those whose reasons were originally found wanting. It would be quicker and cheaper for those familiar with the issues arising from the court's decisions to consider the matter.

[68] As the respondent noted in submissions, the remedy sought in this petition for judicial review is reduction of the decision and such other orders as may seem to the court just and reasonable in all the circumstances of the case. Whether the matter should go back before a differently constituted tribunal is not a matter raised within the substantive arguments. *HCA International Ltd* v *Competition and Markets Authority* did not concern judicial review procedure, far less Scottish judicial review proceedings. In *Chief Constable of Lothian and Borders* v *Lothian and Borders Police Board*, the petitioner argued the court should reduce the decision and order a rehearing before a differently constituted tribunal. The respondent argued that the court should not reduce the decision but only require it to provide reasons. Alternatively if it did reduce the decision, there did not require to be a rehearing and the same tribunal could issue a fresh decision. The court reduced the decision and ordered a rehearing of the matter by a different tribunal.

[69] The circumstances in this petition are different. The only substantive order that was sought in the petition was reduction of the decision. The parties accept that following the opinion of this court, the tribunal's decision should be reduced which will inevitably result in a rehearing. In judicial review proceedings the court is involved in reviewing how the tribunal's decision was arrived at, deciding whether there are any errors in law and

ultimately deciding whether to grant the petition or not. Whether the matter is reheard by the same or a differently constituted tribunal was not raised by the petition and is a matter for the specialist tribunal. The tribunal that rehears the case will do so in light of the court's findings about the errors made in the decision on 6 July 2023 including the taking into account of irrelevant considerations and failure to provide adequate reasons.

[70] On discussion with parties, both accepted that it would be appropriate for the court to reduce the decision and to direct that it be remitted back to a police appeals tribunal to proceed as accords. I will do that. I will sustain the petitioner's first and second pleas in law and repel the respondent's second to fifth pleas in law.

[71] The respondent conceded expenses should be awarded in favour of the petitioner, with the exception of the expenses of the by order hearing. It was submitted those expenses should be in the cause since neither party's motion was successful in terms of remedy. The petitioner submitted all expenses should be awarded in her favour.

[72] Ultimately the petitioner was successful in having the decision reduced. The hearing to discuss remedy is a product of that success. I award the expenses of the whole proceedings in favour of the petitioner.