Neutral Citation Number: [2021] EWHC 1125 (Admin)

Case No: CO/630/2020

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 30/04/2021

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

THE QUEEN (ON THE APPLICATION OF THE CHIEF CONSTABLE OF AVON AND SOMERSET POLICE)	**Claimant**
- and -	
POLICE MISCONDUCT TRIBUNAL	**Defendant**
(1) PC PAULINE ARCHER **(2) MS JADE SASANI**	**Interested Parties**
THE DIRECTOR GENERAL OF THE INDEPENDENT OFFICE FOR POLICE CONDUCT	**Intervener**

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- -

Elliot Gold (instructed by **Legal Services of Avon and Somerset Constabulary**) for the **Claimant**
Dean George QC (instructed by **Reeds Solicitors**) for the **First Interested Party**
James Berry (instructed by **Independent Office for Police Conduct**) for the Intervener
The Defendant and the Second Interested Party did not appear and were not represented

Hearing dates: 1-2 March 2021

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Approved Judgment

Mrs Justice Steyn :

A. Introduction

1. The Claimant is the Chief Constable of Avon and Somerset ("the Chief Constable"). He challenges the decision of the Police Misconduct Tribunal ("the Tribunal") dated 12 December 2019, made following a hearing of a charge of gross misconduct brought against Police Constable Pauline Archer ("PC Archer"). The members of the Tribunal were: Mrs Jane Jones (the legally qualified chair, "the Chair"), Superintendent Rhys Hughes (a senior police officer), and Dr Solomon Fubara (an independent member of the Tribunal).

2. The charge against PC Archer, as stated in the notice provided pursuant to regulation 21 of the Police (Conduct) Regulations 2012 ("the regulation 21 notice"), was that:

> "On Tuesday 23 July 2019, you were on duty and working at Weston Gateway Police Centre in the IRiS MOSOVO office. At or about 14.30 on that day, you were engaged in conversation with Jenni Thompson and said, concerning your partner who was sunbathing at your home, the following or words to similar effect: "*The problem is that she's got olive skin and I know what she's like, by the time I get home she'll look like a nig nog*". Immediately following saying those words, you said words to the effect of "*Did I just say that?*". You then laughed and repeated again words to the effect of "*Did I just say that?*""

3. This charge was admitted by PC Archer and found proved by the Tribunal. From the outset when interviewed on 12 August 2019, although PC Archer said she could not recall using this racist term, she accepted the truth of the allegation that she had done so. PC Archer (rightly) described the term she had used as "*abhorrent*" and "*completely unacceptable*". As I explain below, PC Archer gave an explanation of how, she believed, it had come about that she had inadvertently used such an abhorrent term which, she said, was not common vocabulary (for her or generally) and why, she believed, she had laughed. PC Archer apologised "*unreservedly and without condition*" to the two people who had heard the conversation and to the Constabulary, describing herself as "*so ashamed of myself*" and "*deeply upset at the effect I've had on another person when I work so hard to be inclusive of everyone, regardless of gender, race or sexual orientation*".

4. The regulation 21 notice alleged that by her conduct PC Archer had breached three of the Standards of Professional Behaviour, namely:

> "1) **Authority, Respect and Courtesy** in that you used a racist term and that your words as detailed above could reasonably be perceived as abusive, victimising or offensive.
>
> 2) **Equality and Diversity** in that you used a racist term, that your words as detailed above were discriminatory, and that you failed to take a proactive approach to opposing discrimination.

> 3) **Discreditable Conduct** in that your actions as set out above brought discredit on the police force and/or undermined public confidence in it."

5. PC Archer admitted, and the Tribunal found, that each of these Standards was breached. In her response to the regulation 21 notice ("the regulation 22 response"), PC Archer acknowledged the term she had used was racist, could reasonably be perceived as abusive, and that her actions had brought discredit on herself and the police force, and had undermined public confidence. She denied any intention to victimise, offend or discriminate against anyone.

6. The regulation 21 notice alleged that PC Archer's conduct "*if proven, is so serious that dismissal could be justified*" and assessed that it constituted "*gross misconduct*". PC Archer admitted, and the Tribunal found, that her conduct constituted gross misconduct.

7. The Chief Constable contends, in essence, that the Tribunal erred in reaching its factual findings regarding PC Archer's conduct and in imposing a final written warning rather than dismissal.

B. The grounds

8. The Chief Constable relies on the following four pleaded grounds by which he alleges:

   i) It should have become apparent to the Chair during the course of the hearing that the Tribunal would have to make determinations on disputed issues of fact and, at that stage, the Chair erred in failing to call Ms Jade Sasani to give evidence.

   ii) The Tribunal's findings (i) that PC Archer used the word "*nig-nog*" ("the racist term") *unintentionally*, (ii) that she accepted full responsibility for her actions and (iii) that her conduct did not amount to discrimination contrary to the Equality Act 2010, were irrational.

   iii) The Tribunal failed to give adequate reasons for preferring the evidence of PC Archer to that given by Ms Sasani.

   iv) The disciplinary sanction is vitiated by the errors referred to in the first three grounds and, in any event, the Tribunal failed to structure its decision correctly or give adequate reasons and reached a perverse conclusion as to the appropriate sanction.

C. The legal framework

9. The regulations in force at the time of the investigation and proceedings before the Tribunal in this case were the Police (Conduct) Regulations 2012 ("the 2012 Regulations").

10. Regulation 19 of the 2012 Regulations provides:

> "(4) Where the appropriate authority determines that there is a case to answer in respect of gross misconduct, it shall, subject to

> regulation 9(3) and paragraph (2), refer the case to a misconduct hearing.
>
> (5) Where the appropriate authority determines that there is a case to answer in respect of misconduct it may –
>
> (a) subject to regulation 9(3) and paragraph (2), refer the case to misconduct proceedings; or
>
> (b) take management action against the officer concerned."

11. Where there is no case to answer in respect of gross misconduct, only simple misconduct, the matter may be referred to a misconduct meeting conducted by a police officer. Whereas a case to answer in respect of gross misconduct must be referred to a public hearing before a police misconduct tribunal. The "*appropriate authority*" ("the AA") is, in this case, the Chief Constable (regulation 3 of the 2012 Regulations).

12. Regulation 21 of the 2012 Regulations provides (so far as material):

> "(1) Where a case is referred to misconduct proceedings, the appropriate authority shall as soon as practicable give the officer concerned –
>
> (a) written notice of –
>
> (i) the referral;
>
> (ii) the conduct that is the subject matter of the case and how that conduct is alleged to amount to misconduct or gross misconduct as the case may be;
>
> …"

13. Regulation 22 of the 2012 Regulations provides (so far as material):

> "(2) <u>The officer concerned shall provide to the appropriate authority</u> –
>
> (a) <u>written notice of whether or not he accepts that his conduct amounts to misconduct or gross misconduct as the case may be</u>;
>
> (b) where he accepts that his conduct amounts to misconduct or gross misconduct as the case may be, any written submission he wishes to make in mitigation; and
>
> (c) where he does not accept that his conduct amounts to misconduct or gross misconduct as the case may be, or he disputes part of the case against him, written notice of –
>
> (i) the allegations he disputes and his account of the relevant events; and

(ii) any arguments on points of law he wishes to be considered by the person or persons conducting the misconducting proceedings.

…

(4) Before the end of 3 working days beginning with the first working day after the date on which the officer concerned has complied with paragraph (2), the appropriate authority and the officer concerned shall each supply to the other a list of proposed witnesses or give notice that they do not have any proposed witnesses; and any list of proposed witnesses shall include brief details of the evidence that each witness is able to adduce.

(5) Where there are proposed witnesses, the officer concerned shall, if reasonably practicable, agree a list of proposed witnesses with the appropriate authority." (emphasis added)

14. Regulation 23 provides:

"(1) As soon as practicable after any list of proposed witnesses has been –

(a) agreed under regulation 22(5); or

(b) where there is no agreement under regulation 22(5), supplied under regulation 22(4),

the appropriate authority shall supply that list to the person conducting or chairing the misconduct proceedings.

(2) The person conducting or chairing the misconduct proceedings shall-

(a) consider the list or lists of proposed witnesses; and

(b) subject to paragraph (3), determine which, if any, witnesses should attend the misconduct proceedings.

(3) No witness shall give evidence at misconduct proceedings unless the person conducting or chairing those proceedings reasonably believes that it is necessary for the witness to do so in the interests of justice, in which case he shall –

(a) where the witness is a police officer, cause that person to be ordered to attend the misconduct proceedings; and

(b) in any other case, cause the witness to be given notice that his attendance is necessary and of the date, time and place of the proceedings." (emphasis added)

15. Regulation 33 of the 2012 Regulations provides (so far as material):

> "(1) Subject to these Regulations, the person conducting or chairing the misconduct proceedings shall determine the procedure at those proceedings.
>
> …
>
> (3) Subject to paragraph (4), the person conducting or chairing the misconduct proceedings may from time to time adjourn the proceedings if it appears to him to be necessary or expedient to do so.
>
> (4) The misconduct proceedings shall not, except in exceptional circumstances, be adjourned solely to allow the complainant or any witness or interested party to attend.
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> …
>
> (8) Whether any question should or should not be put to a witness shall be determined by the person conducting or chairing the misconduct proceedings.
>
> …
>
> (13) The person or persons conducting the misconduct proceedings shall review the facts of the case and decide whether the conduct of the officer concerned amounts –
>
> (a) in the case of a misconduct meeting, to misconduct or not; or
>
> (b) in the case of a misconduct hearing, to misconduct, gross misconduct or neither.
>
> (14) The person or persons conducting the misconduct proceedings shall not find that the conduct of the officer concerned amounts to misconduct or gross misconduct unless –
>
> (a) he is or they are satisfied on the balance of probabilities that this is the case; or
>
> (b) the officer concerned admits it is the case." (emphasis added)

16. The Home Office Guidance (*Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures*) provides:

> "Witnesses
>
> 2.201 A witness will only be required to attend a misconduct meeting/hearing if the person conducting or chairing the meeting/hearing reasonably believes his or her attendance is necessary to resolve disputed issues in that case. Where there is

> a witness whose evidence is in dispute and who is material to the allegation then such witnesses should be made available to attend. …
>
> 2.202 The appropriate authority and the officer concerned shall inform each other of any witnesses they wish to attend including brief details of the evidence that person can provide. They should attempt to agree which witness(es) are necessary to deal with the issue(s) in dispute.
>
> 2.203 The appropriate authority shall supply the person(s) conducting the proceedings with a list of the witnesses agreed between the parties or where there is no agreement, the lists provided by both the officer and the appropriate authority. The person conducting a misconduct meeting or the chair of a misconduct hearing will decide whether to allow such witnesses. The person conducting or chairing the misconduct proceedings may also decide that a witness other than one on such lists should be required to attend (if their attendance is considered necessary)." (emphasis added)

D. The complaint

17. Ms Sasani works for Avon and Somerset Constabulary. On 23 July 2019, having recently taken on a new role as MAPPA & VISOR Administrator, Ms Sasani spent the day shadowing Jo Cornish, an offender manager, initially out of the office and then, from about 2pm, in the open-plan office where PC Archer worked. At the time, PC Archer did not know Ms Sasani.

18. At about 2.30pm, PC Archer had just finished a telephone conversation with her partner which had made her laugh and she explained her amusement to her colleague, Ms Jenni Thompson, who was sitting next to her. While PC Archer and Ms Thompson were conversing, Ms Sasani was walking behind them to get back to the desk where she was sitting that afternoon and she overheard PC Archer.

19. On 25 July 2019, Ms Sasani sent an email to Temporary Sergeant Stacy Sutton in which she said:

> "At one point I came back to the desk and walked past whilst Pauline was having a conversation with Jennie. I heard Pauline state: "*I've left … at home sunbathing, the only problem is she's got olive skin and I know what she's like, by the time I get back she'll look like a nig nog. Oh did I just say that (laughing) did I just say that*". "

20. Ms Sasani described in her email how shocked and deeply upset she had been by what she had heard, and how very uncomfortable it had made her feel at the time and subsequently. Ms Sasani said:

> "I was really disappointed that this language was used and the fact that it was done within an open office and the joking manner in which it was said is beyond me."

E. The disciplinary investigation

21. This email prompted a disciplinary investigation into PC Archer's conduct. This was a non-recordable conduct matter (as it did not involve a public complaint or recordable conduct) (Police Reform Act 2002, s.12(2)(b) and sch.3, para 11, and reg.7 of the Police Complaints and Misconduct Regulations 2012). The Chief Constable appointed an investigator in accordance with regulation 13(2) of the 2012 Regulations.

22. A witness statement was taken from Ms Thompson on 29 July 2019. Ms Thompson was asked if PC Archer made a comment in the terms stated in Ms Sasani's email. Ms Thompson said:

> "Yes she did say that expression although I don't remember the latter part about 'did I just say that'. At the time I was only half listening. …I didn't take it as a racist insult at the time, I honestly didn't. It didn't really sink in what she said at the time. … I have never known her to make a racist comment before. … Basically she is a good person. … I think she's honourable, I honestly don't think she would have said that phrase to upset anybody."

In an email the following day, Ms Thompson described it as "*a private conversation between Pauline and myself*".

23. A witness statement was taken from Ms Sasani on 30 July 2019. In her statement, Ms Sasani said that about 2.30pm she came back into the open plan office and she was walking behind PC Archer, Ms Thompson and Steve Alsop to get to Ms Cornish's desk. The statement continues:

> "As I walked past Pauline and Jenny I heard Pauline talking she had left someone, I don't know the name, at home sunbathing. The problem is that she's got olive skin and I know what she's like, by the time I get home she'll look like a nig nog. She said it like that. Oh did I just say that, and then laughing, and then did I just say that, again.
>
> …
>
> When Pauline said this phrase I was a quarter of a metre away from her. I heard what she said in the conversation clearly. The conversation had been spoken in a normal level of volume but when Pauline said the phrase nig nog she lowered the volume level of her speech. This made me think she knew it was wrong to say it. It seemed she used the term she used in a joking way."

Ms Sasani's statement also described in detail how deeply upsetting she had found this incident.

24. The Investigating Officer took a number of other statements, including from Mr Alsop who sat at the desk next to PC Archer, on the other side from Ms Thompson. Mr Alsop's evidence was that he "*did not hear Pauline say that phrase. If I had heard it I would have challenged it*". More generally, he had "*never heard Pauline make a racist comment*".

25. On 6 August 2019 the Investigating Officer issued a notice to PC Archer, pursuant to regulation 15 of the 2012 Regulations, notifying her of the investigation into an allegation that she had committed gross misconduct.

26. On 12 August 2019 PC Archer was interviewed. In the interview PC Archer said:

> "At the first outset I'm utterly mortified for the comment that I have attributed to have said [sic]. I do recall the conversation but I do not recall saying specifically 'nig-nog'. I have read the statement of JADE and I am so, so sorry for her feeling the way she has following this and hearing me say such a thing. I make no excuses but can assure you that this is not common vocabulary for me to use…I am also sorry to JENNY for the position I have put her in …"

27. PC Archer described telling Ms Thompson about the conversation she had just had with her partner about sunbathing topless. PC Archer explained that her partner tans easily rather than, as she does, getting sunburnt, and PC Archer was expressing jealousy of her partner's complexion. She continued:

> "I know I was having a quiet conversation as [my partner] is a private person and I didn't want all to hear what we were talking about. I cannot remember saying 'nig-nog', I simply can't, but I accept that if JENNY and JADE heard me say it then I must have. I cannot remember the last time I heard this phrase; it is not common vocabulary."

28. PC Archer said that she had "*deeply reflected and considered how or why I would say such a thing*". She explained that shortly before, she had had a conversation with a neighbour whose elderly father had put a large cardboard cut-out of a 'golliwog' in the front bedroom window of their property. PC Archer had advised her neighbour that it could be a racially aggravated offence and, while her father's action might be explained by his old age, it would be best to take it down and her neighbour had done so. PC Archer surmised that:

> "it could be that it was in my subconscious, maybe I was gonna say 'golliwog' as it was fresh in my mind … and realised saying such a thing would be horrendous and inappropriate, ending up saying something equally abhorrent. I am so ashamed of myself. I know that terms such as these are completely unacceptable and I loathe bigots and bullies. … I am more than aware of the effect bigotry and discrimination can have on a person. To be considered in this way is deeply distressing to me, and not only that, I am deeply upset at the effect I've had on another person when I work so hard to be inclusive of everyone, regardless of

> gender, race or sexual orientation. I apologise unreservedly and without condition to JADE, JENNY and the CONSTABULARY. … There are not enough ways to say sorry for this situation and I will do anything in my power to make it right."

29. PC Archer readily agreed with the Investigating Officer that the phrase she had used was "*racist*", "*racially offensive*" and "*completely unacceptable*"; that "*using racist language towards the public, or towards colleagues, can have a significant impact on public confidence*" and by using the phrase she did, she failed to support the value of "*inclusiveness*".

30. On 12 August 2019 the Investigating Officer submitted his report recommending that PC Archer had a case to answer in gross misconduct.

F. Regulation 21 notice and regulation 22 response

31. The regulation 21 notice given to PC Archer described the conduct in the terms set out in §2 above and alleged that this conduct breached three Standards of Professional Conduct (see §4 above) and constituted gross misconduct. I note that while the "*alleged facts*" referred to the circumstances in which the racist term was used (i.e. while on duty, in the IRiS MOSOVO office) and included the statement that PC Archer "*laughed*", no reference was made to PC Archer lowering her voice to say the racist term. The regulation 21 notice also informed PC Archer of the identity of the members of the Tribunal who would hear her case, and that it would take place on 12 and 13 December 2019.

32. In her regulation 22 response, in response to the alleged facts (as described in §2 above), PC Archer incorporated the statement she had made to the investigating officer when she was interviewed (see §§26 to 29 above). In response to the allegation that immediately after using the racist term she said "*Did I just say that?*", laughed and then said again, "*Did I just say that?*", the regulation 22 response said:

> "The Officer has no recollection of saying this, but also has no recollection of saying the offensive comment. The Officer is rightfully contrite for the comment she made, despite not specifically remembering making the comment. She makes no excuse for her comment, simply she cannot explain it as it [is] simply not common in her vocabulary and believes that she got excited in a moment and said something abhorrent. The Officer does not want to diminish the effect this has had on the complainant or excuse her comment; however, the Officer will state that it is not a simple matter of laughing because the situation was funny or comedic; in fact the opposite is more accurate. The laugh was most likely a nervous reaction to something the Officer already recognised as not funny, it was an involuntary reaction to a situation that the Officer was immediately mortified for and instantly remorseful for and immediately recognised as wrong."

33. Further, the regulation 22 response stated:

> "She regrets that the matter unfolded as it did and has nothing but shame and contrition for her actions. This misconduct is confined to a single episode of brief duration and was a serious lapse in judgement. The Officer bitterly regrets how it all unfolded but denies that it brings discredit on the police service as a whole when viewed objectively and as a single lapse of judgement, a split second error."

PC Archer made clear in her regulation 22 response that she would not ask for any witnesses to give live evidence.

34. In relation to the allegations that her conduct breached the Standards of Professional Behaviour:

i) Of "*Authority, Respect and Courtesy*" (in the manner described in §4 above), the regulation 22 response stated:

> "The Officer accepts that the word she used could be reasonably perceived as abusive, but denies that it was said with any intent, especially to victimise any person or be offensive to any person".

ii) Of "*Equality and Diversity*" (in the manner described in §4 above), the regulation 22 response stated:

> "The Officer accepts that the comment she made was a racist term, but she is not discriminatory, nor did she intend to be."

iii) Of "*Discreditable Conduct*" (in the manner described in §4 above), the regulation 22 response stated:

> "The officer accepts that her actions have brought discredit on herself and in so doing on the police force and/or undermined public confidence."

In respect of all three breaches of the Standards, the Part 22 response stated:

> "The officer accepts that she has misconducted herself and unreservedly apologises for her behaviour and harm caused. "

35. As regards the question whether PC Archer's admitted misconduct constituted gross misconduct, the regulation 22 response stated:

> "The Officer would like to draw attention to section 6.7 of the Guidance on Outcomes at Misconduct Proceedings where it lays down that
>
> '*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.*'
>
> This is an Officer who demonstrates diversity in her everyday life, whilst the misconduct in this matter could be construed as so serious that dismissal would be sufficient to maintain public confidence. In this case it is reasonably argued that in order to effect change that must and should be done from within and the education of a person who has suffered at their own hands is recognised as often as a better teacher." (emphasis added)

36. Although it may be said to be implicit in this answer that PC Archer accepted her conduct constituted gross misconduct, I accept there was a degree of ambiguity in the regulation 22 response such that the Chief Constable understandably sought clarification prior to the hearing. The initial brief response from Mr Loker, in which he suggested the matter would be "*fit for disposal in a meeting*" (which would only have been possible if there were no case to answer in respect of gross misconduct), did not provide the clarification sought.

37. The regulation 22 response also noted that during her time in uniform PC Archer had been recognised and commended by Stand Against Racism and Inequality for her work with a family who were suffering with racial abuse and harassment, work which was recognised as "*exemplary*" and "*going above and beyond*" the call of duty.

G. The Chair's decision regarding witnesses

38. On 13 November 2019, the solicitor for the Chief Constable ("the AA's solicitor") sought confirmation from PC Archer's representative, Mr Loker (a non-lawyer), as to whether the alleged facts were accepted. He said he assumed from the regulation 22 response that they were, but

> "[i]f she denies the comments, we will need to have witnesses attend the hearing because their evidence would be in dispute. If so, I will need a list of proposed witnesses from you. If the officer accepts the facts and accepts the contents of the statements in the bundle, then no witnesses will be required."

39. Mr Loker responded the following day by email:

> "The alleged facts are agreed, there is no deviation from the Officer[']s written response. The Officer does not recall making the comment, but has never disputed that she made it. There is no dispute of the evidence provided by the witnesses. There will be no need for any witnesses."

40. On 28 November 2019 the AA's solicitor wrote to the Chair:

> "**Witnesses**

As is required under the Regulations both sides have to consider which witnesses, if any may be required to attend the forthcoming hearing.

Regulation 22(4) of the Regulations provides:

> 'Before the end of 3 working days beginning with the first working day after the date on which the officer concerned has complied with paragraph (2), the appropriate authority and the officer concerned shall each supply to the other a list of proposed witnesses or give notice that they do not have any proposed witnesses; and any list of proposed witnesses shall include brief details of the evidence that each witness is able to adduce.'

Whether any witness should give evidence is a matter for the Chair. Regulation 23(3) provides:

> 'No witness shall give evidence at misconduct proceedings unless the person conducting or chairing those proceedings reasonably believes that it is **necessary** (our emphasis) for the witness to do so in the interests of justice.'

Necessity is a higher requirement than 'desirable'. As referred in Chief Constable of Hampshire v Police Appeals Tribunal [2012] EWHC 746 (Admin): 'there will rarely, if ever, be a need to call witnesses about events which are not central to the allegations of misconduct.'

The Home Office Guidance comments (as is relevant)

> 2.201. A witness will only be required to attend a misconduct meeting/hearing if the person conducting or chairing the meeting/hearing reasonably believes his or her attendance is necessary to resolve disputed issues in that case. Where there is a witness whose evidence is in dispute and who is material to the allegation then such witnesses should be made available to attend.

Accordingly, in this context it will usually be in the interests of justice for a witness to give oral evidence where (i) their evidence is disputed by one of the parties; and (ii) that dispute is material to an issue in the case.

The officer has accepted the facts as set out in the Regulation 21 Notice and accepts the contents of the evidence and statements.

Accordingly, both parties agree that no witnesses are required to attend the hearing." (original emphasis)

41. On 1 December 2019, the Chair decided that no witnesses were to be called at the hearing that was listed to begin on 12 December 2019 (with a two day time estimate). She stated her reasons as follows:

> "The Officer has confirmed that the factual bases of the allegation will not be challenged
>
> Neither party has indicated that they wish any of the witnesses whose evidence is provided in the bundle to attend and give live evidence.
>
> It is not in the interests of justice for any witness to be called."

H. The Appropriate Authority's Opening Note

42. Prior to the hearing, (then) Counsel for the Chief Constable ("the AA's Counsel", not Mr Elliot Gold, who has appeared for the Chief Constable before me) submitted an "Opening Note". At §2, the Opening Note stated:

> "The case of the Appropriate Authority (AA) in summary is that PC Archer used the racist slur 'nig nog'. This was during a discussion at work with a colleague and the officer is alleged to have said in the context of her partner sunbathing: 'The problem is that she's got olive skin and I know what she's like, by the time I get home she'll look like a nig nog'. Further, immediately following saying those words, the officer is alleged to have said words to the effect of 'Did I just say that?', then laughing and repeating again words to the effect of 'Did I just say that?'"

43. The Opening Note stated:

> "The officer has admitted all of the allegations levelled against [her]. Therefore, the AA's primary submission is that, pursuant to Reg 33(14) of the 2012 Regulation, the Panel may (and in this case should) proceed on that basis. In light of the officer's admissions, the Chair has not called any other witnesses to give live evidence.
>
> The Officer has admitted that her conduct was in breach of the professional standards of Authority, Respect and Courtesy, Equality and Diversity, and Discreditable Conduct."

44. The Opening Note recorded that, although PC Archer had not said so in terms, "*the AA understands the officer's case to be that her conduct did not reach the threshold of gross misconduct*". Accordingly, it was submitted:

> "Two questions then arise for the Panel to determine:
>
> (i) Whether the conduct set out in the Regulation 21 notice amounts to misconduct or gross misconduct; and

> (ii) Dependent on that finding, what outcome would be appropriate in this case."

45. In support of the submission that PC Archer's conduct constituted gross misconduct, the AA relied on, first, the seriousness of the word used, secondly, the fact that the phrase was used by PC Archer at work, surrounded by other colleagues, while she was unequivocally holding herself out as an officer, in a professional context and, thirdly:

> "it is not accepted by the AA that PC Archer's use of the phrase 'nig nog' was an aberration so that the Panel should not draw wider conclusions as to her character. The AA will rely on the additional comments made by PC Archer in that conversation, her laughter at the time, and the unusual nature of the phrase used. The AA will seek to ask questions of the officer in respect of those matters that are in dispute between the AA and the officer."

46. Notably, just as no reference had been made in the "alleged facts" stated in the regulation 21 notice to PC Archer lowering the volume of her voice to say the racist term, equally there is no reference to that in the AA's Opening Note.

I. The Tribunal hearing

47. The hearing took place on 12 December 2019. The AA was represented by Counsel and the AA's solicitor was in attendance. PC Archer was represented by Mr Loker. At the outset, the Chair noted that there was no challenge to the evidence and no requests for witnesses to attend to give live evidence, so she had not required any witnesses to attend, and then invited the AA's Counsel to give an outline of the case. The Chair observed:

> "In a misconduct hearing the panel has four issues to determine, and we will work through them in this order. First, the facts of what happened, according to what is admitted or proven on the balance of probabilities. Second, whether on the basis of those facts, the conduct breached the standards of professional behaviour as alleged. Third, whether we consider any breaches found to amount to misconduct, gross misconduct, or neither. And if either misconduct or gross misconduct is made out, both the Appropriate Authority and you will have a further opportunity to address us before we move onto the fourth and final stage. That fourth stage, depending on the findings, is to determine what any outcome should be."

48. The AA's Counsel observed that PC Archer accepted the evidence of Ms Sasani and Ms Thompson that she had used the racist term, and she accepted that doing so breached three Standards as alleged in the regulation 21 notice. The AA's Counsel noted that in his Opening Note he had stated it was unclear whether PC Archer accepted the conduct constituted misconduct or gross misconduct and said:

> "having spoken to Mr LOKER this morning, the officer accepts that on her, even on her account, if accepted in full, and any

> challenges I may make are rejected, it still amounts to gross misconduct. So that's a matter that is admitted by the officer."

49. The AA's Counsel told the Panel that the "*only question of fact*" that was not agreed between the parties, and that the Panel needed to determine, was whether this was a "*complete aberration*", an "*entire lapse*" (as PC Archer contended), or "*the use of the word actually betrays a more concerning part to her character*" (as the AA contended). The AA's Counsel stated, "*Other than that one factual question, everything else is agreed*". Consequently, he submitted that the only procedural matter was whether PC Archer wished to give evidence. He made clear, as he had done in the Opening Note, that he wished to question PC Archer as to "*why she said these words, whether they indicate something more concerning than a single lapse*" (emphasis added).

50. Mr Loker submitted that the fact PC Archer could not remember saying the racist term was perhaps a natural and subconscious response. It did not serve her, as she accepted that she had said it and that it was a "*terrible, terrible thing to say*". Mr Loker submitted:

> "PC ARCHER says she lowers her voice when having a private conversation with Jenny THOMPSON not to hide the comment, to actually hide what they were talking about, her partner being topless, and describing her breasts as fried egg [sic]. It was about protecting privacy for her partner. It was never intended to be a larger heard conversation. And it certainly wasn't lowered or whispered to give it a better explanation, to hide the fact that she was going to use or did use, a racial slur."

51. I note that, contrary to the assertion in the Chief Constable's statement of facts and grounds, Mr Loker did not say that "*PC Archer lowered her voice when having the private conversation in its totality*" (emphasis added). The focus of his submission was on her purpose in lowering her voice.

52. Mr Loker also submitted, reflecting PC Archer's account in interview, that

> "The assertion the officer found it funny couldn't be further from the truth. In fact it's widely recognised that inappropriate laughter is often viewed as a form of emotional dysregulation."

53. It is apparent from the transcript that PC Archer had not intended to give evidence. The AA's Counsel submitted that the latter point was one on which she would need to give evidence. After the Chair said that it was for PC Archer to decide whether to give evidence, "*[i]t could work both ways really*" and that "*willingness to expose herself to questions may reveal to the panel …attitudes and character … that may well be in her favour*", PC Archer said, "*If you want me to, I'll answer anything*". I do not accept the submission made by Mr Gold that Ms Archer's decision as to whether to give evidence could only "*work both ways*" if there was a factual dispute between her evidence and that given by other witnesses, particularly Ms Sasani. It is clear that the Chair considered PC Archer's evidence could assist the Panel in considering her own character and attitudes, and whether this was an isolated unintentional lapse.

54. PC Archer was cross-examined about how it was that if she had never used the term before and knew it was deeply offensive, she had come to use it on this occasion and

then its use had not stuck in her memory. She denied that she remembered saying the racist term and had sought to downplay it. She explained, as she had done in interview, that she believed that because of the recent conversation she had had with a neighbour, the word 'golliwog' must have been in her head, that she was going to use it and in the process of correcting herself "*I've stupidly come out with something equally horrendous*".

55. In cross-examination, it was suggested to PC Archer that she had let her guard down when speaking in confidence to a colleague with whom she was reasonably close, because she thought no one else would hear the conversation. That while she knew that society and the police force would frown on use of this term, she personally "*had no qualms about using a racial slur*". These were all allegations that PC Archer denied. She accepted she had not wanted anyone to hear the conversation but reiterated that was because it was a conversation about her partner, a very private person, being topless.

56. The AA's Counsel referred to Ms Sasani's evidence that PC Archer lowered her voice when using the racist term and suggested to PC Archer

> "you lowered your voice not <u>because</u> you were using the word completely unexpectedly, because you knew exactly what you were going to say, and knew that it was an offensive … term, and sought to … keep your voice down <u>for that reason</u>". (emphasis added)

PC Archer did not accept this. She also noted that Ms Sasani's evidence was that she had heard the conversation while walking past and said that "*for someone walking past a conversation they would hear it at different levels*".

57. It was also suggested to PC Archer by the AA's Counsel that the way in which she lowered her voice and then subsequently said '*Did I just say that?*', laughed and then repeated '*Did I just say that?*' "*shows that you knew at the time exactly what you were saying and that since then you've been seeking to downplay the offensive effect of that?*", an allegation PC Archer denied.

58. After PC Archer had given evidence, the Chair asked the AA's Counsel if he wished to make any further submissions as to findings before the Panel retired. The AA's Counsel noted, and the Chair agreed, that the Panel would be determining the first three issues outlined by the Chair at the outset (see §47 above). He submitted there was no question as to the answer to issues two and three as the breaches of the Standards, and gross misconduct, were admitted. The AA's Counsel submitted the sole question was as to the facts. While accepting that the "*evidence is undeniably limited to this instance*", the AA's Counsel contended that it was difficult to understand how PC Archer had no memory of using the term, giving rise to a concern either about the truth of her account that she did not remember or going to her understanding of how offensive the term was. He submitted this was "*more concerted*" and more than a "*single, solitary lapse*". The AA's Counsel submitted:

> "You will have to make findings of fact as to <u>what was said</u>, and as to <u>how the officer intended to act</u>, and <u>what her reasons were for saying this word</u>. Either way, however that comes out … it

> amounts to breaches of the standards of professional behaviour and gross misconduct. But your findings at this stage will be particular[ly] important for outcome. Now I don't seek to address [you on] outcome. But these are matters in my submission that can't be dodged at this stage, there must be findings of fact, and I'd invite you to make them. "

59. Mr Loker submitted that "*the three key decisions will be the facts, the breaches, and the severity*". He described the parties' cases as being, on the one hand, the officer's case that, recognising and accepting it was "*one of the worst things that a person could say to another, regardless of who is present*", nonetheless, it was an unintentional lapse, and on the other hand, the AA's case that the "*volcano*" had erupted, exposing her previously hidden racist attitudes. He suggested that the fact PC Archer did not recall saying something she hated having said was likely to be a consequence of the fact the "*human subconscious does all sorts of weird and wonderful things*".

J. The Tribunal's decision

60. The Tribunal found "*this single allegation concerning offensive words used on 23rd July 2019*" proved. For the reasons articulated by the AA's Counsel, they said the finding needed some explanation.

> "This is what we have found: The conversation was meant to be a private one. We do not think that the Officer lowered her voice because she knew she was going to say an offensive term. We think she lowered her voice because she was talking about her partner sunbathing topless. We think she did not know that she was being overheard by Ms Sasani.
>
> The use of the offending word: we do not think that this forms part of the Officer's general vocabulary. We do not think it was meant as an offensive term in the context in which it was used. We think she was struggling to use a word which encapsulated the appearance of someone of a dark skin colour and she came out with a term that she could not believe she had articulated. We think she recognised instinctively that this was wrong, as soon as she said it. We think she said 'Did I just say that?' because she knew that what she had said was wrong. It was her way of saying that she should not have said it. We think the laughter was a nervous or emotional response to her recognition of wrong.
>
> We do not think the use of the phrase betrays a more concerning part of the Officer's character. There is no evidence of any other racist or inappropriate behaviour. This is not the volcano erupting."

61. The Tribunal found breaches of all three Standards of Professional Behaviour, as alleged and admitted. As the Tribunal noted, these Standards are set out in Schedule 2 to the 2012 Regulations which provides, so far as relevant:

> "**Authority, Respect and Courtesy**

> Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.
>
> Police officers do not abuse their powers or authority and respect the rights of all individuals.
>
> **Equality and Diversity**
>
> Police officers act with fairness and impartiality. They do not discriminate unlawfully or unfairly.
>
> …
>
> **Discreditable Conduct**
>
> Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty." (emphasis added)

62. In respect of the standard of "Equality and Diversity" the Tribunal said:

> "Oddly, this is the Standard that has caused us the most concern. This is largely to do with how you treat actual people. We do not think the Officer has discriminated against anyone in the sense that would offend the Equality Act 2010. It is not about preferring one person or class of persons over another. We find this standard is breached because the use of the offending term does not comply with the duty to treat all people with respect."

63. The Tribunal then addressed the seriousness of PC Archer's misconduct:

> "We now turn to the assessment of seriousness and in doing this we have had regard to the general framework of the Guidance on Outcomes in Police Misconduct Proceedings issued by the College of Policing pursuant tot section 87 of the Police Act 1996. We appreciate that this is a guide and does not override our discretion.
>
> **Culpability**
>
> Culpability lies with the Officer alone. She made the comment of her own volition and no responsibility can be allocated anywhere else. The context is important. This occurred whilst the Officer was on duty and on police premises. This makes it serious. On the other hand, the conversation was meant to be a private one. This was not done in a public context. It is also right to note that the offensive comment was not directed at anybody and did not refer to an actual person. The conduct was not planned or carried out with any malice or intent to harm anyone. The officer was not in a position of particular trust or responsibility. The officer has embraced full responsibility and

shown a real insight into her behaviour. This does not involve any element of dishonesty and has no casework implications.

Harm

The person who was sharing the conversation was not harmed, but the person who overheard the words used was very upset by this conduct. There will be a degree of reputational harm to a Force that rightly takes pride in its progressive attitude to matters of equality and diversity. We bear in mind too that how such behaviour would be perceived by the public is relevant, even though the behaviour was not known about at the time.

Aggravating factors

Aside from the nature of the words used, without which there would be no case, aggravating factors are largely absent in this case. We do take notice of the fact that the words used are considered derogatory and extremely offensive. The Ofcom reference guide describes the term used as the strongest language and highly unacceptable without strong contextualisation. This is representative of standards on television and radio and we should not look to accept a lesser standard from a serving police officer, especially on duty.

Mitigating factors

This was a single episode of brief duration. There has been a full admission of responsibility. The Officer has demonstrated real insight and genuine remorse. She was ashamed that she had not been more approachable to the person who was most affected."

64. The Tribunal announced their overall assessment that the conduct amounted to gross misconduct for the reasons outlined by the AA. Those reasons were recorded by the Tribunal as being:

"a) The conduct is apparently racist

b) The conduct tends to be evidence of a serious lack of respect and courtesy for members of the public and colleagues

c) The conduct is capable of seriously undermining the Force's commitment to equality and diversity

d) The conduct is capable of amounting to serious discredit to the Force."

65. The Tribunal took a break to enable the AA's Counsel to take instructions before proceeding to hear submissions from both parties as to the appropriate outcome. The AA's Counsel submitted the appropriate outcome would be dismissal, whereas Mr Loker contended a final written warning would suffice. The Tribunal decided to give a final written warning explaining their reasons in these terms:

> "At this stage of the proceedings we keep in mind the threefold purpose for which outcomes are imposed in police misconduct proceedings; these are
>
> - To maintain public confidence in, and the reputation of, the police service
> - To uphold the high standards in policing and deter misconduct
> - To protect the public.
>
> We have gone on to choose the outcome which most appropriately fulfils these purposes, given the seriousness of the conduct proved. We have considered less serious outcomes first.
>
> …
>
> We are well aware that the case of Williams (*R (on the application of Williams) v Police Appeals Tribunal* [2016] EWHC [2708 (Admin), [2017] ICR 235]) reiterates that the weight a panel should give to personal mitigation is limited.
>
> The character references presented here are very impressive, both because of their breadth and content. The overwhelming view of people who know this Officer in a variety of capacities is that she is a person of great competency and integrity. She has been described as a 'port in a storm' and she has shown resilience, warmth and emotional intelligence in both her personal and professional life. Her particular strength in communication has clearly made a huge difference in many scenarios and several witnesses say how she has been instrumental in shaping their professional development.
>
> We have given separate consideration to the Officer's service record, as we have a statutory obligation to do.
>
> Our primary obligation at this stage is to maintain public confidence in and the reputation of the police service. We consider that the public confidence would be satisfied if, in the particular circumstances of this case, this Officer received a final written warning. This would not be any sort of 'let-off', given the seriousness of the conduct found. We are not able to make any direction to this effect, but would also suggest or recommend that the Force should engage this Officer on further Equality and Diversity training to extend her comprehension and limit further risk."

K. Ground 1: "failure to call witnesses"

Res judicata/rule in Henderson/abuse of process

66. A preliminary issue raised by Mr Dean George QC, who appeared on behalf of PC Archer before me, is whether the Chief Constable is prevented from raising in these proceedings an alleged failure by the Chair to call witnesses, in circumstances where the Chief Constable did not raise these matters before the Tribunal.

67. I do not accept that the Chief Constable is precluded from pursuing this ground. Given that I have, in any event, found against the Chief Constable on this claim, I can state the reasons for my conclusion on this preliminary issue shortly. It was not an abuse of process to bring this claim. The Chief Constable's concern to ensure that the use of abhorrent racist language is rooted out of the force, and appropriately sanctioned whenever it occurs is entirely proper. While I have not accepted the criticisms the Chief Constable has made of the Tribunal, and of Counsel who represented him before the Tribunal, it is evident that in bringing and pursuing this claim, and in making those criticisms, the Chief Constable has acted with due care and sensitivity. The approach taken by the Chief Constable's representatives before the Tribunal is relevant in assessing whether the grounds have merit but, in my judgment, it does not preclude him from pursuing this claim.

The parties' submissions on the power/duty to call witnesses

68. It was common ground that, prior to the hearing, the question whether any witness should be called to give evidence was a matter to be determined by the Chair alone, applying the test set out in regulation 23(3), that is, whether she reasonably believed it to be necessary, in the interests of justice, for the witness to give evidence. There is no challenge to the Chair's decision on 1 December 2019 that no witnesses should be called. It is accepted that was a lawful and rational decision.

69. The Chief Constable contends that the Chair had an ongoing obligation, during the hearing, to determine whether it was necessary in the interests of justice to call any witnesses, applying the regulation 23(3) test. Mr Gold relies on s.12(1) of the Interpretation Act 1978 which provides:

> "Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

70. Mr Gold submits that the Chair had the sole power to call witnesses, and that power extended to enable her to call witnesses even if neither party sought to call any: regulation 23(3) and paragraph 2.203 of the Home Office Guidance. He relies on *Chief Constable of Hampshire Constabulary v Police Appeals Tribunal and McLean* [2012] EWHC 746 (Admin) ("*McLean*") in support of the proposition that the determination to be made under regulation 23(3) is "*not an exercise of discretion but of judgment*" (*McLean*, [22]) and that the Chair should call any witness where there is a material dispute of fact (*McLean* at [13] and [22]).

71. Mr George submits that regulation 23(3) did not apply to the scenario that presented itself. The reason for this is that no witnesses had been notified that they should attend the hearing and none were in attendance on 12 December 2019. So he submits a decision during the hearing to call Ms Sasani or any other witness would have been likely to have required an adjournment. Mr George submits that the applicable test was,

therefore, that contained in regulation 33(4) rather than 23(3). He submits that it is artificial to suggest that the decisions are distinct as the consideration during a hearing whether to call a witness would be bound up with consideration of the impact of doing so, in particular whether it would necessitate an adjournment.

72. Mr Gold contests the suggestion that a decision to call Ms Sasani would have necessitated an adjournment of the proceedings, other than perhaps for a few hours or until the following day. He points out that the hearing had been set down for two full days, as confirmed by the Chair at the outset of the first day. If any person who worked for the Chief Constable was required to give evidence, he would have ordered their attendance. In any event, he maintains the test in regulation 23(3) applied at every stage to the discrete question whether to call a witness. If the separate question whether to adjourn had arisen, Mr Gold submits that the "*exceptional circumstances*" test in regulation 33(4) would have to be interpreted having regard to article 6 of the European Convention on Human Rights and the determination that it was necessary in the interests of justice to hear the witness's evidence.

73. On 1 February 2021, I granted the Director General of the Independent Office for Police Conduct ("the IOPC") permission to intervene on ground 1. The IOPC has made submissions confined to the proper interpretation of the rules for calling witnesses at misconduct hearings held pursuant to the 2012 Regulations. The IOPC supports the Chief Constable's submissions as to the interpretation of the rules but takes no position on whether there was any failing on the facts of this case.

74. Mr James Berry, Counsel for the IOPC, submits, *first*, the decision as to whether a witness should give evidence is for the chair alone (reg.23); *second*, the test to be applied in determining whether to hear oral evidence is whether the chair reasonably believes it is necessary in the interests of justice; *third*, the interests of justice ordinarily require a witness to be called where their evidence is material and in dispute (*McLean*, [22]); *fourth*, the chair's decision is an exercise of judgment rather than discretion (*McLean*, [22]); *fifth*, while the scheme of the 2012 Regulations anticipates that a decision regarding calling of witnesses will be taken prior to the hearing, the decision may be revisited at any time up to and during the course of the hearing; *sixth*, there is no proper basis on which any test other than that in regulation 23(3) could be applied when revisiting the question whether to call witnesses; and *seventh*, a separate question whether to adjourn may arise, if a decision to call a witness is made during the course of a hearing, but this should not be conflated with the prior question whether it is necessary in the interests of justice to call the witness, albeit the questions may well admit of the same conclusion.

75. In relation to his fifth point, Mr Berry submitted that *McLean* is an example of a regulation 23 decision being revisited on the first day of the hearing and other situations where it may need to be revisited include: (a) where there are three witnesses who speak to a material dispute and the chair decides that one should be called and the others should not, if that one witness becomes unavailable the decision not to call either of the other two witnesses would need to be reconsidered; (b) where the regulation 21 notice or regulation 22 response are amended in a way that gives rise to a new dispute of fact; (c) where the chair receives further case papers after making the initial regulation 23 decision, from which a need to call a witness becomes apparent; and (d) where, during the course of the hearing, a material dispute of fact emerges that had not been apparent

(whether the dispute or its materiality) when the initial regulation 23 decision was made.

76. Finally, Mr Berry supported Mr Gold's submission that the chair is required to keep the decision whether to call any witnesses under review throughout the process. Police misconduct tribunals are quasi-inquisitorial and they must command the confidence of complainants as well as the wider public. That confidence is served by chairs taking steps to ensure that cases are presented fully and on a sound evidential basis. If a material dispute of fact opens up during the course of the hearing, even if the parties are represented, it is incumbent on the chair to raise the materiality of the dispute and invite submissions as to whether any additional evidence should be called.

The parties' submissions on the Chair's alleged failure to call witnesses

77. The key question is whether the Chair erred, as the Chief Constable alleges, in not deciding during the hearing that it was necessary in the interests of justice to call Ms Sasani. Mr Gold submits that in respect of this ground, the court's function is not to review the rationality of the Chair's approach: the objective question whether there has been procedural fairness is one the court must determine for itself: see *R (Osborn) v Parole Board* [2014] AC 1115, Lord Reed at [65]. I accept, and Mr George did not dispute, that procedural fairness is a question for the court.

78. The Chief Constable submits that there were disputes between the evidence of PC Archer and Ms Sasani that were material and substantial, and the resolution of those matters depended entirely on those witnesses' credibility. In particular, he submits:

    i) PC Archer's case that her laughter was the effect of emotional dysregulation was not supported by Ms Thompson's account and was positively contradicted by Ms Sasani's evidence that "*she had spoken the words in a joking way and jokingly laughed after having done so*", giving no indication that her laugher was "*nervous or tense*".

    ii) PC Archer's account that she had been "*struggling*" to find an appropriate word was not supported by Ms Thompson's or Ms Sasani's account, and the Chief Constable submits Ms Sasani's evidence suggests the words were spoken fluently and jokingly.

    iii) PC Archer's account regarding lowering her voice was not supported by Ms Thompson and was positively contradicted by Ms Sasani's evidence that she had lowered her voice specifically when saying the racist term, indicating her deliberate use of the term.

79. Mr Gold acknowledges that it is a potent consideration that none of the parties' representatives considered it necessary in the interests of justice for any witness to be called, and that a chair may rely to a degree on the parties' representations. Mr Gold accepts that it is necessarily implicit in the Chief Constable's case that criticism attaches to Counsel who represented him before the Tribunal for failing to raise the need to call witnesses with the Tribunal before they retired to make their factual findings. Nevertheless, he submits that it was the function of the Chair to recognise, even if the parties did not, that there was a direct evidential conflict which could only be resolved

by hearing from Ms Sasani, at least. The fact that others also failed to ensure matters were fully ventilated did not lessen the Chair's error.

80. Mr George submits that in PC Archer's interview, in the regulation 21 notice, the Opening Note and at the hearing the emphasis was not on *when* or for *how long* PC Archer lowered her voice, but on her *intent*. Mr Loker did not say PC Archer had lowered her voice "*in its totality*" (see §51 above). Nor did PC Archer assert in her oral evidence that anyone's evidence was wrong. Mr Loker's submissions and PC Archer's evidence was consistent with what she had already said in her interview and her regulation 22 response. In keeping with the submission of the AA's Counsel that the question was "*why*" she had used the racist term and whether it indicated "*something more concerning than a single lapse*", the focus was on PC Archer's mindset.

81. Mr George submits that logically the Chief Constable's criticism of the Chair for not identifying a material dispute must extend not only to his own (former) Counsel but also to his solicitor who represented him before the Tribunal and in this claim. However, Mr George submits the criticism of each of them and of the process is unmerited. There was no material dispute on an issue on which Ms Sasani or Ms Thompson could give evidence. Only PC Archer could give evidence about her own mindset.

Decision on ground 1

82. On the power, and in some circumstances duty, of the chair to call witnesses, I agree with the submissions made on behalf of the Chief Constable (in §§69 to 70 and 72 above) and the IOPC (in §§74 to 76 above). The chair has a continuing obligation to keep under review whether any witness should be called. At all times, the test is whether the chair reasonably believes it is necessary in the interests of justice to call any witness. I am not persuaded that a different test to that set out in regulation 23(3) applies during a hearing. There is no justification for applying the "exceptional circumstances" test in regulation 33(4), in place of the regulation 23(3) test, if a question arises during a hearing whether to call a witness, not least because a decision to do so will not necessarily result in an adjournment. Although the questions whether to call a witness and whether to adjourn may be linked, they are separate. Given that regulation 23(3) directs consideration to what is necessary in the interests of justice, and given the overarching requirement to ensure that a decision whether to adjourn (applying regulation 33(4)) must accord with the principles of procedural fairness, applying these separate regulations in circumstances where the questions are bound up together is unlikely to lead to inconsistent conclusions.

83. The IOPC invited me not to determine the question whether police misconduct tribunal hearings must comply with article 6 of the ECHR (as submitted by Mr Gold), at least without giving the IOPC an opportunity to reflect and make further submissions. I have not heard argument on the point and it is unnecessary to determine it, so I have not done so.

84. The starting point in assessing whether fairness required the Chair, in this case, to call any witnesses is a proper understanding of the extent to which matters before the Tribunal were admitted, and the limited scope of the dispute. During the hearing it became apparent that, until I put to Mr Gold the passage of the hearing transcript quoted at §48 above, when bringing this claim the Chief Constable had not appreciated that PC Archer had admitted her conduct amounted to gross misconduct. The facts as alleged

in the regulation 21 notice (quoted in §2 above) were established by admission. So, too, were the breaches of the Standards of Authority, Respect and Courtesy, Equality and Diversity, and Discreditable Conduct. The essential issue before the Tribunal was whether this was a case in which a lesser sanction than dismissal was appropriate. With a view to determining that question, the Tribunal had to consider the seriousness of PC Archer's conduct. That gave rise to one disputed question, namely whether PC Archer's use of the racist term on 23 July 2019 was a "*complete aberration*" or "*betray[ed] a more concerning part to her character*" (see §49 above).

85. In her witness statement, Ms Sasani said that after saying the racist term PC Archer said, "*Oh did I just say that, and then laughing, and then did I just that, again*". Ms Thompson could not recall this but it was admitted by PC Archer and the Tribunal accepted this evidence. Ms Sasani also said: "*It seemed she used the term she used in a joking way*". There was never any doubt cast on the truthfulness of Ms Sasani's evidence by PC Archer or the Tribunal. But naturally Ms Sasani could only give evidence of her own perception, not of PC Archer's actual mindset or intention. The evidence of Ms Sasani was not inconsistent with PC Archer's laughter having been prompted by "*a nervous or emotional response to her recognition of wrong*". On the contrary, Ms Sasani's evidence of what PC Archer said repeatedly immediately after using the racist term was indicative of PC Archer's disbelief that she had used such a term. Mr Gold's submission that it was necessary in the interests of justice for Ms Sasani and/or Ms Thompson to be called to give evidence as to whether PC Archer's laughter had seemed "*nervous or tense*" is based on an unfounded assumption that laughter prompted by emotional dysregulation would necessarily be perceived as nervous or tense.

86. Moreover, it was evident long before the hearing, from PC Archer's interview and regulation 22 response, that PC Archer accepted the account that she had laughed but suggested this was a form of emotional dysregulation. PC Archer's case as presented by Mr Loker and her own evidence on this issue was the same at the hearing as it had been before the Chair decided on 1 December 2019 not to call witnesses, a decision the Chief Constable accepts was lawful.

87. Equally, the Tribunal's finding that PC Archer was "*struggling*" to use an appropriate word and "*came out with a term that she could not believe she had articulated*", reflected the evidence PC Archer had given in her interview and regulation 22 response about having become "*muddled*" in the moment. In her oral evidence she used the term "*confused*" but there was no change that could be said to have given rise to a material dispute. Again, this evidence concerned PC Archer's mindset. Ms Sasani's evidence that PC Archer immediately and repeatedly said "*Did I just say that?*" was supportive of the Tribunal's conclusion.

88. In her interview, PC Archer said that she had been "*having a quiet conversation*" with Ms Thompson because her partner is a private person and she did not want everyone to hear what she was talking about. She said she did not think anyone else would hear it. She also described how she would pull back slightly closer to the wall when having a "*private conversation*". Similarly, Ms Thompson described it as a "*private conversation between Pauline and myself*". The evidence was that no one in the open plan office heard the conversation, including Mr Alsop who sat on the other side of PC Archer, other than Ms Sasani who said she was behind PC Archer, a quarter of a metre away, when the racist term was used. The difference between this evidence and Ms

Sasani's evidence that the conversation was spoken at a "*normal level of volume*" save that when PC Archer "*said the phrase nig nog she lowered the volume of her speech*" existed before the Chair made her decision of 1 December 2019.

89. At the hearing, Mr Loker's submission was not that PC Archer lowered her voice in its totality, and nor did PC Archer say words to that effect. However, PC Archer reiterated that it was a quiet conversation with Ms Thompson and the line of questioning pursued in cross-examination accepted that PC Archer did not think anyone but Ms Thompson would hear her. PC Archer also made the point that Ms Sasani said that she had been coming back from the toilet and walking past, and "*for someone walking past a conversation they would hear it at different levels*". PC Archer was evidently suggesting that the impression Ms Sasani had gained as to the volume of the conversation may have been influenced by the fact that she was walking past. But the focus of cross-examination by Counsel for the AA, and of the Tribunal's decision, was not on the volume at which she had spoken the words but on her mindset.

90. In my judgment, the circumstances were not such that procedural fairness required the Chair to call Ms Sasani (or Ms Thompson) before the Tribunal reached their findings of fact. It is a powerful factor that both parties considered that there was no necessity in the interests of justice to call any witnesses. That is particularly so in circumstances where the interests of the party who alleges there was a procedural failure were protected by the fact that he was represented by both Counsel and his solicitor. If they had considered that there was a material dispute on which, in the interests of justice, evidence should be called, the Chair was entitled to place some reliance on the fact that they could and would have said so.

91. Moreover, as there was no material change in the evidence such as to give rise to a new factual dispute during the hearing, the view of the parties that it was unnecessary to call any witnesses could be assumed to have been a considered one. While different representatives may have taken a different approach, this is not a case where the approach taken by the Chief Constable's representatives before the Tribunal was obviously flawed. Notably, while Ms Sasani was prepared to give evidence if required, it was plain that she was not keen to do so. In addition, in the absence of any material change, the contention that the Chair was required to call witnesses is undermined by the acceptance that the Chair's decision on 1 December 2019 was lawful.

92. For the reasons I have given in respect of the three matters raised by Mr Gold, insofar as there was any evidential discrepancy, it was limited to the volume at which the conversation and the racist phrase were said. That was not a matter on which PC Archer was questioned in interview, nor was it a matter that was even referred to in the regulation 21 notice or the Chief Constable's Opening Note. The Tribunal did not reject any of Ms Sasani's evidence. Insofar as there may be said to be a difference between the Tribunal's decision and Ms Sasani's evidence, this reflects the fact that the Tribunal reached their own view regarding PC Archer's mindset and intent, a matter on which Ms Sasani gave her impression but could give no direct evidence. Accordingly, I reject ground 1.

L. Ground 2: "irrationality in the finding of gross misconduct"

93. There are three elements to this ground. The Chief Constable's first contention is that the Tribunal's finding that PC Archer used the racist term *unintentionally* was irrational.

Mr Gold submits that PC Archer's case that, despite never having used the racist term before, she suddenly thought of it and then could not recall using it was internally illogical and incoherent. There was no reason why she would have reached for such a horrendous word if it was not part of her vocabulary. He submits that if she had thought at the time her use of the term was abhorrent, it would have been impossible for her to forget using it as she would have been so ashamed it would have burned in her memory. He also contends that the Tribunal's conclusion that her immediate response reflected "*recognition of wrong*" contradicted PC Archer's account that she could not recall using the term.

94. The Chief Constable's second contention within ground 2 is that the Tribunal's conclusion that PC Archer accepted full responsibility for her actions was irrational; and based on flawed findings that her use of the term was unintentional and acceptance that she could not recall using it. Mr Gold contends that PC Archer presented the most minimal form of admission, volunteering nothing and asserting just enough of a case to contend that her use of the term was unintentional.

95. The Chief Constable's third and final contention within ground 2 is that the Tribunal's conclusion that PC Archer had not "*discriminated against anyone in the sense that would offend the Equality Act 2010*" was wrong.

96. Mr Gold submits that PC Archer's conduct amounted to harassment contrary to s.26 of the Equality Act 2010, in that her words were unwanted conduct which had the effect of causing Ms Sasani to feel as though her dignity was violated and/or to create for her an intimidating, hostile, degrading, humiliating or offensive environment. The language did not need to be directed at Ms Sasani for it to amount to harassment, as the IPCC guidelines for handling discrimination make clear at §1.14.

97. The Tribunal's language appears to have been drawn from *R (Chief Constable of Northumbria Police v Police Appeals Tribunal* [2019] EWHC 3352 (Admin) ("*Northumbria*"), to which the Tribunal were referred by the AA's Counsel, in which Freedman J, addressing the Police Appeals Tribunal's use of the words "*unconscious discrimination*", observed at [42]:

> "Further, in context, the word "discrimination" does not refer to an act of discrimination in the sense that would offend the Equality Act 2010. It is not to prefer one person or class of persons over another. It is a reference to discriminatory language."

98. Mr Gold submits that whereas in *Northumbria* the police officer was off duty, and so there was no breach of the Equality Act 2010, the position was different in this case because PC Archer was in the office and on duty. He acknowledges that no allegation of harassment was made and the Tribunal were not asked to find a breach of the Equality Act 2010. Nevertheless, he submits they did make a finding that was wrong and which will have informed their view of the seriousness of PC Archer's gross misconduct.

99. Mr George submits that what the Tribunal were saying here, in the context of their positive finding that PC Archer's conduct breached the Standard of Equality and Diversity, was that although PC Archer had not directly discriminated against anyone, in the sense of preferring one person or class of persons over another, nonetheless her

conduct breached the Standard because "*use of the offending term does not comply with the duty to treat all people with respect*". Mr George contends that it is reasonably apparent that their reference to the Equality Act 2010 was intended to be directed at s.13 of that Act, which addresses direct discrimination. A finding of harassment was not necessary to the Tribunal's consideration of whether PC Archer had breached the Equality and Diversity Standard, and as there was no allegation of harassment it was unnecessary for the Tribunal to address it, even if PC Archer's conduct could have been found to constitute harassment. In any event, he submits this finding had no material impact on the decision-making process.

Conclusions on ground 2

100. In my judgment, the Tribunal reached conclusions regarding PC Archer's mindset and intentions which were supported by the evidence and were within the band of rational findings that were open to them. PC Archer explained how she thought it had come about that she had used the term she did. She believed that the term "*golliwog*" may have come into her mind as a result of the conversation she had had with a neighbour shortly before 23 July 2019 and, seeking to avoid using that word, she had used a term she described as equally abhorrent. This explanation did not lack coherence. It was not irrational to consider that having recently been reminded of one term from about the 1970s, a similar term from a similar era may have unwittingly come into PC Archer's mind, even though she could not recall when she had last heard it.

101. It was open to the Tribunal rationally to conclude that the very words Ms Sasani heard PC Archer say immediately and repeatedly after she used the racist term ("*Did I just say that?*") indicated disbelief, because she had not intended to use such a term, and instinctive recognition in that moment that what she had said was wrong. In reaching the conclusions they did, the Tribunal accepted Ms Sasani's evidence, but reached their own assessment of PC Archer's mindset, as they were well placed to do having had the benefit not only of the written evidence but also of hearing PC Archer answering questions.

102. The Tribunal also had an opportunity to assess whether PC Archer was telling the truth when she said that although she recalled the conversation she could not recall using the racist term. Mr Loker's submission, in essence, was that the way in which memory works is complex. While shameful episodes may often be hard to forget, it was equally possible for PC Archer's instinctive shame at what she had said to have operated to block out that part of her recollection. It is undoubtedly true that memory works in complex ways: see e.g. *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), Leggatt J, [15] to [23]. It is plain that the Tribunal found PC Archer to be a credible witness and, in my judgment, that was a conclusion that was open to them and cannot be categorised as irrational.

103. I reject the contention that the Tribunal erred in finding PC Archer accepted full responsibility for her gross misconduct. There was extensive support for the Tribunal's conclusions in PC Archer's interview, regulation 22 response, and her approach to, and evidence, before the Tribunal. *First*, in her first account when interviewed PC Archer not only made clear and full admissions, it is evident that she was deeply distressed by the harm she had caused to Ms Sasani and, as the investigating officer put it in PC Archer's interview, it was "*clear that [PC Archer had] thought hard to try and understand [herself and] how [she had] come to say it*". *Second*, while I have accepted

that there was a degree of ambiguity in the regulation 22 response, it was reasonably apparent that PC Archer accepted the allegation, accepted that it constituted a breach of the three Standards of Professional Behaviour relied on by the Chief Constable, and accepted her conduct could be construed as so serious that it could justify dismissal. *Third*, before the Tribunal hearing began, PC Archer confirmed that she accepted that she had committed gross misconduct. *Fourth*, the Tribunal were able to see and hear for themselves how evidently ashamed and remorseful PC Archer was of her conduct, and how upset she was at the hurt she had caused Ms Sasani. The characterisation of PC Archer's admission as "*minimal*" is not a fair reflection of PC Archer's early and full recognition of the seriousness of her misconduct and the harm her words had caused and the evident sincerity of her apology above all to Ms Sasani, but also to Ms Thompson and the force.

104. As regards the third contention, I have set out the Tribunal's reasoning in respect of the Standard of Equality and Diversity in §62 above. That Standard is described in the 2012 Regulations as requiring police officers to act with fairness and impartiality and not to "*discriminate unlawfully or unfairly*" (see §61 above). It is evident that the Tribunal focused on the term "*discrimination*", and considered whether PC Archer's conduct constituted unlawful discrimination contrary to the Equality Act 2010, because they were addressing the definition in Schedule 2 to the 2012 Regulations.

105. The Equality Act 2010 addresses "prohibited conduct" in Chapter 2 of Part 2. Sections 13 to 25 address discrimination, and sections 13 and 19 provide the definitions of direct and indirect discrimination. The final two provisions of this Chapter, sections 26 (Harassment) and 27 (Victimisation), appear under the heading "*other prohibited conduct*".

106. Section 26 of the Equality Act 2010 provides so far as material:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct as the purpose or effect of
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for 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."

Race is one of the relevant characteristics for the purpose of this provision: s.26(5).

107. The IPCC guidelines for handling allegations of discrimination state:

> "**Harassment**
>
> 1.13 The Equality Act prohibits harassment relating to a relevant protected characteristic.
>
> **Harassment is unwanted conduct which violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment.**
>
> 1.14 This would include making offensive comments or jokes or insulting gestures that relate to a relevant protected characteristic – even if these are not specifically directed at the complainant themselves."

108. In my judgment, the Tribunal were addressing the scope of the Standard of Equality and Diversity, and finding that it extends beyond unlawful discrimination to cover the use of language which fails to treat all people with respect. This finding was correct. They did not consider whether the Equality and Diversity Standard extends to cover other prohibited conduct (namely, harassment and victimisation) - as it plainly does – because this was not raised and, in any event, they had found the Standard was breached.

109. In saying they did not think "*the Officer has discriminated against anyone in the sense that would offend the Equality Act 2010*", the Tribunal were only addressing the concept of discrimination under that Act, not other prohibited conduct such as harassment. The Tribunal were not asked to consider whether PC Archer's conduct constituted harassment, contrary to s.26 of the Equality Act 2010 and I do not consider that their decision, properly analysed, contains any decision of that issue.

110. I accept Mr Gold's submission that PC Archer's conduct did constitute harassment of Ms Sasani contrary to s.26 of the Equality Act 2010. It would have been open to the Tribunal to make such a finding. But I do not consider that the Tribunal has erred in making no such finding in circumstances where the regulation 21 notice made no allegation of harassment, nor was any such allegation made at any stage of the hearing, and the Tribunal had found that the Equality and Diversity Standard was breached. Nevertheless, in case I am wrong, I will consider the impact of this omission in the context of the Chief Constable's challenge to the outcome.

111. Accordingly, I reject all three elements of the Chief Constable's challenge under ground 2.

M. Ground 3: "failure to give adequate reasons for preferring PC Archer's evidence over that of Ms Sasani"

112. The Chief Constable submits that the Tribunal failed to give proper reasons for preferring PC Archer's account to that given by Ms Sasani. Mr Gold submits that the Tribunal should have expressed its decision clearly and in such a way as to enable Ms Sasani to know why she 'lost', or why the points had been resolved against her and the Chief Constable: *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at [19]. There were "*substantial inconsistencies*" and the Tribunal was required to show that it had "*fairly grappled with the inconsistencies*" and to provide reasons for their resolution: *R (Chief Constable of Durham) v Police Appeals Tribunal* [2012] EWHC 2733 (Admin), Hickinbottom J at [12]-[13] and *R (Chief Constable of Dyfed Powys*) *v Police Misconduct Tribunal* [2020] EWHC 2032 (Admin) ("*Dyfed Powys*"), Nicklin J at [59]. He submits that the resolution of these inconsistencies "*rested on the witnesses' credibility*" and it is impossible to know from the Tribunal's decision why it rejected Ms Sasani's recollection or why it preferred PC Archer's account and found her to be a credible witness given the inconsistencies in her evidence.

113. In his oral submissions, Mr Gold addressed grounds 2 and 3 together, and took them relatively briefly in light of his submissions on ground 1. Consequently, my reasons for rejecting this ground have already been given in the course of addressing the earlier grounds. In short, Ms Sasani's complaint was upheld. The misconduct to which she drew attention was found to have occurred and to constitute gross misconduct. She did not 'lose' and it is wrong to characterise this as a decision rejecting her evidence. Her evidence was accepted but the Tribunal formed its own assessment, as it was entitled to do, of PC Archer's mindset and intent, giving sufficient reasons for its conclusions.

N. Ground 4: "irrationality in the decision on disciplinary outcome, procedural irregularity and failure to give adequate reasons"

Alleged irrationality

114. In *Northumbria*, Freedman J considered a case in which a probationer constable, while off duty, went to a takeaway restaurant with police colleagues and, while sat at a table waiting for the food they had ordered, called the restaurant staff (out of their hearing) "*fucking Pakis*" and "*fucking niggers*", referring to the staff as "*Pakis*" on at least five occasions when talking to her colleagues, and saying "*I wish these Pakis would hurry up with me pizza*". Freedman J held at [57] to [58]:

> "In my judgment, the only reasonable decision on the facts of this case was dismissal. This was due to the words used. It was not a word used inappositely or just an odd word that just slipped out: it was a whole volley of expressions, and it contained vile, offensive and racist language.
>
> It was submitted for the IP that if the rules had intended that dismissal would be the only sanction for use of racist language, it would have said so. That is not a well-made submission. There are times when there is a slip of language e.g. by the use of an old-fashioned and now discredited expression with racist overtones. It was not a lapse of one word. The panel was evaluating the precise circumstances of this case, namely the repeated use of the terms "Paki" and the other deeply offensive language used." (emphasis added)

115. The AA's Counsel recognised, drawing the Tribunal's attention to the *Northumbria* case, that it was open to the Tribunal to "*weigh a 'lapse' differently from repeated and conscious use of discriminatory language*". On the Tribunal's findings of fact, which for the reasons I have given I consider were reasonably open to them on the evidence, while the term used by PC Archer was abhorrent and plainly constituted gross misconduct (as she acknowledged), the circumstances of this case are several steps removed from the *Northumbria* case. Specifically, this involved the unintentional use of a single word, not of a whole volley of racist expressions; and in the context in which it was used, it was not meant as an offensive term or directed at anyone, whereas in the *Northumbria* case the offensive language was vile abuse directed at members of the public (albeit out of their hearing, and the panel found it was 'unconscious').

116. The Chief Constable does not contend that, irrespective of my conclusions on the earlier grounds, the only rational outcome in this case was dismissal. The allegation of irrationality in the decision on disciplinary outcome is predicated on the Chief Constable succeeding on the earlier grounds and so being able to show that the disciplinary sanction was based on irrational and/or erroneous findings. In essence, he submits that it was perverse not to dismiss PC Archer in circumstances where she *deliberately* used the racist term, *lied* about her lack of recollection and demonstrated a *real lack of insight*. As I have rejected grounds 1-3, the Tribunal made no error in determining the appropriate sanction on the basis that PC Archer's use of the term was an unintentional aberration for which she had accepted full responsibility and in respect of which she had shown real insight, therefore this aspect of ground 4 falls away.

117. If I am wrong to conclude that the Tribunal did not act unlawfully in omitting to make a finding that PC Archer's misconduct constituted harassment contrary to s.26 of the Equality Act 2010, in my judgment it is highly likely that the sanction they would have imposed, but for this error, would have been the same. Although the Tribunal did not acknowledge that the misconduct falls within the section 26 definition, in determining that a final written warning was appropriate they were fully apprised of the gravity of PC Archer's misconduct, the fact that it related to the protected characteristic of race, took place while she was on duty on police premises, as well as of the effect on Ms Sasani.

Alleged structural failing

118. The separate contention raised by the Chief Constable is that the Tribunal failed to structure its decision correctly. Mr Gold submits that the Tribunal was required to approach its decision as to the *misconduct finding* in three stages: (i) finding the relevant facts; (ii) considering whether those facts disclosed breaches of one or more of the Standards of Professional Behaviour; and (iii) considering whether the cumulative effect of any breaches found amounted to misconduct or gross misconduct. Having made its misconduct finding, the Tribunal should then have moved to stage (iv), inviting submissions on and then determining the appropriate outcome.

119. Mr Gold submits that at stage (iii), the Tribunal should not have considered the seriousness of the conduct, save to the extent of determining whether it could justify dismissal and so constituted gross misconduct. He contends the Tribunal conflated stages (iii) and (iv), by making findings on seriousness and harm in the course of its misconduct finding that were solely relevant to the issue of outcome. In doing so, Mr

Gold submits the Tribunal reached its decision prematurely, without the benefit of submissions.

120. Mr Gold submits that as a consequence of this failure properly to separate its decisions on misconduct finding and outcome, the Tribunal failed to apply the structured approach to the determination of the appropriate sanction required by *Fuglers LLP v Solicitors Regulatory Authority* [2014] EWHC 179 (Admin), Popplewell J at [28], which has been applied to police misconduct hearings in *R (Chief Constable of Greater Manchester Police) v Police Misconduct Tribunal and Roscoe* (unreported, 13 November 2018) ("*Roscoe*"), HHJ Pelling QC at [16], [18] and in *Dyfed Powys*, Nicklin J at [65]. This approach is addressed in the College of Policing Guidance on Outcomes in Police Misconduct Proceedings ("the Guidance on outcomes") at §§4.2-4.5 (footnotes omitted):

> "4.2 As Mr Justice Popplewell explained, 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."

121. Mr Gold submits that, as in *Roscoe*, the Tribunal adverted to the existence of the Guidance on outcomes but failed to demonstrate that it had followed it. Further, the Tribunal made no reference to the public sector equality duty in s.149 of the Equality Act 2010, which it was required to consider when performing its public function of deciding on the disciplinary sanction.

122. Mr George submits that the Tribunal's approach cannot fairly be criticised. They said they were approaching their task by reference to the four stages outlined by Mr Gold and it is apparent that is what they did, including inviting submissions on the appropriate penalty after they had made their misconduct findings. It cannot be said that the Tribunal's approach was unfair in circumstances where they made the determinations they did at stage (iii) at the request of AA's Counsel, supported by Mr Loker.

Conclusions on ground 4 – alleged structural failing

123. I accept, and it is not disputed, that a misconduct finding consists of the three stages outlined by Mr Gold, and that once the misconduct finding has been made, the Tribunal should hear submissions on the outcome before proceeding to determine the appropriate penalty. I also accept that the determination of the appropriate sanction should be structured in accordance with the guidance given by Popplewell J in *Fuglers* and explained in the Guidance on outcomes to which I have referred.

124. That is precisely the approach Chair explained at the outset of the hearing that the Tribunal intended to take (see §47 above) and which they in fact took. It is readily apparent, and expressly stated, that the Tribunal applied the structured approach outlined in the Guidance on outcomes. The AA's opening note stated that if the Tribunal made a finding of misconduct or gross misconduct, it would wish to consider "*any character evidence and mitigation before considering outcome and the relevance of that evidence*"; and that is the approach the Tribunal took.

125. The only real question is whether the decision was procedurally unfair because the Tribunal made findings at stage (iii) which ought to have been left until stage (iv) and on which the parties did not have a fair opportunity to make submissions.

126. The submission made by the Chief Constable that the Tribunal should not have considered the Guidance on outcomes when making its misconduct findings is inconsistent with the submissions made to the Tribunal in the AA's Opening Note. At §23 the AA's Counsel submitted:

> "The Panel's attention is drawn to the College of Policing's 'Guidance on outcomes in police misconduct proceedings' and specifically chapter 4 concerning assessing seriousness (<u>both at finding and outcome stage</u>) at paragraphs 4.51-4.56 in particular. These paragraphs make the common sense point that conscious or deliberate discrimination is particularly serious, but that even unconscious discrimination can be very serious and can have a significant impact on public confidence in policing. Indeed, the impact of this phrase on Ms Sasani is set out in her statement and email." (emphasis added)

127. The Tribunal heard submissions from both parties, before making its misconduct findings, regarding the seriousness of the racist term used, the effect on Ms Sasani, whether PC Archer was being honest about her recollection, and whether the use of the term was an unintentional aberration or deliberate and more concerning conduct. The AA's Counsel contended that the Tribunal's "*findings at this stage will be particular[ly] important for outcome*", a submission that, in circumstances where the

breaches and gross misconduct had been admitted, plainly demonstrates he anticipated the Tribunal's misconduct findings would address the seriousness of the conduct. Moreover, the AA's Counsel urged the Tribunal that these matters "*can't be dodged at this stage*".

128. While it may be, as Mr Gold submits, that if there had been a procedural error it would have been irremediable once the misconduct findings were made, it is nonetheless striking that there was no suggestion before the Tribunal that the misconduct findings addressed matters on which the Tribunal had yet to hear submissions, not least given that the Tribunal allowed a break for the AA's Counsel to take instructions before making submissions on the appropriate penalty.

129. In my judgment, in the particular circumstances of this case, where gross misconduct was admitted, and having regard to the written and oral submissions made by the parties, the Tribunal did not act unfairly in reaching determinations at stage (iii) regarding the seriousness of PC Archer's conduct, including addressing her culpability, the harm caused, and aggravating and mitigating factors, so far as those were referrable to the conduct itself.

130. Reading the decision as a whole, the Tribunal's reasons for imposing a final written warning, rather than concluding that this was a case in which nothing less than dismissal was appropriate, are clear.

131. Finally, I do not consider that there is any substance to the allegation that the Tribunal itself breached the public sector equality duty. The duty was not to consider the provision itself. The Tribunal's duty was to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Equality Act 2010. In my judgment, in their decision (and recommendation) the Tribunal had due regard to the need to ensure police officers treat all people with respect and courtesy, do not use racist and offensive language, and do not harm others or create a hostile or offensive environment by the use of such language.

O. Overall conclusion

132. For the reasons I have given, the Chief Constable's claim is dismissed.