

[2018] EWHC 3533 (Admin)

IN THE ADMINISTRATIVE COURT
SITTING AT LEEDS

Case No: CO/671/2018

Courtroom No. 1

The Courthouse
1 Oxford Row
Leeds
LS1 3BG

Thursday, 27th September 2018

Before:
HIS HONOUR JUDGE KRAMER
SITTING AS JUDGE OF THE HIGH COURT

B E T W E E N:

CHIEF CONSTABLE OF NORTHUMBRIA POLICE

and

POLICE MISCONDUCT PANEL

MRS SCOTT-BELL appeared on behalf of the Applicant
MISS A WILLIAMSON appeared on behalf of the Respondent

JUDGMENT
(Approved by HHJ Kramer on 5th January 2019)

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HHJ KRAMER:

1. This is an ex tempore judgment. I heard the case this morning and the parties have asked that I give judgment by the end of the day and so I do. The consequence is that the judgment, oddly, might be rather longer than it would otherwise be as I have not had a chance to edit it and it may be not be as fluent.
2. This is an application for judicial review of the decision of the Police Misconduct Panel by the Chief Constable of Northumbria in relation to one of his officers, DC Smith. The Panel, and the investigation which led to the appearance before it, were constituted under the Police (Conduct) Regulations 2012. The Panel heard evidence and submissions on 20 and 21 November 2017 and gave its decision at the conclusion of the hearing, which was set out in a notice under Regulation 36 of the 2012 Regulations dated 29 November 2017.
3. The Chief Constable is represented by Mrs Scott-Bell, DC Smith is represented by Miss Williamson. The Panel acknowledged service but take no part in these proceedings and make no submissions. Permission to move for Judicial Review was granted by the court on 25 May 2018 in relation to a number of the grounds put forward, I do not need to identify them for the moment.
4. The background facts are not largely in dispute, if at all. Detective Constable Smith is an officer in the Northumbria Police. He was the officer in the case in two cases of alleged rape involving different individuals. A person called Witness A, who features in this case, was the mother of one of the complainants. Witness B was the sister of a male complainant who had made an allegation of historic sexual abuse. The two of them are not connected.
5. In relation to Witness A, the admitted facts were that Detective Constable Smith telephoned Witness A in November 2016 asking when it would be convenient to take a statement from her in relation to her daughter's complaint of rape. The daughter had provided him with the number of her mother's mobile phone. A meeting was arranged, but this meeting did not take place as it was overlooked by Witness A because she had been thrown out by her partner after telling the partner that she was pregnant, which became a fact known to DC Smith in due course.
6. He contacted Witness A again and arranged to take a statement, which he did. When he took the statement, he also asked her to email him some Facebook messages, which she did, having given her his work email address. Later the same day he sent texts to Witness A of a personal nature which she described in her statement. There was a text, "I couldn't believe you were C's mum, you looked young enough to be her sister" and another couple of texts such as, "When you opened the door I was blown away". Witness A said that she felt flattered by these attentions. She was, because of what was happening to her, as she said, "all over the place," at the time. Following that, a large number of texts were exchanged between DC Smith and Witness A – copies of which were placed before the Disciplinary Panel.
7. The content of the texts indicated that DC Smith wished to pursue a romantic relationship with Witness A and he made several comments about her good looks and very personal information was exchanged between them about the circumstances of their own relationships. He claimed that he was separated from his partner, which in the event was not true. There were also some sexually suggestive texts from him such as a desire to wash

her back in the bath and there was a text concerning skin-to-skin contact and whether this reference was “Getting her going.”

8. There came a time in the course of the texts, which must have taken place, it looks as if it was a period of slightly over a month, that DC Smith indicated that he wished to meet Witness A for a drink. It is necessary at this stage to read out the content of those texts. Where an ellipsis appears in a quoted text that is as it appears and does not indicate that I have omitted words.

There is a text from him – unfortunately I have the times but not the dates of the texts – but there is a text from him where he talks about himself as a parent and then he adds, “Have a think about my invitation,” this was an invitation for a drink. The answer from Witness A, “Absolutely, we will and do, yeah I can imagine. LOL! When C told me she was pregnant, I thought my world had ended, but it didn’t and I love D to bits, can’t imagine life without him, just need to keep on the right path”. She goes on, “A drink would be lovely, I’m only a little worried of any implications for C’s case”. The response in relation to that part of the text was, “OK, I don’t know what will happen yet as I still have enquiries to do. If it went to court, which I can’t promise, it would be vital no-one knew we went for a drink or anything ... that make sense? If you would rather wait, it’s fine, I would understand...”. The rest of that text, unfortunately, is not well copied. In it DC Smith went on to say that their connection would have a bearing if “you were upset with me if C did not get the result she wants.” He then wrote ‘Or if it went to court and the defence knew we were friends or closer. That make sense? I won’t disclose but it is important C etc. don’t know as if he finds out, he may use it to his advantage, that makes sense’. I should add that that is DC Smith referring to the danger that there would be a disclosure of his connection with Witness A. So, having sent the first text saying that it was vital no-one knew, he then goes on in the second text to explain why it is important that C does not know, for if the defendant finds out he may use it to his advantage.

9. The response from Witness A is:

“Glenn I’m absolutely aware of what could happen etc.... honestly I am quite intelligent you know lol.

Whatever the outcome, I would not be upset with you.... I know what your job entails.... and I know you’re not a judge... if you and I were to meet outside of work, then I can assure you it would be in absolute confidence that no-one would know. I’d never want to do anything to jeprodise (sic) C’s case.

With you having read C’s history etc... does that not put you off me? Lol”

10. DC Smith replied:

“No, why would I? I can see you and the family have tried very hard to help her. C is lovely. Every time I speak to her she says, “Thank you” for everything I’ve done, I haven’t done anything apart from check on her and keep her up to date with what’s happening. D is lovely as well. But if we do go further, I have to forget about that and so do you... does that make sense? We have got very serious and I am taking up your night out”.

She responds:

“not serious, just cautious, lol I think it’s best to air it all before, if and when, you and were (sic) to meet for a drink.

I absolutely agree with everything you’ve said. Just on the way out no”.

He answers, “OK, I like you. So good to clear the air. Have fun”. So that was the exchange of texts.

11. The texting continued until after Christmas Day 2016 but it stopped because DC Smith’s partner discovered the texts and rang Witness A to say that she had found out. This had caused, according to DC Smith, World War Three in his household.
12. After New Year 2017, DC Smith contacted Witness A to say that he was coming round to get a statement signed. She said that she wanted him to bring someone with him, she was not comfortable seeing him on her own. A few days before that conversation, she had told her daughter about the texts and the daughter, who was the complainant, reported the matter to her support worker, who reported it to the police. In the interim, DC Smith and a colleague visited Witness A to go through the statement, which she describes as being very awkward and during the course of which, she felt uncomfortable – certainly when he sat next to her on the settee.
13. The police, alerted to the texts, took screen shots of Witness A’s telephone and DC Smith was served with a notice under Regulation 15 of the 2012 Regulations indicating that he was being investigated. He volunteered his mobile phone and what is called his police phablet. Apparently, that is something like a computer tablet, although it is also described as a sort of mobile phone. There were no texts on either which were of relevance to the disciplinary proceedings. Unfortunately, each of the devices, as regards their texts, had been wiped clean as a result of repairs which had been carried out prior to them being handed over in the context of this investigation.
14. As regards the mobile phone, the repair had wiped both the texts and the call history but on the phablet, there was a call history and this revealed that there had been 575 calls to a number that was traced to Witness B. These had taken place between October and December 2016. Witness B was contacted by the police and she accepted that the phone number was hers and that she had had the mobile phone for the last three years but she denied that she had received any calls or texts from DC Smith, save that he had called her once and she said on that occasion he was very professional. As a result of the 575 calls, DC Smith was served with a fresh Regulation 15 notice, dealing with Witness B. He was interviewed about these matters. He provided a pre-prepared statement. He said that as regards Witness B, he met as a result of investigating Witness B’s brother’s case and he had been receiving and sending non-work related texts with her, which, he said, may have been flirtatious in nature. He said he did it because he had a great lack of self-esteem. Subsequently he indicated that 70% of the communications with Witness B were work related but 30% were personal and these were sent both on and off duty.
15. As regards Witness A, DC Smith accepted that he had sent the texts. He said that he never expected to meet Witness A in a social context or have a sexual relationship with her. He accepted that he had instigated the texts on the first day he met her and that he knew it was wrong as she was connected with the case.
16. On 11 October 2016, DC Smith was served with notices under Section 21 of the Regulations. These are rather like a charge sheet and set out the allegations against him. The Regulation 21 notice provides that there is a case to answer and then it sets out the allegations which is said to amount to misconduct, or gross misconduct.
17. As regards Allegation 1 what was said was that:

“DC Smith, being a police constable with the Northumbria Police between the 1st day of November 2016 and 10th day of January 2017, you abused your position as a police officer in your dealings with, *call her Witness A*, a key witness in a rape and serious sexual offence case in which you were involved, in that you:

- i. communicated with *Witness A* in a very personal and sexualised manner;
- ii. communicated with *Witness A* on your personal mobile phone;
- iii. communicated with *Witness A* when both on and off duty;
- iv. told *Witness A* that you had split up from your partner when that was not the case;
- v. gave the impression that you sought to form a sexual relationship with *Witness A*;
- vi. told *Witness A* that if the case in which she was involved went to court it was “vital no-one knew [and she] went for a drink or anything. Such conduct constitutes gross misconduct and is in breach of the following standards of professional behaviour, namely Honesty and Integrity, Duties and Responsibilities and Discreditable Conduct.”

Allegation 2:

“DC Smith, being a police constable with Northumbria Police between the 20th day of April 2016 and the 21st day of December 2016, you abused your position as a police officer in your dealings with, *call her Witness B*, a witness in a Rape and serious Sexual Offence case in which you were involved, and that you:

- i. repeatedly communicated with *Witness B* in a personal and flirtatious manner;
- ii. communicated with *Witness B* on your police issued mobile phone;
- iii. communicated with *Witness B* when both on and off duty.

Such conduct constitutes gross misconduct and is in breach of the following standards of professional behaviour, Duties and Responsibilities and Discreditable Conduct.”

18. The system of police misconduct hearings provides for a response and a Regulation 22 response was duly served on behalf of DC Smith. In it, he accepted that he had breached the standards of professional behaviour relating to discreditable conduct and duties and responsibilities. He did not, however, accept that he was in breach of standards of behaviour relating to honesty and integrity, nor that what he had done was gross misconduct although he accepted that it was misconduct.
19. In his Rule 22 response he said that he did not request the attendance of any live witnesses at the hearing and he would welcome an opportunity to address the Panel as to the lessons that he had learnt and he provided a bundle of character witnesses.
20. As regards the allegations, there were a number of admissions made, factual admissions. The communication with Witness A – he accepted that his communication with her was personal and sexualised but at the time he said he was suffering from anxiety and depression, as he had set out in a report, and he believes his communications were a misguided attempt to alleviate his low self-esteem at a time when he felt, “crap at his job, ugly and good for nobody”. He pointed out that in many of these texts he was requesting

assurance from Witness A that he was not putting her off and asking her that she was not receiving attention from other men. He did not accept that the communications were very sexualised but he accepted that they were very flirtatious. None of the messages were sexually explicit. He said that he did this to boost his self-esteem. One of the messages, it is to be found at page 52, and formed part of investigation, read “V v v nice. I love skin-to-skin as well as ops.” And “I’m very tactile and love that kind of relationship Xxx. Getting you going???”. That is the height of the sexualised content to which I was referred.

21. Communicating with her on the personal mobile phone – he accepted that and now recognises it was inappropriate.
22. Communicating with her both on and off duty – he accepted that he did this but said that was closely correlated with his mental health difficulties and he was affected by the pressure of work.
23. He told her that he had split up with his partner when in fact that was not the case – he accepted that but he said that is not a breach of professional standards, it is just morally questionable.
24. He gave the impression that he sought to form a sexual relationship with her – he accepted that he sent texts which content which may point to this but did not accept that he intended to meet her outside of his duties or actually pursue a sexual relationship with her.
25. As regards his text that it was vital no-one knew they went for a drink or anything – he accepted sending the message but pointed to the fact that he did not go for a drink with her and he did not intend to and in his mind there was little chance of the case ever proceeding to trial. At the time of this message he had appreciated how inappropriate his conduct was and the impact it may have on others. He accepted that it was wrong and he understands that this was one of the reasons why his communication was inappropriate.
26. As regards Witness B – repeated communications with her in a flirtatious manner. DC Smith accepted that he engaged in personal flirtatious communication with a witness B and had accepted this from the beginning of the investigation. He pointed out that the only evidence as to the nature of the communications was from him as the messages could not be retrieved and Witness B had not engaged with the investigation. He said he could not recall the content of the message. He knew they had discussed Witness B’s University, she told him that she attended a course as a mature student. There was no suggestion of meeting her in person for non-policing purposes. He accepted the conduct was repeated in that there was more than one communication. In fact, there were something like 170 plus. He did not accept all, or even most of the 575 messages were of a personal flirtatious nature. Much of the communication was necessary to arrange witness statements etc. He put this as 70% for business purposes – policing purposes – and 30% that were not. Hence the 170-plus texts or messages.
27. On the police-issue mobile phone – he accepted the allegation saying much of the communication was for policing purposes but he accepted he used the same police-issue mobile phone for some personal messages.
28. As regards communicating with her both on and off duty – he accepted his conduct and as he stated in interview, he recognised that he was using inappropriate communications with Witness B as a pick-up for his low self-esteem. This were closely connected to his mental difficulties.
29. So that was his case as set out in the response and, essentially, a resume of the evidence that was available to the Panel.

30. On 20 November 2017, the Panel met. It was made up of Ian Palmer, the legally qualified Chair, Ranjana Bell who, I take it, was the lay representative and Superintendent M Barton, a police officer. The only oral evidence was that given by Detective Constable Smith, who submitted himself to cross-examination as a result. The other evidence consisted of statements from Witness A, an officer who investigated the Witness B allegation and copy texts, character references, occupational health and medical records, and supervisor's report and, produced somewhat late in the day, a psychiatric report from a Dr Brownell which was said to be relevant to the issue of outcome and mitigation.
31. The decision of the Panel was given on the day and set out in the Regulation 36 notice. Under the heading "Determination of your alleged breach of Standards of Professional Behaviour" it recites, "Two allegations of discreditable conduct proved on the allegations referred to in Regulation 15 notice but redrafted and particularised by Counsel for the Authority served at Tab 1 of the bundle. Outcome – Allegation 1: Gross Misconduct," (that is Witness A). "Allegation 2: Misconduct" (Witness B)
32. The details of the reasons for the determination and the outcome are set out in the notice. As to Allegation 1, gross misconduct was found on the allegations in all of subdivisions numbers i-vi, of the Rule 21 notice. This was said to be found proved and to be discreditable conduct. The Panel did not find that the requirements of honesty and integrity had been breached for the following reasons:
1. Not being frank with medical and mental health professionals or work colleagues about your mental health condition is not dishonest;
 2. Telling Witness A not to mention going for a drink if the case went to court does not go to prove lack of honesty and integrity as it was a speculative observation;
 3. As invited to do so we have had due regard to the 7 character references submitted indicating that the officer is honest and trustworthy."
33. Allegation Two, Misconduct was found. The allegations in all Subdivisions i-iii was found proved and to be discreditable conduct. In respect of Subdivision i the Panel found that this was a low-level example of being flirtatious. The decision states:
- "Reasons for outcome – the Panel directed itself to the current Guidance on outcomes in police misconduct cases and adopted the Popplewell Three Stage Process to determine appropriate sanctions." That is a reference to the decision of Mr Justice Popplewell in the *Fuglers LLP & Ors v Solicitors Regulation Authority* [2014] EWHC 179 (Admin). Then they dealt with the outcome this way, they said:
1. –**Assessing the seriousness of the proven misconduct.**
The Panel assessed this behaviour as serious, as evidenced by the finding of gross misconduct in the respect of Allegation 1 and Misconduct Allegation 2.
 2. **The officer's culpability for the misconduct.**
The officer has accepted he is fully responsible for this conduct;
 3. **The harm caused by this misconduct in respect of Witness A + B**
This is to be understood in the light of there being no complaint being made and evidence of mutual dialogue between the officer and the witness. The Panel noted that texting ceased when steps were taken by the witness to bring this to an end. There is no evidence of psychological harm to the witness. The Panel duly noted paragraph 4.59 of the Guidance and made the distinction regarding conduct which is proven and not a speculative guess. The Panel readily accepted there was a power differential between the officer and the public

but were mindful of the absence of a complaint by the witnesses. It was accepted by the Authority that the witnesses were not vulnerable per se.

Once witness A desired to end the relationship, it stopped.

In relation to witness B the Panel noted that there was no sufficient statement of complaint, however, in the statement that was made, the witness stated that the officer was acting professionally in his dealings with the witness”.

34. Under “ **The harm caused to the public/public confidence and the police service**” the panel said:

“The Panel assessed the misconduct in accordance with paragraph 4.59 and 4.60 of the guidance and considered the reputation of the public and police service in the context of misconduct which is admitted or proved and not that which has been speculated upon.”

35. Under “**Aggravating factors**” the Panel concluded:

“The Panel assessed that there has been:

1 – a breach of trust;

2 – a repeat of behaviour in the knowledge it was improper;

3 – there are two victims;

4 – there are two breaches of the standards of professional behaviour;

5 – the cases being investigated were serious offences;”

36. As regards “**Mitigating Factors**” they said

“The mental health of the officer was relevant to the behaviour and we refer to four pieces of information in this regard;

1, the General Practitioner (GP) records;

2, the Occupational Health records;

3, the Psychiatric Report from Dr L W Brownell; 4.

supervisors’ reports regarding the officer.

All of the above demonstrate the officer has a long history of mental health issues. The officer’s silence about this does not, in the view of the Panel, equate to Dishonesty or Integrity issues. This response is a well settled way of dealing with mental health issues, particularly by men. The supervisor’s reports record the officer’s anxiety, stress and history of depression. The GP records support this proposition, with particular reference to the defendant’s treatment for skin eczema, which can be attributed to stress/ anxiety.

The demands on the team

The rape investigation team were operating in an environment of significant demand and pressure against a backdrop of reduced resources.

The officer’s admissions

At the first and significantly at the earliest opportunity, the officer had openly admitted his misconduct in relation to both witnesses. It is notable that the misconduct in respect of Witness B is based upon his early account.

Evidence of genuine remorse

The Panel accept the officer has shown genuine remorse and admitted responsibility for his actions, and has taken steps to change his behaviour.”

37. Finally, under “**Conclusion and outcome of the hearing.**”

“Having considered all of the facts, the decision of the Panel is that the officer will be subject to a final written warning in respect of Allegation One and Allegation Two.”

38. That is the factual background. The grounds upon which leave were given was that firstly, the Panel were irrational in not finding that there had been a breach in the standards of honesty and integrity and a breach of the duties and responsibilities in relation to Witness

A. Secondly, that it was irrational of the Panel not to find that the allegation in relation to Witness B amounted to gross misconduct and that the outcome of being given a final warning was an irrational result, or was irrational on the evidence, and fourthly, that inadequate reasons had been given in relation to the failure to find a breach of honesty and integrity and a breach of duties and responsibilities in relation to what was said about Witness B only being misconduct and also as to the outcome.

39. Turning now to the law. There is no need for me to give an extensive exposition of the legal procedure under which these Panels operate. There is no dispute that the Panel was operating within its powers and there is no dispute as to the procedure it was adopting. Indeed, as regards procedures, if one turns to paragraph 33 of the Regulations under which the Panel was constituted, which are the 2012 Regulations, we see that subject to the Regulations, the person conducting or chairing the misconduct proceedings shall determine the procedure at those proceedings. The task of the Panel appears at Regulations 33(13) and (14). The person or persons conducting the misconduct proceedings shall review the facts of the case and decide whether the conduct of the officer concerned amounts, in the case of ‘a misconduct meeting’, to misconduct or not, or in the case of a ‘misconduct hearing’, which is what we are dealing with here, this is 33 (13b), to misconduct, gross misconduct or neither. Regulation 33(14) provides that the person or persons conducting the misconduct proceedings shall not find that the conduct of the officer concerned amounts to misconduct or gross misconduct unless a) he is, or they are, satisfied on the balance of probabilities that this is the case, or b) the officer concerned admits it is the case. The outcomes available for the Panel are set out in Regulation 35 which provide, so far as is relevant, that the outcomes are as set out in Paragraphs 3(a), (b) or 7 of the Regulation. We do not need to look at 7. The options were, in this case, management advice, a written warning, a final written warning, dismissal with notice or dismissal without notice.
40. As regards assistance to the Panel in reaching its decision, there is issued, under Section 87 of the Police Act 1996, guidance to assist those who are conducting misconduct proceedings. The guidance is described on page 205 of the bundle, at paragraph 1.2, as follows: “The guidance is designed to ensure consistency and transparency in assessing conduct and imposing outcomes at the conclusion of police misconduct proceedings.” It goes on at 1.3, “The guidance does not override the discretion of the persons conducting the meeting or hearing. Their function is to determine the appropriate outcome and each case will depend on the particular person’s circumstances. Guidance cannot and should not prescribe the outcome suitable for every case; instead this guidance outlines a general framework for assessing the seriousness of conduct including factors which may be taken into account. These factors are non-exhaustive and do not exclude any other factors that the person conducting the proceedings may consider relevant.”
41. It is common ground that the Panel are required to take into account the guidance but, of course, that is subject to the caveat that it does not override their discretion and that the purpose of the police misconduct regime, is as set out in the guidance, at paragraph 2.3 on page 206, to “Maintain public confidence in and the reputation of the police service, uphold high standards in policing and deter misconduct and to protect the public”.
42. As regards what is misconduct, paragraph 3.1 provides: “Misconduct is generally defined as unacceptable or improper behaviour and for police officers would involve a breach of the standards of professional behaviour set out in Schedule 2 to the Conduct Regulations.” Under Regulation 3.1 – so this is referring to the Conduct Regulations – “misconduct means a breach of the standards of professional behaviour; gross misconduct means a

breach of the standards of professional behaviour which is so serious that dismissal would be justified.” It goes on at 3.5, “Thus the power to determine outcome arises after the person(s) conducting the proceedings, having reviewed and determined the fact, established which, if any, standards of professional behaviour have been breached and determined whether the conduct found proved against the officer amounts to misconduct or gross misconduct.” The Home Office guidance allows persons, this is 3.6, “considering more than one allegation against the same officer at a misconduct hearing to take the allegations together so they can treat them as a single allegation for the purposes of making an assessment, finding, determination or decision in connection with the conduct issue.”

43. What are the standards of professional conduct to which reference is made? They are in Schedule 2 to the 2012 Regulations and those which are relevant for the present proceedings are honesty and integrity. Schedule 2 sets out various headings. It provides:
“Honesty and Integrity”: “Police officers are honest, act with integrity and do not compromise or abuse their position.”
“Duties and Responsibilities”: “police officers are diligent in the exercise of their duties and responsibilities.”
“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 duties.”
44. There is clearly an overlap between standards, for example a lack of honesty is, of its nature, discreditable conduct because it is likely to undermine public confidence, as would a failure to be diligent in discharging duties and responsibilities.
45. It is common ground that this is the decision of a specialist tribunal which is being considered. They saw the witness, Detective Constable Smith. They made primary findings on what they saw and they are in a better position to make factual findings than am I; it is right to record that they did not need to make many controversial findings in the light of the officer’s admissions. Also, as a specialist tribunal, their assessment of what constitutes misconduct or gross misconduct is primarily for them and I must give due weight to their decision.
46. Indeed, as this is not a statutory appeal but an application for judicial review, I must not interfere with the decision unless it is Wednesbury unreasonable, i.e. one to which no reasonable Panel could have come, on the challenge in this case, because it is irrational and/or the decision making process was defective in the sense that the Panel failed to take into account something that was relevant or took account of a matter which was irrelevant, or gave insufficient reasons, which itself is now regarded as being unreasonable.
47. As to insufficiency of reasons however, such a tribunal is not expected to give a fully reasoned judgment. It is enough that they give their findings and reasons so that each side knows what the decision of the tribunal is as to the key issues in the case and why they have won or lost such that they have sufficient detail that they can consider whether these decisions may be subject to challenge.
48. Let us look at the grounds and the complaint as to the tribunal’s decision that there had been no breach of the duty of honesty and integrity. In the course of argument I questioned whether it was not, of its nature, a lack of integrity to use one’s position as an officer in a case to foster a personal relationship with a witness, who happened to be the mother of an alleged rape victim? That, on the face of it, would be using one’s position for one’s own advantage, and is exploiting a position, as an officer in the case and that, on the face of it would be a lack of integrity. Miss Williamson pointed out, and having looked at this, I think correctly, that that is not the way in which the breach of the honesty or integrity duty

was put. When I look at the grounds for judicial review, the complaint of a failure to find a lack of honesty or integrity is based upon the assertion that DC Smith's encouragement of a witness to lie is what should have led to such a finding. Thus, it would be wrong for me to consider a challenge to that alleged failing of the tribunal to make the finding in reliance upon the proposition that it is fairly axiomatic that the use of his position as the officer in the case to foster a relationship amounted to a breach of the duty of integrity and so I do not do so. I limit myself to the challenge which is made, which is that the witness was encouraged to lie.

49. Mrs Scott-Bell for the Chief Constable says that the only reasonable conclusion that the tribunal could have reached from the exchange of the texts was that the witness was being encouraged not to disclose that she was having a relationship with DC Smith. That was a breach of the duty of honesty and integrity. How was this issue dealt with by the Panel?
50. At page 34 of the bundle, we have the decision. The first reason given for concluding that the duty had not been breached was that DC Smith's absence of candour about his mental health condition when talking to medical and mental health professionals and work colleagues was not dishonesty on his part. That particular issue had been introduced in the course of cross-examination and was not the subject of the Rule 21 notice and there had been no new Rule 21 notice preferred to raise it. Therefore, in a sense they did not need to deal with that, or deal with it in that way. That issue seems to have originally been introduced by counsel for the Chief Constable to demonstrate that DC Smith could not generally be believed because he, on his own admission, had misled health professionals; it went to credibility. It was not a matter that was necessary to decide in order to consider whether what was admitted, which were the texts, amounted to a breach of honesty or integrity. I do not really need to look at that.
51. The second reason given was that telling Witness A not to mention going for a drink if the case went to court does not go to prove a lack of honesty or integrity, as it was a speculative observation. The concept of speculative observation was introduced by Miss Williamson in her final submissions before the Panel in which she argued that whatever had been said in the texts, the fact is the parties had not met and the case did not go to trial and therefore, DC Smith was never put to the test as to whether he would not disclose the relationship. That essentially is her argument today. That is why she says the tribunal were right to characterise this as a speculative observation because it was not carried through. That indeed is how they set it out almost word for word in what may be regarded as the judgment they gave, or the reasons they gave at the end of the hearing prior to the Regulation 36 notice. They said that in relation to the sixth point of Allegation One, which relates to 'you told the Witness A in the case that you were investigating that it was vital that no-one knew if you went out for a drink. We do not find that this goes to prove a lack of honesty or integrity as it was a speculative observation.'
52. I consider this reasoning on the basis that the tribunal accepted Detective Constable Smith's explanation for the number and the nature of the texts that he sent, namely he, whilst not intending to meet Witness A, wanted to have a text relationship with her to bolster his self-esteem. It does seem on the face of it that the words that are being used is that he is seeking assurance from Witness A that if the matter goes to court, no-one is to know about it, if they have a drink or anything. He then said he is fine if she wanted to put the matter on hold, which of course, then gave her the option to continue with it on hold but if it continued, on the face of those words, it was to be kept quiet. She gave the assurance that

if they did meet outside work, the matter would be kept confidential. Clearly, it was unknown at the time if the matter would go to court but, on one view, it would seem pretty clear to the recipient of the request for confidentiality that DC Smith was clearing the way for a relationship with Witness A by securing her agreement that if the matter did go further she was not to let on.

53. A relationship between an officer on a case and a witness is disclosable to the defence and indeed it is recognised in the texts produced by DC Smith that he was concerned what the defendant would make of it, if the defendant found out there was the relationship. Indeed, it must be the case, that it would be reportable by the officer if he was having a relationship with a witness even before the matter got to court so that his employers could take the option of replacing him as officer in the case. I appreciate that that was not a matter that was argued so I do not place any reliance on that.
54. There was, on the face of it, an agreement that if the need arose, they would do something improper, and in the course of doing that DC Smith was compromising both himself and the witness. That is not speculative. The agreement is something which is concrete. The area where speculation came to be relevant is in looking at what harm this may create. Of course, it may have created no harm if the matter, that is the prosecution, went no further. That is a question to be considered when looking at the degree of harm and one of the questions the guidance poses is that you do not only have to look at the existing harm but also the risk of harm, and clearly the question of what was 'speculative' is a risk of harm issue but it is not a matter, that on the face of it, is to be considered at the stage of lack of honesty and integrity. Asked, under cross-examination, why he suggested in a particular text that the relationship should not be mentioned to anybody, he said well he could get into trouble, which is an indication that in securing this agreement, he was putting his personal interests ahead of his obligations as a police officer. In my view, it was irrational to characterise the suggestion as mere speculation and thus, not to give it any weight.
55. The suggestion to Witness A not to divulge if they met for a drink, and indeed that they were friends and her agreement to this course were, as I say, concrete acts. It was not correct to give that no weight in deciding whether or not the duties of honesty or integrity had been breached. It is salutary to look at the full definition of honesty and integrity as I just read it out earlier, page 461. It says, 'police officers are honest, act with integrity and do not compromise or abuse their position'. It is difficult to see the logic in concluding that suggesting to and gaining the agreement of a witness that if certain contingencies arise, they will not take certain actions which they undoubtedly should take, and the officer should take, is not a compromise or abuse of the officer's position. Therefore, I conclude that it was indeed irrational for the Panel to fail to give weight to the agreement that has been reached in considering whether there was a breach of the duties of honesty and integrity and to characterise what had occurred as a speculative observation.
56. In relation to duties and responsibilities, the assertion that there had been a failure to comply with the breach of the standard as to duties and responsibilities was set out in the notice which was served, the Regulation 21 notice. The decision does not deal with it at all. The decision does not explain why that particular allegation has been entirely left out of account in coming to a decision and the most that one has is that when it came to outcome, Mrs Scott-Bell, for the Chief Constable, asked whether they had also found a breach of the standard in relation to the duties and responsibilities or just discreditable conduct and they said discreditable conduct. Nowhere is there an explanation as to why they made no finding, one way or the other, as to this particular standard.

57. As officer in the case, the duty and responsibility of that officer included looking after the welfare of the victim and the witnesses and seeking to, so far as he could, ensure the investigation was effective and the case was effectively prosecuted. This liaison which he embarked upon was contrary to all of that and Miss Williamson accepts that this aspect of this allegation was not dealt with by the tribunal and she also accepts that the behaviour could amount to a breach and indeed her own client had, in his response to the notice, indicated that he accepted that it was such a breach.
58. There is no explanation in the decision as to why they did not accept that admission and on the face of it, it has all the hallmarks of being overlooked. The lack of any reference to this allegation in the decision is irrational since it was one of the breaches of standards which were being alleged and simply to ignore it is irrational and Wednesbury unreasonable as they seemed to fail to take into account the evidence about it or indeed give any reason as to why they rejected it. Miss Williamson's main argument about this is that it would have made no difference but that is something which needs to be looked at when I consider whether any remedy by way of judicial review should be granted.
59. As regards Witness B, how did they deal with the question as to why the behaviour in relation to Witness B was misconduct and not gross misconduct? Their explanation for that conclusion is that they found that this was a low-level example of being flirtatious; that is all they say as to Allegation 2. If that was the extent of their reason for finding it was not gross misconduct, the claimant argues that the level of flirtation is not the yard-stick by which one determines whether this is misconduct or gross misconduct and one had to look at the purpose of the misconduct procedure. That requires one to look at this behaviour and see how it impacts upon maintaining public confidence in and the reputation of the police service, upholding high standards of policing, to deter misconduct and protecting the public.
60. Mrs Scott-Bell says the very fact of the activity is relevant to whether it is serious misconduct not just the level of flirtation. She postulates, as she did before the Panel, what will the public think? Someone complains of a rape, or a relative of theirs complains of a rape, what will they think if the policeman who is the officer in the case uses this connection, made as a result of being called to deal with the matter in his official capacity, to send over 170 texts, some of them, albeit at a low level, flirtatious? The member of the public may wish to desist from relying on the policeman or not think they are reliable if they ran that risk. She says this is very serious. As regards it being serious, she points me to the guidance. At paragraph 4.39, page 220 in the bundle, the guidance in dealing with culpability states under the heading "Violence, intimidation or sexual impropriety": "Misconduct involving violence, intimidation or sexual impropriety undermines public trust in the profession and is serious". At paragraph 4.40, the guide goes on: "This includes includes cases involving bullying or harassment either in the police service or towards members of the public Give attention to the degree of persistence and the vulnerability of the other party, the number of people subjected to the behaviour and where the officer was in specific position of authority or trust. More serious action is likely to be appropriate where the officer has demonstrated predatory behaviour motivated by a desire to establish a sexual or inappropriate emotional relationship with a colleague or member of the public."
- Paragraph 4.41: "The presence of any of these factors is likely to increase the seriousness of the misconduct although the treatment of a single individual can be sufficiently serious to amount to gross misconduct." Then at paragraph 4.42 we see:

“The nature of the Office of Constable means that all officers are in a position of trust and authority in relation to members of the public. An officer’s misconduct will be more culpable where it involves an abuse of this position. Where an officer has used their position to pursue a sexual or improper emotional relationship with a member of the public, this should be regarded as an abuse of authority for sexual gain. Such conduct can cause substantial damage to public trust and confidence in the police and is particularly serious where the subject of the officer’s behaviour is a vulnerable person.” In this case Witness B was not, apparently, a vulnerable person. Nevertheless, we can see the seriousness attached by the guidance to what it terms “abuse of authority for sexual gain.”

61. Further, says Mrs Scott-Bell, one also has to look at the cumulative effect. It was not just Witness A but Witness B as well and that makes it more serious.
62. Miss Williamson says there is no requirement to look at both allegations together, which is correct. The guidance only says one may do that. She says the facts are very different and furthermore, Witness B did not want to engage with making any complaint about this, and therefore there is nothing irrational in the outcome.
63. It seems to me that Mrs Scott-Bell is correct. The seriousness of what happened is not measured simply by the level of flirtation but by the potential for contravening the very purposes for which there are misconduct regulations, which I have just read quoted. This particular allegation should have been considered against those yardsticks and account should have been taken, on the face of it, to what the guidance says about those who seek to use their position to have improper emotional relationships with members of the public.
64. Clearly, the way the guidance apply and the weight that the tribunal give to particular factors are ordinarily a matter for them, they are to have regard to the guidance, it is not prescriptive as to what view they have to take as the application for guidance. In this case, to discount the allegation in relation to Witness B and put it on a less serious level in reliance upon the level of flirtation is so far at odds with the purpose of the guidance and the disciplinary procedure that in my view that too is an irrational outcome that fails to take account of relevant matters, namely why it is that the conduct guidelines exist.
65. Ground Three – Inadequate reasons. I do not really need to go into that. The reason put forward in the decision under Ground 1, that is to say the agreement concerning not telling anyone was speculative and therefore that particular factor was not of particular weight, was not a good reason. It was incorrect. There were no other reasons put forward to support the honesty and integrity conclusion under Allegation 1 other than the one which, in fact, is of no weight and is irrelevant to this matter, i.e. that it was not dishonest to mislead as to the medical condition when talking to the employers. There was a third reason put forward which does not seem, to me, to be relevant to this particular issue which is that this gentleman had a number of character witnesses who said that he was a very honest person. What had to be focused upon was what he had actually done and why, doing what he accepted he did, that could not be properly described as a lack of honesty and integrity.
66. Miss Williamson argues that the Panel did direct themselves to the correct guidance. It is correct that it referred to the guidance but it had to apply the guidance as well and frankly, it is not clear how they applied it at all in relation to Allegation 1. As regards Allegation 2, it does not appear to have applied that part of the guidance which sets out the reason as to why one has a misconduct procedure or to explain why they did not regard this second allegation as one which had a considerable potential impact upon the protection of the public and the reputation of the police if such a matter were to become known to the public.

67. As regards outcome, they did refer to guidance. So, in relation to inadequate reasons, I think I have dealt with that adequately in relation to what I have said about Grounds One and Two.
68. As regards Ground Four which is the question of outcome, the tribunal did recite the guidance or, at least, refer to the Popplewell threefold test. This provides the three stages to determine the appropriate sanctions and is summarised at paragraph 4.2 or the guidance: first, assess the seriousness of the misconduct, secondly, keep in mind the purpose of imposing sanctions and thirdly, choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.
69. The first matter they had to do was assess the seriousness of the conduct. In this respect the guide, at 4.4 directs the panel to, assess the seriousness of the proven conduct by a reference to first, the officer's culpability for the misconduct, secondly, the harm caused by the misconduct, thirdly, the existence of any aggravating factors and finally, the existence of any mitigating factors.
70. Mrs Scott-Bell argues that they did not do what was contemplated by the guidance. What they did was – and we look at page 34 – they first decided the seriousness of the misconduct. Under, 'Assessing the seriousness of the proven misconduct,' the Panel said it assessed this behaviour as serious as evidenced by the finding of gross misconduct in respect of Allegation 1 and misconduct in Allegation 2. They then went on to look at culpability as a separate head and said the officer has accepted he is fully responsible for his conduct. Now, stopping there, Mrs Scott-Bell's argument is that the examination of culpability was a factor it was supposed to look at in the context of determining the seriousness, it was not simply a second consideration on a checklist and they, in assessing the seriousness, had simply indicated that their reasons for this being serious was that they had found gross misconduct in Allegation 1 and misconduct in Allegation 2. As regards the issue of culpability, they had treated that as synonymous with the fact of guilt, as opposed to the level of blameworthiness.
71. Miss Williamson takes me to paragraph 4.10 of the guidance which provides that 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. Then it gives instances of what is more serious and less serious and she says that since paragraph 4.10 refers to blameworthiness or responsibility, that is culpability denotes blameworthiness or responsibility, it was legitimate for the tribunal to direct themselves that all they had to consider under the question of culpability of misconduct was whether he was responsible or not, which of course, is simply the fact of guilt. Did he do it? As they say, he accepted he is fully responsible for the conduct.
72. Maybe that argument succeeded before the Panel, but it is perfectly clear that when the word 'culpability' is being used, it is being used in the context that there is a range of behaviours, some of which are what might be called very culpable and others which are less culpable but there is a spectrum of blameworthiness and the Panel were expected to make a decision as to where within that spectrum, this behaviour lay.
73. To do that, they were given the assistance, to which I have referred in paragraph 4.39 to 4.42 concerning sexual impropriety undermining public trust and where this falls in the spectrum of blameworthiness. Of course, in light of their findings, the factors concerning honesty and impropriety were not those to which the Panel had regard. Certainly, they would have had to look at the section on impropriety for guidance. Accordingly, on the face

- of it, it is not clear they did actually make a decision on culpability. What they did was simply treated the issue of culpability as the fact of guilt and, therefore, they did not identify where in the range of what is called ‘serious behaviour,’ these particular activities lay.
74. They then went on to look at harm, pointing out that the two witnesses were not vulnerable per se and that they do not appear to have suffered any particular harm but then go on to deal with the paragraph 4.59 and 4.60 considerations. Paragraph 4.59, in relation to harm, says where no actual harm has resulted, consider the risks attached to the officer’s behaviour including the likelihood of harm occurring and the gravity of harm that could have resulted. At 4.60 how such behaviour would be or has been perceived by the public will be relevant whether or not the behaviour was known about at the time. The Panel say, “we have assessed the misconduct in accordance with 4.59 and 4.60” but they do not set out what their conclusion is as to whether this misconduct triggers or this misconduct involves these sort of risks. They do not identify the potential harm created by the risk or the gravity of it or how the public would perceive the matter if they found out about what had happened. They simply do not deal with that, therefore it is not possible to reach a conclusion, or to identify from this decision as to what their decision was as to the harm caused to public and public confidence in the police service or indeed risk of harm and that is a shortcoming in this decision which results in it being insufficiently reasoned.
75. Of course, the Panel was supposed to look at the issue of harm, and aggravating and mitigating factors in coming to a conclusion as to the level of seriousness, but because of the way in which they approached the case they did not do so. They looked at seriousness first and then went through other factors and came up with a decision and thus it is not possible to see what of the mitigating and aggravating factors, harm or culpability, they have factored into a decision to the seriousness of the behaviour. Thus, the reasoning here does not follow the guidance. Neither do they give a reason as to why they have departed from the guidance and accordingly the reasoning here is faulted.
76. Thus, the decision, subject to one matter, on the face of it, cannot stand but Miss Williamson has asked me to consider, which is an application under Section 31 of the Senior Courts Act 1981, that whatever criticisms one can make of the decision, the outcome would have been the same. I would have to find that it would be highly likely that there would be no different outcome if these criticisms were not available to the claimant. Whilst one could see how that particular argument may avail the interested party if the only legitimate criticism of the decision related to the absence of a finding that there was a breach of professional standards in relation to a breach of duty and responsibilities, it is clear from my decision that the shortcomings are much greater than that and go to the heart of the decision they had to make and the process by which they were to reach such decision. Accordingly, it does not seem to me that I could possibly come to the conclusion that it is highly likely that there would have been no different outcome. The decision of the Panel must be quashed and the case dealt with by a new Panel.

End of Judgment

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This transcript has been approved by the judge.