BEFORE: The Police Appeals Tribunal

UNDER THE POLICE TRIBUNAL RULES 2012

Nottingham Police HQ 29/09/2021

Before

LEGALLY QUALIFIED CHAIR MRS NAHIED ASJAD
ASSISTANT CHIEF CONSTABLE KERRIN WILSON
MR STEVE MATTHEWS

Between

EX-PS JONATHAN FLINT

Appellant

and

THE CHIEF CONSTABLE OF NOTTINGHAM

Respondent

Representation:

For the Appellant: Mr Michael Rawlinson, Counsel
For the Respondent: Mr John Beggs QC

INTRODUCTION

1. This is the decision of the Police Appeals Tribunal (PAT) that sat on the 29th of September 2021, following the remittal of this case by The Honourable Mrs Justice Steyn DBE, on the 12th of May 2021, in the High Court. The case was remitted for a fresh decision on sanction to be made.

2. By way of background, the Appellant was dismissed by Nottinghamshire Police for gross misconduct on the 7th of November 2019. This Tribunal heard his appeal against the finding and outcome imposed, on the 5th and 11th of June 2020. Our decision was to allow the Appellant's appeal and we substituted the decision to dismiss with a decision to impose a final written warning.

3. The Respondent brought a claim for judicial review of our decision on the 11th of June 2020. The claim succeeded on two of the grounds advanced one of which was on outcome. This Tribunal was re-convened to decide the issue of outcome only.

OUR ROLE

4. We heard legal arguments from both learned counsel as to what our role and powers were upon remittal.

5. Mr Rawlinson, on behalf of the Claimant, relied upon the High Court authorities of R (on the application of the Chief Constable of Durham) and Police Appeals Tribunal & Cooper [2012] EWHC 2733 (Admin) and R (on the application of the Chief Constable of Cleveland Constabulary v Police Appeals Tribunal v Rukin [2017] EWHC 1286 (Admin).

6. In Cooper, Lord Justice Moses and Mr Justice Hickinbottom, set out the unreasonableness test under Rule 4(4)(a) and stated that the test imposed was not the Wednesbury test, but something less. Lord Justice Moses went on to state at paras. 7 to 9, the following:

> "7. It follows therefore, to my mind, that the test imposed by the rules is not the Wednesbury test but is something less. That does not mean that the appeal tribunal is entitled to substitute its own view for that of the misconduct hearing panel, unless and until it has already reached the view, for example, that the finding was unreasonable. Nor, I should emphasise, is the Police Appeals Tribunal entitled, unless it has already found that the previous decision was unreasonable, to substitute its own approach. It is commonplace to observe that different and opposing conclusions can each be reasonable. The different views as to approach and as to the weight to be given to facts may all of them be reasonable, and different views may be taken as to the relevance of different sets of facts, all of which may be reasonable. The Police Appeals Tribunal is only allowed and permitted to substitute its own views once it has concluded either that the approach was unreasonable, or that the conclusions of fact were unreasonable. None of what I say is revolutionary or new."
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> "8. If authority is required for those propositions, it is to be found in the judgment of Lightman J in a different statutory context, namely that of the Dart Harbour and Navigation Authority Act 1975 in R

(Dart Harbour and Navigational Authority) v Secretary of State for Transport, Local Government and the Regions [2003] EWHC 149 (Admin), and in a number of decisions of Collins J, notable amongst which is his more recent decision in R (Montgomery) v Police Appeals Tribunal and the Commissioner of Police of the Metropolis [2012] EWHC 936 (Admin). In the latter case, Collins J had to consider whether it was permissible for an appeal tribunal to look at fresh documents. He decided that it was; that is not an issue which we are required to determine in this case. "

"9. This case turns on the question whether the Police Appeals Tribunal restricted itself to the permissible approach under rule 4(4)(a), or on the contrary, as the Chief Constable for Durham contends, was guilty of substituting its own findings for those of the misconduct panel without any justifiable basis for reaching the conclusion that the misconduct hearing panel's decision and conclusion was unreasonable."

7. In Rukin, His Honour Judge Saffman, referring to the Cooper decision and R (Williams) v PAT [2016] EWHC 2708 (admin), referred to the principles that could be gleaned from those decisions, stating at para. 52:

"(A) When considering whether a finding by a panel is unreasonable the PAT is not required to find it Wednesbury unreasonable as a prerequisite for overturning the decision of the panel.

(B) The PAT is not entitled to substitute its own view for that of the panel unless and until it has already reached the view for example that the finding may by the panel was unreasonable or that there was another valid basis for appeal as provided by paragraphs 4(4)(b) and/or 4(4)(c) of the Rules.

(C) The PAT is entitled to substitute its own view for that of the panel once it has concluded either that the approach the panel took

was unreasonable or the appeal from the panel's decision is justified under grounds 4(4)(b) or 4(4)(c)

(D) In other words, rule 4 (4) provides a gateway for an appeal. If the appellant gets through the gateway because the PAT find that the decision of the panel was for example, unreasonable or unfair then it is open to the PAT to substitute its own views for those of the panel. Thus, once the gateway is negotiated, the PAT can deal with this matter on a clean slate basis and can make an order dealing with the appellant in any way in which he could have been dealt with by the panel whose decision is appealed. "

8. At paras 114, 116 and 117, His Honour stated:

> "114. It is equally clear from Cooper that once through the gateway into the appeal process, the PAT is not trammelled by the conclusions reached by the panel"
>
> "116 Even if I am wrong in relation to issues surrounding the panel's observations in paragraph 3.8, it is clear that the panel had directed itself that mitigation was irrelevant. On the basis of the authorities, that too appears to have been a misdirection. In that event that was a path through the gateway which opened up to the PAT the right to make its own decisions, unencumbered by the decisions of the panel."
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> "119. Nor do I think that the fact that the PAT may have erred in concluding that the panel made no reference to the HOG is in itself sufficient to impugn the decision of the PAT. The fact is that on the basis of the misdirection is as I have found them, the PAT was properly seized of the appeal and was therefore in a position to reach its own conclusions in respect of it."

9. Mr Rawlinson submitted that as we had allowed the Appellant's appeal under Rule 4(4)(a) and that decision stood following judicial review, then we were 'no longer trammelled or encumbered' by the findings of the Panel and, we were entitled to substitute our own views for that of the Panel, including making our own findings of fact.

10. Mr Beggs QC disagreed with that approach. He submitted that the starting point had to be the decision of Mrs Justice Steyn, and the reasons for remittal as set out in the final paragraph of her judgement:

> "78. It follows that the PAT's decision to remake the sanction stands, but its decision as to sanction must be quashed. This is not a case in which it is possible to conclude that it is highly likely the decision would not have been substantially different had the correct legal approach been applied. Accordingly, it is appropriate to remit this case for a fresh decision as to sanction to be made, on the basis of the Panel's findings on the allegations, save to the extent that the finding in respect of allegation 11 is quashed, applying the structured approach identified in the Guidance on outcomes."

11. Mr Beggs QC submitted that the role of the Tribunal was to consider the sanction on the basis of the Panel's findings on the allegations, except in relation to allegation 11, which had been quashed. Mr Beggs QC's detailed written submissions on this were as follows:

"*8. It is trite law that a first instance tribunal's findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses (as here), are close to being unassailable, see (with emphasis added):*

a. *Southall v GMC [2010] EWCA Civ 407 at [47] per Leveson LJ: "First, as a matter of general law, it is very well established that findings of primary fact, particularly iffounded upon an assessment of the credibility of witnesses, are virtually unassailable (see Benmax v Austin Motor Co Ltd [1955] AC 370); more recently, the test has been put that an appellant must establish that the fact-finder was plainly wrong (per Stuart-Smith LJ in National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1995] 1 Lloyd's Rep 455 at 458).*

b. *Langsam v Beachcroft LLP [2012] EWCA Civ 1230 at [72] per Arden LJ: "Both parties made submissions on the test to be applied on an appeal from a judge's findings of fact. It*

is well established that, where a finding turns on the judge's assessmentof the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate courtto overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into accountthat the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong andreached a conclusion which on the evidence he was not entitled to reach. In othercases, where the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding (see Datec Electronic Holdings v United Parcels Service [2007] 1 WLR 1325 at [46] per Lord Mance)."

c. *Kalma v African Minerals Ltd [2020] EWCA Civ 144 at [48] per Coulson LJ: "It is unnecessary to set out in detail the proper approach of an appellate court to appeals that raise issues about the first instance judge's findings of fact. The Supreme Court has regularly explained that, unless a critical finding of fact has nobasis in the evidence, or is based on a demonstrable misunderstanding of relevantevidence, or a failure to consider such evidence, an appellate court will interferewith the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified: see Henderson v FoxworthInvestments Limited [2014] UK SC 41, Lord Reid at paragraph 67; Volcafe Ltd v CiaSud Americana de Vapores SA [2018] UKSC 61, Lord Sumption. This applies equallyto findings of primary fact and any inferences to be drawn from them: see Staechelin v ACLBDD Holdings & Others [2019] All ER 429".*

9 So (as Mrs Justice Steyn stressed) the PAT must approach sanction on the panel's findings of fact, absent allegation 11 and applying the Guidance on seriousness."

10 Having considered both arguments, we agree with the approach advocated by Mr Beggs QC. We say this for the following reasons:

11 Firstly, this is a remittal hearing and not an appeal hearing. The authorities that Mr Rawlinson relies upon, all relate to the PAT's powers upon appeal. Neither Collins nor Rukin relate to a remittal hearing.

12 Secondly, Mrs Justice Steyn expressly stated that our new decision should be on the findings made by the Panel in relation to the remaining allegations and not in relation to allegation 11 which had been quashed. (our emphasis). Our decision under rule 4(4)(a) and which stood following judicial review, was in relation to the Panel's findings regarding allegation 11. As that allegation was quashed there is no gateway that allows us to revisit findings of fact made in relation to the other allegations that were not found to be unreasonable. We find that that conclusion reflects what Mrs Justice Steyn stated in her conclusion – namely that this Tribunal should determine sanction on the basis of the Panel's findings, except in relation to allegation 11.

13 Thirdly, whilst we as the Tribunal watched the body worn footage and read the witness statements, as part of our review process, we did not hear evidence from the witnesses or assess their credibility so as to make findings of fact. The Panel, on the other hand did do so and we accept that that they are the primary arbiter's of fact.

14 Finally, had Mrs Justice Steyn intended for this Tribunal to revisit the Panel's findings of fact then that would be clear from the Honourable Judge's decision. But at no point does Mrs Justice Steyn state that that was what this Tribunal must do – either in the body of the decision or within the conclusion. Indeed, Mrs Justice Steyn referred to the findings of fact made by the Panel, when she upheld the Respondent's challenge to our decision under rule 4(4)(c) (unfairness), as shown in paragraph 56 of the judgement:

> 56. The Panel made it clear that their conclusions were based on the evidence they themselves heard:
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> "Firstly, the observation that Sgt Flint has not been dealt with in the same way as PC Elliott. We note that the role of the two officers was different, their rank was different, their role profiles within the police were different, their actions were different, and their attitudes were different. Further, these proceedings against Sgt Flint are as a result of an IOPC recommendation. This is a matter of public law. This Panel cannot sit as an appellate body of their decisions. We can only deal with what is presented to us. It is not our role in these circumstances to go behind the decisions that brought that case here.

Secondly, we note the findings of the regulation 36 misconduct meeting that PC Elliott had, as presented to us as additional evidence, and it has been helpful to see some of what was said during that process. Nevertheless, we would like to make it clear that we in no way consider ourselves bound by the factual findings of that process."

15 We find therefore that the Panel's findings of fact in relation to the allegations stand, but we are entitled to form our own view on the question of sanction. There was no dispute between Counsel about the latter approach.

FACTS FOUND BY PANEL

16 The particulars of the misconduct set out in the Regulation 21 notice were as follows:

1. You instructed Ms Bowen to let you into the property to search for the parcel which Mr Allen had said was taken from his car and threatened to use force to enter if she did not do so. In that respect, you misrepresented your police powers without justification;

2. You spoke to Ms Bowen in an aggressive and/or overbearing manner, which was inappropriate and unprofessional;

3. You spoke to Ms McHale in an aggressive and/or overbearing manner by shouting at her, this was inappropriate and unprofessional;

4. You misrepresented your police powers and/or used an aggressive/overbearing manner to unfairly induce Ms Bowen to allow you inside. As such, you entered the address unlawfully and were a trespasser inside the address.

5. Once you entered the address with PC Elliott and Ms Bowen, she locked the door behind you to prevent Mr Allen from entering the address and carrying out his duties. You instructed Ms Bowen to unlock the door, by

which you were unreasonable in both your demeanour and/or that you suggested to her that she was falsely imprisoning you and PC Elliot;

6. You unreasonably disregarded Ms Bowen's assertion that she was attempting to keep Mr Allen out of the property, as she was entitled to do;

7. You threatened to use CS spray against Ms Bowen if she did not give you the key;

8. You thereafter used force on the person of Ms Bowen in order to take the key from her. The use of force was unlawful in that

a. you were not lawfully on the premises and therefore were not lawfully entitled to use force in the circumstances and/or
b. the force used was disproportionate and unreasonable;

9. You thereafter arrested and/or assisted in the arrest of Ms Bowen to prevent a breach of the peace. This arrest was unlawful as:

a. You were not lawfully on the premises; and/or
b. It was unnecessary to arrest Ms Bowen; and/or
c. The sole or main purpose of effecting the arrest was to enable you to incapacitate Ms Bowen with handcuffs and thereafter recover the key to the property;

10. You applied handcuffs and/or assisted in the application of handcuffs to Ms Bowen which:
a. was unlawful and/or
b. was inappropriate in the circumstances and/or
c. were applied too tightly, in which respect you failed to have sufficient regard for Ms Bowen's welfare, having purported to take her into your custody;

11…...

12. You thereafter spoke to Mr Allen about Ms Bowen in a disrespectful and offensive manner, referring to her as a 'fucking loony'.

13. You failed to complete a use of force form in relation to the incident, or otherwise ensure that one was completed. This was a breach of Nottinghamshire Police policy."

17 The facts found by the Panel (not including allegation 11) were as follows:

Allegation 1

This is found to be proved. This did happen. Sgt Flint justified his entry by reference to a search for stolen property; "let me tell you what I can do. There's parcels been stolen out of his car. I suspect they are in this house. Therefore I think …" He did not in law have a right of entry for this purpose. He did misrepresent his police powers. There is no justification for the misrepresentation.

In order to properly assess which Standards of Professional Behaviour are breached with regard to this first allegation it is necessary to make further decisions regarding at least the first question set out at the top of page 3 of the Case Summary, as prepared by Counsel for the Appropriate Authority. Firstly, did Sgt Flint make a mistake about his police powers or did he deliberately misrepresent them to Ms Bowen?

We think that at the time he stated his power inappropriately he was mistaken about his actual powers.

The Standard engaged here is Duties and Responsibilities because he has not been diligent in the correct use of his powers. "

Allegation 2

This is accepted, and it is found to be proved. Sgt Flint repeatedly talked over Ms Bowen, asked her none of the obvious questions, closing down every attempt by her at dialogue and ignoring her requests for information. He gave instructions and did not listen.

The standards engaged here are Authority, respect and courtesy and Discreditable Conduct.

Allegation 3

"This is accepted, and it is proved. He was rude to and dismissive of a person who he obviously regarded as an interfering distraction, when actually she was an eyewitness to the offence he was supposed to be investigating and her statement of the legal position was more accurate than his own.

The standards engaged here are Authority, respect and courtesy and Discreditable Conduct."

Allegation 4

"It is argued for the officer that this is duplicitous – or at least so similar to the first allegation that it should not be separately pleaded. It does contain the same elements of a statement of powers that did not exist, and an unfair inducement being given to enter the premises. There is some merit in this submissions – although the conclusion of the allegation is different, which justifies it appearing as a separate allegation.

He did misrepresent his police powers, as we have already stated with regard to allegation 1. He did use an aggressive and overbearing manner to induce Ms Bowen to allow him inside and that was unfair. The allegation continues that "As such, he entered the address unlawfully and were a trespasser inside the address". The second part of this does not really flow from the "as such" but requires a separate determination. The question to be asked here is whether the Officer did in law have a right to enter the address. This is regardless of his knowledge of this law or his ability to state it correctly. His power to enter is found in s.17 of the Police and Criminal Evidence Act 1984. This permits entry to premises if the purpose is to arrest a person for an indictable offence. This would have to relate to the theft, not the criminal damage. The power is only exercisable if the officer has reasonable grounds for believing that the person whom he is seeking is on the premises. This brings us to the second question that the Appropriate Authority have posed on page 3 of their Case Summary, namely

Did PS Flint genuinely believe that entry to the premises was necessary and lawful to locate the suspects for that offence (namely the theft of a parcel) and was that belief based on reasonable grounds?

The Panel think that he might have hoped the suspects were in the property. His gut instinct as an experienced officer who was familiar with the area might have told him this, but his grounds for believing this cannot be objectively justified. The reasons he has given to support such a belief do not bear scrutiny and some of those matters were not within his knowledge at the time. There are few if any logical grounds for thinking that the suspects might have been there. So, we do not think that he actually had a power of entry. Therefore, he did enter the address unlawfully and was in fact a trespasser inside the address. So, allegation 4 is proved in all its aspects.

We have considered Honesty and Integrity; Again, we think that the misrepresentation here arises from ignorance and mistake as opposed to dishonesty. We have wrestled with the question of whether what we consider to be an unintentional abuse of position engages the Standard of Integrity and we will err on the side of caution here and say that it does not.

The Standard of Authority, Respect and Courtesy is engaged however, as is Orders and Instructions and Duties and Responsibilities and Discreditable Conduct."

Allegation 5

"The Panel are not sure that Ms Bowen did not unlock the door immediately after she locked it. The evidence on this is ambiguous. However we do not need necessarily need to make a finding on this specific detail. What we do think is that the Officer genuinely believed that he had his colleague were locked in, whether that was the fact of the matter or not. The officer pleads that, despite the irony of the situation in which he then found himself, that the request to open the door was not in itself unreasonable. The Panel agree – even if you should not be in there at all, it would be an uncomfortable position for an officer to be in and it would not be unreasonable to give an instruction for the door to be unlocked. The officer's regulation 33 response moves from the assertion that the request would not be unreasonable to the conclusion that to make it would not amount to any kind of misconduct. However, that is not what the allegation says – it says that the demeanour and/or suggestion of false imprisonment that accompanied the request to unlock the door were unreasonable. The Panel finds that the request of itself and the demeanour were not unreasonable, but that using the threat of false imprisonment was unreasonable. To this extent, allegation 5 is proved. The standard engaged here is Authority, Respect and Courtesy"

Allegation 6.

Not proven.

"Due to the Officer's continued arrogance and disdain for all interruptions Ms Bowen was never allowed to articulate what was undoubtedly her desire that Mr Allen be kept out of the property. The Officer's defence to this is that she never made such an assertion so he could not have disregarded it. Technically, this is correct, so we do not find this allegation proven. The reason why we do not find it though hardly bathes the Officer in glory."

Allegation 7

"This is accepted as to the fact of the threat, although it is also said that it would not have been carried out. The threat can be heard on the video. It is found proven. It does not follow that such a threat would be unreasonable in any circumstances or that the use of a threat would necessarily amount to misconduct and the allegation might have been more appropriately framed. Having said that we do find that in this particular context and time frame such a threat was disproportionate and unnecessary. It only served to heighten fear in what was already a volatile situation."

Allegation 8

"You thereafter used force on the person of Ms Bowen in order to take the key from her. The use of force was unlawful in that

a. you were not lawfully on the premises and therefore were not lawfully entitled to use force in the circumstances and/or
b. the force used was disproportionate and unreasonable;

This is proven on all of the above bases. We take into account the timeframe and the circumstances of Ms Bowen being in her own home. The standards engaged are: Authority, Respect and Courtesy, Use of Force and Discreditable Conduct".

Allegation 9

"You thereafter arrested and/or assisted in the arrest of Ms Bowen to prevent a breach of the peace. This arrest was unlawful as:

a. You were not lawfully on the premises; and/or

b. It was unnecessary to arrest Ms Bowen; and/or

c. The sole or main purpose of effecting the arrest was to enable you to incapacitate Ms Bowen with handcuffs and thereafter recover the key to the property;

This is proved on all of the above bases. The standards engaged are: Authority, Respect and Courtesy, Use of Force and Discreditable Conduct".

Allegation 10

"You applied handcuffs and/or assisted in the application of handcuffs to Ms Bowen which:

a. was unlawful and/or

b. was inappropriate in the circumstances and/or

c. were applied too tightly, in which respect you failed to have sufficient regard for Ms Bowen's welfare, having purported to take her into your custody;

This is proven on all bases. The application of handcuffs was not done by Sgt Flint himself, although as the arresting and senior officer present, he did have some responsibility for the welfare of the person he had purported to take into custody.

The standards engaged are : Authority, Respect and Courtesy, Use of Force and Discreditable Conduct".

Allegation 12

"This is admitted and found proven. The standards engaged are : Authority, Respect and Courtesy and Discreditable Conduct".

Allegation 13

"This is admitted and proven. It relates to the Standard of Duties and Responsibilities".

18 The Panel also recorded the following, under findings:

"The Panel do acknowledge that decisions taken in the context of operational policing can be complex. The passage recited in the Regulation 22 response from the National Decision-Making Model expresses the fact that officers are sometimes required to make decisions in circumstances where those involved may deliberately try to mislead them. Operational; situations can be challenging, and officers are frequently juggling competing or incomplete information. We have no wish to be over critical of decisions made in such circumstances, nor to hold operational officers to unrealistically high standards that can only be achieved with the benefit of hindsight. However, this scenario was not particularly difficult, or it should not have been. There was a complaint to the police of a low-level theft and minor criminal damage. The complainant and two potential witnesses waited at the scene. For an experienced officer, arriving at the scene and taking basic details of the allegations from those who were present should have been a routine matter. That the attendance of an experienced officer has actually led to the events we have heard about is pretty remarkable. Sgt Flint has described the situation as pressurised, but there was no immediate threat to life, or limb, there was no present danger, there was no time restriction. A few minutes assessing the situation, asking basic questions and listening to those involved would not have been an inappropriate response."

COLLEGE OF POLICING GUIDANCE ON OUTCOMES

19 The College of Policing Guidance on Outcomes (COP on Outcomes) in Police Misconduct Proceedings is a document that clearly sets out the three stages in determining sanction as set out in Fuglers LLP v Solicitors Regulation Authority [2014] EWHC 179 (Admin). (noted at paras 4.2 of the COP):

As Mr Justice Popplewell explained, there are three stages to determining the appropriate sanction:

- assess the seriousness of the misconduct
- keep in mind the purpose of imposing sanctions
- choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question

20 Assessing the seriousness of the misconduct is the first of these three stages and as noted in the COP, seriousness of the proven conduct as assessed by reference to:

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

21 Paras 4.5 – 4.9 of the COP go on to give the following guidance:

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

4.6: Consider personal mitigation such as testimonials and references after assessing the seriousness of the conduct by the four categories above.

4.7: There may be overlap between these four categories and/or imbalances between them. Low-level culpability on the part of a police officer, such as a failure to respond in good time to an incident, can result in significant harm. Equally, an officer may commit serious misconduct which causes minimal harm to individuals or the wider public but may still damage the reputation of the police service.

4.8: Carefully assess the officer's decisions and actions in the context in which they were taken. Where the misconduct has taken place on duty, consider the policing context and whether the officer followed the College of Policing's National Decision Model. Many police officers are required to take decisions rapidly and/or in highly charged or dangerous situations, for example, in a public order or other critical incident. Such decisions may carry significant consequences. Take care not to confuse these consequences with what the officer knew or could reasonably have known at the time of their decision.

4.9: Weigh all relevant factors and determine the appropriate outcome based on evidence, independently of any views expressed by the media.

Culpability

22 We have applied the relevant paras set out in the COP Guidance on Outcomes in our assessment of culpability. In particular, the paras that we have applied are as follows:

> 4.10 Culpability denotes the officer's blameworthiness or responsibility for their actions. The more culpable or blameworthy the behaviour in question, the more serious the misconduct and the more severe the likely outcome.
>
> 4.11 Conduct which is intentional, deliberate, targeted or planned will generally be more culpable than conduct which has unintended consequences, although the consequences of an officer's actions will be relevant to the harm caused.
>
> 4.12 Where harm is unintentional, culpability will be greater if officer could reasonably have foreseen the risk of harm.
>
> 4.13 Culpability will also be increased if the officer was holding a position of trust or responsibility at the relevant time. All police officers are in a position of trust, but an officer's level of responsibility may be affected by specific circumstantial factors such as rank, their particular role and their relationship with any persons affected by the misconduct.

23 We find that it is clear from the findings of fact that the Panel made, that whilst the Appellant was to blame for his demeanour, language, ignorance and lack of thought, his actions in relation to entering the property were found to be born out of mistake as to what his actual powers were. That conduct was dealt with as part of allegations 1 and 4 and we find that his actions in relation to entering the property were neither intentional, deliberate, targeted or planned.

24 We are mindful that it would be unfair to repeatedly penalise the Appellant for being unlawfully on the premises. Thus while the Panel made their findings of fact in relation to Allegations eight and nine on the basis of him being unlawfully on the premises, we have not double counted his unlawful presence as part of these allegations when considering outcome.

25 We take into account that the Appellant had a legitimate policing purpose that he was responding to, when he attended the incident that day. There was no evidence of there being any improper motive for him being there or anything in the Panel's findings to suggest that the Appellant was not acting in good faith. Indeed, the Panel's findings as to his state of mind and motive were phrased in the following terms:

- mistaken
- ignorance
- honest (Panel ruled out dishonesty)
- genuine belief

26 These findings rule out the Appellant having an improper motive or that his actions were planned or targeted. Mistaken, ignorance, honest and genuine belief are also inconsistent with intentional or deliberate. We have taken this into account when assessing the Appellant's culpability in relation to Allegations 1 and 4.

27 The Panel found that the Appellant's demeanour and behaviour breached the standards of professional behaviour. He was described as:

- aggressive and overbearing
- disrespectful
- offensive
- rude
- inappropriate
- unprofessional

28 We find that only the Appellant was to blame for the way that he acted. It was intentional and deliberate because he chose to behave that way. However, we rule out any question of the Appellant's actions being targeted or planned.

29 In relation to Allegation 12, the Appellant had admitted calling Ms Bowen a 'fucking loony' and thereby spoke to her in a disrespectful and offensive manner. The Appellant was the only one to blame for his actions in relation to this allegation.

30 The Appellant's actions following his entry into the property were dealt with in Allegations 5, 7,8,9 and 10.

31 In relation to Allegation 5, the Appellant was found to have acted unreasonably when he used the threat of false imprisonment. The Appellant's threat to use the CS spray was also found to be disproportionate and unnecessary and only served to heighten fear of what was already a volatile situation. He was also found to have breached the standard in relation to the use of force when he took the keys from Ms Bowen which

was dealt with by Allegation 8. We find all of these allegations needed to be looked at in the context of what the Panel's findings were in relation to the door being locked and the Appellant's genuine belief that they were locked in. In that regard we do not find that the actions of the Appellant can be said to be intentional or deliberate – rather they followed on from what the Panel found was the Appellant's misplaced judgement of the situation may have been. The Panel in their own findings go no further than recognising that the Appellant may have held that genuine belief, even though they could not be objectively justified.

32 As regards the taking of the key from Ms Bowen, this was one action following on from what the Appellant perceived to be the circumstances inside the house. The key was grabbed for the purpose of opening the door. It was intended and deliberate but not targeted or intended for any other purpose other than taking the key.

33 In so far as the arrest and handcuffing of Ms Bowen was concerned, the Appellant did not apply the handcuffs himself and the Panel made its finding that he had breached the standards on the basis that as he was the arresting and the senior officer present, he had some responsibility for the welfare of Ms Bowen. The Panel did not go as far as saying that the Appellant was wholly responsible or was responsible simply that he had some responsibility. We have taken this into account when assessing culpability. As regards the arrest, we accept that the Panel found that the arrest was unlawful, and injury was caused.

34 In assessing the Appellant's level of culpability overall, we find that the majority of his conduct was neither intentional nor deliberate. As noted, it was born out of ignorance, mistake and mistakenly held belief about what his powers of entry were and being locked in the house. There were, however, consequences arising from his conduct, which we will consider further under 'Harm'. Further whilst the Panel found that the Appellant was in a position of seniority and therefore by default in a position of trust, we did not find that this fell into the category of cases that were envisaged within the COP guidance at paragraph 4.42. Whilst it is undeniable that as a Sergeant, he was more senior than the other officer present – the Panel made no finding of fact that the other officer had been influenced and led by the Appellant. The only reference in the Panel's decision, comes in their assessment of seriousness. Indeed, the only finding of fact made about the Appellant's status as a Sergeant was that he had some

responsibility for the welfare of Ms Bowen as he was the arresting and senior officer present, We note also that none of the allegations were framed to reflect the Appellant's seniority or influence over PC Elliot.

35 There were no findings of fact made by the Panel to reflect any vulnerability factors relating to Ms Bowen or Miss McHale that the Appellant would have been aware of, or ought to have been aware of at the time of the incident. Para 4.49 gives examples of factors which may give rise to vulnerability such as:

- age, and any other protected characteristic
- physical disability
- mental ill health or learning disability
- substance misuse
- social circumstances such as homelessness or bereavement
- cultural differences and the person's ability to communicate in English
- experience of crime, including harassment or domestic abuse
- the person's status relative to the officer

36 Social circumstances are noted in the examples of vulnerability and the Panel did note that Ms Bowen was socially vulnerable but for a different reason. They found that Ms Bowen was socially vulnerable because a court enforcement officer was seeking to remove her property and it was already a 'bad day'. Again, that note was not part of the Panel's findings but was noted in their assessment of outcome. We do not find that the social vulnerability referred to by the Panel fell into the category of cases envisaged by the guidance. There was no other evidence of vulnerability before the Panel.

37 We do find that the Appellant was wholly to blame for his demeanour, language - 'fucking loony' and his failure to listen to or deal with the incident in a professional and calm manner.

38 We find that this was not a case involving any form of dishonesty, discrimination, criminal behaviour or sexual impropriety.

Harm

39 Ms Bowen suffered minor injuries during this incident, comprising a slight bruise to her wrists and a mark to her forehead. The marks to her wrist were consistent with

the use of handcuffs. She also suffered a very short period of detention whilst under arrest. Ms Bowen also stated that she had lost confidence in the police as a direct consequence of what had happened. We note however, that there was no evidence that Ms Bowen had suffered any psychological harm

40 Reputational harm was also caused to Nottinghamshire Police because the behaviour displayed did not reflect those of the organisation.

41 As noted at paragraph 4.63 of the COP guidance:

Consideration of the harm caused will usually follow findings in relation to the facts, breaches of Standards of Professional Behaviour and whether the behaviour amounted to misconduct or gross misconduct.

42 We accept that the Appellant bears some responsibility for the physical harm that was caused to Ms Bowen – to the extent reflected in the Panel's findings of fact. We also accept that Ms Bowen was impacted by what happened to such an extent that her confidence in the police service has been damaged.

43 We note that this was not an intentional abuse of power but an unintended one. Nevertheless, the harm caused was not too remote so that it would not be reasonably foreseeable. There were consequences arising from the Appellant's mistakenly/ignorantly held beliefs – not least of which was the fact that the actions that followed, i.e. false imprisonment accusation, arrest, use of force - were all unlawful.

Aggravating Factors

44 The COP guidance states that aggravating factors are those tending to worsen the circumstances of the case, either in relation to the officer's culpability or the harm caused. Factors which indicate a higher level of culpability or harm include (4.67):

premeditation, planning, targeting or taking deliberate or predatory steps – **there were none in this case.**

malign intent, eg, sexual gratification, financial gain or personal advantage **- there were none in this case.**

abuse of trust, position, powers or authority – **there was a breach of authority due to mistake**

deliberate or gratuitous violence or damage to property **- there was not in this case.**

concealing wrongdoing in question and/or attempting to blame others **- there was not in this case.**

regular, repeated or sustained behaviour over a period of time – **this was a single incident lasting some 7 minutes**

continuing the behaviour after the officer realised or should have realised that it was improper – **this was not found as a fact**

serious physical or psychological impact on the victim – **there was no evidence of serious physical or psychological impact**

vulnerability of the victim – **only social vulnerability was found as noted earlier**

multiple victims – **there was not in this case.**

additional degradation, eg, taking photographs as part of a sexual offence **- there was not in this case.**

any element of unlawful discrimination **- there was not in this case.**

significant deviation from instructions, whether an order, force policy or national guidance **- there was not in this case.**

failure to raise concerns or seek advice from a colleague or senior officer **- there was not in this case.**

scale or depth of local or national concern about a particular issue **- there was not in this case.**

45 As regards – multiple proven allegations and/or breaches of the Standards of Professional Behaviour, we take into account that this one incident, lasting some 7 minutes and that some of the findings of fact made in relation to the allegations were qualified in their extent. Nevertheless, we find that it was an aggravating feature that there were multiple breaches of standards.

46 We also find that the breaches of standard occurred whilst the Appellant was unlawfully on the premises. This was an aggravating feature.

Mitigating Factors

47 As noted in the COP guidance, mitigating factors are those tending to reduce the seriousness of the misconduct. Some factors may indicate that an officer's culpability is lower or that the harm caused by the misconduct is less serious than it might

otherwise have been. At 4.71 the guidance sets out factors indicating a lower level of culpability or harm:

- misconduct confined to a single episode or brief duration. **This was a single episode of 7 minutes duration.**
- extent of the officer's involvement in the misconduct. **The Appellant was primarily involved.**
- any element of provocation, threat or disturbance which may have affected the officer's judgement, eg, in relation to the use of force in the heat of the moment. **The Appellant's judgement was affected by his mistaken belief that he had been locked in.**
- acting pursuant to a legitimate policing purpose or in good faith, ie, a genuine belief that there was a legitimate purpose but getting things wrong. **The Appellant was at the address for a legitimate policing purpose but got things wrong.**
- mental ill health, disability, medical condition or stress which may have affected the officer's ability to cope with the circumstances in question. **This does not apply.**
- whether the officer was required to act outside their level of experience and/or without appropriate training or supervision. **This does not apply.**
- early actions taken to reduce the harm caused. **This does not apply.**

48 In so far as open admissions at an early stage are concerned, the Respondent submitted that this was not a case where early admissions were made. This matter proceeded to full hearing and whilst some allegations were admitted – they were only admitted to the extent of misconduct.

49 We do not find that this is a case where no admissions were made by the Appellant. The Appellant was served with a complicated Regulation 21 notice and as we noted on appeal, there were multiple allegations covering an incident lasting 7 minutes with repetition in the particulars. The Appellant rightly challenged Allegation 11 – relating to integrity – which was allowed on appeal and quashed upon judicial review. The Appellant did admit his behaviour.

50 As regards evidence of genuine remorse, insight and/or accepting responsibility for his actions, we note that the Appellant did make admissions in his Regulation 22 response and acknowledged that he could have approached the situation differently. He also admitted some allegations to the extent of misconduct only. It was open to the Appellant to believe his conduct amounted only to misconduct given the earlier decisions made by the Respondent as to the seriousness of his conduct and that he should be dealt with for misconduct only.

Our Assessment of Seriousness

51 We have assessed the seriousness of the conduct and have considered the harm caused by the Officer's actions; the culpability borne by the Officer for his actions; the existence of any aggravating factors; and the existence of any mitigating factors.

52 With regard to culpability, we find that the actions of the Officer were not intentional or deliberate and were not reflective of his behaviour as a police officer as demonstrated by the substantial character evidence and his personal development record and an otherwise unblemished record over 20 years' service as a police officer. We find that whilst there were some aggravating factors, the behaviour was unintentional, not deliberate, was not malicious and was not repeated. We find that the harm caused to Ms Bowen was unintentional but that it was reasonably foreseeable that were he wrong in his belief about his powers of entry and whether he was locked in, she would suffer physical harm upon arrest and would lose confidence in the police force. It was reasonably foreseeable that by snatching the key he would cause harm as well. We find that the potential harm to the reputation of the Nottinghamshire policing in general and the confidence of the public is mitigated and lessened by our findings in respect of the context in which the incident occurred – namely mistaken belief.

53 We remind ourselves of the purpose of police disciplinary proceedings which is to maintain public confidence in and the reputation of the police service, to uphold high standards and deter misconduct, and to protect the public. We also note the character evidence and the previously unblemished record of service.

54 We considered all of the available outcomes starting with the least serious and are of the view that management advice does not adequately reflect the seriousness of the gross misconduct found proved. We further considered whether a written warning would be sufficient to mark and declare the significance of the misconduct but decided that this would be insufficient to mark its seriousness and found that it would not reflect the potential harm caused by the Appellant's conduct nor would be sufficient to maintain public confidence in the police service and the confidence of police colleagues within Nottinghamshire Police.

55 In our view, the proportionate outcome is a final written warning. A final written warning is, in itself, a serious outcome, because it conveys to the Appellant, the service at large and the public that any future departure from proper standards by the Appellant would result, almost invariably, in dismissal. It will last for 12 months. It conveys to the service and to the public the level of seriousness with which the facts were objectively viewed in the context of the public interest. It sends the message that is warranted in this case, namely, that despite all the pressures under which they work for the good of the public, officers must always act with restraint. In our view, the facts and circumstances in this particular case, are such that it is not necessary and would be disproportionate to dismiss the Appellant for a single isolated incident set against, an otherwise unblemished record.

56 In the light of our findings, we consider that the only appropriate outcome is a final written warning for a period of 12 months.

Mrs Nahied Asjad
ACC Kerrin Wilson
Mr Steve Matthews