

**IN THE MATTER OF POLICE ACT 1996
AND IN THE MATTER OF POLICE APPEALS TRIBUNALS RULES 2012
AND IN THE MATTER OF FORMER POLICE SERGEANT JONATHAN FLINT**

BETWEEN

FORMER POLICE SERGEANT JONATHAN FLINT

APPELLANT

-AND-

**THE CHIEF CONSTABLE OF
NOTTINGHAMSHIRE POLICE**

RESPONDENT

Mukhtar Hussain QC

Chairman

Christopher Haward

DCC

Leonie Jane Tromans

DETERMINATION

1. On 1st October 2018 AND 16th, 17th, 18th January 2019, former Police Sergeant Jonathan Flint (The Appellant) appeared before the Misconduct Panel (the Panel) in relation to breaches of **the standards of professional behaviour contrary to Police (Conduct) Regulations 2012**. The breaches related to the Professional Standards: (1) Duties and Responsibilities; (2) Authority, Respect and Courtesy (3) Use of Force (4) Orders and Instructions (5) Honesty and Integrity and (6) Discreditable Conduct. The allegations, as these appear in Regulation 21 Notice, were:
 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 then 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 over bearing manner which was inappropriate and unprofessional.
 3. You spoke to Ms McHale in an aggressive and/or over bearing manner by shouting at her, this was inappropriate and unprofessional.
 4. You misrepresented your police powers and/or used an aggressive and/or over bearing 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 Officer 2 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 unlocked 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 Officer 2.
 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 affecting 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. Your main purpose in carrying out the conduct of paragraphs 1 to 9 above was to facilitate Mr Allen's entry to the premises; you had no lawful authority to do so.
 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. This conduct is alleged to amount to gross misconduct for the following reasons –
 - a. You mis-used your Police powers to enable Mr Allen to enter the house in order to remove Ms Bowen's personal possessions.
 - b. In order to do so you misled Ms Bowen about the law and sought to intimidate her in to permitting you to do so.
 - c. You used excessive and disproportionate force against Ms Bowen without justification and mis-used your Police powers in arresting her so that you could recover the key to the property.
 - d. The conduct overall does serious damage to the reputation of Nottinghamshire Police.
2. The Appellant at the hearing accepted certain aspects of the allegations as set out above but denied others. He admitted that those particulars that he accepts amount to misconduct but not gross misconduct. The Panel after considering all the evidence found the allegations proved and that these amounted to gross misconduct. After hearing evidence and further submissions, the Panel ordered the Appellant to be dismissed without notice.
3. The background facts as outlined to the Panel may be summarised:
On the 24th of April 2017 Mr Allen, an enforcement officer attended Ms Bowen's home address. He was there in relation to an outstanding debt. Mr Allen knocked on the door and looked through the front window. He saw Ms Bowen and formed the impression that she was hiding from him. He walked around the house and in to the back garden and knocked on the kitchen window, he asked Ms Bowen to come to talk to him and he returned to his vehicle in order to complete the necessary paperwork. While stood at the vehicle family

members started to arrive at the address, this included 2 young males and Mrs McHale. Some of the group were stood near Mr Allen's vehicle. He had his boot open, there were a number of packages in the boot and he noticed that one of packages was missing. He suspected that one of the groups had taken the package from his car. Accordingly, he rang the police to report a theft. Mr. Allen raised the fact he'd noticed damage to the car. He asked one of the males if he thought that he was "funny" and the male responded in a verbally aggressive manner. Mr Allen rang the police again. He requested police attendance at the address. He requested the police assistance quite urgently. At 12:52 and 42 seconds, Mr Allen identified the offenders to the police as the, "one who got aggressive with me it was definitely him". He told the police operator, "They're walking off now" then provided a description of the alleged offender. The 2 males walked away from the scene and Mr Allen told the operator the direction they were walking in. Sergeant Flint arrived at the address in full uniform and in a marked police car. Mr Allen told Sergeant Flint that the males had gone "to the cob shop around the corner", he clarified that this was the one near the Post Office. Mr Allen told Sergeant Flint that he'd come to take control of goods for an outstanding fine that Mrs Bowen had. There was the following exchange between Sergeant Flint and Mr Allen, Sergeant Flint asked, so you've come to take that have you, Mr Allen replied, I've come to take that and take goods out of the house as well, Sergeant Flint replied, yeah ok well we shall go and do that shall we. Mrs McHale queried what the goods were to be taken, she made reference to the "207 law that the police are not allowed to assist a bailiff with them things". Sergeant Flint replied, "Yes we are so that's that". He went on to say that's what's happening, that's what's happening. Mrs McHale repeated that Sergeant Flint was not supposed to assist the bailiff, he replied, "cool that's what's happening". Then Mr Allen told Sergeant Flint that there was a parcel missing from his car, Sergeant Flint replied "is there, all right, all right, we'll get what you need". Both Sergeant Flint and Mr Allen attempted to open the door to Mrs Bowen's home address. They were unable to open the door. Mr Allen said "she's not going to open the door", Sergeant Flint asked "are you able to force it", Mr Allen replied, I can't force entry on this occasion, no, I wish I could I would have done it by now, I'm fuming. It was clear that the door would not be opened consensually. Sergeant Flint then told Mrs Bowen that "this officer needs to do what he needs to do you better arrange for it". Mrs Bowen told Sergeant Flint that he could not force entry to assist the bailiff. Sergeant Flint ignored that and instead he replied "let me tell you what I can do though, let me tell you what I can do, there's parcels been stolen out of his car, I suspect they're in the house. Sergeant Flint continued, I'll talk, I'm talking, so I can force entry, so if you don't open that door I will, I'll put that door through, it's up to you, I'll put it through so it's up to you, I'll give you about 5 seconds to open the door or I'll put it through, I'm not bothered. Sergeant Flint continued, 5 seconds, I will kick the door through in 5 seconds. By this stage Officer 2 arrived. Mrs Bowen continued to try to talk to Sergeant Flint but he continued to talk over her, to ignore her

and to threaten to force entry. Mrs Bowen said, I'm going to open the door, I'm going to open the door but can I ask some questions before you bully me. Sergeant Flint replied "No open the door now or I will put it through". Mrs Bowen had to agree to open the door because she felt she had no other option because of Sergeant Flint's actions and attitude. Mrs Bowen then stated that Sergeant Flint didn't have a warrant, Sergeant Flint replied "just give me the key otherwise I will put the door through". Mrs Bowen opened the door and the 2 officers entered. Mrs Bowen then shut the door she put the key in the lock and she locked the door. Sergeant Flint immediately told her to unlock the door as she was imprisoning the officers. She unlocked the door but retained the key. She was then told that "you will be arrested in a moment". Sergeant Flint kept saying that he wanted the key. Sergeant Flint shouted at Mrs Bowen, the officers moved towards Mrs Bowen and she believed that she was going to be attacked by them, she was frightened, she was intimidated, and she considered the officers to be aggressive. Mrs Bowen started to scream, she was repeatedly shouting for help. Mrs Bowen was forced to a kneeling position on the floor, she was taken by her arms and by her hands, and Sergeant Flint told her that he would spray her with his CS spray if she did not give him the key. Mrs Bowen was then struck several times on the back of the head, she was frightened, shocked and confused, the officers are trying to pull Mrs Bowens arms away from her body and Sergeant Flint told her that she was under arrest for a breach of the peace. Mrs Bowen was laid on the floor on her front, the key was taken from her hand and she was handcuffed to the rear. At 13:09 Sergeant Flint opened the door to the address, he was smirking, and he told Mr Allen "you'll be having whatever you want". That wasn't within Sergeant Flint's gift. Mr Allen queried that and said "pardon", Sergeant Flint replied you'll get what you need, sorted. Mrs Bowen told the officers that handcuffs were cutting her hands, she said "it's cutting my hand" and she repeated this. Sergeant Flint told Mr Allen "she's a fucking loony". Sergeant Flint told Mr Allen "we're just gonna get her out then you can get what you need", Mr Allen stated he'd speak to his office, Sergeant Flint replied, "let's put it this way we're in here because we're looking for bits and bobs so whilst we're here, as far as I'm concerned, you can come in". This incident caused Mrs Bowen injuries, in particular a swollen right wrist and hand, stiff head and neck and it has left her upset. Vast majority of the events described above were video recorded.

LAW

4. The right to appeal is provided by Rule 4[4] of the Police Appeals Tribunals Rules 2012 (the Rules). Sub Rule 4, sets out 3 grounds upon which an appeal may be made:

- a. *That the finding or outcome imposed was unreasonable; or*

- b. *That there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on the outcome; or*
 - c. *That there was breach of the procedures set out in the Conduct Regulations, the Police (Complaints and Misconduct) Regulations 2012, or Schedule 3 to the 2002 Act or other unfairness which could have materially affected the finding or decision on disciplinary action.*
- 5. The test as to “unreasonable” within the rules is not the Wednesbury test but something less (see *The Chief Constable of Durham v Police appeals Tribunal & Cooper C0/10571/2011* dated 20/7/2012) [Durham case]. On the other hand the Tribunal is not entitled under the rules to substitute its own views or its own approach for that of the Misconduct Panel unless it has reached a view that the finding was unreasonable. In other words the appeal will not succeed simply because the Appeals Tribunal concludes it would have reached a different decision to that reached by the Panel, provided the decision reached by the Panel was within the range of reasonable decisions to which the Panel could have reached.
- 6. In ***The Queen (on the application of) the Chief Constable of Wiltshire Police v The Police Appeals Tribunal [2012] EWHC 3288 (Admin)***, the court set out the jurisdiction and the approach that the Police Appeals Tribunal should adopt when considering appeals under the Rules:

“There have been a number of recent decisions in which this court has grappled with what is meant by the word “unreasonable” in Rule 4(4) (a) of the Appeal Rules 2008 . I refer to [R \(Montgomery\) v Police Appeals Tribunal \[2012\] EWHC 936 \(Admin\)](#) (Collins J); [R \(Chief Constable of Hampshire\) v Police Appeals Tribunal \[2012\] EWHC 746 \(Admin\)](#) (Mitting J); [R \(Chief Constable of the Derbyshire Constabulary\) v Police Appeals Tribunal \[2012\] EWHC 2280 \(Admin\)](#) (Beatson J) and [R \(The Chief Constable of Durham\) v Police Appeals Tribunal \[2012\] EWHC 2733 \(Admin\)](#) (a Divisional Court consisting of Moses LJ and Hickinbottom J). In his decision in the Derbyshire case Beatson J expressed the view that the issue of whether a finding or sanction was unreasonable should be determined by asking the question whether the panel in question had made a finding or imposed a sanction which was within the range of reasonable findings or sanctions upon the material before it.”

“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, should I 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."

7. Under the Rules the task for the Tribunal when considering sanction imposed is to determine whether the Panel's view of the allegations was a reasonable one and, in light of that view, whether the Panel's sanction constituted a reasonable response. In other words, was the sanction within the range of reasonable responses open to the Panel given the material before it?

In *R (Green) v Police Complaints Authority [2004] UKHL 6* Lord Carswell said:—
"Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded."

In *Salter v Chief Constable of Dorset Police [2012] EWCA Civ 2012* Maurice Kay LJ, in a passage of his judgment which considered whether the public confidence aspect of disciplinary proceedings which is emphasised in cases involving solicitors should apply in relation to police officers explained:—

"Although police officers do not have a fiduciary client relationship with individual members of the public or the public at large, they do carry out vital public functions in which it is imperative that the public have confidence in them. It is also obvious that the operational dishonesty or impropriety of a single officer tarnishes the reputation of his Force and undermines public confidence in it. In these respects, the similarities between solicitors and police officers justify the analogy provided that, ultimately, the decision-maker, be it the PAT or a judge of the Administrative Court, appreciates at all times that the index case falls to be assessed in the context of policing."

In a more recent case of *Darren Williams) v Police Appeals Tribunal [2016] EWHC 2708*, the court said:

"In my judgment, the importance of maintaining public confidence in and respect for the police service is constant, regardless of the nature of the gross misconduct under consideration. What may vary will be the extent to which the particular gross misconduct threatens the preservation of such confidence and respect. The more it does so, the less weight can be given to personal mitigation. Gross misconduct involving dishonesty or lack of integrity will by its very nature be a serious threat: save perhaps in wholly exceptional circumstances, the public could have no confidence in a police force which allowed a convicted fraudster to continue in service. Gross misconduct involving a lack of integrity will often also be a serious threat. But other forms of gross misconduct may also pose a serious threat, and breach of any of the Standards may be capable of causing great harm to the public's confidence in and respect for the police".

At paragraph 67 of the judgement, the court emphasized that this did "not mean,

of course, that personal mitigation is to be ignored ... [o]n the contrary, it must always be taken into account". However, the weight to be attached to such personal mitigation must always be fact specific and, given the strong public interest in the maintenance of respect and confidence in the police, it was right that personal mitigation should be afforded less weight than these other points. The court went on at paragraph 64 to explain why, with reference to the purpose of sanctions imposed by disciplinary panels, personal mitigation was of less importance:

"... the purpose of the sanction is not primarily punitive and often not punitive at all: the purpose is to maintain public confidence in and respect for the police service or the profession concerned. Personal mitigation which may provide a ground for reducing the punishment which would otherwise be imposed for a criminal offence cannot therefore have the same effect in disciplinary proceedings which have a different, and wholly or largely non-punitive, purpose. The second is that in criminal proceedings, a defendant's personal mitigation may enable him to distinguish himself from others convicted of similar offences, and so to demonstrate that the normal punishment for his offence would be unduly severe in his case. In contrast, a defaulting police officer or professional person will usually be able to adduce evidence of good character and to point to very severe consequences if dismissed or excluded from his or her profession".

The principle to be derived from an analysis of all cases is that dismissal is almost inevitable where the dishonesty is such as to undermine trust and confidence in the profession concerned, whether that dishonesty arises on an operational basis or on some other basis

8. The relevant legal principles in relation to fresh evidence under the Rules are:
 - a. *Where evidence could have been obtained without any difficulty then it would not fall within 4(4) (b) because it would have been evidence which could reasonably have been considered. It is not sufficient to say that, simply because it was not there, it could not have been reasonably considered by the Panel. It would be a question of fact in any given case whether it could be said that it was reasonably available;*
 - b. *Failures by a person's legal advisers or representatives cannot be relied on in order to show that there was a breach of fairness. When considering whether or not to admit fresh evidence, the general rule is that failure to adduce evidence by the party's legal advisers provides no excuse.*
9. Unfairness in this context means unfairness to the individual police officer which results from something which is done or not done, either by the Panel or Tribunal in question or by the Chief Constable, or those representing him, who bring the charges against him. Such failures can produce unfairness within the meaning of 4(4)(c). It is perfectly clear from the terms of 4(4)(c), since it is a ground of appeal,

that other unfairness that must mean unfairness to the individual police officer concerned. [See *The Queen on the Application of Chief Constable of British Transport Police v Police Appeals Tribunal CO/3243/2012* in relation to Police (Conduct) Regulations which are in identical terms].

10. As to findings of credibility, A recent example being the Court of Appeal in Langsam v. Beachcroft LLP [2012] EWCA Civ 1230 (at 72):

“It is well established that, where a finding turns on the judge's assessment of 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 court to 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 account that 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 and reached a conclusion which on the evidence he was not entitled to reach.”

THE PANEL’S FINDINGS AND REASONS

11. In its decision the Panel set out correctly the applicable principles of law; define the issues to be determined. The Panel considered evidence from witnesses including the Appellant. The Panel then dealt with the issues raised at the hearing. The Panel found:
- a. “Ms Bowen- we considered that overall Ms Bowen was a credible witness.”
 - b. “Ms Bowen’s evidence was broadly consistent with the evidence of the video footage, both in what it showed visually and the soundtrack.”
 - c. “Ms Bowen’s account of her behaviour off camera, though it could not be corroborated by sight of video footage, appeared to fit broadly with the soundtrack as far as it could be heard, and her account of behaving compliantly and in a non-confrontational way towards the officers once inside her premises, fitted with the demeanour shown by her before entry, in that she was calm and displayed no aggression. However, there was one matter on which the panel did not find Ms Bowen’s evidence to be convincing and that was that she had unlocked the door immediately after locking it.
12. The Panel then dealt with the Appellant’s evidence. The Panel found his evidence “to lack credibility in a number of important areas.” There were discrepancies in his evidence compared with the footage both as to his words and

actions; it was inconsistent with logic and common sense; his evidence on the procedure he followed was inconsistent with common police practice; and his explanations were unpersuasive. The Panel preferred the evidence of other witnesses where it conflicted with that of the Appellant.

13. The Panel then dealt with each allegation as set out in Regulation 21 notice.

- (1) *"The panel concluded that there was a deliberate as opposed to mistaken representation of powers."*
- (2) *"The facts of the particulars of misconduct are proved by admission, are shown in the video footage and by the evidence from Ms Bowen."*
- (3) *Initially denied but then admitted during the hearing. The panel said: "Based on these admissions and on the BWV footage, the panel concluded that this was proved."*
- (4) *"The panel concluded that there was a deliberate misrepresentation of police powers for the same reasons as outlined at 1 above. It follows that entry was unlawful and that PS Flint entered as a trespasser."*
- (5) *"Some of the particulars of misconduct are accepted, namely that the door was locked, that PS Flint instructed Ms Bowen to unlock it and that he referred to false imprisonment or something of that nature, but he denied that he was unreasonable. The panel found that PS Flint was unreasonable both in his demeanour and in his suggestion of false imprisonment."*
- (6) *"The panel found the particulars of this proved on the same basis as at 5 above."*
- (7) *"The panel found this proved based on the soundtrack of the BWV, Ms Bowen's evidence and the lack of dispute."*
- (8) *"It follows from the findings above that PS Flint was not entitled to use force as he was not lawfully on the premises. The panel also found that the force used was disproportionate and unreasonable, based on the BWV soundtrack which suggested an immediate escalation in the threats used towards Ms Bowen on entering the premises, based on her account and based on the lack of explanation provided by PS Flint for moving towards her with officer 2 when in the premises."*
- (9) *This was found proved on the same basis as the findings in 7 and 8 above.*
- (10) *This was found proved in respect of parts (a) and (b) for the reasons set out in 7 and 8 above. With regard to (c) this was found proved on the basis of the evidence from Ms Bowen.*

(11) *This was found proved on the basis of the evidence of the course of PS Flint's conduct from a point shortly after his arrival at the incident. PS Flint told the panel that his purpose in his conduct was to respond to Mr Allen's report of crimes committed against him. The Panel went on to find that "He also displayed a mindset that demonstrated his focus on facilitating the bailiff's entry to the exclusion of all other considerations by his repeated remarks such as "that's what's happening" when challenged, his talking over Ms Bowen and Ms McHale when they tried to tell him that he was not entitled to assist the bailiff and his repeated threats to 'put the door in'."*

(12) *This was found proved on the basis of the BWV and PS Flint's admission.*

(13) *This was found proved on the basis of PS Flint's admission.*

14. *The Panel then considered whether breaches proved amount to gross misconduct. They found: "the allegations, taken together, amount to gross misconduct. The reason for this is that the conduct included the misrepresentation of police powers, the misuse of police powers, unlawful entry and unlawful and excessive use of force, all of which has the potential for serious reputational damage to the profession of policing in general and the Nottinghamshire police force in particular, especially bearing in mind that the officer held the rank of sergeant and was in a position to play a supervisory role in the incident."*

15. *The Panel having found the breaches amount to gross misconduct, then considered further evidence and submissions as to the appropriate outcome. The Panel stated: "We consider that this is a case involving operational dishonesty, in view of our finding that PS Flint deliberately misrepresented his powers. The principles to be derived from Salter are outlined in the College of Policing Guidance on outcomes in police misconduct proceedings:*

- Dismissal will be almost inevitable in cases where operational dishonesty has been found proven.*
- There may be exceptions but the number of such cases will be very small.*
- Where the person(s) conducting the proceedings conclude that a case involving operational dishonesty falls into this very small residual category, they must identify the features of the case which render it exceptional.*

In this case, the defending side confirmed that no exceptional circumstances could be relied upon.

We therefore concluded that dismissal without notice is the only appropriate outcome."

16. *In the preliminary ruling under rule 11 of the Rules the Chairman stated: "The issues raised by the Appellant in his grounds of appeal are confusing and unfocused. There*

are, however, in my judgement, two specific matters that give rise to concerns that should be adjudicated by the full tribunal. Firstly, there is an issue of contact between one of the Panel members and counsel for the Appropriate Authority in the absence of all other parties. This is briefly mentioned in the transcript by the Legally Qualified Chair [LQC] but no details have been given. The second matter is whether the Appellant received a fair and open hearing. Again, the same member of the Panel appears to have conducted an extensive cross-examination of the Appellant which goes over to 29 pages in the transcript compared with no questions from the other two Panel members including the LQC. The Appellant further argues that questioning was not to clarify any ambiguities or to obtain information but has the appearance of bias. The issues identified deserve an oral hearing."

DISCUSSION

17. On 29th August 2019, we heard oral submissions from counsel representing the Appellant and the Respondent in relation to the Panel's finding and outcome. We are grateful to both counsels for their clear and succinct submissions. Both counsels had provided written skeleton submissions prior to the hearing. We have carefully considered both the written and oral submissions. At the conclusion of the hearing and with the consent of both parties, we gave our decision allowing the appeal and remitting it to another panel for a fresh hearing. This will mean that the Appellant will be reinstated as a police sergeant. We also made it clear that Appellant must give full credit for any income received by him during the period between his dismissal and reinstatement which may be deducted from his back-dated salary.
18. At the outset of the oral hearing, the appellant's counsel made it clear that the appeal is under 4(4) (c) of the rules on two grounds: (1) the questioning of the Appellant by Superintendent Antill [a member on the Panel] was unfair in that it gave the impression of actual or apparent bias on the part of the Panel as against the Appellant and amounted to material irregularity. It was in breach of procedures and natural justice which could have materially affected the finding and/or the decision to dismiss without notice. (2) There was private conversation between Superintendent Antill and counsel for the Appropriate Authority [AA] whilst the Panel was in retirement considering its decision with no one else present. This, the Appellant submitted, contravened the fundamental principle that "justice should not only be done, but should manifestly and undoubtedly be seen to be done". [See *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256.
19. The Respondent on the other hand submitted:
 - (1) As regards the questioning by the Panel, the Panel is entitled to ask questions and as an expert panel play a more pro-active role. The questions asked by Superintendent Antill were not unfair, hostile, aggressive, inappropriate or bullying. The Appellant is therefore, unable to show that there was unfairness and/or

unfairness which could have materially affected the finding or sanction.

- (2) As regards contact between the Superintendent Antill and counsel for the AA, it was accepted by the Respondent that it was “unusual” but it could not have materially affected the panel’s decision on finding or outcome. Furthermore, this was raised by the panel chair during the hearing but no point was taken by the Appellant at the time. Therefore, it was not considered by anyone, to be important that may affect the panel’s decision either as to finding or sanction. Furthermore, it is not open to the appellant now to pursue this point having elected not to do so before the panel.

20. Both counsel referred us to a number of legal authorities in support of their respective submissions. We have carefully considered the cases and have come to the conclusion that in essence there is no real difference between the parties as to the applicable principles of law in this case. It is therefore unnecessary for us to quote various passages referred to during the submissions.

CONCLUSIONS

21. We have carefully considered the evidence before the Panel; the Panel’s decision and reasoning; and the submissions, both written and oral, made on behalf of each party. We have carefully considered the matters raised by the Appellant. We have summarised the relevant submissions for the purposes of this judgement. We have set out above the Panel’s full reasons for its finding and sanction.
22. We have carefully considered the issues raised by the Appellant. We have looked at the matter in the round. We have carefully considered the questions asked by Superintendent Antill. Whilst we recognise that the panel has the right to ask questions, close examination of the transcript discloses unreasonable level of intervention amounting to a fundamental failure of justice with regard to the totality of the case including its underlying merits. We are satisfied that his questioning of the Appellant does not give the impression that the questions were intended to clarify any ambiguity or understand issues which the panel had to decide. We are satisfied that overall impression is that the Superintendent, [the sole questioner on the Panel] had abandoned the role of a referee and had joined in as a participant. Whilst we accept that the intention may have well intended, the impression that is created is extremely unfortunate. We need not set out various passages which clearly illustrate that his “descent into the arena may so have hampered his ability properly to evaluate and weigh the evidence”. His questioning was inappropriate, protracted and hostile. It is difficult to measure what effect it may have had on the other members of the Panel.

23. We are therefore satisfied that this created “other unfairness which could have materially affected the finding or decision on disciplinary action” under rule 4(4) (c). We allow the appeal under that ground.
24. We have also considered the issue of meeting/contact between Superintendent Antill and counsel for the AA. This was most unfortunate and highly undesirable. We are unable to understand why it occurred, particularly at the stage when the Panel was in retirement. If Superintendent Antill wanted advice on law, why not ask the Legally Qualified Chair? Having said that, however, we accept the Respondent’s submission that this should have been raised by the Appellant at the hearing. It was clearly known to the Appellant and there may have been discussion with his legal team. As this was not raised at the time, it could not have been thought to be of any importance. We accept the Respondent’s submission that the appellant is unable to satisfy us that this could have materially affected the Panel’s decision on finding or sanction. Had this been the only ground of appeal then we would not have allowed the appeal.

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4/9/2019