



Neutral Citation Number: [2020] EWHC 2032 (Admin)

Case No: CO/2372/2019

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

Date: 29 July 2020

Before :

THE HONOURABLE MR JUSTICE NICKLIN

Between :

**R (on the Application of the Chief Constable
of Dyfed Powys Police)**

Claimant

- and -

Police Misconduct Tribunal

Defendant

- and -

PC Simon England

Interested Party

Elliot Gold (instructed by **Force Solicitor, Dyfed Powys Police**) for the **Claimant**
Mark Ley-Morgan (instructed by **Slater & Gordon LLP**) for the **Interested Party**
The Defendant was not represented

Hearing date: 1 May 2020

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Approved Judgment

The Honourable Mr Justice Nicklin :

1. This claim for judicial review challenges the lawfulness of decisions of a Police Misconduct Tribunal (“the Tribunal”), which considered charges of misconduct against Police Constable Simon England (“PC England”) at a hearing between 1-5 April 2019. The Tribunal’s panel was: Peter Griffiths QC, the legally qualified chair, Superintendent Robyn Mason, and an independent panel member, John Cross.
2. As a result of a complaint about PC England made by PC A, the Chief Constable of Dyfed Powys launched a misconduct investigation pursuant to Police (Conduct) Regulations 2012 (“PCR”). PC England was interviewed, on 31 May 2018, as part of the investigation of the alleged misconduct (“the Interview”).
3. As a result of the investigation, PC England was alleged to have been guilty of the following acts of misconduct:
 - (1) On 2 December 2017, whilst on duty, he told a male and female colleague, *“I always make time for wanking”* (“Incident (1)”).
 - (2) On 4 December 2017, whilst on duty, he said to a male colleague, referring to a woman standing in the street, *“I’d fuck her and suck the juice out of her pussy”* (“Incident (2)”).
 - (3) On 11 December 2017, whilst on duty at a hospital, he had said to a female colleague, PC “A”, that he had put tissues in his pocket otherwise the nurses would think that he was *“having a wank”*; put his hand down the back of her shirt without permission or invitation whilst stating, *“you never know, I’d probably be able to get it down your neck”*; told her *“I like it with one glove”*; and suggested that they should go running together but that *“there is only one shower at the ‘nick’ so that could be interesting”* (“Incident (3)”).
 - (4) On 22 December 2017, whilst at a Christmas party, he put his hands on PC A’s exposed back and rubbed it without permission or invitation (“Incident (4)”).
 - (5) On 26 April 2018, whilst on restricted duties, he made contact with PC A despite expressly being told not to do so (“Incident (5)”).
4. In the Regulation 21 Notice, which effectively contained the disciplinary charges against PC England, the Chief Constable of Dyfed Powys Police (“the Appropriate Authority”) contended that his actions (identified in Incidents (1) to (5)):

“... breached the following Standards of Professional Behaviour

 - (a) Authority, respect and courtesy. Your actions described above... amounted to:
 - (i) Unwanted conduct or unwanted conduct of a sexual nature;
 - (ii) Conduct which had the purpose or effect of violating the dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for the officers you were with and for officers in general;

- (iii) A failure to act with self-control and respect towards your colleagues;
- (b) Orders and instructions in that you made contact with [PC A] as stated [Incident (5) above] when it was not required or necessary for you personally to do so; and/or
- (c) Discreditable conduct in respect of the above...

As a result of that stated herein, if proved, your conduct singularly or in its totality amounts to gross misconduct.”

5. As the Tribunal was advised on the first day of the hearing, the misconduct charges had adopted the precise definition of sexual harassment provided in s.26 Equality Act 2010 (the relevant terms of the section are set out in [55] below). In summary, the charges against PC England principally included a charge of sexual harassment of PC A. Although both the incident at the hospital and at the Christmas party involved touching by PC England, the alleged misconduct was not alleged to amount to sexual assault.
6. PC England had previously received a warning from Thames Valley Police, on 22 December 2010, for inappropriate behaviour towards a Police Community Support Officer (“PCSO”) on 16 December 2010. PC England had:
 - (1) asked the PCSO, “*what turned her on*” and “*what got her going*”;
 - (2) talked about his own sexual activities with a partner who had “*squirted on his face*” and asked whether the PCSO “*squirted*”;
 - (3) asked whether the PCSO got erect nipples when she was “*turned on*”;
 - (4) put his arm around the PCSO’s seat in the car in which they were travelling and asked where she had “*done it*”; and
 - (5) suggested that, if she wanted, she could pull over into a lay by and said to the PCSO that she looked like she gave “*good blow jobs*”. When the PCSO replied “*how the hell would you know that?*”, PC England replied that the PCSO looked like the type of person that would “*give a bloke a good time and would want to please them*”.

In the Regulation 21 Notice, the Appropriate Authority gave notice that it intended to rely on this previous behaviour at the misconduct hearing as similar fact evidence or evidence of propensity.

7. PC England served his Regulation 22 response to the misconduct charges on 21 January 2019 (“the Regulation 22 Response”). He denied that his behaviour (admitted or proved) should be categorised as misconduct and should not be considered as a breach of the standards of professional behaviour. He relied upon an expert report from Dr Ronald Lyle, a consultant clinical psychologist, dated 7 January 2019 and served with his Regulations 22 Response. In his report, Dr Lyle diagnosed PC England as suffering from depression and having high functioning Asperger’s Syndrome. He noted:

“Mr England finds social interactions, and especially small talk, really hard and he tries to be ‘liked’ or ‘funny’ with work colleagues as a way of ‘fitting in’... He finds it difficult to judge what it is appropriate to say and only realises afterwards that he may have said something out of order. As he put it, ‘I haven’t got much of a filter’. He accepts now that he has misjudged what he thought was only ‘flirty banter’ and that he had perhaps ‘overshared’ with colleagues.”

8. In the Regulation 22 Response, PC England stated that he accepted the vast majority of the factual assertions made against him in the Regulation 21 Notice. On his behalf it was submitted:

“He now recognises that his words and actions were inappropriate and caused anxiety and concern to his colleagues. He did not realise this at the time. The [Tribunal] is invited to carefully consider the Dr Lyle report and to conclude that this is an Occupational Health/Disability issue rather than a misconduct issue...”

9. The Appropriate Authority obtained its own expert opinion. Dr Ruth Bagshaw, a consultant clinical and forensic psychologist, carried out an assessment with PC England on 23 March 2019 and prepared a report dated 26 March 2019. She disagreed with Dr Lyle’s diagnosis of autistic spectrum disorder and concluded:

“In my opinion, PC England is likely to be experiencing an acute exacerbation of a depressive disorder with obsessive compulsive features against a background of maladaptive personality traits. It is possible that he could meet the threshold for a diagnosis of personality disorder, however, taking account of his tendency to exaggerate clinical symptoms, I am inclined to suggest his personality traits are below diagnostic threshold, and in any case, a formulation based description of his difficulties is probably more useful than a diagnostic label.

In my opinion, PC England’s difficulties related to depression and possibly personality disorder, could constitute a disability in terms of the Equality Act 2010 (‘the Act’) in that they reflect a mental impairment. Given his intellectual ability and normal day to day functioning, he could reasonably be expected to modify behavioural tendencies related to his mental health problems by using coping or avoidance strategies to reduce their effects on his normal day to day activities.

A tendency to sexual abuse of other persons is specifically excluded from the definition of disability in the Act, regardless of whether it arises from a mental impairment that itself would be considered a disability.

Thus, in my opinion, PC England’s tendency to consciously take higher than normal risks on his own initiative, such as making risqué or sexually inappropriate remarks and overtures in the work place... would not under the Act, be regarded as having a substantial adverse effect on normal day to day activities to the extent that it would be considered a disability.”

The Proceedings at the Tribunal

10. Mr Gold, who represented the Claimant in these judicial review proceedings, was the presenting Counsel for the Appropriate Authority before the Tribunal. PC England was represented by Counsel, Catherine Richards.

11. The expert evidence was in a state of flux when the proceedings commenced. The two experts had provided reports, but there were substantial areas of disagreement between them. On the first day of the hearing, a joint report, dated 29 March 2019, had been provided to the Tribunal. It identified the areas of agreement between the experts, but there remained areas upon which they were not agreed, including the nature of the mental impairment presented by PC England (whether a personality trait or disorder or high functioning Asperger’s syndrome), its severity and impact. The Tribunal had anticipated hearing evidence from both experts in relation to the disputed issues. However, whilst Dr Bagshaw was available to attend the Tribunal hearing, Dr Lyle was not. In the end, neither expert was called to give evidence before the Tribunal. On the second day of the hearing, Mr Griffiths QC informed the parties that the Tribunal had decided that it did not need either expert to give oral evidence and that the relevant issues on the expert evidence would be resolved on the written evidence that had been provided.
12. Although witness statements from several other witnesses had been served, only three witnesses relied upon by the Appropriate Authority were required to give evidence before the Tribunal and be cross-examined by Ms Richards:
 - (1) Police Constable Saul Thomas (“PC Thomas”);
 - (2) PC A; and
 - (3) Police Sergeant Katie Davies (“PS Davies”).
13. PC England gave evidence and was cross-examined by Mr Gold.
14. Rather than deal with the evidence of each witness, it is more convenient to deal with each of the Incidents (as set out in [3] above) and the evidence that was before the Tribunal. I shall need to set out the evidence before the Tribunal in some detail, as one of the challenges is to the adequacy of the decision-making and an alleged failure to find sufficient facts, particularly in some areas where there was a conflict of evidence.

Incident (1)

15. In his witness statement, PC Thomas stated that he was present with PC Jessica Jones (“PC Jones”) and PC England in a police car, in uniform and on-duty. PC England said to them that he always made time when at home to masturbate. Up to that point, there had been nothing about the conversation that was remotely sexual in nature, so he and PC Jones were surprised by the comment, such that there was a short period of silence that followed the remark.
16. In her witness statement, PC Jones stated that she was present with PC Thomas and PC England in a police car, in uniform and on-duty. PC England said, “*I always make time for wanking*”. She was quite shocked as the comment was “*completely out of the blue*” and “*not in the context of conversation at all*” as they were not discussing anything sexual of any kind. It made her feel a bit awkward and uncomfortable.
17. PC Thomas was not substantially challenged on the account he gave in his witness statement. PC Jones was not required for cross-examination.

18. In his Interview, PC England stated that he could not remember making the remark, but stated that he might have done. He said that he would not have made the comment 'out-of-the-blue'. He did not recall a period of uncomfortable silence after the remark.
19. In his evidence to the Tribunal, PC England accepted that he had made a remark about masturbation as alleged and that he should not have done so. He could not recall more about the circumstances in which the remark was made, but he thought that either PC Thomas or PC Jones had asked him about whether he was going to be seeing his girlfriend on his rest days. He said that he did not have a girlfriend, that he had not wanted to talk about it and had made the remark that he was going to be staying in "*having a wankathon*" or something like that. He said that one of the officers had said something along the lines that they did not need to know about that.
20. When cross-examined, PC England did not recall seeing PC Jones being shocked at his comments, but he would not dispute if she had been. He insisted that his comments would have had a context; they would not have been made 'out-of-the-blue'.

Incident (2)

21. In his witness statement, PC Thomas stated that he was in a police car with PC England around Station Road in Llanelli. Both were in uniform and on duty. PC England saw a woman standing on the street and said to PC Thomas, "*I'd fuck her and suck the juice out of her pussy*". PC Thomas said that this, too, was "*out of the blue*" and unexpected. It made PC Thomas feel awkward and he didn't know what to say. PC Thomas added that the two specific instances about which he had given evidence were "*ones that stand out in memory the most*", but there had been other instances where he had worked with PC England where "*random sexual comments [had] been made out of the blue by him*". PC Thomas could not remember specific details. He said he would "*tune out*" of what he was saying "*in an effort not to entertain the subject if of a sexual nature*".
22. PC Thomas was not substantially challenged on the account he gave in his witness statement.
23. PS Davies was cross-examined about what PC Thomas had reported to her about the incident. She stated that PC Thomas would not repeat the words used by PC England to her.
24. In his Interview, PC England denied using the alleged words, and stated that he and PC Thomas were crewed together. PC Thomas pointed out a woman. They both commented on her appearance. PC England said something of a sexual nature but not the words alleged; he thought that he might have said, "*I'd have a go on that*".
25. In his evidence to the Tribunal, PC England accepted that he had made the alleged remarks or words that were "*very similar*" to those alleged. He stated that the comments had been made in the context of him and PC Thomas making comments about women at the time. PC England maintained that account in cross-examination. In fairness to PC Thomas, this was not something that had been put to him in cross-examination and his evidence had been that the comments had been completely 'out-of-the-blue'.

Incident (3)

26. Objectively, this was the most serious charge that PC England faced. PC England and PC A had been tasked to attend Singleton Hospital in Swansea to guard a woman, who was wanted for recall to prison, whilst she was a patient at the hospital.
27. In her witness statement, PC A stated that she and PC England had arrived at the hospital shortly before midnight. About half-way through their shift, PC A said that PC England had approached her from behind and put his hands on her shoulders. She thought that this was an attempt to startle her. PC England then went to the toilet. When he returned, as he was passing the nurses' station, he pulled a substantial quantity of tissue paper from his pocket and, as he approached PC A, he said, "*I had to put them in my pocket in case they [the nurses] think I'm having a wank*". As he made the comment, he "*shimmied*" past her chair and put his hand down the back of her shirt collar on to her neck, which made her jump. PC England moved her shirt collar away from her neck slightly and said words to the effect of, "*you never know, I'd probably be able to get it down your neck*". PC A understood the remark to refer to getting semen down her neck as this comment was made almost as part of the remark about the nurses thinking that he was masturbating. PC England went back to where he had previously been sitting. Later he asked her to let him know "*if there are any fit nurses around*".
28. Describing the impact of PC England's behaviour, in her statement, PC A said:

"I was shocked by PC England's actions. I found his behaviour bizarre... I did not feel threatened by PC England's actions. I did not think that he would do it... His actions were completely unexpected, unnecessary and unprofessional..."
29. Towards the end of the duty at the hospital, as she and PC England were packing up their things, PC A noticed that PC England's gloves were out, and she asked him why. PC England replied, "*I like it with one glove*". PC A said that this remark was PC England clearly trying to be sexually suggestive.
30. PC A stated that PC England then started to tell her about a holiday on which he had been, in Turkey and Kuala Lumpur. He told her that he had been to a lap-dancing bar but that, in relation to sex, "*I have never had to pay for it. I go with what I've got*" as he gestured by pointing to himself from head to toe.
31. In the car journey back to the police station PC A and PC England were discussing running, as they had discovered that it was a common interest. PC England suggested that they could run together before work sometime, adding "*there's only one shower at the nick, so that could be interesting*", which PC A understood as his suggesting that they share a shower together.
32. PC A concluded her statement by saying that she did not feel that she had been the victim of a crime – and she did not wish to make a criminal complaint – but PC England's actions amounted to "*non-consensual touching, sexual in nature [that were] inappropriate*":

"My view is that PC England is a bit of a creep. He has an odd sense of humour. He displays a bad attitude towards women and is cavalier... I was asked what my feelings would be if I were to be asked to accompany PC England on hospital

duties again. My initial response was, ‘Please, No!’... I would be apprehensive about being alone in his company and I don’t want to be in that predicament again.”

33. In what was, in parts, a skilful cross-examination, Ms Richards did not substantially challenge PC A’s account of what had happened. For example, she suggested to PC A that PC England had said “*boo*” to her, but PC A said that she did not recall him saying anything and that it was his actions that had made her jump. Ms Richards left it there. Ms Richards asked several questions about whether PC England’s actions had been sexual. For example:

Ms Richards: “... In any event, your impression then was of him trying to be funny. Did you find it funny initially, just that first rather infantile attempt to frighten you?”

PC A: “Yeah. It was not malicious.”

Ms Richards: “No. And certainly you didn’t think it was anything sexual or anything like that at that time though?”

PC A: “No.”

And later

Ms Richards: “... He [had] to shimmy past your chair, all right. And as he did so – it was as he was passing you in effect – you say that he put his hand down the back of your shirt collar onto your neck?”

PC A: “Yes.”

Ms Richards: “So it was just at the top here was it?”

PC A: “That’s right.”

Ms Richards: “And he made again a fairly crude comment about getting it down your neck?”

PC A: “Yes.”

Ms Richards: “And you I think deflected from that by saying you’d have to put your magazine in the way...”

PC A: “Yes.”

Ms Richards: “... to stop such nonsense in effect?”

PC A: “Yes.”

Ms Richards: “I’m not suggesting this is your sense of humour [for] one moment, all right, but was it your impression that he was trying to be funny?”

PC A: “Yeah, I’ve put that in my statement. That was his sense of humour.”

Ms Richards: “Yeah.”

Mr Griffiths QC: “Did you still think at this stage that he was just funny or what?”

PC A: “That’s when it started to turn and I was shocked that in that environment in the workplace, with someone I didn’t know, that he could come up with that comment but again, as I said, I didn’t feel threatened, that’s just perhaps his sense of humour”

Ms Richards: “Not a terribly professional thing to do?”

PC A: “No.”

Ms Richards: “And that’s what you felt?”

PC A: “Yeah”

....

Ms Richards: “And again, not endorsing what he did, what he thought was funny, but you again, you didn’t think he was sexually trying to come on to you or anything like that?”

PC A: “No.”

Ms Richards: “... You didn’t feel frightened by him?”

PC A: “No.”

Ms Richards: “... Is this the position? You’ve met someone who, professionally, who is saying unprofessional things, [which] he obviously thinks is funny, but you don’t?”

PC A: “Mmm.”

Ms Richards: “Is that a fair summary of it?”

PC A: “Yeah.”

Mr Griffiths QC: “Just pause a moment. Can you repeat that proposition...?”

Ms Richards: “He thought it was funny, but you didn’t?”

Mr Griffiths QC: “Thank you.”

Ms Richards: “I think the last incident in terms of that night was this reference to fitness and running.”

PC A: “Yeah”

Ms Richards: “And him referring to one shower. He didn’t actually say, or suggest actually, the two of you having a shower or anything like that; it didn’t go that far?”

- PC A: “No.”
- Ms Richards: “Again, you laughed it off in a sort of light ‘don’t be silly’ kind of way?”
- PC A: “Yeah, just tried to change the subject.”
- Ms Richards: “Yeah. This is pretty puerile Benny Hill sort of humour isn’t it? Do you know what I mean by that?”
- PC A: “Yeah, schoolboy.”
- Ms Richards: “Schoolboy, exactly. At no point during the course of that night did you think that he was making any sexual advance to you?”
- PC A: “No.”

34. The effect of this cross-examination – I am satisfied, quite deliberately – was not to challenge PC A’s account of what had happened. Ms Richards left untouched by cross-examination, and therefore unchallenged, PC A’s statement that PC England’s actions had been “*non-consensual touching, sexual in nature [that were] inappropriate*”. Instead, she suggested, more generally, to PC A that PC England’s comments had been “*puerile Benny Hill sort of humour*” and that PC A did not consider that PC England was making sexual advances to her.
35. Mr Gold took the opportunity in re-examination to seek to clarify some of PC A’s answers to questions she had been asked in cross-examination.

Mr Gold: “The way the question went was this, that PC England came back from the bathroom and made some comments, that he’d shimmied past your chair, and as he did so, he put his hand down the back of your shirt collar to the neck and that you had deflected that by saying you put your magazine in the way, and the question you were asked was, ‘Was it your impression that he was trying to be funny?’ You said, ‘well that was his sense of humour.’ You were asked, ‘do you think it still was his sense of humour?’ and your answer was, ‘well, that was when it started to turn and I was shocked that he would come up with that comment’... So could you explain to us what you meant by ‘that was when it started to turn’?”

PC A: “Right, ok. Because he’d said in close context regarding the masturbation and that’s why he’d got the tissues and that’s when he touched my neck, that was in my head in one sentence if you like, one scenario, so that’s why I took the touching to be weighed to the comment he made and that was the turning of his sense of humour; everything was sexualised.”

Mr Gold then asked PC A about her description in her witness statement of PC England’s actions being “*non-consensual touching, sexual in nature [that were] inappropriate*”:

- Mr Gold: “Assist us with the point at which you consider that the touching became sexual in nature?”
- PC A: “The touching of the back of the neck. So not the startling of the shoulders... but the second touching...”
- Mr Gold: “And you answered a question to my learned friend that you didn’t think at the time the touching on the shoulders was sexual.”
- PC A: “Mm mm.”
- Mr Gold: “After having considered the totality of what you’ve described as the behaviour... Do you consider, looking back on it, as sexual or do you still say, looking back on it, that it wasn’t sexual?”
- PC A: “Looking back on it, it seems like it was just another excuse to touch me and maybe to see how I would react.”
- Mr Gold: “You say... you would be apprehensive about being alone again in PC England’s company. Why would that be the case?”
- PC A: “Because I don’t want that to happen again. I don’t want to be put in that position again.
- Mr Gold: “And what do you describe that position as being?”
- PC A: “To have him make derogatory comments, to touch me without my consent, all of the above, all of what we’ve spoken about...”

36. In his Interview, PC England stated:

- (1) He denied putting his hands on PC A’s shoulders – or touching her at all – and she did not jump. He had put his hands on the back of PC A’s chair and had said “*boo*”.
- (2) He did not recall making comments about the nurses, tissues and masturbation but accepted that it happened “*pretty much as described*”.
- (3) He did not touch PC A’s neck on his returning from the toilet. He made no physical contact with her.
- (4) He denied saying to PC A that he’d probably be able to get it down her neck. It was not merely that he could not recall saying it, he did not say it and it was something that he would not say in any context.
- (5) He did not know what the “*one glove*” comment meant and denied saying to PC A “*I like it with one glove*”.
- (6) He did not recall making the shower comment. He may have pointed out to PC A that there was only one shower at the police station, but there was no suggestion that they were going to take a shower together.

37. By the time of his evidence to the Tribunal, however, PC England stated:
- (1) He put his hands on to the back of PC A's chair and said "*woo*" or "*boo*". Such behaviour he described as "*a playful thing*". He denied putting his hands on PC A's shoulders at any time.
 - (2) He accepted that on returning from the toilet, he said words to the effect of, "*I had to put them [the tissues] in my pocket in case they [the nurses] think I'm having a wank*".
 - (3) When asked by Ms Richards whether he had said the words, "*you never know, I'd probably be able to get it down your neck*" or "*down there*", PC England said that, initially, he had not recalled saying or doing anything along those lines, but "*subsequently, I do remember making a comment very similar to that*".
 - (4) He did not recall putting his hands down the back of PC A's shirt collar and touching the back of her neck, but he might have done that. Ms Richards asked him why he had done that. PC England replied that he was "*trying to be funny; I wanted to be liked*". Ms Richards asked, "*were you trying in any way to make a sexual advance upon her?*" PC England said, "*no*".
 - (5) He accepted that he probably had made the comment about "*fit nurses*", about the glove and PC A's account of his comments, and gestures, about not having to pay sex were correct.
 - (6) He accepted making the shower comment. Ms Richards asked PC England: "*In making that sort of comment, what were you trying to infer (sic)?*" PC England replied: "*I wasn't necessarily inferring (sic) anything as such, it was supposed to be left quite open. It wasn't a come on in any way, shape or form; it was cheeky and stupid, not thought through.*"
38. In cross-examination, PC England:
- (1) maintained his denial that he had put his hands on PC A's shoulders;
 - (2) said he could not remember, clearly enough to say definitively, whether he had or had not touched PC A's neck, but he may have done. He did not remember touching it at the time he made the comment about ejaculating down her neck;
 - (3) suggested that his being "*playful*" – or "*joking about*" – with PC A was not inappropriate because he joked about with male colleagues as well;
 - (4) stated it was probably likely that there had been occasions where he had put his hands down a male officer's shirt although he had probably not done so whilst making a joke about ejaculating down his neck;
 - (5) stated that he might, in the past, have suggested to a male colleague that it would be interesting for them to take a shower together (as there was only one shower); and
 - (6) denied that his actions were an exercise of power over PC A, by using sexually suggestive words and behaviour.

Incident (4)

39. In her witness statement, PC A stated that she had attended the Christmas Party on 22 December 2017. She had worn a lace dress which had partially exposed the skin on her back. A woman caught a piece of jewellery in her dress and the two women had disentangled it. PC England was standing behind her. As the woman walked away, PC A said that PC England had put his hand on PC A's back and rubbed it up and down once. His hand was cold, and it made PC A jump.
40. PS Davies gave evidence about this incident in her witness statement. She said that she had seen PC A in conversation with PC England. PC England had reached around PC A's back and had put his hand on the middle part of her back. She said that she saw PC A flinch and from that, she thought that it was clear that the touching was not welcomed by PC A.
41. In his Interview, PC England stated he could not be "100%", but he did not remember rubbing PC A's back at any point. He had sought to pay PC A a compliment, and had touched her back once, with an open palm, without rubbing.
42. When PC A was cross-examined, she was not substantially challenged on the account she had given in her witness statement.
43. When he gave evidence to the Tribunal, PC England said that he had placed his hand on PC A's back but could not remember if this was straight-away or around the time she became entangled with someone's bag. He did so as a friendly gesture. He did not remember rubbing PC A's back, but he might have done after helping disentangle the bag from her dress. The action was not sexual. When cross-examined, he maintained that nothing that he had done could have been interpreted as a rub and his touching of PC A had not caused any adverse reaction from her. This had not been put to PC A in cross-examination.

Incident (5)

44. The factual evidence relating to this incident was unchallenged by PC England. Following the complaint by PC A, PC England had been placed on restricted duties in the Resource Management Unit ("RMU"). He had been given an instruction not to contact PC A. On 26 April 2018, Police Sergeant David Walters ("PS Walters") had instructed all RMU staff to contact officers via telephone to fulfil an urgent request in connection with an ongoing incident in the Powys area. PC England held up a phone receiver in the air, clearly trying to attract the attention of other staff. PS Walters took the phone off him and discovered the person on the line was PC A. At the time, PS Walters was unaware that PC A was a witness in a disciplinary case against PC England.
45. PC A's evidence, in her witness statement, was that, on 26 April 2018, she received a telephone call from PC England. He said that he knew that she was not supposed to talk to him so if she hung on, he'd get someone else. PC A said she felt shocked and uneasy that PC England had called her directly, on her personal mobile phone, whilst she was off duty.

46. In his Interview, PC England stated that a civilian employee had tried to call PC A unsuccessfully. PC England therefore decided to call her himself with a view to handing over the phone to someone else. When PC A picked up the telephone, he did not know what to do. He told PC A that he was not supposed to speak to her and handed the call to someone else.
47. In his evidence to the Tribunal, PC England said that he had been working in the RSU with a sergeant and three to four civilian members of staff. Officers were being called-up following a murder. A civilian member of staff had been unsuccessful in trying to contact PC A. PC England had therefore called her, with an intention immediately to hand over the phone if she answered. He said that he had called PC A because he did not want her to be discriminated against because of the investigation into him. He knew that he had been instructed not to contact PC A but had done so because he thought it was the right thing to do. In cross-examination, he accepted that he had been given a lawful and direct order and that he had disobeyed it.

Submissions to the Tribunal

48. Based on the evidence that it had heard, the Appropriate Authority made the following submissions to the Tribunal on the evidence:
 - (1) The Tribunal should consider the misconduct allegations not individually but taken together in their totality, forming part of a continuous course of improper conduct.
 - (2) It was a matter of PC England's credibility as to whether there was any context for his first two remarks. The Appropriate Authority submitted that there was no such context and that PC England was not telling the truth in this respect.
 - (3) There was a positive dispute on the evidence as to whether, at the hospital, PC England touched PC A's shoulders and then touched her neck by putting his hand down the collar of her shirt. The Tribunal was invited to reject PC England's evidence that he had touched the chair instead and to find that he had put his hand down the collar of PC A's shirt, pulling it back to expose her neck.
 - (4) PC England's account of his not rubbing PC A's back at the Christmas party should be rejected in light of his lack of credibility and his inconsistency in respect of the earlier allegations.
 - (5) As to the final incident, PC England's motivations to contact PC A were personal not professional and that his explanation again rested on his credibility.
49. The Appropriate Authority submitted that PC England's behaviour, particularly towards PC A, amounted to sexual discrimination and/or sexual harassment:
 - (1) The definition of direct sexual discrimination was treating a woman less favourably than a man. The Tribunal should ask itself the "reason why" PC England behaved in the way he did towards PC A – whether it was because she was a woman. If it was, this showed that PC England's motivating behaviour was on grounds of sex.

- (2) PC England's conduct amounted to harassment of PC A, and other officers, where he engaged in unwanted conduct or unwanted conduct of a sexual nature which had the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- (3) When an officer behaved inappropriately towards a woman, that affected not just the complainant directly involved but all officers in the constabulary. In that respect, it was no different from conduct such as racism, where the telling of a racist joke would create an offensive environment for numerous other officers beyond person to whom the joke was told.
- (4) PC England behaved in a sexualised manner towards PC A, engaging in an opportunity to touch her without permission as a demonstration of his power over her and/or in circumstances where he would never have touched a male officer in the same way. Similarly, his comments about masturbating, liking it with one glove and showering together were highly sexualised remarks, were unwanted and were sexual in nature.
- (5) The fact that PC A had not immediately objected to the conduct in the hospital was not determinative. She had not understood the full extent of what was happening until afterwards. She had not been expecting PC England's conduct, had tried to laugh it off but, on reflection, she realised the gravity and severity of it, with the result that she was upset and never wanted to serve with PC England again.
- (6) PC England's behaviour amounted both to less favourable treatment in that he acted towards PC A as he did because she was a woman, which was less favourably than he would have behaved with a man. It also amounted to sexual harassment because the conduct was sexual in nature and had the purpose or effect of violating her dignity and causing an intimidating, hostile, degrading humiliating *or* offensive environment for her and for officers in general.

The Tribunal's Decision

50. The Tribunal heard closing submissions on 3 April 2019, and gave its decision on 5 April 2019, providing written reasons. An extract from the Tribunal's decision is set out in Appendix 1. The Tribunal found the first three incidents were proved and that they amounted to gross misconduct. Incidents (4) and (5) the Tribunal was not satisfied amounted to misconduct. The Tribunal made the following findings (with paragraph references in brackets):

- (1) PC Thomas, PC A and PS Davies were truthful witnesses who had done their best to recollect as accurately as possible what had occurred in their presence in respect of PC England's conduct and that there had been "*no real challenge to their evidence*" (8).
- (2) PC England had also been a truthful witness who had done his best to answer frankly what he recalled he had said and done (14).
- (3) All of the factual assertions set out in the allegations against PC England had been proved on the balance of probabilities (20).

Incident (1)

- (4) Viewed in isolation, this constituted no more than a single act of misconduct and a breach of the standard relating to “Authority, Respect, and Courtesy”. Viewed as part of a series along with Incidents (2) and (3), it constituted gross misconduct and breaches of the standards relating to “Authority, Respect and Courtesy” and “Discreditable Conduct” (21).

Incident (2)

- (5) Viewed in isolation, this constituted a single act of misconduct and a breach of the standard relating to “Authority, Respect, and Courtesy”. Viewed as part of a series along with Incidents (1) and (3), it constituted gross misconduct and breaches of the standards relating to “Authority, Respect and Courtesy” and “Discreditable Conduct” (22).

Incident (3)

- (6) Accepting the evidence of PC A, PC England had touched PC A’s neck in the circumstances she had described (8).
- (7) However, PC A did not at the time think that PC England’s touching was in any way sexual; she did not feel threatened by his conduct; and, overall, PC England had said and done things at the hospital which were unprofessional and which he thought was funny but which she did not (8).
- (8) Accepting the evidence of PC England, his actions in touching PC A “*were not sexual and were not intended to be sexual*” but were “*a part of a wholly inappropriate, misguided, crass and objectionable series of attempts by him to try to make a friend of [PC A]...*” (15).
- (9) Viewed in isolation or as a part of a series along with Incidents (1) and (2), the conduct of PC England amounted to gross misconduct and constituted a breach of the standards relating to “Authority, Respect and Courtesy” and “Discreditable Conduct” (23).

Incident (4)

- (10) The rubbing of PC A’s back at the Christmas Party was “*not sexual and ... not intended to be sexual*” but was “*a part of a wholly inappropriate, misguided, crass and objectionable series of attempts by him to try to make a friend of [PC A]...*” (15).
- (11) The conduct did not amount to misconduct either viewed in isolation or as part of any alleged series. Consequently, no breaches of professional standards had been proved (24).

Incident (5)

- (12) The Tribunal accepted that PC England’s motivation in making the call to PC A was “*entirely professional*” and his brief action did not amount to misconduct on his part (16). There was no “*personal motivation*” behind the call (25).

51. Having made its findings and given its reasons, the Tribunal adjourned for a short time before it heard submissions on outcome or sanction. Mr Gold, for the Appropriate Authority, referred the Tribunal to paragraphs of the College of Policing *Guidance on outcomes in police misconduct proceedings* (“the Guidance”). He submitted that the gross misconduct found by the Tribunal warranted PC England being dismissed.
52. The Tribunal returned and determined that the appropriate outcome was to give PC England a final written warning. It provided written reasons (set out in Appendix 1 under the heading “Outcome”).

Grounds for Judicial Review

53. The Appropriate Authority advances four grounds on which it contends the decision of the Tribunal was unlawful:
 - (1) The Tribunal’s finding that PC England’s actions were not sexual was perverse and/or inadequately explained.
 - (2) The Tribunal failed in its duty to resolve disputed elements of fact (or even to identify what was in dispute) and to give reasons for the same, before finding that PC England was a credible witness.
 - (3) The Tribunal failed to find that incidents (4) and (5) were proved and failed to give adequate reasons for accepting PC England’s evidence that he had not rubbed PC A’s back and for rejecting the evidence that he had done so given by PC A and PS Davies.
 - (4) The Tribunal’s decision on outcome was perverse and the Tribunal failed to follow the correct approach to determining disciplinary action as set out in *Fuglers LLP -v- Solicitors Regulatory Authority* [2014] EWHC 179 (Admin).

Ground 1: Decision that PC England’s actions were not sexual was perverse

54. The Appropriate Authority’s case at the Tribunal was that PC England’s actions amounted to direct discrimination and sexual harassment. Direct discrimination is treating a person less favourably than another on the ground of a protected characteristic, here sex: s.13(1) Equality Act 2010.
55. Under s.26 Equality Act 2010, sexual harassment is unwanted conduct that has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for a person. The section provides (so far as material):

26 Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—

- (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
 - (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
...
 - (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
56. The Appropriate Authority had contended before the Tribunal that the actions of PC England towards PC A amounted to direct discrimination and sexual harassment. He had subjected her to treatment that was less favourable than he would have a male officer and his actions amounted to sexual harassment of PC A.
57. The Appropriate Authority argues that the finding (implied or express) of the Tribunal that PC England's behaviour was not discriminatory on the grounds of sex was perverse:
- (1) The Tribunal ignored PC A's evidence that, although at the time she had tried to 'laugh off' PC England's behaviour, on reflection she considered that PC England had inappropriately touched her without consent, that this was sexual, "creepy" and that she did not want again to serve with him.
 - (2) The Tribunal failed properly to consider what was meant by PC England's behaviour being sexual. In particular, it failed to consider whether PC England would have treated a male as he had treated PC Davies and/or whether the effect of his conduct (regardless as to its purpose) was such as to violate her dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.
58. Even if PC England's conduct was not measured against the Equality Act 2010, but following the wording of the misconduct charges, the Appropriate Authority argues that PC England's actions in touching PC Davies' shoulders, putting his hand down the back of her shirt, pulling away her shirt from her neck, touching her bare skin, joking about masturbation, joking about ejaculating on or down her, saying that he liked it with one glove and implying that it would be interesting for them to take a shower together was undoubtedly unwanted sexual conduct on any reasonable view. The Tribunal's finding that this was "*not intended to be sexual*" but part of an inappropriate and crass attempt to make a friend of PC A failed to view the matters from PC A's perspective,

as the object of this conduct and failed to follow the wording of the misconduct charge and was perverse.

59. To the extent that the Tribunal relied upon the medical evidence, in finding that PC England's behaviour was not intended to be sexual, it failed to explain why it preferred parts of the evidence to others and/or why it supported the findings that were made. There was a complete absence of fact-finding, of weighing of evidence or even of identifying what was the relevant evidence to consider.
60. The Appropriate Authority contends that, in relation to this first ground, the Tribunal also failed to consider the effect of PC England's conduct on other officers in the constabulary. Their knowledge that PC England had behaved in such a manner towards PC A will have had an impact other officers in the constabulary, much as officers engaging in racist behaviour may affect persons beyond those persons instantly involved. The Tribunal failed to address or grapple with this.
61. Mr Ley-Morgan for PC England submitted that the Regulation 21 Notice had not made an allegation of discrimination or harassment and it was not necessary for the Tribunal to make a finding whether PC England's actions amounted to discrimination or harassment on the grounds of sex. The issue for the Tribunal was simply whether PC England had breached the Standards of Professional Behaviour and, if so whether his conduct amounted to misconduct or gross misconduct. The Tribunal found that his behaviour amounted to gross misconduct without reference to the law governing discrimination and harassment.
62. Mr Ley-Morgan argued that whether or not PC England's actions were sexual was a question of fact for the Tribunal to decide. Its finding that the touching of PC A was not sexual and was not intended to be sexual was one that it was entitled to make upon consideration of the evidence as a whole. He contends that the Tribunal's decision provides more than adequate reasons why it came to its decision, namely:
 - (1) the totality of the medical evidence: (6);
 - (2) PC A's evidence of how she felt at the time: (8);
 - (3) the problems that PC England was having after transferring to Dyfed Powys Police from Thames Valley Police: (18);
 - (4) PS Davies' evidence corroborated what PC England had said during his evidence concerning his problems: (9);
 - (5) Dyfed Powys Police's failure to act despite being aware of concerns about PC England's mental health: (10) & (12);
 - (6) the deterioration in PC England's relationship with his sergeant: (11); and
 - (7) the fact that the incidents all occurred in a relatively short space of time: (13).

The Court's approach on Judicial Review

Fact-Finding

63. Appellate courts should not interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them: ***Fage UK Ltd -v- Chobani UK Ltd* [2014] FSR 29** [114]. This is particularly so where the tribunal of fact has based its decision on the credibility and reliability of the evidence given by witnesses: ***Gupta -v- General Medical Council* [2002] 1 WLR 1691** [10]. The weight given to evidence is pre-eminently a matter for the tribunal of fact: ***Henderson -v- Foxworth Investments Ltd* [2014] 1 WLR 2600** [57].

“... [I]n the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified”: ***Henderson*** [67].

64. However, any fact-finding tribunal must explain how it has got from its findings of fact to its conclusions: ***Tran -v- Greenwich Vietnam Community Project* [2002] ICR 1101** [17] *per* Sedley LJ:

“... It may be done economically, but simply to recite the background and the parties' contentions and then to announce a conclusion is not to do it at all; and an opaque reference to the evidence which has been given does not save it. The giving of adequate reasons fulfils many functions, among them the important one of concentrating decision-makers' own minds on what they are doing and demonstrating to the parties and (if necessary) to appellate tribunals that they have given acceptable answers to the right questions...”

- see also ***English -v- Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409** [17]-[18].

Sanction

65. The Tribunal found PC England guilty of gross misconduct. Pursuant to Regulation 3(1) of the PCR, that was a finding of conduct that was so serious that dismissal would be justified. The Tribunal nevertheless had a discretion as to the appropriate sanction to impose. Such discretion is required to be exercised in accordance with the structure identified in the Guidance. The relevant paragraphs of the Guidance are set out in the Appendix to this Judgment (with footnotes omitted). The Tribunal has a discretion to depart from the structure of the Guidance (see paragraph 1.3) but if it does so, the Tribunal must explain why: ***R (Chief Constable of West Midlands Police) -v- Police Misconduct Panel* [2020] EWHC 1400 (Admin)** [30]. The Tribunal was required to determine the appropriate disciplinary action by reference to the three stages set out in ***Fuglers*** [28]-[29] (set out in Paragraphs 4.2-4.5 of the Guidance).
66. The Tribunal was required to adopt a structured approach under the Guidance. On a review, it will not be assumed that the correct approach has been adopted if it is not

apparent on the face of the decision: ***R (Chief Constable of Greater Manchester Police) -v- Police Misconduct Panel*** (Unreported Admin, 13 Nov 2018 [16]).

Decision

67. I have reached the conclusion that the Tribunal’s fact-finding in relation to Incidents (1) to (4) was flawed. Largely, this was due to the Tribunal not directing itself to consider the terms of the charges that PC England faced. The Tribunal did set out the charges in its written decision, but it never asked itself whether the evidence had demonstrated that PC England’s behaviour had, in the language of the charge, “*amounted to unwanted conduct or unwanted conduct of a sexual nature*”, particularly in relation to the incidents involving PC A, and, in respect of Incidents (1) to (4) whether his conduct “*had the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment*”.
68. The Tribunal’s assessment of PC England’s conduct towards PC A was that his conduct was “*part of a wholly inappropriate, misguided, crass and objectionable series of attempts by him to try and make a friend of PC A*”, but found that his touching of her was not sexual and not intended to be sexual. That latter factual conclusion was, in public law terms, irrational. But more importantly, limiting the question only to whether his touching of PC A was sexual was a misdirection. The Tribunal needed to assess the events as a whole and decide whether PC England’s conduct was “*unwanted conduct of a sexual nature*”. On the unchallenged evidence there was only one answer to that question: it was. Yet the Tribunal made no finding on this point.
69. I have set out above the relevant parts of the cross-examination of PC A. Fundamentally, she was not challenged on the evidence she had given in her witness statement and, in due course, when PC England came to give evidence such challenges as he appeared to make to her factual account of what took place in his Interview, were abandoned. The following parts of PC A’s evidence were not challenged by PC England:
- (1) his remark to PC A that he had put tissues in his pocket “*in case [the nurses] think I’m having a wank*”;
 - (2) his remark to PC A of probably being able to ejaculate down her neck and that, when he said it, he may have touched PC A’s neck; and
 - (3) his remark about “*fit nurses*”, his comment about liking it “*with one glove*” and the statement that if they went running together, it would be “*interesting*” as the police station only had one shower.
70. The only conclusion available to a rational Tribunal on this unchallenged evidence was that PC England had repeatedly used highly sexualised language towards PC A which was unwanted. Objectively judged, it had the effect of violating the dignity of PC A and it created a degrading, humiliating and offensive environment for PC A. The Tribunal appears to have lost sight of the fact that PC A had not been challenged on her description of how PC England’s conduct had made her feel (see [32] above). The Tribunal should have seen that the suggestions made to PC A in cross-examination that PC England had been “*trying to be funny*” with a “*Benny Hill sort of humour*”, not “*sexually trying to come on to [her]*”, and that “*he thought it was funny, but [PC A]*

did not” were no answer at all to the charges. The Tribunal never confronted the absurdity of PC England’s answers in cross-examination that his language was not sexualised because it never addressed the issue at all; it wrongly confined itself to asking only the limited question of whether the touching of PC A was sexual.

71. As to that, I have already stated that the Tribunal’s answer that the touching was not sexual was irrational. On the unchallenged evidence it was perverse. PC A was not challenged on the evidence in her witness statement that, reflecting upon the incident, she felt that she had been the victim of “*non-consensual touching, sexual in nature [that was] inappropriate*”. The Tribunal’s conclusion, in paragraph 15 of its decision, was that PC England’s actions in touching PC A in the hospital “*were not sexual and were not intended to be sexual*”. Whilst intentional conduct would have been worse, PC England’s intention had no bearing on whether his conduct was unwanted conduct of a sexual nature that had the effect of violating PC A’s dignity or creating a hostile, degrading, humiliating or offensive environment. Likewise, although the Tribunal stated that its conclusions in this paragraph had been influenced by the expert medical evidence, that could also not have had any bearing on the effect of PC England’s conduct on PC A.
72. In reaching the finding that the actions “*were not sexual*”, the Tribunal seems to have been influenced by PC A’s evidence that, immediately at the time of the incident, she had not regarded the touching as sexual. But she had been clear in her witness statement, upon which she had not been challenged, that reflecting on the incident as a whole she considered PC England’s actions to have been non-consensual touching of a sexual nature. The point had been amplified in re-examination: “*everything was sexualised*”; “*it was just another excuse to touch me and maybe see how I would react*”. The Tribunal stated that it had accepted the evidence of PC A, even noting that there had been no real challenge to her evidence (8). On the only point of factual dispute in relation to Incident (3) – whether PC England had first put his hands on PC A’s shoulders rather than on the back of her chair – the Tribunal accepted PC A’s evidence.
73. The authorities demonstrate that, ultimately, a tribunal of fact can make findings that might be thought to go against the weight of the evidence, but if it does so, it must explain its reasons and demonstrate that it has “*given acceptable answers to the right questions*”. Here, there was no evidence to put into the balance against the evidence of PC A. Her evidence was not challenged, and it was accepted by the Tribunal. What might be called the “Benny Hill” defence was no answer to the charge. At best, it might have been advanced as mitigation.
74. I reject Mr Ley-Morgan’s submissions that the finding that the touching of PC A was not sexual was open to the Tribunal. The medical evidence was only relevant to what PC England might have perceived and/or intended, and was inconclusive in any event. The problems that PC England had experienced having transferred to Dyfed Powys Police could equally have only had relevance to his state of mind. The alleged failure of action by Dyfed-Powys after being alerted to problems that PC England was having and the deterioration of his relationship with his sergeant cannot have any bearing on whether the touching of PC A was sexual.
75. In my judgment, the Tribunal’s findings in connection with the Singleton Hospital incident are legally flawed and cannot stand. Objectively judged, it was the most serious allegation of misconduct faced by PC England. I also conclude that the Tribunal also

failed to make important factual findings, in connection with Incidents (1) and (2). As with Incident (3), the Tribunal had to decide whether the, effectively admitted, conduct of PC England had been unwanted conduct, or unwanted conduct of a sexual nature, that had the effect of violating the dignity of or created a hostile, degrading, humiliating or offensive environment for the officers concerned in those incidents. It did not make those decisions.

76. Overall, the Tribunal critically failed to make key findings as to the conduct of PC England in relation to charges (1), (2) and (3). I reject Mr Ley Morgan's argument that the Tribunal found PC England guilty of gross misconduct and therefore the Appropriate Authority can have no complaint. That approach is superficial. The basis on which gross misconduct is found by the Tribunal is crucial, not least when it comes to the outcome decision.
77. Arguably, the failure by the Tribunal to address each Incident, in a systematic and structured way, also led to a failure to appreciate the seriousness of the conduct of PC England. Incident (3) did not stand in isolation. Had the Tribunal also found that Incidents (1) and (2) were also unwanted (sexual) conduct that had the effect of violating the dignity of or created a hostile, degrading, humiliating or offensive environment for the officers concerned in those incidents, it might have concluded that, overall, the conduct of PC England was serious. Arguably, the seriousness was aggravated by PC England's previous inappropriate behaviour whilst at Thames Valley Police (see [6] above), to which the Tribunal made no reference. These are issues relevant to outcome, but they demonstrate that unless the Tribunal makes clear findings of fact in relation to each Incident, it deprives itself of a proper foundation upon which to make the important assessments of culpability and harm that are required at the outcome stage.
78. Mr Gold has also challenged the Tribunal's decision in relation to Incident (4). His submission is that the Tribunal failed to give adequate reasons for accepting PC England's evidence that he had not rubbed PC A's back and for rejecting the evidence that he had done so by PC A and PS Davies. In my judgment, the Tribunal's actual decision on this narrow factual dispute is unclear. It stated that it had accepted the evidence of PC A, PS Davies and PC England as truthful. In doing so, it apparently had not identified that there was a factual dispute between the witnesses whether PC England had rubbed – as opposed to simply touched, as he claimed – PC A's back. The point was not helped by PC A not being challenged in cross-examination on her evidence that PC England had rubbed her back. The Tribunal did not make any finding as to this point, save that the touching was "*not sexual and... not intended to be sexual*" (15). If this charge had stood alone, I might have reached the conclusion that this was a failure that, overall, did not vitiate the Tribunal's decision. However, I consider that Incident (4) may well be important in the context of the totality of the conduct of PC England towards PC A. Had the Tribunal reached the decision that the touching at Singleton Hospital was sexual, then that might have influenced its decision on Incident (4). The Tribunal also failed to make any findings as to whether the touching – whether rubbing or a simple palm placed on her back – was unwanted and whether it was conduct that had the effect of violating PC A's dignity or created a degrading, humiliating or offensive environment for her. In the circumstances, I also consider that the Appropriate Authority has demonstrated that the Tribunal's findings in relation to Incident (4) are also legally flawed.

79. I do not consider, however, that the Tribunal's decision in relation to Incident (5) is open to legal challenge. This was a discrete allegation of failing to follow orders. I do not consider that the Appropriate Authority has demonstrated that the Tribunal has failed to make sustainable findings of fact or that its decision was perverse or irrational. The facts of the incident were not substantially challenged, and the Tribunal's decision of whether the actions of PC England amounted to misconduct was quintessentially one for the expert assessment of the Tribunal. No legal error has been demonstrated. Essentially, Mr Gold's submission is that the Tribunal should have reached a different decision. That is not a basis on which the Court will intervene by way of Judicial Review.

Remedy

80. In light of my conclusions, I will quash the Tribunal's decision as to disciplinary findings in Incidents (1) to (4), quash the outcome decision (which inevitably falls with the quashing of the disciplinary findings) and remit the case in respect of Incidents (1) to (4) to be reheard by a differently constituted panel of the Police Misconduct Tribunal.
81. In consequence, the Tribunal's decision on outcome falls away and it is not necessary, therefore, for me to consider the separate challenge on this ground. Had I been required to do so, I would also have quashed the decision as to outcome on the grounds that the Tribunal had failed to explain its reasoning and failed to direct itself by reference to the Guidance. As I have noted above (see [77]), the failure to make proper findings of fact effectively prevented the Tribunal from carrying out a structured assessment of culpability and harm (see [65] above).

Appendix 1: Extracts from the Tribunal's decision

...

THE HEARING – The lay evidence called by the Appropriate Authority

7. The Panel heard oral evidence from three police officers: PC 595 Saul Thomas (re Allegations 1 and 2), [PC A] (re Allegations 4, 5 and 8) and PS 156 Kate Davies (re background matters and, specifically, Allegation 5). The Panel, of course, considered also the other written evidence relied upon by the Appropriate Authority contained in the Hearing Bundle.
8. The Panel found each of these three witnesses truthful witnesses who did their best to recollect as accurately as possible what had occurred in their presence in respect of the Officer's conduct. Save for the two discrete acts of physical touching of [PC A] at the hospital on the night of 11/12 December 2017 (shoulders and neck), there was no real challenge to their evidence. The Officer, when he gave evidence said that he recalled putting his hands on the back of the chair in which [PC A] sat as opposed to on her shoulders. The Panel, on the balance of probability, preferred the evidence of [PC A] on this. In respect of the touching of the neck the Officer stated in evidence that although he could not specifically recall doing so, on reflection he accepted that he might well have done so. The Panel, in assessing this whole incident approached the matter on the basis that the Officer had in fact touched [PC A]'s neck in the circumstances she recalled. Those circumstances included her evidence before the Panel, inter alia, (a) that she did not at the time think that the Officer's touching of her shoulders was in any way sexual, not for that matter, the touching of her neck, (b) that she didn't feel threatened by the Officer's conduct and (c) that, overall, the Officer was saying and doing things at the hospital that night which were unprofessional which he (the Officer) thought was funny but which she did not.
9. PS Davies both in her statements included in the Hearing Bundle and in the evidence that she gave to the Panel provided important corroboration of what the Officer told the Panel during his evidence concerning the problems which had beset him upon, and shortly after, the commencement of his employment with the Dyfed Powys Police Authority in July 2017.
10. In a statement made by PS Davies on 21 October 2017 (which is largely redacted) she records that towards the end of September 2017 whilst she had been on leave she had been made aware of matters of concern in respect of the Officer such that she felt that she should report those concerns to her supervisor which she did. It seems that the only guidance she received from her supervisor as to what she should do (as the Officer's direct sergeant), was simply "to keep an eye" on the Officer. In her statement, PS Davies states that this "guidance" did not "sit right with her".
11. Another significant problem at this time in the Panel's view, on the evidence, was the unfortunate deterioration of the Officer's working relationship with his Sergeant (PS Davies) as a result of a quite serious dispute which had developed between them concerning police issue clothing of which the Panel has scant information.
12. There can be no doubt that at some stage prior to 1 November 2019 PS Davies received further and fuller information from PC Rees concerning what can properly be described

as the potential deterioration of the mental health of the Officer. No support was afforded to the Officer. PC Rees did urge the Officer to “self-report” his problems but the Officer declined to do so. The Panel notes that PC Rees’s statement, dated 1 November 2017, was taken at the behest of the Force’s Professional Standards Department – so that Department must, also, have been aware of the Officer’s problems.

13. The cluster of arguably related Allegations (Allegations 1, 2, 4, and 5) laid against the Officer all occurred in early December 2017, which the Panel has concluded is significant.

The Officer’s Evidence – the Panel’s Assessment

14. The Panel found the Officer to be a truthful witness who did his best to answer frankly what he recalled he had said and done. The Panel totally rejected the Appropriate Authority’s Counsel’s submissions that the Officer was “not a frank witness”, that he “sought to be a deceitful witness” and that he was “positively dishonest”.
15. In particular, in the light of the whole of the expert medical evidence, the Panel accepted the Officer’s case (in his Regulation 22 Response and in his evidence) that his actions in touching [PC A] in the hospital and on 22 December 2017 in the social setting were not sexual and were not intended to be sexual. They, in particular those at the hospital, were in the Panel’s view, a part of a wholly inappropriate, misguided, crass and objectionable series of attempts by him to try to make a friend of [PC A] – a fellow officer who, like him, had recently started in the Force.
16. The Panel found the Officer’s evidence concerning the circumstances he came to make the telephone call to [PC A] on 26 April 2018 compelling. The Panel entirely accept that his motivation in making that call was entirely professional in the pressured circumstances of the unit in which he worked. The factual matrix is of course proved but as will appear under the heading “**The Panel’s Decision**” below the Panel did not consider this brief action on his part “misconduct” or, in the full circumstances, a breach of any of the Professional Standards.

The Medical Evidence

17. It is unnecessary in these Reasons to review the voluminous expert medical evidence which was before the Panel. Suffice it to say that although both experts disagreed on the precise diagnosis (Dr Lyle: clinical depression on top of an Asperger’s disorder/autism spectrum disorder: Dr Bagshaw: a depressive disorder with compulsive features against a background of maladaptive personality traits), both now agree having sight of the GP Records that the Officer has been beset with genuine mental health symptoms potentially adversely affecting his interpersonal skills for some years. In her Addendum Dr Bagshaw puts it thus: “In short, it is my opinion that PC England presents with maladaptive personality traits which may not reach the threshold for a diagnosis of personality disorder, but which, in combination with negative attitudes, result in distress arising from recurring difficulties in interpersonal relationships, affecting both his occupational and social functioning”.
18. In her report(s) Dr Bagshaw made two points which the Panel broadly accept. Firstly, that even if the Officer did have an Asperger’s disorder, contrary to her view, it was relatively mild in the sense that in normal circumstances the Officer should have been

able to cope with the same. The Panel notes that this proposition is supported by the Officer's "clean" work record, inter alia, between 2011 and July 2017, and during 2018 up to the present time. Secondly, that in the period following the Officer's employment with the Dyfed Powys Police Authority he may well have been experiencing an exacerbation of his underlying clinical depression – as Dr Bagshaw put it "an emerging depression" – due to, inter alia, difficulties in his new work and lack of support here in Wales and the ending of his relationship with his girlfriend.

19. Clearly the medical evidence will become relevant again at the **Outcome** stage of these proceedings.

DECISION

20. The Panel found, on the balance of probability, all the factual assertions set out in the Allegations proved.
21. **Allegation 1:** This, viewed in isolation, constituted no more than a single act of misconduct and thus a breach of the standard relating to "Authority, Respect and Courtesy". Viewed as part of a series along with Allegations 2 and 4 it constitutes gross misconduct and constitutes breaches of the standards relating to "Authority, Respect and Courtesy" and "Discreditable Conduct".
22. **Allegation 2:** This, viewed in isolation, constituted a single act of misconduct and thus a breach of the standards of "Authority, Respect and Courtesy". Viewed as part of a series along with Allegations 1 and 4 it constitutes gross misconduct and constitutes breaches of the standards relating to "Authority, Respect and Courtesy" and "Discreditable Conduct".
23. **Allegation 4:** This, viewed in isolation or as part of a series along with Allegations 1 and 2, amounts to gross misconduct and constitutes a breach of the standards relating to "Authority, Respect and Courtesy" and "Discreditable Conduct".
24. **Allegation 5:** This as framed does not in the Panel's view amount to an act of misconduct either viewed in isolation or as part of any alleged series. Consequently no breaches of professional standards have been made out in respect of this allegation.
25. **Allegation 8:** As has been mentioned earlier in these Reasons the Panel do not consider that what the Officer did crosses the threshold into the realm of "wilful misconduct". He did something in the pressure of the moment with the best of intentions. The Panel firmly rejected the Appropriate Authority's submission that he had a parallel "personal motivation". No breaches of Professional Standards have been established in respect of this Allegation.

OUTCOME

1. The Panel has carefully considered the submissions of both parties as to Outcome.
2. The Panel has reminded itself that the purpose of the police conduct regime is threefold:
 - (1) to maintain public confidence in and the reputation of the police service;

- (2) to uphold high standards in policing and deter misconduct; and
 - (3) to protect the public.
3. The Panel has reminded itself of the guidance afforded in the ‘Guidance on Outcomes in Police Misconduct Proceedings’, including those specifically referred to by Counsel acting for the Appropriate Authority.
 4. The Panel noted the views of the Deputy Chief Constable but do not accept that it will be impossible to deploy the Officer operationally in future; the Panel is mindful of his long period of unblemished police service (2011 to 2017 when he was a ‘well man’) and the fact that the medical evidence makes it clear that he is highly motivated so far as treatment is concerned.
 5. The Panel has also reminded itself that the Outcome must be proportionate to the Officer’s proved breaches of Professional Standards and to the particular circumstances in which the Officer came to offend.
 6. The Panel has determined that there were exceptional circumstances existing at the time of the Officer’s offending relating to his deteriorating mental health which would render ‘Dismissal Without Notice’ (being the Outcome urged upon the Panel by the Appropriate Authority) a disproportionate Outcome.”
 7. The Panel unanimously determined that the proportionate Outcome was a Final Written Warning and so ordered.

Appendix 2: Extracts from the College of Policing *Guidance on outcomes in police misconduct proceedings*

Introduction

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

...

Police misconduct proceedings

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

2.2 When determining the appropriate outcome to impose, consider the purpose of police misconduct proceedings.

2.3 The purpose of the police misconduct regime is threefold:

- maintain public confidence in and the reputation of the police service;
- uphold high standards in policing and deter misconduct; and
- protect the public.

2.4 These aims derive from the following authorities on the nature and purpose of professional disciplinary proceedings:

- a. *Bolton -v- Law Society* [1994] 1 WLR 512, 518H, in which Sir Thomas Bingham MR (as he then was) explained the apparent harshness of sanctions imposed by the Solicitors Disciplinary Tribunal:

‘The second purpose is the most fundamental of all: to maintain the reputation of the solicitors’ profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission...’

- b. *Redgrave -v- Commissioner of Police of the Metropolis* [2003] 1 WLR 1136 [33] where Lord Justice Simon Brown stated, by reference to the dental profession:

‘The purpose of disciplinary proceedings against a dentist who has been convicted of a criminal offence by a court of law is not to punish him a second time for the same offence but to protect the public who may come to him as patients and to maintain the high standards and good reputation of an honourable profession.’

- c. *R (Green) -v- Police Complaints Authority* [2004] 1 WLR 725 [78], where Lord Carswell stated, in relation to the police service:

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

- d. *R (Coke-Wallis) v Institute of Chartered Accountants* [2011] 2 AC 146 [60], in which Lord Collins reaffirmed the purpose of professional disciplinary proceedings to be:

‘...to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour: see e.g. *Bolton -v- Law Society* [1994] 1 WLR 512, 518, per Sir Thomas Bingham MR; *Gupta -v- General Medical Council* [2002] 1 WLR 1691 [21] per Lord Rodger of Earlsferry.’

...

- 2.10 Misconduct proceedings are not designed to punish police officers. As stated by Lord Justice Laws in *Raschid -v- General Medical Council* [2007] 1 WLR 1460 [18]: ‘The panel then is centrally concerned with the reputation or standing of the profession rather than the punishment of the doctor.’
- 2.11 The outcome imposed can have a punitive effect, however, and therefore should be no more than is necessary to satisfy the purpose of the proceedings: *Chaudhury -v- General Medical Council* [2002] UKPC 41. Consider less severe outcomes before more severe outcomes. Always choose the least severe outcome which deals adequately with the issues identified, while protecting the public interest: *Davey v General Dental Council* [2015] EWHC 3594 (Admin) [18]. If an outcome is necessary to satisfy the purpose of the proceedings, impose it even where this would lead to difficulties for the individual officer.

Assessing seriousness

- 4.1 Assessing the seriousness of the conduct lies at the heart of the decision on outcome under Parts 4 and 5 of the Conduct Regulations. Whether conduct would, if proved, amount to misconduct or gross misconduct for the purposes of Regulation 12 of the Conduct Regulations is also a question of degree, i.e. seriousness.
- 4.2 ... there are three stages to determining the appropriate sanction:
- assess the seriousness of the misconduct
 - keep in mind the purpose of imposing sanctions
 - choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.
- 4.3 Assessing the seriousness of the misconduct is the first of these three stages.
- 4.4 Assess the seriousness of the proven conduct by reference to:

- the officer's culpability for the misconduct
- the harm caused by the misconduct
- the existence of any aggravating factors
- the existence of any mitigating factors.

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

...

Culpability

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

4.11 Conduct which is intentional, deliberate, targeted or planned will generally be more culpable than conduct which has unintended consequences, although the consequences of an officer's actions will be relevant to the harm caused.

4.12 Where harm is unintentional, culpability will be greater if [the] officer could reasonably have foreseen the risk of harm.

...

4.14 It is not possible to categorise all types of case where dismissal will be appropriate because the circumstances of the individual case must be considered. Many acts have the potential to damage public confidence in the police service.

4.15 The following types of misconduct, however, should be considered especially serious.

...

Violence, intimidation or sexual impropriety

4.39 Misconduct involving violence, intimidation or sexual impropriety undermines public trust in the profession and is therefore serious.

4.40 This includes cases involving bullying or harassment, either in the police service or towards members of the public. Give attention to the degree of persistence, the vulnerability of the other party, the number of people subjected to the behaviour and whether the officer was in a specific position of authority or trust. More serious action is likely to be appropriate where the officer has demonstrated predatory behaviour motivated by a desire to establish a sexual or inappropriate emotional relationship with a colleague or member of the public.

4.41 The presence of any of these factors is likely to increase the seriousness of the misconduct, although the treatment of a single individual can be sufficiently serious to amount to gross misconduct.

...

Discrimination

4.51 Persons affected by discrimination are those with protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

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

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

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

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

4.55 There is inevitably a degree of overlap between the particular types of misconduct highlighted above. Take care to avoid 'double counting' factors which have been identified as being relevant to the assessment of seriousness.

4.56 Equally, these considerations should not be considered an exhaustive list. There may be other factors specific to the behaviour in question, which render it more culpable and therefore more serious.

Harm

4.57 The harm caused by an officer's actions can be considered in various ways including:

Type of harm

The types of harm caused or risked by different types of police misconduct are diverse. Victims may suffer:

- physical injury
- sexual abuse
- financial loss
- damage to health
- psychological distress
- reputational harm
- loss of liberty (e.g. if a person has been wrongfully arrested or detained)
- infringement of human rights.

Persons affected

Misconduct may affect particular individuals, in which case the harm caused may depend on the victim's personal characteristics and circumstances. Misconduct can also harm the wider community. Such harm may involve economic loss, harm to public health or interference with the administration of justice.

Effect on the police service and/or public confidence

Harm will likely undermine public confidence in policing. Harm does not need to be suffered by a defined individual or group to undermine public confidence. Where an officer commits an act which would harm public confidence if the circumstances were known to the public, take this into account. Always take seriously misconduct which undermines discipline and good order within the police service, even if it does not result in harm to individual victims.

- 4.58 Assess the impact of the officer's conduct, having regard to these factors and the victim's particular characteristics.
- 4.59 Where no actual harm has resulted, consider the risks attached to the officer's behaviour, including the likelihood of harm occurring and the gravity of harm that could have resulted.
- 4.60 How such behaviour would be or has been perceived by the public will be relevant, whether or not the behaviour was known about at the time.
- 4.61 If applicable, consider the scale and depth of local or national concern about the behaviour in question. A case being reported in local or national media, however, does not necessarily mean that there is a significant level of local or national concern. Distinguish objective evidence of harm to the reputation of the police service from subjective media commentary.
- 4.62 Whether a matter is of local or national concern will be a matter for the person(s) conducting the proceedings based on their experience and the circumstances of the case.

- 4.63 Consideration of the harm caused will usually follow findings in relation to the facts, breaches of Standards of Professional Behaviour and whether the behaviour amounted to misconduct or gross misconduct.
- 4.64 Harm, including death or serious injury, can result where an officer has behaved appropriately and no misconduct has been established.
- 4.65 Where gross misconduct has been found, however, and the behaviour caused or could have caused, serious harm to individuals, the community and/or public confidence in the police service, dismissal is likely to follow. A factor of the greatest importance is the impact of the misconduct on the standing and reputation of the profession as a whole: *Fuglers* [29]

Aggravating factors

- 4.66 Aggravating factors are those tending to worsen the circumstances of the case, either in relation to the officer's culpability or the harm caused.
- 4.67 Factors which indicate a higher level of culpability or harm include:
- premeditation, planning, targeting or taking deliberate or predatory steps
 - malign intent, e.g. sexual gratification, financial gain or personal advantage
 - abuse of trust, position, powers or authority
 - deliberate or gratuitous violence or damage to property
 - concealing wrongdoing in question and/or attempting to blame others
 - regular, repeated or sustained behaviour over a period of time
 - continuing the behaviour after the officer realised or should have realised that it was improper
 - serious physical or psychological impact on the victim
 - vulnerability of the victim
 - multiple victims
 - additional degradation, e.g. taking photographs as part of a sexual offence
 - any element of unlawful discrimination
 - significant deviation from instructions, whether an order, force policy or national guidance
 - failure to raise concerns or seek advice from a colleague or senior officer
 - scale or depth of local or national concern about a particular issue
 - multiple proven allegations and/or breaches of the Standards of Professional Behaviour (see paragraph 3.6).

- 4.68 This list is not intended to be exhaustive and the aggravating factors are not listed in any particular order of priority.
- 4.69 On occasions, two or more of the factors listed will describe the same feature of the misconduct – take care to avoid ‘double counting’.

Mitigating factors

- 4.70 Mitigating factors are those tending to reduce the seriousness of the misconduct. Some factors may indicate that an officer’s culpability is lower, or that the harm caused by the misconduct is less serious than it might otherwise have been.
- 4.71 Factors indicating a lower level of culpability or harm include:
- misconduct confined to a single episode or brief duration
 - extent of the officer’s involvement in the misconduct
 - any element of provocation, threat or disturbance which may have affected the officer’s judgement, e.g. in relation to the use of force in the heat of the moment
 - acting pursuant to a legitimate policing purpose or in good faith, i.e. a genuine belief that there was a legitimate purpose but getting things wrong
 - mental ill health, disability, medical condition or stress which may have affected the officer’s ability to cope with the circumstances in question
 - whether the officer was required to act outside their level of experience and/or without appropriate training or supervision
 - open admissions at an early stage
 - early actions taken to reduce the harm caused
 - evidence of genuine remorse, insight and/or accepting responsibility for one’s actions.
- 4.72 In cases where the misconduct occurred several years prior to the meeting or hearing, consider the outcome by reference to the standards of the time rather than current attitudes and standards. Give due account to the officer’s conduct in the intervening years, for example, whether they performed their duties to a high standard.

...

Personal Mitigation

- 6.1 As Lord Justice Maurice Kay confirmed in the Court of Appeal decision in *Salter -v- v Chief Constable of Dorset* [2012] EWCA Civ 1047 [23]:

‘As to personal mitigation, just as an unexpectedly errant solicitor can usually refer to an unblemished past and the esteem of his colleagues, so will a police officer often be able so to do. However, because of the importance of public confidence, the potential of such mitigation is necessarily limited.’

- 6.2 Purely personal mitigation is not relevant to the seriousness of the misconduct. Tributes and testimonials should not be confused with the mitigating factors relating to the misconduct itself, as outlined above (at paragraphs 4.70-4.72). Consider any personal mitigation after forming an assessment of the seriousness of the misconduct.
- 6.3 Consider any personal mitigation advanced by the officer when deciding on the appropriate outcome. Such mitigation may include whether the officer has shown remorse, acted out of character or made a significant contribution to the police service.
- 6.4 Due to the nature and purpose of disciplinary proceedings, however, the weight of personal mitigation will necessarily be limited, particularly where serious misconduct has been proven. Per Holroyde J in *Williams -v- Police Appeals Tribunal* [2017] ICR 235 [67]:

‘... the importance of maintaining public confidence in and respect for the police service is constant, regardless of the nature of the gross misconduct under consideration. What may vary will be the extent to which the particular gross misconduct threatens the preservation of such confidence and respect. The more it does so, the less weight can be given to personal mitigation.’

- 6.5 As Lord Bingham stated in *Bolton -v- Law Society* [1994] 1 WLR 512, 519B-E, of disciplinary proceedings:

‘Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.’

- 6.6 The primary consideration for the panel or chairperson is the seriousness of the misconduct found proven. If the misconduct is so serious that nothing less than dismissal would be sufficient to maintain public confidence, personal mitigation will not justify a lesser sanction.
- 6.7 There is also a public interest, however, in retaining officers who have demonstrated or developed particular skills and experience. In the words of Mr Justice Collins in *Giele -v- General Medical Council* [2006] 1 WLR 942 [30]:

‘It must be obvious that misconduct which is so serious that nothing less than erasure would be considered appropriate cannot attract a lesser sanction simply because the

practitioner is particularly skilful. But if erasure is not necessarily required, the skills of the practitioner are a relevant factor.’

- 6.8 Although personal mitigation may carry more weight where lesser outcomes are being considered, the case law confirms that the interests of the profession, and the protection of the public, are more important than those of the individual officer.
- 6.9 Nonetheless, personal mitigation is always relevant and should always be taken into account.

Conclusion

- 7.1 This guidance should be used to inform the approach taken by panels and chairpersons to determining outcomes in police misconduct proceedings. It sets out an approach for assessing the seriousness of conduct, which can be applied to assessments of conduct under Regulation 12 of the Conduct Regulations or paragraph 19B of Schedule 3 to the Police Reform Act 2002.
- 7.2 There are three stages to determining outcome:
- assess the seriousness of the misconduct
 - keep in mind the threefold purpose for imposing outcomes in police misconduct proceedings
 - choose the outcome which most appropriately fulfils that purpose, given the seriousness of the conduct in question.
- 7.3 Assessing the seriousness of the conduct is the first of these three stages. In assessing the seriousness of the conduct, have regard to the four categories outlined: culpability, harm, aggravating and mitigating factors.
- 7.4 Consider less severe outcomes before more severe outcomes. The more serious the conduct found proven against an officer, the more likely it is that dismissal will be justified.
- 7.5 Always take personal mitigation into account. Due to the purpose of disciplinary proceedings, its impact will necessarily be limited. Less weight can be attached to personal mitigation where serious misconduct has been proven.
- 7.6 The reasons for imposing a particular outcome should be recorded and usually read out in public. Refer to this guidance and explain any departures from it.
- 7.7 Each case will depend on its particular facts. Have regard to all relevant circumstances when determining the appropriate and proportionate outcome to impose.