Neutral Citation Number: [2024] EWHC 2796 (Admin)

Case No: AC-2023-LON-003694

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 November 2024

Before :

Jonathan Moffett KC, sitting as a Deputy High Court Judge

- -

Between :

THE KING

on the application of

DIRECTOR GENERAL OF THE INDEPENDENT OFFICE FOR POLICE CONDUCT	**Claimant**
- and -	
POLICE MISCONDUCT PANEL	**Defendant**
- and -	
(1) CHIEF CONSTABLE OF CAMBRIDGESHIRE CONSTABULARY **(2) DANIEL BUCKETT**	**Interested Parties**

- -
- -

Raj Desai (instructed by **Independent Office for Police Conduct Legal Services**) for the **Claimant**

Hearing date: 3rd October 2024

- -

Jonathan Moffett KC, sitting as a Deputy High Court Judge:

A. INTRODUCTION

1. This claim for judicial review relates to the decision of the Defendant ("the Panel") in police misconduct proceedings against the Second Interested Party, Daniel Buckett. At the relevant time, Mr Buckett was a Detective Constable in the First Interested Party's police force. I shall refer to the First Interested Party, the Chief Constable of Cambridgeshire Constabulary, as "the Chief Constable".

2. The misconduct proceedings related to events that occurred at the Lola Lo Nightclub ("the nightclub") in Cambridge on the night of 3 December 2021. In brief, it was alleged that Mr Buckett had improperly used his police warrant card to gain entry to, or remain in, the nightclub ("the first allegation"), and that he had used racist language to refer to a Black doorman at the nightclub, Mr Olaleye ("the second allegation").

3. By its decision dated 13 September 2023, the Panel found that both allegations were proven, and that Mr Buckett's conduct was, in totality, so serious as to amount to gross misconduct ("the outcome decision"). The Panel went on to impose a sanction of a final written warning of two years' duration ("the sanction decision").

4. The Claimant ("the IOPC"), challenges the sanction decision. The IOPC argues that the sanction decision was irrational and, in particular, that the only decision that was rationally open to the Panel was a decision to impose a sanction of immediate dismissal. In the alternative, the IOPC argues that the Panel failed to give adequate reasons for the sanction decision.

5. Permission to apply for judicial review was granted by James Strachan KC, sitting as a Deputy High Court Judge, by an order dated 15 April 2024.

6. Neither the Panel, the Chief Constable nor Mr Buckett have taken any part in the claim for judicial review. None of them filed an acknowledgment of service or detailed grounds of resistance, and none of them appeared at the substantive hearing. However, in response to pre-action correspondence from the IOPC, Mr Buckett's solicitors indicated that he did not consent to the Panel's decision being quashed. Also, the Chair of the Panel ("the Chair") stated that almost all of the arguments advanced by the IOPC in the letter before claim (which foreshadowed the arguments advanced before me) were not advanced at the hearing before the Panel. This is a point to which Mr Strachan KC referred when granting permission to apply for judicial review, and he indicated that the IOPC should be prepared to address it at the substantive hearing.

7. At the hearing before me, the IOPC was represented by Raj Desai of counsel, and I am grateful to him for his extremely helpful submissions, and to those instructing him for the obvious care that had been taken when preparing the bundles of documents for the Court.

B. IS THE CLAIM ACADEMIC?

8. The IOPC has drawn my attention to the fact that Mr Buckett is no longer a serving police officer, and has properly pointed out that this raises the question whether the claim is now academic.

9. The relevant information was put before the Court by way of a witness statement from Charmine Arbouin, the IOPC's acting regional director for London, dated 4 September 2024. At the outset of the substantive hearing, I granted permission to the IOPC to rely on Ms Arbouin's statement, because it provides relevant information as to matters that have arisen since the claim was commenced.

10. Ms Arbouin explains that, as a result of the Panel's decisions, the Chief Constable withdrew Mr Buckett's vetting clearance, which led to Mr Buckett being dismissed for gross incompetence on 22 April 2024. It appears that Mr Buckett was dismissed solely on the ground of the withdrawal of his vetting clearance, which had the effect that he could no longer perform the duties of a constable; the dismissal was not related to his performance or, at least directly, the misconduct that was considered by the Panel.

11. Ms Arbouin draws attention to the fact that the consequences that flow from Mr Buckett's dismissal for gross incompetence differ from those that would have resulted had he been dismissed for gross misconduct. For example, she points out that, although Mr Buckett has been included on the College of Policing's barred and advisory list ("the list"), with the consequence that he is barred from working as a police officer for at least three years, his name does not appear on the publicly-accessible version of the list, and he will be able to apply for removal from the list after three years (and, if unsuccessful, to re-apply for removal every three years thereafter). Had Mr Buckett been dismissed for gross misconduct, his name would have appeared on the publicly-accessible version of the list (along with a description of his misconduct), and he would have been able to apply for removal from the list only after five years (and to re-apply only every five years thereafter). Further, should

Mr Buckett in the future apply to be removed from the list, the starting point for the consideration of that application would be the nature and circumstances of the decision to dismiss him; as matters currently stand, that decision is a decision based on competency grounds, not on misconduct grounds. In addition, any consideration of an application for removal from the list would also be premised on the Panel's decisions and, in particular, the Panel's decision that dismissal was not the appropriate sanction in Mr Buckett's case.

12. In these circumstances, I consider that the IOPC's claim for judicial review has not been rendered academic by Mr Buckett's dismissal for gross misconduct. If I were to quash the Panel's decision, and if that were in due course to result in the dismissal of Mr Buckett for gross misconduct, that would result in a materially different situation to that which currently exists.

C. RELEVANT LEGISLATIVE BACKGROUND

13. Police misconduct proceedings are governed primarily by the Police Conduct Regulations 2020 (SI 2020 No 4) ("the Regulations"), which were made by the Secretary of State under the Police Reform Act 2002 ("the 2002 Act") and the Policing and Crime Act 2017. Where in this judgment I refer to a regulation, it is a reference to a provision of the Regulations, unless the context indicates otherwise.

14. Insofar as is relevant for present purposes, the Regulations are concerned with allegations of misconduct and gross misconduct. Regulation 2 defines "misconduct" as a breach of the Standards of Professional Behaviour ("the Standards") that is so serious as to justify disciplinary action, and it defines "gross misconduct" as a breach

of the Standards that is so serious as to justify dismissal. By virtue of regs 2(1) and 5, Schedule 2 to the Regulations sets out the Standards under ten headings, four of which are relevant in the context of this case:

> "**Honesty and Integrity**
>
> Police officers are honest, act with integrity and do not compromise or abuse their position.
>
> **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.
>
> Police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice."

15. Under Schedule 3 to the 2002 Act, in certain circumstances the IOPC may carry out an investigation into alleged misconduct by a police officer and provide a report of the investigation to the appropriate authority. Under reg 2(1), in a case such as the present, the "appropriate authority" is the chief constable of the force of which the relevant police officer is a member. Accordingly, in Mr Buckett's case, the appropriate authority was the Chief Constable.

16. This is a case in which the IOPC undertook an investigation into the allegations against Mr Buckett, pursuant to the provisions of Schedule 3 to the 2002 Act. Subsequently, after seeking the views of the Chief Constable, the IOPC decided that Mr Buckett had a case to answer for gross misconduct, and that there should be disciplinary proceedings in the form of a misconduct hearing. The IOPC therefore directed the Chief Constable to refer the case to a misconduct hearing. Reg 2(1) defines a "misconduct hearing" as a hearing to which the officer concerned has been referred to determine whether his or her conduct amounts to misconduct or gross misconduct or neither and whether disciplinary action should be imposed.

17. Insofar as is relevant, reg 28(1)(a) provides that a misconduct hearing must be conducted by a panel of three persons appointed in accordance with that regulation ("a misconduct panel"). At the material time, reg 28(4) stipulated that a misconduct

panel must comprise a legally-qualified chair appointed by the relevant local policing body, selected on a fair and transparent basis from a list of persons maintained by that body; a police officer of the rank of superintendent or above appointed by the appropriate authority; and one other person appointed by the local policing body, selected on a fair and transparent basis from a list of candidates maintained by that body. The Regulations do not define "local policing body", but by virtue of Schedule 1 to the Interpretation Act 1978, it has the meaning given by s 101(1) of the Police Act 1996, i.e. insofar as is relevant for present purposes, the relevant police and crime commissioner.

18. Regulation 41 makes provision for the procedure that must or may be followed at a misconduct hearing. In particular, reg 41(15) provides that the misconduct panel must review the facts of the case and decide whether the conduct of the police officer amounts to misconduct, gross misconduct or neither.

19. Regulation 42 makes provision for the outcome of a misconduct hearing. In particular, and insofar as is relevant, reg 42(1) and (3)(b) provides that, where "the person conducting or chairing misconduct proceedings" decides that the conduct of the police officer amounts to gross misconduct, that person may impose disciplinary action in the form of a final written warning, a reduction in rank, or dismissal without notice. By virtue of reg 42(14), when the question of disciplinary action is being considered, the person or persons considering it must have regard to the relevant police officer's record of police service, may receive evidence from a witness, and must give the officer and the appropriate authority an opportunity to make representations, including on the appropriate level of disciplinary action.

20. I raised with Mr Desai the question whether reg 42 envisages that it is for the chair of a misconduct panel alone to determine what sanction should be imposed. As I set out below, in the present case the sanction decision is phrased in the first person plural ("we"), which would appear to indicate that it was taken by the Panel as a whole. Mr Desai inclined to the position that reg 42 does indeed envisage that it is for the chair of a misconduct panel to take a decision on sanction alone, but his primary position was that in any real practical sense it does not make any difference, because even if it were a decision for the chair alone, he or she would in all probability confer with the other members of the panel before reaching a decision.

21. In my view, reg 42 is somewhat ambiguously drafted, particularly when it is read in context. For example, reg 42(3)(b) is predicated on "the person conducting or chairing the misconduct proceedings" having reached a decision under reg 41(15) that the conduct in question constitutes gross misconduct, whereas reg 41(15) itself allocates that decision-making function to "the person or persons conducting the misconduct proceedings" which, in the case of a misconduct hearing, I take to be a reference to the misconduct panel. Further, it would be surprising if the function of deciding on whether there had been misconduct were allocated to the misconduct panel, but the function of determining what sanction should follow from that decision were allocated only to the chair of the panel. Conversely, I note that in at least one previous case it appears to have been considered appropriate to bring a claim for judicial review against the chair of a misconduct panel alone (see *R (Chief Constable of the West Midlands Police) v Panel Chair, Police Misconduct Panel* [2020] EWHC 1400 (Admin)), although I note that in that case Eady J's judgment consistently refers to the decision on sanction having been a decision of the relevant misconduct panel, not a decision of the chair of that panel.

22. I did not receive any detailed submissions on the proper interpretation of reg 42, and in circumstances in which no party has raised any question as to whether it was lawful for the Panel as a whole to take the decision on sanction, and in which (as Mr Desai submitted) there are no obvious material practical consequences of it having done so, this would not be an appropriate case in which to determine the point. I shall therefore proceed on the assumption that the Panel as a whole was empowered to take the sanction decision.

23. Under reg 42(9), if a final written warning is imposed by way of sanction, it remains in force for a period of two years beginning on the day on which it is notified to the officer concerned, although under reg 42(10) that period may be extended to a maximum period of five years. Accordingly, a final written warning of two years' duration, which was the sanction imposed in Mr Buckett's case, is the lowest sanction that a misconduct panel may impose.

24. Regulation 43(1) makes provision for the notification of the outcome of a misconduct hearing. Before the end of a period of five working days beginning with the first working day after the end of the misconduct hearing, the person chairing that hearing must send to the appropriate authority a report setting out (insofar as is relevant) the finding of the panel, the reasons for that finding, and any disciplinary action imposed. Under reg 43(2), the appropriate authority must send a copy of the report to the police officer concerned and, in a case such as the present, under reg 43(5) it must also send a copy of the report to the IOPC.

D. RELEVANT FACTUAL BACKGROUND

25. On the night of 3 December 2021, Mr Buckett was on a team night out which ended at the nightclub. It was at the nightclub that the events to which the misconduct proceedings related occurred. As I have explained, the events were referred to, and investigated by, the IOPC and, as a result, the Chief Constable was required to refer the matter to a misconduct hearing.

26. As a result, under reg 30, a notice of referral to misconduct proceedings (commonly referred to as a "regulation 30 notice") dated 19 May 2023 was given to Mr Buckett. That notice set out the allegations against Mr Buckett as follows:

> "It is alleged that Detective Constable 0850 Daniel Buckett breached the following Standards of Professional Behaviour as set out in Schedule 2 of the Police (Conduct) Regulations 2020:
>
> (a) Honesty and Integrity
>
> (b) Authority, Respect and Courtesy
>
> (c) Equality and Diversity
>
> (d) Discreditable Conduct
>
> It is contended that, if proven, the conduct below breaches the above Standards of Professional Behaviour.
>
> **Allegation 1**

On 3rd December 2021 DC 0850 Daniel Buckett acted without integrity and in a manner that could bring discredit upon the police service, in that he:

(a) Produced his police issued warrant card and/or

(b) Identified himself as a police officer

on at least one occasion for other than a policing purpose and/or to gain a personal advantage, namely to secure entry to or to remain within the Lola Lo Nightclub.

Allegation 2

On 3rd December 2021 DC 0850 Daniel Buckett discriminated unlawfully, failed to treat members of the public with respect and courtesy and acted in a manner that could bring discredit upon the police service, in that he referred to a member of the public as an 'African cunt' and/or an 'African prick'.

The above matters, if proved (individually or collectively) constitute gross misconduct, in that they are so serious as to justify dismissal."

27. In accordance with reg 31, Mr Buckett responded to the regulation 30 notice by way of what is referred to as a "regulation 31 response" dated 5 June 2023. Mr Buckett did not accept that he had breached the Standards in a manner that constituted gross misconduct, but he did accept that in relation to the first allegation he had breached the Standards in a manner that constituted misconduct. In short, Mr Buckett accepted

that he had produced his warrant card on two occasions and that he was wrong to do so. Mr Buckett denied the second allegation; in particular he denied using the racist language that he was alleged to have used (although I note that, in an earlier written statement, he did accept that he had used the adjective "African").

28. The Panel conducted the misconduct hearing over three days, on 11, 12 and 13 September 2023. In accordance with reg 28, the Panel comprised the Chair, Harry Ireland, who is legally-qualified; a superintendent serving in the Cambridgeshire Constabulary, Mike Branson; and an independent panel member appointed by the Police and Crime Commissioner for Cambridgeshire, John Jones. The Chief Constable (who was in effect prosecuting the allegations) and Mr Buckett were each represented by counsel (Jenny Oborne and Dominic Lewis, respectively), and Mr Buckett was also supported by a representative from the Police Federation and a police welfare officer. The IOPC was represented by one of its lead investigators, who attended as an observer.

29. The Panel heard live evidence from Mr Buckett and two other police officers who had witnessed the events on the night of 3 December 2021, and it received other evidence in writing and in the form of a recording of a telephone call with one of the doormen at the nightclub. The Panel also viewed CCTV footage from the nightclub.

30. On the final day of the hearing, the Chair announced the outcome decision, and gave the Panel's reasons for that decision, orally. Those reasons were subsequently reduced to writing. The Panel found that each of the two allegations against Mr Buckett had been proven, and that in totality his conduct constituted gross misconduct.

31. The reasons for the outcome decision that were given orally are slightly fuller than the written reasons, and therefore I shall refer to the transcript of the oral reasons, which

records them as follows. For convenience, I have removed some extraneous wording, corrected some typographical and other minor errors, and inserted paragraph numbers to facilitate cross-referencing (in this judgment, references in square brackets are references to paragraphs of the outcome decision or the sanction decision, as the case may be).

> "[1] So we heard evidence from PCs Williams, Coteman and DC Buckett, with the remainder of the evidence received in the prepared bundle. DC Buckett in his Regulation 31 response accepted that he had breached the Standards of Professional Behaviour of discreditable conduct and integrity in respect of allegation one and allegation two.
>
> [2] I should add for our findings, as well, we appreciate in the circumstances the distinction between dishonesty and integrity. So we concentrated, as per the admission it's integrity not dishonesty, even though, but the Standard, DC Buckett, they are lumped together as you're probably aware.
>
> [3] Right, so the CCTV evidence helpfully provided coverage of most of the events complained of. From this we found that DC Buckett and his two friends, PCs Oatridge-Hajee and Cowley were clearly affected by the alcohol they had consumed. The effects on PC Oatridge-Hajee being particularly noticeable. DC Buckett admitted 'letting his hair down' and being 'jovial and happy but aware of his surroundings'. Given his admission of consuming two pints of beer, a glass of mulled wine, two cocktails, and then in a nightclub three to four shots of Jaeger bombs during the course of the evening and night, and the contents of the CCTV, we could only conclude he was drunk at

the time of his removal from the night, removals should I say, from the nightclub. We also accept what he told us that once evicted on a cold December night wearing only his t-shirt he began to sober up.

[4] Within the nightclub we received evidence from Abby Olaleye and Asha Gordon in statement form for the former and telephone recording for the latter. Accepting we had to consider that there was no opportunity to cross examine either, we found that their evidence was consistent with much of what we saw and heard from other evidence, thus we found that DC Buckett was argumentative with Mr Olaleye and, clearly, was unwilling to leave the nightclub initially, albeit we accepted DC Buckett's explanation that this was largely because he needed to retrieve his clothes containing his house keys. We also considered the contents of the phone call made by Asha Gordon to the police complaining about the behaviour of DC Buckett and his friends. He described DC Buckett as drunk, 'flashing his warrant card at people', and all of them as 'nightmares', having had too much to drink. Given the work of the two witnesses that night we believe it to be more likely than not that they were sober and undertaking their normal duties.

[5] With this their description of Buckett's behaviour and the CCTV evidence we concluded that DC Buckett's behaviour within the nightclub was unacceptable, borne out of drink, and even DC Buckett in his evidence to us accepted that he deserved to be asked to leave following his twice removal of his t-shirt, despite early intervention by Mr Olaleye.

[6] We would add that whilst undoubtedly behaving in an obstreperous and argumentative manner we did not find any evidence of aggression on

the part of DC Buckett within the nightclub. His pulling of his arm away from Mr Olaleye did not amount to such.

[7] Thereafter the comments from DC Buckett contained in the second allegation were witnessed by PCs Williams and Coteman who had been present in the nightclub, albeit with a different party. They had seen the removal of the t-shirts by DC Buckett and his friends but had not been involved. On leaving the nightclub they saw DC Buckett and Oatridge-Hajee were still in the lobby and began to enquire as to what was happening. It is noted here that neither PC Williams or Coteman knew DC Buckett other than an awareness of DC Buckett being an officer, and on PC Williams' part the odd greeting. There was no evidence of any bad feeling between the parties, nor was such advanced on behalf of DC Buckett. Therefore we found that both PCs Williams and Coteman became involved simply to come to the aid of their fellow officers, especially one, DC Buckett, who had his warrant card confiscated by Mr Olaleye. Such was PC Williams' concern that she telephoned her control room to ascertain if what she had been told regarding the confiscation was true. Similarly PC Coteman checked the reference number given to Asha Gordon from his complaint to ensure its authenticity. In doing this we accepted that PC Williams, whose evidence was clear and cogent, considered fairly that the situation may have escalated and undertook a role as a police officer, quite properly, to try and calm the situation down. We accepted that despite having had drinks earlier, PC Williams was not adversely affected by her intake of alcohol at that time, as witnessed by her conduct and the recording of her call to the control room.

[8] We also found PC Coteman to be sober given the details of his drinking that night, which was unchallenged, and the CCTV evidence. Therefore we accepted, when combined with what we saw on the CCTV evidence, that DC Buckett did, indeed, make the comment as to what would have happened had he still been a member of the military, and noted the punching action from the CCTV. We did not accept that DC Buckett's evidence that he may have been pointing at something. We noted such pointing appears to be with a clenched fist.

[9] We also accepted that while standing in the doorway of the nightclub we see DC Buckett indicate towards Mr Olaleye twice in conversation with PC Williams that he, as PC Williams described, blamed Mr Olaleye for what had happened. However, despite the assertion on behalf of the appropriate authority regarding the comment about 'speaking English', was evidence of racism, we could not be satisfied that the words used were as advanced, but may have been, as described by DC Buckett in his evidence, i.e. 'say again in English', as a result of DC Buckett not hearing what was said clearly.

[10] Turning then to the comment complained of. We will not repeat the words alleged, they are detailed within the evidence and the Reg 30. We noted that there was some minor difference between PCs Williams' and Coteman's recollections in that PC Coteman did not hear the concluding word, but did hear the use of the words 'fucking' and 'African' within a sentence uttered by DC Buckett. DC Buckett's evidence is clear in that he

did not say these words and there was no error or mishearing on the part of the other officers, they simply were not said at any time.

[11] As stated earlier we found PCs Williams and Coteman to be both credible and truthful witnesses with no interest, at all, in seeking to falsely accuse DC Buckett. They appear to the panel to act fairly and professionally on the night in question, therefore we find that the words alleged were stated by DC Buckett and were racist in context.

[12] We would note in stating this that we also found that when saying this the words were not directed at anyone. Mr Olaleye and other door staff had left, the nightclub had closed its doors, and the street was empty save for the officers DC Buckett, PCs Williams and Coteman and, of course, DC Oatridge-Hajee. Just an aside there, clearly he was in such a state that he probably didn't realise what day it was, never mind what was heard.

[13] Given these factors and the fact that the nightclub had closed and therefore, as DC Buckett conceded, he realised he was not going to retrieve his clothes and house keys, the comment was an act of frustration and anger on his part, and largely said to himself.

[14] We thus find the case proved and find that the breach, that he breached the Standards of honesty and integrity, and I said earlier, it relates only to integrity, discreditable conduct, authority, respect and courtesy, and equality and diversity, and such breaches in totality amount to gross misconduct."

32. Having announced its decision that the allegations were proven, the Panel afforded the Chief Constable's and Mr Buckett's counsel an opportunity to make representations on sanction.

33. On behalf of the Chief Constable, Ms Oborne drew the Panel's attention to the purpose of the police misconduct regime and to the three-stage approach that should be adopted to deciding on the appropriate sanction (as summarised in paragraph 48 below). She argued that the appropriate sanction in Mr Buckett's case was dismissal without notice, and in this respect she relied primarily on the second allegation, relating to the use of racist language. Ms Oborne adopted what she described as an holistic approach, rather than looking separately at the issues of culpability and harm. She argued that, from the Chief Constable's point of view, the main concern was the fact that the language used by Mr Buckett may reflect an underlying attitude and that, if Mr Buckett did have such an attitude, that would have an effect on his ability to deal with members of the public and to be an effective police officer. Although Ms Oborne accepted that by the time that Mr Buckett used racist language he had been outside in the cold for some time, and there was a degree of frustration on his part, she also highlighted the fact that discrimination was an aggravating factor. In response to questions from the Chair, Ms Oborne accepted that there was no other proven evidence of racist behaviour on Mr Buckett's part, and she accepted that the direct impact of Mr Buckett's misconduct was "low".

34. In relation to the first allegation, relating to the production of the warrant card, Ms Oborne argued that Mr Buckett's argumentative behaviour took place at a time when he had identified himself as a police officer, thereby giving rise to potential reputational harm, and additional harm arose out of the fact that the warrant card was

taken from him. The one other aggravating factor on which Ms Oborne relied was the fact that there were multiple breaches of the Standards.

35. On behalf of Mr Buckett, in relation to the first allegation Mr Lewis relied on the fact that Mr Buckett had accepted responsibility for using his warrant card from an early stage, and argued that Mr Buckett had used his warrant card only to establish trust and not, for example, to attempt to coerce anyone. In relation to the second allegation, Mr Lewis emphasised that Mr Buckett's use of language was a one-off, and that he had not, for example, used racist language or engaged in discriminatory behaviour earlier in the evening. He also pointed to the facts that Mr Buckett's racist language was not directed to anyone, including Mr Olaleye, it was not overheard by a member of the public, and it was said out of frustration (as counsel for the Chief Constable had accepted). Mr Lewis pointed out that, as with the other Standards, there is a spectrum of conduct that would breach the Standard on equality and diversity, and that Mr Buckett's conduct was not at the most serious end of that spectrum. Mr Lewis rejected the suggestion that Mr Buckett's language was indicative of an underlying attitude, and in this respect he relied on ten testimonials, the majority of which appear to have been provided by Mr Buckett's former colleagues in the military, and which (said Mr Lewis) spoke to Mr Buckett's ability to conduct himself with individuals of different races and from different cultures. Mr Lewis referred to Mr Buckett's record of service in the military and in the police, and said that he had otherwise been a good police officer. Mr Lewis reminded the Panel that they should select the least severe sanction that would reflect the seriousness of Mr Buckett's misconduct, and suggested that a final written warning would be an appropriate sanction.

36. After retiring to consider its decision, the Panel announced the sanction decision orally, in the following terms (again, I have corrected some minor errors in the transcript and inserted paragraph numbers to facilitate cross-referencing).

> "[15] So we start off, as the AA will remind us, about the purpose behind the misconduct process. First to protect the public confidence in, and the reputation of policing. Secondly, to maintain the high professional standards of the police force by demonstrating to others that misconduct won't be tolerated. And thirdly, to protect the public and/or officers and staff by preventing officers from committing similar misconduct again.
>
> [16] So following the College of Policing guidance we followed the recommended pattern, so for culpability we found that there was a pattern of behaviour resulting from excessive drinking, ending with a racist comment, albeit one that was undirected, and borne from frustration.
>
> [17] Secondly, harm, we find that the harm, inevitably, would be the undermining of public confidence in the police if the facts were to be known to an objective member of the public.
>
> [18] Thirdly, aggravating factors, first of all, obviously the element of racism involved in our findings, secondly, the ongoing national concern regarding racism and the police, and thirdly, there were two allegations found proven and four standards breached.
>
> [19] In mitigation we accepted that there was an early admission by DC Buckett regarding allegation one and the second factor we took into account

> is that the second breach, namely the comment, was of very limited duration.
>
> [20] In coming to our determination as to sanction we've acknowledged the risk of double counting, so we've taken that into account, and we find that the appropriate sanction in the circumstances is a final written warning for two years' duration."

37. The Panel also reduced the sanction decision into writing. The written reasons for the sanction decision are broadly the same as those set out above, save for the fact that the written reasons do not include the express reference to the College of Policing's guidance.

E. THE COLLEGE OF POLICING'S GUIDANCE ON OUTCOMES

38. The College of Policing has issued *Guidance on Outcomes in Police Misconduct Proceedings* (August 2023) ("the Guidance"). The Guidance explains that it is intended to assist persons appointed to conduct misconduct proceedings and to ensure consistency and transparency in assessing conduct and imposing outcomes at the conclusion of misconduct proceedings (paragraph 1.2), and that it "should be used to inform the approach taken by panels and chairpersons to determining outcomes in police misconduct proceedings" (paragraph 7.1). The Guidance states that "[t]here is…an expectation in case law that the process outlined in this guidance should be followed" (paragraph 1.6, citing the decision of HHJ Pelling in *R (Chief Constable of Greater Manchester Police) v Police Misconduct Panel* (unreported, 13 November 2018)).

39. The Guidance was issued by the College of Policing under s 87(1B) of the Police Act 1996 ("the 1996 Act"). That subsection confers on the College, with the approval of the Secretary of State, the power to issue to local policing bodies, chief officers of police, and other members of police forces, guidance as to the discharge of their disciplinary functions in relation to members of police forces. Section 87(1B) does not expressly or directly confer a power to issue guidance to a misconduct panel.

40. Mr Desai nevertheless argued that the Panel was under a statutory duty to have regard to the Guidance, and by extension the Panel was therefore subject to a duty to follow the Guidance unless there was a good reason for departing from it. In this respect, Mr Desai relied on s 87(3) of the 1996 Act, which imposes on every person to whom guidance under s 87 is issued to have regard to that guidance when discharging the functions to which the guidance relates (in addition, s 87(4) provides that a failure by a person to whom guidance under s 87 is issued to have regard to that guidance is admissible in evidence in misconduct proceedings). Although a misconduct panel is not one of the persons to whom guidance may be issued under s 87(1B), at least not expressly, Mr Desai argued that a misconduct panel is appointed by the relevant appropriate authority and local policing body, and therefore the duty imposed by s 87(3) applies to a misconduct panel as it applies to those bodies.

41. However, I was not shown anything in the legislative scheme which explains the relationship between an appropriate authority and a misconduct panel in this respect, and it is not self-evident that duties imposed on a chief officer, for example, apply also to a misconduct panel. Indeed, it seems to me that there is at least an argument that a panel acts in its own right as an independent body, and not as a surrogate or delegate of the relevant chief officer. This would not be surprising; after all, the

relevant chief officer usually acts in a role equivalent to that of prosecutor at a police misconduct hearing. In this respect, I note that in *R (Chief Constable of Thames Valley Police) v Police Misconduct Panel* [2017] EWHC 923 (Admin), para 31 *per* McGowan J, it was held that a misconduct panel was, under the legislation then in force, "sufficiently separate from and independent of" the relevant chief officer to enable him to challenge the misconduct panel's decision by way of a claim for judicial review.

42. Mr Desai also referred me to case law which showed that this Court has in the past proceeded on the basis that a misconduct panel is required to take the Guidance into account: *R (Chief Constable of Northumbria Police) v Police Misconduct Panel* [2018] EWHC 3533 (Admin), para 41 *per* HHJ Kramer and the *West Midlands Police* case, paras 5 and 30 *per* Eady J. However, in neither case does the point appear to have been argued or decided: in each case the point was agreed and, in the *West Midlands Police* case, Eady J relied on the *Northumbria Police* case. I was also referred to *R (O'Connor) v Police Misconduct Panel* [2023] EWHC 2892 (Admin), in which reliance was placed on s 87(3) of the 1996 Act, and in which Swift J appears to have accepted that a misconduct panel is under a duty to have regard to the Guidance (see paras 28 and 32). However, it is not clear whether Swift J heard any argument on the point and, in any event, it appears that it was not a necessary part of his decision, because he concluded that on the facts of that case the misconduct panel did have proper regard to the Guidance (see paragraph 42).

43. It is perhaps not surprising that, in previous cases, the parties have agreed and this Court has accepted that a misconduct panel is under a duty to have regard to the Guidance. In light of the fact that the Guidance is issued by an expert body exercising

a statutory function, it seems to me that it is very likely that, even if s 87(3) of the 1996 Act is inapplicable, the common law would impose on a misconduct panel a duty to have regard to the Guidance and to depart from it only if there is good reason to do so (see, by analogy, *R (Ali) v Newham London Borough Council* [2012] EWHC 2970 (Admin), [2013] LGR 230, paras 39-41 *per* Kenneth Parker J). However, an argument to that effect was not advanced to me.

44. Nevertheless, it seems to me that, on the facts of this case, the IOPC does not need to show that the Panel was under a duty to have regard to the Guidance and to depart from it only for good reason, and I do not need to determine the point. As I explain below, I consider that the Panel took into account, and at least intended to apply, the Guidance. As such, on the facts of this case, the Panel did not consciously depart from the Guidance, and nothing turns on whether Mr Desai's argument is correct.

45. The Guidance sets out the three purposes of the police misconduct regime as being: to maintain public confidence in, and the reputation of, the police; to uphold high standards in policing and to deter misconduct; and to protect the public (paragraph 2.3). It points out that the purpose of police misconduct proceedings is not to punish police officers, although the outcome might have a punitive effect (paragraphs 2.7 and 2.8). In relation to the punitive effect of sanctions, the Guidance reminds the reader that the outcome should be no more than is necessary to satisfy the purpose of the proceedings, that it is appropriate to consider less severe outcomes before considering more severe outcomes, and that the least severe outcome that deals adequately with the issues identified while protecting the public interest should always be chosen (paragraph 2.8).

46. The Guidance also reminds the reader that police officers exercise significant powers, and that the misconduct regime is a key part of the accountability framework for the use of those powers. In particular, the Guidance states that, if public confidence in the police is to be maintained, outcomes should be sufficient to demonstrate individual accountability for any abuse or misuse of police powers (paragraph 2.1).

47. Section 4 of the Guidance addresses the issue of how to assess the seriousness of a police officer's conduct. Paragraph 4.1 of the Guidance explains that assessing the seriousness of conduct lies at the heart of decision-making in police misconduct regime (paragraph 4.1). In the *O'Connor* case, Swift J identified the following passages in section 4 of the Guidance as setting out a general approach that is applicable in all cases (see para 32) (I note that the version of the Guidance to which Swift J referred would appear to be different from that to which I have been referred, but the substantive content is the same):

> "4.4 When considering the outcome, first assess the seriousness of the misconduct, taking account of any aggravating or mitigating factors. The most important purpose of imposing disciplinary sanctions is to maintain public confidence in, and the reputation of, the policing profession as a whole. This dual objective must take precedence over the specific impact that the sanction has on the individual whose misconduct is being sanctioned.
>
> …
>
> 4.8 Weigh all relevant factors and determine the appropriate outcome based on evidence, independently of any views expressed by the media."

48. The Guidance advises that there are three stages to determining the appropriate sanction in police misconduct proceedings, by reference to the stages set out by Popplewell J in *Fuglers LLP v Solicitors Regulation Authority* [2014] EWHC 179 (Admin), [2014] BPIR 610, paragraph 28, in the context of solicitors' disciplinary proceedings. The first stage is to assess the seriousness of the misconduct, the second stage is to keep in mind the purpose of imposing sanctions, and the third stage is to choose the sanction that most appropriately fulfils that purpose for the seriousness of the conduct in question (paragraph 4.2). In this respect, the Guidance advises that the most important purpose of imposing disciplinary sanctions is to maintain public confidence in, and the reputation of, the policing profession as a whole (paragraph 4.4).

49. The Guidance explains that the seriousness of a police officer's conduct should be assessed by reference to the officer's culpability for the misconduct, the harm caused by the misconduct, any aggravating factors, and any mitigating factors (paragraph 4.3). This approach to the assessment of seriousness has been described as a "structured approach" (see, for example, the *Greater Manchester Police* case, para 14 *per* HHJ Pelling QC; *R (Chief Constable of Nottinghamshire Police) v Police Appeals Tribunal* [2021] EWHC 1248 (Admin), para 75 *per* Steyn J). However, in the *O'Connor* case, Swift J emphasised that the Guidance lays down a general framework for assessing seriousness, and that it does not require a misconduct panel to express its reasons in any prescribed structured form. In particular, a misconduct panel is not necessarily required to consider each of the factors referred to in paragraph 4.3 separately or in sequence; on a challenge, the question for the court is whether a misconduct panel has properly considered those factors as a matter of substance (see the *O'Connor* case, paras 35-36).

50. The Guidance goes on to give advice on culpability, both generally and in relation to particular types of misconduct. In the *O'Connor* case, Swift J described this advice as valuable, but he emphasised that whether it would inform the application of the general approach set out in paragraphs 4.4 and 4.8 would depend on the facts of the particular case, and the misconduct panel's assessment of those facts (see para 32).

51. In relation to culpability, the Guidance makes the straightforward point that, the more culpable or blameworthy the behaviour in question, the more serious the misconduct and the more severe the likely outcome (paragraph 4.9). In this respect, the Guidance advises that particular categories of misconduct should be treated as being "especially serious". Mr Desai placed particular emphasis on paragraphs 4.13 and 4.14 of the Guidance. Those paragraphs, and the two which immediately follow them, provide as follows.

> "4.13 It is not possible to categorise all types of case where dismissal will be appropriate because the circumstances of the individual case must be considered. Many acts have the potential to damage public confidence in the police service.
>
> 4.14 However, the types of misconduct given in the following sections should be considered especially serious.
>
> 4.15 There is inevitably a degree of overlap between the particular types of misconduct highlighted below. Take care to avoid 'double counting' factors that have been identified as being relevant to the assessment of seriousness.
>
> 4.16 Equally, these considerations should not be considered an exhaustive list. There may be other factors specific to the behaviour in question, which

render it more culpable and therefore more serious."

52. At this point it is necessary to consider a submission made by Mr Desai in relation to paragraphs 4.13 and 4.14 of the Guidance. He submitted that those paragraphs provide that misconduct falling within the "especially serious" categories is presumptively incompatible with public confidence and, bearing in mind the importance in this context of public confidence in the police, in effect they give rise to a presumption that, in a case in which the police officer committed an act of misconduct which falls with the "especially serious" categories, the sanction should be dismissal. In support of this submission, Mr Desai relied on the comments of Jay J in *R (Chief Constable of Thames Valley Police) v Police Misconduct Panel* [2023] EWHC 2693 (KB).

53. Mr Desai correctly accepted that the true meaning of the Guidance is a matter for the Court to determine, on an objective basis. In my view, the Guidance does not impose a presumption in favour of dismissal in a case involving an "especially serious" category of misconduct.

54. The general approach adopted by the Guidance is to recognise that the outcome of each case must depend on its own particular facts and circumstances. Paragraphs 4.13 and 4.14 are concerned with the issue of culpability, in which respect the Guidance recognises that there is a spectrum of culpability. Further, as I have explained above, the Guidance recommends that a misconduct panel's assessment of culpability should feed into its assessment of seriousness (see paragraphs 4.3 and 4.9), in relation to which there is also a spectrum of seriousness: "seriousness is not a binary question" (the *Greater Manchester Police* case, para 18 *per* HHJ Pelling). In turn, the assessment of seriousness is only the first step in the three-stage approach referred to

in paragraph 4.2 of the Guidance. Although it would not necessarily be inconsistent with this case-specific and multi-factorial approach for the Guidance to advise that, in some cases, a particular factor should normally trump all others and generally result in dismissal, it would represent something of a departure from that approach, and as such one would expect to see it flagged to the reader in express terms.

55. However, paragraphs 4.13 and 4.14 of the Guidance make no reference to a presumption in favour of dismissal. In this respect, paragraphs 4.13 and 4.14 may be contrasted with paragraph 4.74 (which I quote below), which refers expressly to the likelihood of dismissal being the appropriate sanction in certain types of cases. Indeed, I consider that the first sentence of paragraph 4.13 is, if anything, inconsistent with a presumption in favour of dismissal. Mr Desai sought to overcome the absence of any express reference to a presumption in favour of dismissal by arguing that paragraphs 4.13 and 4.14 should be read in light of the fact that they are addressed to readers who would be aware of the relevant case law, including *Salter v Chief Constable of Dorset* [2021] EWCA Civ 1047, to which I refer below. However, insofar as the Guidance is addressed to the members of misconduct panels, it is addressed to lay persons as well as legally-qualified persons and, in contrast to other parts of the Guidance, paragraphs 4.13 and 4.14 do not cross-refer to any case law. In consequence, I do not consider that it would be right to read the Guidance as somehow implicitly incorporating case law to which no reference is made and of which a reader to whom the Guidance is addressed may not be aware.

56. Further, some of the text in the later sections of the Guidance to which paragraph 4.14 refers does not sit comfortably with a presumption in favour of dismissal. For example, the section immediately following paragraphs 4.13 and 4.14 addresses the

situation in which a police officer is convicted of an offence or receives a caution. In that context, paragraph 4.20 refers to convictions or cautions for certain criminal offences being "particularly serious and likely to terminate an officer's career". Such advice would be otiose if there were a general presumption in favour of dismissal in cases in which a police officer is convicted or receives a caution. A similar point may be made in relation to paragraph 4.41, which refers to "more serious action" being likely to be appropriate in certain types of cases falling within the category of violence, intimidation or sexual impropriety. Further, some of the sections implicitly recognise that there are ranges of seriousness even within the "especially serious" categories of misconduct (see, for example, paragraphs 4.30, 4.31, 4.41 and 4.57 of the Guidance).

57. Turning to Mr Desai's reliance on the *Thames Valley Police* case, in that case, Jay J set out (at paras 50 to 62) a series of principles that he had derived from the relevant jurisprudence. The third principle was as follows.

> "58. …some types of gross misconduct are so serious that dismissal may be regarded as the expectation: in order to avoid it, some particularly compelling consideration has to be advanced. This principle clearly applies in a police context to cases of operational dishonesty (see the facts of *Salter*), and I would hold that it should also apply to the 'especially serious' categories of cases that I have previously referenced…."

58. In a later paragraph, Jay J put the same point more briefly in the following terms: "*Salter* applies to cases where the officer's culpability is especially serious" (see para 62). *Salter* was a case in which a police sergeant, who was the investigating officer on a case, had instructed a more junior officer to destroy evidence which he knew would

be required for a coroner's investigation. At the final stage of the misconduct proceedings against the sergeant, the Police Appeals Tribunal imposed the sanction of reduction in rank. At first instance, Burnett J quashed the decision of the Tribunal. In the course of his judgment, Burnett J referred to case law that emphasised the importance of honesty and integrity, and held that "the correct approach for a decision-maker is to recognise that a sanction which results in the officer concerned leaving the force would be the almost inevitable outcome in cases involving operational dishonesty". Burnett J held that, in such a case personal mitigation is of limited relevance (*R (Chief Constable of Dorset) v Police Appeals Tribunal* [2011] EWHC 3366 (Admin), paragraph 30). On appeal, Maurice Kay LJ endorsed this approach as "incontrovertibly correct" (para 19), and he reiterated the point that, in such a case, because of the importance of public confidence, personal mitigation is generally of limited relevance (paras 22-23 *per* Maurice Kay LJ). The Court of Appeal was clear that, on the facts, the case involved a serious lack of integrity in an operational context, in way that was inimical to the office of constable (para 22 *per* Maurice Kay LJ, para 31 *per* Gross LJ).

59. It is, I think, important to recognise that the approach adopted in *Salter* was predicated on the fact that the misconduct in question had serious implications for public confidence in the police. Neither Burnett J nor the Court of Appeal based their conclusions on any relevant statutory guidance; although Maurice Kay LJ referred in passing to Home Office guidance (see para 19), that guidance does not appear to have been relevant to the issue that the Court had to decide. Rather, both Courts' conclusions were based on an analogy that they drew with a line of case law on honesty and integrity in the context of solicitors' disciplinary proceedings (including *Bolton v Law Society* [1994] 1 WLR 512, 518-519 *per* Sir Thomas Bingham MR).

60. In my view, the key point that emerges from the *Salter* case is that some types of misconduct have such an adverse impact on public confidence in the police that dismissal is the only appropriate response, no matter what personal mitigation is offered by the officer in question. I consider that this is the principle that Jay J summarised in the first sentence of paragraph 58 of the *Thames Valley Police* case, a conclusion that is reinforced by his reference to this precise point in the immediately preceding paragraphs. In this respect, I note that, in paragraph 58, Jay J does not purport to be interpreting or applying any particular passage or passages in the Guidance. Accordingly, read in context, it seems to me that the point that Jay J made in the second sentence of paragraph 58 was that the types of misconduct that fall within the "especially serious" categories of misconduct are types of misconduct that may have a serious adverse impact on public confidence in the police. Although I recognise that Jay J did not say so expressly, it seems to me that it must be implicit that, in each case, it is necessary to consider the particular facts and to determine whether, in light of those facts, the misconduct in question does indeed have a serious adverse impact on public confidence. I do not consider that Jay J intended to go further, and intended to say that dismissal is the expectation in all cases falling into the "especially serious" categories of misconduct. Indeed, in view of the fact that there does not appear to have been any argument on the point in the *Thames Valley Police* case, it would be surprising if Jay J had intended to go that far.

61. However, if I were wrong about paragraph 58 of the *Thames Valley Police* case, and it does state that there is a presumption in favour of dismissal in all cases of misconduct falling into the "especially serious" categories, I would, with great respect, decline to follow it. The point made in that paragraph would appear to be *obiter* (the misconduct in the *Thames Valley Police* case did not fall into an "especially serious" category: see

para 91) and, as I have mentioned above, it is not clear what argument (if any) Jay J heard on the point. For the reasons set out above, I do not consider that the Guidance imposes a presumption in favour of dismissal in cases involving misconduct falling into the "especially serious" categories. In my view, the effect of paragraphs 4.13 and 4.14 of the Guidance, read in context, is to draw attention to the fact that misconduct falling into the "especially serious" categories is likely to be especially serious in terms of culpability, but that it is necessary to consider the specific facts of each particular case.

62. The types of misconduct that the Guidance identifies as "especially serious" include the following.

(1) Operational dishonesty, impropriety or corruption. In this context, the Guidance states that any evidence that an officer is dishonest or lacks integrity should be treated seriously (paragraph 4.26), and that cases where an officer has exercised his or her police powers for personal gain should be considered as falling into the category of very serious misconduct (paragraph 4.29). The Guidance also provides that a case in which a police officer attempts to exert improper influence is an example of a serious case (paragraph 4.32).

(2) Abuse of trust or authority. The Guidance advises that a police officer's misconduct is more culpable where it involves an abuse of position (paragraph 4.44).

(3) Discrimination. The Guidance states that "[d]iscrimination towards persons on the basis of any protected characteristic is never acceptable and always serious" (paragraph 4.54), and that "[c]ases where discrimination is conscious or deliberate will be particularly serious. In these circumstances, the public cannot

have confidence that the officer will discharge their duties in accordance with the Standards" (paragraph 4.57).

63. In the context of harm, the Guidance gives examples of the various types of harm that may be caused by police misconduct, including reputational harm (paragraph 4.64). The Guidance goes on to explain the interaction between harm and the effect of misconduct on the police service or public confidence in the police service. In this respect, the Guidance gives the following advice:

> "4.66 Harm will likely undermine public confidence in policing. Harm does not need to be suffered by a defined individual or group to undermine public confidence. Where an officer commits an act that would harm public confidence if the circumstances were known to the public, take this into account. Always take misconduct seriously that undermines discipline and good order within the police service, even if it does not result in harm to individual victims.
>
> 4.67 Assess the impact of the officer's conduct, having regard to the factors in the Discrimination section of this document and to the victim's particular characteristics.
>
> …
>
> 4.69 How such behaviour would be, or has been, perceived by the public will be relevant, whether or not the behaviour was known about at the time.
>
> 4.70 If applicable, consider the scale and depth of local or national concern about the behaviour in question.

…

4.74 Where gross misconduct has been found and the behaviour has caused – or could have caused – serious harm to individuals, the community and/or public confidence in the police service, dismissal is likely to follow. A factor of the greatest importance is the impact of the misconduct on the standing and reputation of the profession as a whole."

64. In terms of aggravating factors, the Guidance gives examples of factors that indicate a higher level of culpability or harm, including any element of unlawful discrimination, the scale or depth of local or national concern about a particular issue, and multiple proven allegations and/or breaches of the Standards (paragraph 4.76). In terms of mitigating factors, the Guidance gives examples of factors that indicate a lower level of culpability or harm, including "misconduct confined to a single episode or brief duration" and "open admissions at an early stage" (paragraph 4.81).

65. The Guidance advises that, when consideration is being given to the length of the period for which a final written warning should be imposed, the panel should take into account the seriousness of the conduct, the circumstances that gave rise to the misconduct, the public interest, and the mitigation offered by the police officer (including his or her previous conduct record) (see paragraph 3.16).

66. Paragraph 2.5 of the Guidance cross-refers to Home Office guidance entitled *Conduct, Efficiency and Effectiveness: Statutory Guidance on Professional Standards, Performance and Integrity in Policing* (February 2020) ("the Home Office Guidance"), issued under ss 87 and 87A of the 1996 Act, and states that, when applying the Standards, the Home Office Guidance should be consulted. Insofar as is relevant for present purposes, paragraph 2.21 of the Home Office Guidance makes the

point that, when a police officer produces his or her warrant card in a way to suggest that he or she is acting in his or her capacity as a police officer (such as in order to declare that he or she is a police officer), he or she demonstrates that he or she is exercising his or her authority and he or she has therefore has put himself or herself on duty and will act in a way that conforms with the Standards.

F. THE GROUNDS OF CHALLENGE

67. The IOPC originally advanced six grounds of challenge, as follows.

(1) The Panel's decision not to impose a sanction of immediate dismissal (and in any event its decision to impose a sanction at the lowest end of the spectrum of available sanctions) was irrational and/or was not supported by adequate reasons.

(2) The Panel failed to have regard to, or unjustifiably departed from, or failed to give adequate reasons for, departing from the Guidance.

(3) The Panel committed the following public law errors when assessing the seriousness of Mr Buckett's misconduct:

(a) the Panel did not assess the seriousness of the misconduct to which the first allegation related in accordance with the approach to seriousness laid down by paragraph 4.3 of the Guidance and the *Fuglers* case (see paragraph 49 above);

(b) the Panel did not undertake the second and third stages of the exercise laid down by paragraph 4.2 of the Guidance and the *Fuglers* case (see

paragraph 48 above); and

(c) the Panel failed properly to assess culpability and harm in accordance with the Guidance (see paragraphs 50 to 63 above);

(d) it was irrational for the Panel to conclude that Mr Buckett's frustration reduced his culpability for the racist language that was the subject of the second allegation.

(4) The Panel failed to take into account the fact that, on the basis of its findings, Mr Buckett had dishonestly denied using racist language (and associated threatening language and behaviour), and/or the Panel failed to give adequate reasons in this respect.

(5) The Panel's conclusion that there was no evidence of aggression on the part of Mr Buckett while he was in the nightclub was irrational, and/or the Panel failed to give adequate reasons in this respect.

(6) The Panel's conclusion that Mr Buckett's comment "say again in English" was not racist was irrational, and/or the Panel failed to give adequate reasons in this respect.

68. At the hearing before me, Mr Desai indicated that the IOPC was no longer pursuing grounds 5 and 6. In my view, it was right not to do so; on the face of it, they are directed at the outcome decision, not the sanction decision. I shall therefore not consider those grounds of challenge further.

69. Although Mr Desai advanced his arguments by reference to the IOPC's grounds 1 to 4, he was inclined to accept that, as a matter of substance, those arguments could be

considered by reference to two main questions. First, did the Panel give adequate reasons for the sanction decision? Secondly, was the only decision that was rationally open to the Panel a decision that Mr Buckett should be dismissed with immediate effect? In particular, Mr Desai recognised that, if I were to decide that the Panel failed to give adequate reasons for the sanction decision, it would not be necessary for me to go on to consider the IOPC's conventional rationality challenge to the sanction decision.

70. In light of my conclusions below, it is also necessary to consider a third main question: if I were to quash the sanction decision, should I substitute my own decision as to sanction?

71. I shall address each of these three main questions in turn.

G. DID THE PANEL GIVE ADEQUATE REASONS?

72. The standard of reasons required of a misconduct panel was considered by Jay J in the *Thames Valley Police* case, where he held that the familiar public law approach applies (see para 61):

> "…the reasons provided must be such as to ensure that (a) the parties are aware in broad terms why they have won or lost (as the case may be), (b) that the parties and any appellate court can discern whether there has been legal error, and (c) that the mind of the decision-maker has been focused on the material issues. I would go slightly further: reasons must also be sufficient to enable the reviewing court to discern and understand the decision-maker's essential reasoning processes…."

73. I understood Mr Desai to agree that this formulation reflected what Lord Brown said in the leading case of *South Bucks District Council v Porter (No 2)* [2004] UKHL 33, [2003] 1 WLR 1953, para 36. Lord Brown's formulation has been applied across a broad range of public law decision-making and, for reasons that I will explain in due course, it is worth quoting the relevant part of his speech:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration…."

74. Before turning to the substance of the Panel's reasoning, it is necessary to deal with a specific point made by Mr Desai, by reference to the IOPC's second ground of challenge. Mr Desai argued that either the Panel failed to have regard to the Guidance, or it departed from the Guidance but failed to give reasons for doing so. As I have foreshadowed above, I do not accept this argument.

75. The Panel expressly stated that it had followed the Guidance [16]. Although I accept that an assertion to that effect would not necessarily be a sufficient reason to conclude

that the Panel had regard to the Guidance, I consider that the sanction decision reveals that the Panel at least sought to follow the Guidance as a matter of substance. For example, the Panel referred to the purpose of police misconduct proceedings as set out in paragraph 4.4 of the Guidance [15], and it examined seriousness by reference to the four factors set out in paragraph 4.3 of the Guidance [16-19]. In doing so, the Panel identified specific factors to which the Guidance refers: the undermining of public confidence if the circumstances were known to the public [17], to which paragraph 4.66 of the Guidance refers; the aggravating factors of unlawful discrimination, national concern, and multiple proven allegations and breaches of the Standards [18], each of which are listed under paragraph 4.66 of the Guidance; and the mitigating factors of early admission and limited duration [19], each of which are listed under paragraph 4.18 of the Guidance. The Panel's reference to "double-counting" [20] would appear to be a reference to paragraph 4.15 of the Guidance. Further, there is no suggestion in the sanction decision that the Panel considered that it was consciously departing from the Guidance.

76. In light of the above, I consider that the Panel did have regard to the Guidance, and that it at least sought to follow Guidance and considered that it was doing so. I do not consider that this is a case in which the Panel consciously intended to depart form the Guidance. Nevertheless, it remains necessary to consider the question whether, bearing in mind the advice in the Guidance, the Panel adequately explained why it reached the sanction decision.

77. On this question, Mr Desai recognised that the Panel was not required to express its reasons in any prescribed structured form, and that it was not necessarily required to consider each of the factors referred to in paragraph 4.3 of the Guidance separately or

in sequence (see paragraph 49 above). However, he emphasised that neither was it sufficient for the Panel simply to refer to the factors enumerated in the Guidance; a "tick box" exercise would not suffice. The Panel was required to show by way of its reasons that it had adopted the correct approach to the assessment of seriousness as a matter of substance (see the *West Midlands Police* case, para 53 *per* Eady J).

78. Mr Desai identified what he said were a number of problems with the Panel's reasoning as expressed in the sanction decision, but as I see it they were all aspects of what I consider to be the fundamental problem with the sanction decision: the sanction decision does not explain what conclusion the Panel reached on the question of seriousness, or how the Panel reached that conclusion, and the sanction decision does not explain why the Panel considered that the sanction of a final written warning of two years' duration most appropriately fulfilled the purpose of imposing sanctions in the context of Mr Buckett's case.

79. Although the Panel expressly referred to each of the four factors that the Guidance advises should be considered when assessing seriousness (see paragraph 49 above), the sanction decision does not explain how the Panel evaluated any of those factors. In relation to culpability, the sanction decision lists five matters (a pattern of behaviour, excessive drinking, a racist comment, the undirected nature of the comment, and the fact that the comment was borne from frustration) [16]. However, it is not possible to tell from the sanction decision how the Panel evaluated those matters. For example, although the Panel referred to a "pattern of behaviour", it is not possible to tell whether it considered that the fact that there was a pattern of behaviour increased or reduced overall culpability and, if so, how. Further, and more importantly, the sanction decision does not explain what conclusion the Panel reached

on the issue of culpability; there is no statement to the effect that the Panel considered that there was, for example, a high level of culpability or a low level of culpability.

80. Similarly, in relation to harm, although the Panel referred to the type of harm that it concluded had been caused by Mr Buckett's misconduct [17], the sanction decision does not reveal what conclusion the Panel reached on the degree of harm that had arisen. Again, it is not possible to tell whether the Panel thought that there was, for example, a high degree of harm or a low degree of harm.

81. In relation to mitigating and aggravating factors, the sanction decision lists the factors to which the Panel had regard [18, 19], but it does not explain its assessment of those factors. In particular, the sanction decision does not explain the extent to which it thought that those factors, whether taken individually or cumulatively, mitigated or aggravated Mr Buckett's misconduct.

82. Ultimately, and most importantly, there is no explanation in the sanction decision as to what overall conclusion the Panel reached on the issue of seriousness, or why. In particular, there is nothing in the sanction decision which indicates how the Panel weighed the four factors to which it referred or which explains whether the Panel concluded that, for example, Mr Buckett's misconduct was of a high or low level of seriousness.

83. Mr Desai also argued that these difficulties with the sanction decision were exacerbated by the fact that the Panel did not address each of the four factors separately in relation to each of the two elements of misconduct. In my view, the Panel was not necessarily required to take each allegation separately when assessing seriousness; it appears from the sanction decision that the Panel approached Mr Buckett's misconduct as constituting a course of conduct ("a pattern of behaviour"

[16]), and I consider that it was open to the Panel to address that misconduct compendiously; the Panel had heard the evidence and it was in the best position to judge how Mr Buckett's misconduct should be considered, and in the sanction decision it concluded that it was Mr Buckett's misconduct "in totality" that constituted gross misconduct [14]. However, if the Panel were to adopt the approach of addressing the misconduct compendiously, it had to explain its conclusions in relation to seriousness by reference to Mr Buckett's overall course of conduct, and there is no such explanation in the sanction decision. Indeed, as Mr Desai pointed out, there is in the sanction decision no explanation as to how the Panel addressed the interrelationship between the two allegations.

84. I accept Mr Desai's further submission that the absence of any explanation on these points is even more striking when one considers it in the context that the Panel eventually settled on the least serious sanction that was available to it. It would appear to be implicit in the Panel's decision to impose a final written warning of two years' duration that the Panel concluded that Mr Buckett's misconduct was very much at the least serious end of the spectrum of gross misconduct. However, if that was indeed the Panel's conclusion, it is not set out or explained in the sanction decision.

85. Mr Desai argued that Mr Buckett's misconduct fell into the "especially serious" categories of misconduct, and that the Panel was required to explain whether it treated his misconduct as such and, if not, why not. In this respect, Mr Desai argued that Mr Buckett's misconduct fell within the passages in the Guidance to which I have referred in paragraph 62 above. In particular, he submitted that that the use of racist language by Mr Buckett brought the case within the "discrimination" category of misconduct, and he relied in particular on paragraph 4.45 of the Guidance

("[d]iscrimination towards persons on the basis of any protected characteristic is never acceptable and always serious"). Mr Desai also argued that Mr Buckett's use of his warrant card brought the case within the "abuse of position of trust or authority" category and/or the "operational dishonesty, impropriety or corruption" category (see the reference to improper influence in paragraph 4.32 of the Guidance). On this specific point, I have some sympathy with the Panel because, as I explain below, the case that was put to it on behalf of the Chief Constable did not rely on an argument that Mr Buckett's misconduct was inherently especially serious, and the Panel was not referred to the relevant sections of the Guidance. Nevertheless, I consider that, whether by reference to the Guidance or otherwise, it was obvious (and would or should have been obvious to the Panel) that at the very least Mr Buckett's misconduct potentially fell to be treated as serious.

86. However, when one looks to the sanction decision to discover why the Panel treated the misconduct as other than serious (if that is what it did), it is not possible to do so. The only matters to which the sanction decision refers which might potentially reduce the level of seriousness of the misconduct are the finding that Mr Buckett's racist comment was "undirected, and borne from frustration" [16], the fact that Mr Buckett admitted the first allegation [19], and the finding that the racist comment "was of very limited duration" [19]. All of the other matters to which the sanction decision refers would appear to be matters that would, if anything, increase the level of seriousness of the misconduct. Despite this, and despite the fact that Mr Buckett's misconduct potentially fell to be treated as serious, there is no explanation as to why these matters taken together reduced the seriousness of the misconduct (if that was indeed the Panel's conclusion).

87. This gives rise to an additional problem with the adequacy of the Panel's reasons. I have held that the Panel had regard to the Guidance and at least intended to apply it. However, the points made by Mr Desai gives rise to at least the possibility that the Panel fell into error in its application of the Guidance. However, given the paucity of reasons in the sanction decision, it is simply not possible to discern whether this might be the case.

88. The further fundamental problem with the sanction decision is the fact that it does not explain why the Panel considered that the sanction of a final written warning of two years' duration most appropriately fulfilled the purpose of imposing sanctions in the context of Mr Buckett's case. Although the Panel identified the purposes of imposing sanctions [15], there is nothing in the sanction decision that explains why a final written warning of two years' duration was appropriate to fulfil those purposes. In particular, there is nothing to explain how the Panel put the purposes that it identified at the outset of the sanction decision [15] together with the matters referred to in the subsequent four paragraphs [16-19] so as to reach the conclusion set out in the final paragraph of the sanction decision [20]. I note that in *R (Commissioner of Police of the Metropolis) v Police Conduct Panel* [2022] EWHC 2857 (Admin), Mostyn J described a similar lacuna in the reasoning of a misconduct panel as a "fatal flaw" in the reasons (see para 75).

89. Regrettably, for the reasons set out above, I consider that the sanction decision falls short of the standard of reasons that were required. In my view, the Panel sought to explain its thinking by way of exactly the type of "tick box" exercise that the case law indicates is insufficient. In essence, the sanction decision set out little more than what Mr Desai accurately described as a "cursory checklist" of matters to which the Panel

had had regard; it did not explain how the Panel had taken those matters into account, and it did not explain – even in outline terms – why the Panel reached its ultimate conclusion.

90. For the avoidance of doubt, I do not consider that the failure to give adequate reasons is explicable, or can be excused by, the fact that the arguments that Mr Desai advanced before me were not advanced in the same way to the Panel. As I have explained, the inadequacies in the Panel's reasons emerge from a consideration of the sanction decision on its own terms, regardless of how the case was advanced to the Panel.

91. Accordingly, I have concluded that the Panel failed to give adequate reasons for the sanction decision. For that reason, the sanction decision is unlawful.

92. For completeness, I should note that Mr Desai identified what he said was an additional problem with the Panel's reasons. He pointed out that, on the Panel's findings, it must have concluded that Mr Buckett had dishonestly denied using racist language, and that the sanction decision did not record how, if at all, that matter had featured in the Panel's decision. In this respect, Mr Desai relied on *R (Chief Constable of the British Transport Police) v Police Misconduct Panel* [2023] EWHC 589 (Admin). In that case, an off-duty police officer approached a lone female pedestrian, told her that she was "too curvy to be Asian", showed her his warrant card to demonstrate that he was a police officer, stood close to her and showed her photographs of him at the gym, took her telephone number, asked for a hug, and then drove alongside her at slow speed. The police officer had denied all of the allegations against him, but a police misconduct panel found that they were proven. Having done so, the panel imposed the sanction of a final written warning. Charles Bagot KC,

sitting as a Deputy High Court Judge, held that there had been "a concerted effort by the officer to twist matters, for exculpatory purposes, by portraying himself as the victim" which constituted "sustained and extensive untruthfulness and lack of integrity" on the part of the officer. Mr Bagot KC held that the failure of the panel to consider this was one of the reasons why its decision as to sanction was flawed as a matter of substance (see para 129).

93. It is in this context that the speech of Lord Brown in *South Bucks* is of particular assistance. Lord Brown emphasised that, in order to give adequate reasons, generally a decision-maker is required to explain its conclusions only on the main issues in dispute. In her closing submissions to the Panel, Ms Oborne on behalf of the Chief Constable argued that Mr Buckett's account of what had happened on the night of 3 December 2021 was not credible (although I note that she observed that, in his evidence to the Panel, Mr Buckett no longer disputed using racist language, but merely said that he could not recall using it). However, when she came to make her submissions on sanction, she did not make any point about Mr Buckett having been dishonest in the course of the misconduct proceedings. This is perhaps understandable in light of the fact that, in the outcome decision, the Panel expressly disavowed any finding that Mr Buckett had breached that part of the Standards which relates to honesty [14]. The case law recognises that the fact that a misconduct panel disbelieves the evidence of a police officer is not invariably a matter that must be treated as an aggravating factor (see the *O'Connor* case, para 44 *per* Swift J) and, in circumstances in which the point was not mentioned by either of the parties before the Panel, I do not consider that it can be characterised as one of the main issues on which the Panel was required to explain its conclusions. Accordingly, I would not have been minded to decide that the Panel's failure to explain how it had approached this issue in itself

constituted a failure to give adequate reasons. In the event, however, nothing turns on this point.

H. WAS IMMEDIATE DISMISSAL THE ONLY RATIONAL DECISION OPEN TO THE PANEL?

94. Mr Desai mounted a sustained attack on the substance of the Panel's decision, arguing that the only decision that was rationally open to the Panel was a decision to impose the sanction of immediate dismissal.

95. Mr Desai correctly accepted that it was not open to the IOPC to use its claim for judicial review as a vehicle to advance an argument that the sanction decision was unduly lenient, and that in order to succeed on this ground he had to go further and show that anything other than dismissal was outside the range of reasonable decisions that were open to the Panel (see the *Salter* case, para 22 *per* Maurice Kay LJ). Mr Desai also correctly accepted that, subject to his point about the effect of the Guidance, the Court should afford the Panel a broad area of discretionary judgment; pursuant to the Regulations, the Panel included individuals with experience and expertise in matters relevant to the decision that the Panel had to take, and the Panel had the advantage of hearing the evidence and, in particular, seeing and hearing from Mr Buckett (see the *Thames Valley Police* case, para 59 *per* Jay J and, by analogy, the *Salter* case, para 33 *per* Burnett J).

96. Nevertheless, Mr Desai argued that what constituted a reasonable range of decisions was circumscribed by the Guidance. As I have already explained, he argued that paragraphs 4.13 and 4.14 of the Guidance provide for a presumption in favour of

dismissal in cases involving misconduct that falls into the "especially serious" categories identified in the Guidance. I have rejected that argument, but Mr Desai made the additional, and valid, point that, even if the Guidance does not go as far as he contended in this respect, it indubitably provides that that misconduct falling into those categories is likely to be especially serious in terms of culpability and he argued that, on the facts of Mr Buckett's case, the misconduct was indeed especially serious.

97. In this respect, Mr Desai's starting point was that, by deploying his warrant card Mr Buckett had in effect put himself on duty, and that therefore his misconduct was committed at a time when he was acting as a police officer. Mr Desai argued that this increased the level of seriousness of the misconduct. As I have mentioned, Mr Desai submitted that both elements of Mr Buckett's misconduct fell within the passages from the Guidance to which I have referred in paragraphs 62 above, that as a result there was a high level of culpability and harm, and it was therefore a case that fell within the scope of what was described by Jay J in *Thames Valley Police* as the "prediction" set out in paragraph 4.74 of the Guidance that "dismissal is likely to follow" (see the *Thames Valley Police* case, para 62).

98. Mr Desai argued that, on the Panel's findings of fact, Mr Buckett's use of racist language was deliberately racist conduct, and that it was accompanied by an improper attempt to use his warrant card and aggressive behaviour. He submitted that this put the misconduct at what he referred to as the "top end" of the "especially serious" category of misconduct, and that the position was further exacerbated by Mr Buckett's denial of the second allegation. Mr Desai also argued that the matters that the Panel appears to have taken into account as reducing the seriousness of Mr Buckett's misconduct (see paragraph 86 above) were not matters that could rationally

be treated as reducing seriousness. He argued that it was wrong to characterise Mr Buckett's use of racist language as "undirected"; although the comment was not heard by Mr Olaleye, it was clearly directed at Mr Olaleye in the sense that it was about him. Mr Desai submitted that Mr Buckett's frustration could not justify or explain his use of racist language, and the fact that racist language was used for only a short period of time could not reduce the seriousness of it being used in the first place.

99. Mr Desai drew my attention to other cases in this Court which concerned misconduct proceedings relating to the use of racist language by a police officer. In *R (Chief Constable of Northumbria Police) v Police Appeals Tribunal* [2019] EWHC 3352 (Admin), a misconduct panel had decided that a police officer who had used what Freedman J described as "a whole volley of expressions…vile, offensive and racist language" should be dismissed, but that decision was overturned by the Police Appeals Tribunal. Freedman J quashed the Tribunal's decision, on the basis that the only sanction that was rationally available was that of dismissal, and he adopted the original misconduct panel's reasoning that the racist and offensive language used by the police officer could not be tolerated in the police force, and that if the officer were to remain in post that would seriously undermine trust and confidence in the police (see paras 57-62). In reaching this conclusion, Freedman J expressly contrasted the volley of racist language used in that case with "a lapse of one word" (see paras 57-58).

100. In the *Chief Constable of West Midlands Police* case, a police officer was recorded making racist comments and using racist stereotypes about his colleagues, and a misconduct panel decided that a final written warning should be imposed by way of sanction. Eady J quashed that decision, because the misconduct panel had failed

properly to follow the approach laid down by the Guidance and because certain of the findings made by the panel were irrational (see paras 56-65). However, it does not appear that Eady J was asked to determine whether the only sanction that was rationally open to the misconduct panel was one of immediate dismissal.

101. In *R (Chief Constable of Avon and Somerset Police) v Police Misconduct Tribunal* [2021] EWHC 1125 (Admin), a police officer used a racially offensive term about her partner. The Police Misconduct Tribunal found that officer in question had been able to provide a plausible explanation as to why she had used the term that she had, and that she had showed real insight into her actions. In circumstances in which the officer was also able to put forward impressive character references, the Tribunal concluded that the imposition of a final written warning would be sufficient to maintain trust and confidence in the police. Steyn J dismissed a rationality challenge to the Tribunal's findings of fact (see paras 100-111) and, as a result, a rationality challenge to the decision on sanction fell away (see para 116). In that context, Steyn J observed that the circumstances of the case before her were "several steps removed" from those considered by Freedman J in *Northumbria Police* (see para 115).

102. In the *Chief Constable of the British Transport Police* case, the facts of which I have summarised above, the misconduct panel imposed a final written warning as the sanction, but Mr Bagot KC held that the only sanction that was rationally open to the misconduct panel was that of dismissal (see paras 105-120). Mr Bagot KC referred to the Guidance and held that the panel had failed to appreciate the seriousness and significance of the officer's misconduct, and he held that the Panel's failure in this respect had the consequence that it failed properly to consider the impact of the officer's misconduct on public confidence (see para 117).

103. Mr Desai expressly disavowed any claim to calibrate Mr Buckett's misconduct with the misconduct that was considered in these cases, but he did seek to distinguish Mr Buckett's case from the facts that were considered by Steyn J in the *Chief Constable of Avon and Somerset Police* case (by reason of the fact that Mr Buckett did not accept or show insight into his use of racist language), and he sought to draw a parallel between Mr Buckett's case and the facts considered by Mr Bagot KC in the *Chief Constable of British Transport Police* case (because Mr Buckett had similarly identified himself as a police officer). In my view, given the very different and varying factual circumstances of the other cases to which Mr Desai referred, he was right not to seek to calibrate Mr Buckett's misconduct against the misconduct considered in those cases, and an attempt to compare the facts of Mr Buckett's case with those considered in the case law would not be a fruitful exercise; each case must be considered on its own facts.

104. Insofar as Mr Desai sought to draw from those cases a general principle that the use of racist language by a police officer invariably seriously undermines public trust and confidence in the police, I think that some caution is required. I unquestioningly accept that the use of racist language is abhorrent, and that its use by a police officer undermines trust and confidence in the police. However, in my view the cases to which Mr Desai referred me illuminate an important point in this context. I have explained above how the Guidance indicates that it is always necessary to consider the particular facts of a specific case. I consider that such an approach is reflected in the case law, which reveals that one of the reasons why a case-specific approach is necessary is because the extent to which the use of racist language by a police officer undermines public trust and confidence in the police depends on the circumstances. The *Chief Constable of Avon and Somerset Police* is perhaps the most striking

example of this; despite the use of a term that could not be anything other than racially offensive, a consideration of the wider circumstances indicated that public trust and confidence would not be undermined to such a degree that dismissal was the only rational response.

105. Nevertheless, there is otherwise considerable force in Mr Desai's arguments. However, I remind myself that on this aspect of the case I must not fall into the trap of substituting my own decision for that of the Panel; the question for me is whether, bearing in mind the broad area of discretionary judgement that should be afforded to the decision of a misconduct panel, the only rational decision that was open to the Panel on the facts of Mr Buckett's case was to impose the sanction of immediate dismissal.

106. In this respect, I consider that the point made by the Chair in the pre-action correspondence has considerable purchase. The arguments that Mr Desai advanced before me were far more detailed and more wide-ranging than those which were advanced to the Panel on behalf of the Chief Constable. That is not to be taken to be any criticism of Ms Oborne; there were no doubt good reasons for her to adopt the approach that she did, which was no doubt at least in part influenced by her feel as to the way in which the substantive case had played out before the Panel, and presumably she was acting on instructions. However, when considering whether immediate dismissal was the only sanction that was rationally open to the Panel, I consider that it is important to consider how the case was put to it and, in particular, the approach to the facts that Ms Oborne adopted in her submissions on behalf of the Chief Constable.

107. It appears to have been common ground throughout the misconduct proceedings that the second allegation against Mr Buckett was the more serious of the two, and this approach was reflected in Mr Desai's submissions (although, as I have explained, he was at pains to stress the interrelationship between the two allegations). I have summarised Ms Oborne's submissions above, and in my view the key point that emerges is that, unlike Mr Desai, Ms Oborne did not argue that Mr Buckett's use of racist language was inherently so serious that it merited dismissal in itself; rather, the argument that she advanced was that it might reflect underlying racist attitudes on the part of Mr Buckett and, if he did have such attitudes, he would not be able properly to deal with members of the public or be an effective police officer, and he should be dismissed for that reason.

108. In consequence, it seems to me that the way that Ms Oborne put the case to the Panel was subtly, but materially, different from the way in which Mr Desai put the case before me. In particular, Ms Oborne's submissions were directed at Mr Buckett's general character and the consequences of him being of a certain general character. It seems to me that this is a different argument from Mr Desai's argument that, on a proper application of the Guidance, Mr Buckett's misconduct was inherently "especially serious" such that in itself it merited immediate dismissal. Indeed, in at least one respect it seems to me that Ms Oborne's submissions were potentially inconsistent with Mr Desai's argument, in that she accepted that the impact of Mr Buckett's use of racist language was (at least directly) "low". On Mr Desai's argument, the harm, in the form of the adverse impact on public trust and confidence in the police, is at the most serious end of the spectrum.

109. I was not shown any authority which considers whether the role of a misconduct panel is to adjudicate on a dispute between the appropriate authority and police officer, or whether it acts in a more inquisitorial role, and Mr Desai did not address me on the circumstances in which a misconduct panel would be expected to go beyond or depart from the case that has been presented to it (or the implications for procedural fairness of it doing so). Further, subject to the point to which I refer in the following paragraph, Mr Desai did not in his submissions address me on Ms Oborne's arguments or why, in light of those submissions, the Panel was required to go beyond her arguments and itself to formulate the different case that Mr Desai has advanced before me.

110. Mr Desai did, however, submit that, no matter how the case was put to the Panel by the Chief Constable, the Panel should have followed the approach laid down by the Guidance, and the fact that particular parts of the Guidance were not relied on by the Chief Constable does not excuse a failure to do so on the part of the Panel. However, this submission takes matters only so far. I have explained above that the Guidance generally envisages a case-specific approach, and it seems to me that the applicability of the parts of the Guidance on which Mr Desai particularly relied depends to a large extent on how one approaches the facts of the case to which they might apply. In front of the Panel, Ms Oborne did not approach the facts in the same way that Mr Desai now approaches them and, on the way that she put the case, the relevant parts of the Guidance were not applicable in the way that they would be on Mr Desai's approach to the facts.

111. In light of the above, I am not persuaded that it was irrational for the Panel to proceed on the basis of the case that was pressed on them by counsel for the Chief Constable,

and that the only rational approach that was open to the Panel was to go beyond or to depart from that case in the manner now urged upon me by Mr Desai.

112. As I have explained, Mr Desai did not address me on the substance of the arguments advanced to the Panel by Ms Oborne and Mr Lewis. However, having considered those arguments, I do not consider that the only conclusion that was rationally open to the Panel was to accept the case as put by Ms Oborne. Mr Lewis's response to Ms Oborne's submission was to the effect that there was no other evidence of Mr Buckett harbouring racist attitudes, and that the testimonials demonstrated the opposite. On the face of it, this might have provided an answer to Ms Oborne's argument about Mr Buckett's general character and, in my view, it would not have been irrational for the Panel to accept the points made by Mr Lewis.

113. Accordingly, I do not consider that, bearing in mind the way that the parties' respective cases were put before the Panel, the only decision that was rationally open to the Panel was a decision that Mr Buckett should be dismissed with immediate effect.

I. SHOULD I SUBSTITUTE MY OWN DECISION?

114. Mr Desai argued that, if I were to decide that the sanction decision was unlawful (as I have done) and I were to quash it, I should substitute for the sanction decision my own decision that Mr Buckett should be dismissed with immediate effect, pursuant to s 31(5)(b) of the Senior Courts Act 1981 ("the 1981 Act") and CPR 54.19(2)(b) (see also paragraph 12.3.3 of the Administrative Court Judicial Review Guide 2024). In

this respect, he relied on essentially the same arguments as those which I have summarised above.

115. Insofar as is relevant, section 31 of the 1981 Act provides as follows:

> "(5) If, on an application for judicial review, the High Court makes a quashing order in respect of the decision to which the application relates, it may in addition—
>
> (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or
>
> (b) substitute its own decision for the decision in question.
>
> (5A) But the power conferred by subsection (5)(b) is exercisable only if—
>
> (a) the decision in question was made by a court or tribunal,
>
> (b) the quashing order is made on the ground that there has been an error of law, and
>
> (c) without the error, there would have been only one decision which the court or tribunal could have reached."

116. The effect of s 31(5A)(a) of the 1981 Act is that the Court's power to substitute its decision for that of the primary decision-maker arises only if the decision-maker in question was "a court or tribunal". Although the Court substituted its own decision for that of a misconduct panel in the *British Transport Police* case (see para 155 *per* Charles Bagot KC), in *R (Commissioner of Police for the Metropolis) v Police*

Medical Appeal Board [2020] EWHC 345 (Admin), para 72 *per* Peter Marquand, it was held that a police medical appeal board was not a court or tribunal for the purposes of s 31(5A). In consequence, Mr Desai fairly recognised that there may be some doubt as to whether a police misconduct panel is a court or tribunal in respect of which the s 31(5) power may be exercised. Mr Desai indicated that, if it were to prove necessary to do so, he would make further submissions on this point when he made any submissions on what would be the appropriate remedy in light of my decision.

117. However, it seems to me that s 31(5A) of the 1981 Act potentially places another obstacle in the way of the IOPC's proposed course of action. By virtue of s 31(5A)(c), the High Court may substitute its own decision for that of a court or tribunal only if, without the error of law that gave rise to the quashing order, there would have been only one decision that the court or tribunal could have reached. On the face of it, s 31(5A)(c) is backward-looking, in that it requires the Court to consider the counterfactual of what the court or tribunal's decision should have been at the point at which it took the relevant decision, had it not committed the relevant error of law. In my view, s 31(5A)(c) does not involve the Court looking forward to the point at which the court or tribunal would in due course reconsider the decision that has been quashed. On that basis, in the present case the essential question posed by s 31(5A)(c) would be whether the only decision that the Panel could rationally have reached, at the point at which it took the sanction decision, was a decision to dismiss Mr Buckett with immediate effect. I have already answered that question in the negative, and therefore I consider that the power to substitute my decision does not arise.

118. Nevertheless, in recognition of the fact that I did not hear any submissions on s 31(5A)(c) of the 1981 Act, and the fact that I was not referred to any authority on it,

in case I am wrong about its effect, I have considered the question whether, if the matter were remitted to the Panel, there would at that stage be only one decision that the Panel could rationally reach. This is a different question to that which I have addressed in paragraphs 94 to 113 above, in that it requires me to look forward and consider what approach the Panel would adopt in the future. I note that the Divisional Court appears to have asked itself a similar question, although without express reference to s 31 of the 1981 Act, in *R (Holloway) v Harrow Crown Court* [2019] EWHC 1731 (Admin), [2020] 1 Cr App R 8 (p 171), para 54 *per* Males LJ.

119. In this context, it seems to me that the points that I have made in paragraph 95 above apply with at least equal force. Further, because the exercise that I am engaged in is forward-looking, an additional layer of uncertainty is injected into the exercise, in that in order to consider what decision or decisions would be rationally open to the Panel, I would need to hypothesise as to the circumstances in which the Panel would take its decision.

120. Ultimately, notwithstanding the forceful arguments of Mr Desai that I have summarised above, I am unable to conclude that, on a remittal, the only decision that would be rationally open to the Panel would be a decision that Mr Buckett should be dismissed with immediate effect.

121. It seems to me that the starting point is the fact that I cannot assume that, on a remittal, the Chief Constable would advance to the Panel arguments that are materially the same as those which Mr Desai advanced to me. An unfortunate feature of this case is the fact that the IOPC has in effect stepped in after the event to mount a more sustained case in favour of immediate dismissal than that which was advanced by the Chief Constable before the Panel. I repeat the point that nothing in this

judgment should be taken to be a criticism of Ms Oborne, and equally I do not criticise the IOPC; although the IOPC sent an observer to the hearing before the Panel, it was not otherwise represented. However, it would primarily be for the Chief Constable to argue the case on sanction on any remittal. As I have noted above, there might have been good reasons for the Chief Constable to make the submissions on sanction that he did (and to forbear from making other submissions), and I cannot assume that on a remittal the Chief Constable would in effect adopt the IOPC's arguments.

122. Further, even if the Chief Constable were in effect to adopt the IOPC's arguments, I do not know what counter-arguments might be advanced on behalf of Mr Buckett. I have considered the transcript of the submissions on sanction that Mr Lewis made to the Panel, as summarised above, but as I have explained the arguments that Mr Lewis was seeking to meet were materially different from the arguments that have been advanced by Mr Desai before me, and I do not know what answers to Mr Desai's arguments might be advanced on behalf of Mr Buckett. I recognise that Mr Buckett had an opportunity to advance any arguments in response before this Court, and that he has eschewed the opportunity to do so. However, I do not know why Mr Buckett has played no part in these proceedings, and I do not think that I can safely assume that the reason is that noting material could be said on his behalf in response to the IOPC's arguments.

123. In addition, I do not have available to me all of the documentation that would be considered by the Panel on a remittal. First, the Regulations require that before reaching a fresh decision on sanction, the Panel would have to consider Mr Buckett's record of police service (see reg 42(14)(a)). There is in the documents that were

provided to me a single-page document which is described in an index as Mr Buckett's "full staff history", but I do not know if that document constitutes his record of police service within the meaning of the Regulations (the expression is not defined by reg 2(1)). In any event, even if that document were Mr Buckett's record of police service, I did not receive any submissions as to its significance or as to how it should be taken into account. Secondly, I note from the transcript of Mr Lewis's submissions on sanction that Mr Buckett relied on ten testimonials, the majority of which were apparently provided by his former colleagues in the military. Those testimonials are not in evidence before me, and therefore I am unable to assess what the Panel might make of them on any remittal.

124. Mr Desai's essential answer to points such as these is that the IOPC's arguments are so overwhelming that they are in effect unanswerable, and there is nothing that could be said on Mr Buckett's behalf on any remittal that could dissuade a rational misconduct panel from imposing anything other than the sanction of immediate dismissal. In order to accept that argument, I would have to conclude that the only rational conclusion open to the Panel on remittal would be that Mr Buckett's misconduct was so serious, and its impact on public trust and confidence in the police so great, that nothing could mitigate it.

125. However, there are arguments that could be advanced on Mr Buckett's behalf to the effect that his misconduct was not at the most serious end of the spectrum of possible misconduct of the relevant types. I have summarised Mr Lewis's submissions to the Panel above, but the main points bear repeating. They were as follows. In relation to the first allegation, Mr Buckett did not use his warrant card in an attempt to coerce another; he used it in order to demonstrate that he could be trusted. Further, Mr

Buckett accepted responsibility for the use of his warrant card at the earliest opportunity, and has accepted throughout that he breached the Standards. In relation to the second allegation, Mr Buckett's use of racist language was a one-off event, and he did not commit any other acts of discriminatory behaviour or otherwise behave in a way that was demeaning to Mr Olaleye; he did not use racist language to Mr Olaleye's (or to anyone else's) face, and it was used at a time when Mr Buckett was frustrated; there was no evidence that Mr Buckett harboured racist attitudes; on the contrary, the evidence from his testimonials speak to his ability to deal appropriately with individuals of different races and from different cultures; and Mr Buckett was a good police officer who had much to offer the police service.

126. It appears from the sanction decision that the Panel may have accepted that there was merit in at least some of the points made by Mr Lewis (although, as I have explained, it is not clear how the Panel evaluated those points when reaching its decision). For example, it seems that the Panel's reference to Mr Buckett's racist language being "undirected" [16] may be a reference to Mr Lewis's submission that Mr Buckett did not use that language to Mr Olaleye's face, a submission that was presumably based on the Panel's finding of fact that Mr Buckett's comments were largely said to himself [12-13]. Similarly, it seems that the reference to the use of racist language being of "very limited duration" [19] may in fact be a reference to Mr Lewis's submission that the incident was a one-off event (in this context, I note that paragraph 4.81 of the Guidance, which lists certain mitigating factors, refers compendiously to "misconduct confined to a single episode or brief duration", and it may be that the Panel intended to refer to the fact that there was only a single episode of racist language).

127. It would be a matter for the Panel to reconsider whether those arguments have any merit, but I cannot rule out at least the possibility that these arguments, or any other arguments that might in due course be advanced on Mr Buckett's behalf, would persuade a rational misconduct panel that Mr Buckett's misconduct was not, as Mr Desai argued, at the most serious end of the spectrum.

128. I recognise that the fact that misconduct might not fall at the most serious end of the spectrum of possible misconduct does not in itself mean that it does not inevitably warrant the sanction of dismissal; apart from in the most extreme cases, it will usually be possible to imagine more serious examples of the type of misconduct that is under consideration. Nevertheless, it seems to me that it leaves open at least the possibility that a rational misconduct panel could conclude that Mr Buckett's misconduct was less serious than the IOPC argues it to be.

129. Given the possibility that the Panel might reach such a conclusion, it is very difficult for me to predict what view the Panel might take of the impact of the misconduct on public trust and confidence in the police. In particular, in light of the fact that I do not know what conclusion the Panel might reach in relation to seriousness, I do not think that I can properly conclude that it is inevitable that it would conclude that the impact on public trust and confidence would be so great that nothing could be said that could properly persuade the Panel to impose a sanction other than dismissal. This is particularly so in light of the fact that the assessment of the impact on public trust and confidence is a matter on which the Panel would bring to bear its expertise and its experience, expertise and experience which is not shared by the Court.

130. Ultimately, I consider that, notwithstanding the force of Mr Desai's arguments, there are too many hypotheticals at play for me to be able safely to conclude that, on a

remittal, the only rational decision open to the Panel would be a decision to impose the sanction of immediate dismissal. It follows that, even if I had the power to substitute my own decision for that of the Panel, I would decline to exercise my discretion to do so.

131. By way of conclusion on this point, I should add that I think that my conclusion is consistent with two of the threads that run through public law. First, generally a decision should be taken by the body to which the legislator has allocated the primary decision-making function, and not by the Court, particularly where the body is possessed of institutional competence that the Court does not enjoy. Secondly, the Court should exercise considerable caution before deciding that, in a case in which it has heard only one side of the argument, a particular outcome is inevitable. As Megarry J explained in *John v Rees* [1970] Ch 345, 402:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

J. CONCLUSION AND REMEDY

132. I have concluded that the Panel failed to give adequate reasons for the sanction decision, and therefore that decision was unlawful. Accordingly, the IOPC's claim for judicial review succeeds on ground 1, albeit only in part.

133. In light of this judgment, the IOPC has sought an order quashing the sanction decision and remitting the matter to the Panel for it to take a fresh decision as to sanction. I shall make an order in those terms.

134. Quite properly, the IOPC has not sought its costs against the Panel which, as I have said, did not play any active role in the proceedings. I shall therefore make no order as to costs.