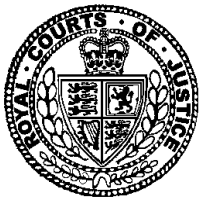


Neutral Citation Number: [2022] EWHC 2857 (Admin)

Case No: CO/887/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2022

Before :

MR JUSTICE MOSTYN

- -

Between :

Commissioner of the Police of the Metropolis	**Claimant**
- and -	
A Police Conduct Panel	**Defendant**
- and -	
PS Hayley Russell	
PC Christopher Strickland	**Interested Parties**

s

- -
- -

Frances McClenaghan (instructed by **Metropolitan Police Department of Legal Services**) for the Claimant
Luke Ponte (instructed by **Reynolds Dawson**) for the First Interested Party
Ben Summers (instructed by **Reynolds Dawson**) for the Second Interested Party
The Defendant was not represented

Hearing date: 3 November 2022

- -

Approved Judgment

Mr Justice Mostyn:

1. I am certain no one would dispute that one of the basic rules of a civilised society has to be that armed police officers are (a) authorised to carry their weapons by a process which is transparent, effective and incorruptible; and (b) rigorously, repeatedly and verifiably trained in their use.

2. Hence, the principal professional guidance issued by the College of Policing states:

> "Chief officers must ensure an effective and auditable system exists for the storage and issue of firearms, ammunition, specialist munitions and less lethal weapons and in their force area, and that these systems comply with the principles set out in this guidance. …
>
> An Authorised Firearms Officer (AFO) is a police officer who has been selected, trained, accredited and authorised by their chief officer to carry a firearm operationally. …
>
> Where firearms, specialist munitions and less-lethal weapons are issued operationally to officers, those officers must be trained and currently authorised to use that particular type of weapon or munition.
>
> A full audit trail must be maintained, detailing the issue, transfer and return of all firearms, ammunition, specialist munitions and less-lethal weapons issued to AFOs or other police staff, irrespective of the reason for issue. The person to whom the equipment is issued is responsible for its security and carriage, in accordance with force procedures.
>
> A system must exist within each force area which enables officers issuing firearms, ammunition, specialist munitions and less-lethal weapons to establish that each AFO is currently authorised in the equipment issued."

3. The regime under which such training and authorisation is regulated and operated derives from s. 54(1) and (3) of the Firearms Act 1968 which exempts members of police forces acting in that capacity from the licensing requirements imposed by firearms legislation.

4. In November 2019, when the events with which I am concerned occurred, the use of firearms by police officers was governed by the *Home Office Code of Practice on the Police Use of Firearms and Less Lethal Weapons* (2003) ('the Code of Practice'). The Code of Practice is statutory guidance, made under ss. 39 and 39A of the Police Act 1996 and ss. 73 and 73A of the Police Act 1997 (see 1.2.2 of the Code). Under s. 2 of the Police Reform Act 2002, Chief Officers have a duty to have regard to the Code (see paragraph 2.1.3 of the Code).

5. Paragraph 5.2.1 states that National Occupational Standards will be drawn up which will define common standards of competence for weapons.

6. Two subsidiary codes of guidance were then in place:

   i) The *Authorised Professional Practice: Issue And Carriage Of Firearms* issued by the College of Policing ("the APP"). This gives generic guidance.

   ii) The *Standard Operating Procedure (Police Use of Firearms and Less Lethal Weapons) Version 15.1* ("the SOP") issued by the Metropolitan Police Service. This gives the operating procedure for that force.

7. The APP, from which I have quoted above in [2], requires Chief Officers to have "an effective and auditable system…for…the issue of firearms" and states that they should consider the circumstances in which they may provide a standing authority for the issue and carriage of firearms. It permits chief officers to issue a standing authority to officers engaged on specific duties where a threat and risk assessment deems this appropriate. Examples of this include officers crewing armed response vehicles.

8. The APP refers to the National Police Firearms Curriculum which stipulates, among other requirements, a framework of continuing professional development.

9. The SOP sets down the authorisation requirements at pages 41 to 42. It lays down the frequency of what are referred to as "reclassification shoots".

   i) Paragraph 2.100 states that successful completion of a reclassification shoot 'qualifies' an officer in that weapon system for a maximum of 183 days. This frequency is a College of Policing mandated requirement.

   ii) Paragraph 2.101 states that the firearms instructor will stamp the officer's blue card or book. The SOP is silent as to whether an instructor could stamp his / her own card. Inferentially, and using common-sense, you would not think that this was possible.

   iii) Paragraph 2.102 sets down the pass requirements. Paragraph 2.106 explains that if an authorisation expires, the officer will have to complete the re-authorisation process before returning to operational duties.

10. In 2019, when the events with which I am concerned occurred, compliance with these standard was, to put it mildly, disturbingly lax. This case demonstrates that self-stamping of blue books by qualified instructors at that time was rife. It also suggests that the falsification or non-completion of shoot reclassification records with which this case is concerned, was not an isolated incident. Considerable evidence was given at the misconduct hearing (q.v.) about a "highly dysfunctional training regime".

11. I have been told that since then systems have been overhauled and that such laxity is a thing of the past. I hope this is true.

12. The case before me concerns false firearms reclassification shoot records on, and false authorisations for, two types of firearm - the Glock pistol and the Sig MCX carbine ("the firearms"). In November 2019, PS Hayley Russell falsified the shoot records and PC Christopher Strickland falsified the authorisation.

13. Disciplinary proceedings were brought against these officers. The Regulation 21 Notice initiating the process was served on PS Russell on 25 February 2020, and on PC Strickland on 28 February 2020. It took nearly two years for the proceedings to be concluded.

14. A misconduct hearing against the officers took place from 8 to 13 December 2021 before the defendant Police Conduct Panel ("the Panel"). The Claimant alleged that the officers had breached the "honesty and integrity", and the "discreditable conduct" standards of professional behaviour stipulated by the Police (Conduct) Regulations 2012, Schedule 2. On 13 December 2021, the Panel found the allegations against both officers proven and held that they amounted to gross misconduct. Under paragraph 3.4 of the governing guidance (q.v.) "gross misconduct" means a breach of the Standards of Professional Behaviour which is so serious that dismissal would be justified. However, the Panel directed that only a final written warning would be given to both officers.

15. The Claimant seeks judicial review of that decision. This is my judgment on the claim.

The facts

16. PS Hayley Russell is an experienced Metropolitan Police firearms instructor. Her friend and colleague PC Chris Strickland is also a firearms instructor. For about four years they had worked together at the Gravesend shooting range. In that period she acted as his line manager for two years.

17. In November 2019, when the events I have to examine took place, PC Strickland was not in fact working at the range but was deployed to the Armed Response Vehicle ("ARV") team, although he retained his status as an instructor. A few days before 3 November 2019 he claims that he had a discussion with PS Russell about a plan of other colleagues to conduct reclassification shoots on 6 November 2019 at Gravesend. He says that they agreed that they would join in the reclassification shoot on that day. It would allow them to catch up and socialise.

18. PC Strickland was in fact rostered to be deployed in a vehicle as part of the ARV team on 6 November 2019. He would have been well aware that he needed approval to relinquish those duties in order to attend Gravesend for a reclassification shoot.

19. Yet, on 3 November 2019, without having been granted any such permission, PC Strickland falsely stamped his personal firearms authorisation document known as his "blue book" to state that on a date in the future, namely 6 November 2019, he had reclassified on the firearms. The significance of this can hardly be overstated. Whenever a weapon is withdrawn by PC Strickland (a regular occurrence on the ARV team) the blue book is the document that tells the armourer that he is authorised to carry it. The importance of its authenticity and accuracy is therefore obvious.

20. PC Strickland told the Panel that he put a false stamp in his blue book to avoid being held up by talkative staff in the offices and canteen at Gravesend when in the process of obtaining the stamp on 6 November 2019.

21. On 6 November 2019 PC Strickland did not go to the Gravesend Range. He told the Panel that he forgot to go.

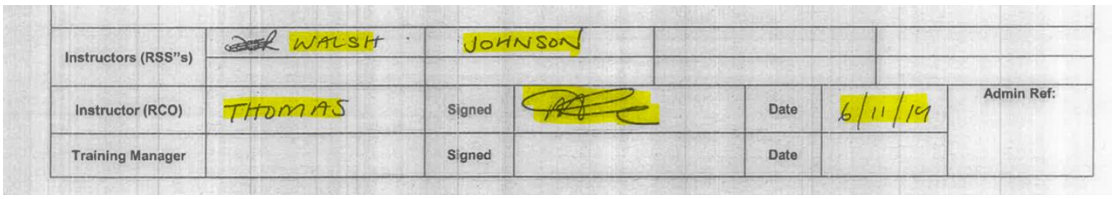
22. The Panel did not believe any of this. In paragraph 25 of its decision given on 13 December 2021 it stated:

> "On the balance of probabilities the Tribunal has concluded that PC Strickland was dishonest in stamping his blue book, which is an important document concerning the time frame in which he is authorised to carry a fire arm. He knew he had not reclassified when he did this and so it was a false entry, and the public would not consider this acceptable."

23. His counsel, Mr Ben Summers, points out that on 3 November 2019 PC Strickland already had an authorisation in his blue book for the firearms for nearly four more months until 27 February 2020 (deriving from an earlier stamp self-applied on 28 August 2019). The false stamp applied by him on 3 November 2019 extended the authorisation by a mere nine weeks to 7 May 2020. The advantage gained by this conduct was therefore minimal.

24. I turn to the conduct of PS Russell. As an instructor she was allowed to record results, and at the shoot on 6 November 2019 she duly, and accurately, did so on ARV Classification score sheets for pistol and carbine shoots for herself and PS Cann.

25. I insert here a picture of the initial paperwork filled in by PS Russell recording the names of the instructors. I have highlighted her handwriting.



26. In her Regulation 22 response she stated:

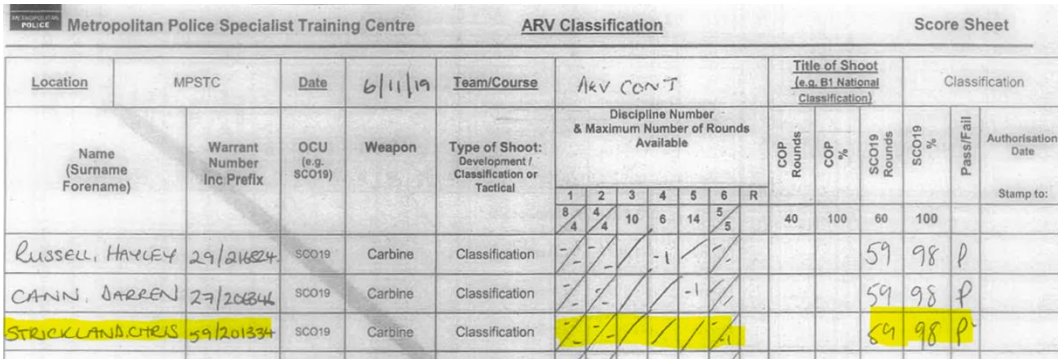
> "She … accepts that she entered the squiggle on SRG/l at p97 which was adjacent to:
>
> "Instructor (RCO) THOMAS Signed... "
>
> This squiggle was not intended as a false signature of Mark Thomas (or anyone else for that matter). It was just a marking, quickly and thoughtlessly entered, which was supposed to signify that the form had been completed. She thinks that she wrote the squiggle before the reclassification took place and the scores were entered."

27. The Panel recorded her oral evidence on this matter in paragraph 10(g) of its decision in these terms:

> "PS Russell claimed she had added a squiggle not a signature, and accepted there are easier markings to use if not intending to look like a signature. She accepted the impression to others on seeing the entry would be that it appeared to be a signature, but

denied that was her intent. In reply to questions she could not offer any example of a Metropolitan Police form marked with a signature box that had an expectation that you could do anything but sign it, and that a squiggle would be acceptable. She accepted a box marked for signature would be expected to contain a signature."

28. After the shoot PS Russell entered the results of herself and PS Cann on the score sheets. But she went on to enter false results in the name of PC Strickland. As stated above, he did not set foot in the range on 6 November 2019. I insert here a picture of the score sheet for the carbine on which I have highlighted the fictitious entry (the entry for the pistol is almost identical).



Metropolitan Police Specialist Training Centre — ARV Classification — Score Sheet

Location	MPSTC	Date	6/11/19	Team/Course	ARV CONT	Title of Shoot (e.g. B1 National Classification)	Classification

Name (Surname Forename)	Warrant Number Inc Prefix	OCU (e.g. SCO19)	Weapon	Type of Shoot: Development / Classification or Tactical	Discipline Number & Maximum Number of Rounds Available							COP Rounds	COP %	SCO19 Rounds	SCO19 %	Pass/Fail	Authorisation Date Stamp to:
					1	2	3	4	5	6	R						
					8/4	4/4	10	6	14	5/5		40	100	60	100		
RUSSELL, HAYLEY	29/216824	SCO19	Carbine	Classification	-/-	-/-	-/-	/	-1	/	-/-			59	98	P	
CANN, DARREN	27/206846	SCO19	Carbine	Classification	-/-	-/-	-/-	/	/	-1	-/-			59	98	P	
STRICKLAND, CHRIS	59/201334	SCO19	Carbine	Classification	-/-	-/-	-/-	/	/	-1				59	98	P	

29. In her Regulation 22 response PS Russell stated:

"At the end of the shoots, PS Russell signed her own blue card. Again, this was standard practice at Command for trainers and instructors to self-authorise in this manner.

PS Russell also completed the scores on SRG/l and SRG/2. Regrettably, she did not pay sufficient attention to the forms as she entered the scores - she mistakenly and inadvertently entered scores for PC Strickland.

PC Strickland had not attended the shoot; there was no particular communication with him one way or the other on the day to indicate that he would be coming or that he would not be coming.

As stated in the written response to caution, she cannot point precisely to what was going through her mind at the time she made these errors. It may have been that she was distracted by events around her; it may be that she had other things on her mind and she was not thinking straight. All she can say at this remove is that she never would have purposely falsified the documents, and she is extremely sorry that the entries were not accurate.

As far as PS Russell can remember, she left the range score sheets at the back of the range with the safety briefs. She thinks that her thought process would have been: if PC Strickland does turns up in due course for the shoot, I will be able to direct him

> to the scores for him to fill in and sign the safety briefs. She did not appreciate at the time that she had mistakenly filled in the scores for him
>
> As it happened, PC Strickland did not make it to MPSTC that day."

30. In her oral evidence she said that she left the scorecards on a table at the back of the range in case PC Strickland turned up. She said that she expected PS Cann to take the scorecards to the office to be uploaded, although PS Cann's evidence was that he left it to PS Russell to complete the forms and that he expected another officer to enter the information on the system.

31. Unsurprisingly, the Panel found her evidence to be unreliable, inconsistent, and in the result, untrue. In paragraph 24 of its decision it held:

> "On the balance of probabilities the Tribunal has concluded that PS Russell was dishonest in her actions in completing a range score card showing PC Strickland as having carried out a shoot, and in particular in adding a false signature to the form against the name of another person. It is our conclusion that she knew PC Strickland was not present on November 6th and consequently she knew all entries in regards to him on range score cards were false, and this was dishonest and that the public would not consider this acceptable."

32. Those were the key facts found by the Panel.

33. However, I must record a key fact that was not found proved. The Panel was invited to consider whether PC Strickland knew that PS Russell had submitted scores on his behalf, and if so, whether he consented to this being done. Put another way, the Panel was asked to find that the two police officers had colluded to provide PC Strickland with false data to substantiate the false stamp placed by him in his blue book. However, the Panel stated at paragraph 23: "we cannot conclude on the balance of probabilities that PC Strickland did know PS Russell submitted scores". Therefore, the case before the Panel proceeded to its conclusion on the limited findings which presupposed, for reasons unconnected to the later conduct of PS Russell, that PC Strickland on 3 November 2019 entered in his blue book a false stamp stating that he successfully reclassified on 6 November 2019; and that coincidentally on that very day, 6 November 2019, PS Russell entered on the scoresheets a completely fictitious reclassification performance by PC Strickland. Given this finding, there is an air of unreality surrounding the decision of the Panel.

The sanction imposed by the Panel

34. The sanction imposed by the Panel was a final written warning. The Panel in paragraph 33 of its decision justified its decision in these terms:

> "We consider the public would not expect those who handle firearms would ever falsify documents, because use of firearms is a serious matter, and they would not expect such officers to

> carry firearms again. We take account of the admissions and the lapse against otherwise long and positive service and have considered what is the least harsh outcome"

35. Ms McClenaghan submits that the phrase "they would not expect such officers to carry firearms again" is some kind of informal steer or suggestion to the Commissioner to cancel the firearms status of these officers. The issuance of a formal recommendation in such terms is beyond the powers of the Panel. Ms McClenaghan submits that the presence of this phrase implies an acceptance by the Panel that its sanction was unduly lenient. She may be right about that, but, as will be seen, my function is not to judge the leniency or otherwise of the sanction but rather to ascertain, first, if the process which led to it was unlawful; and, second, whether it is irrational in the sense of being vulnerable to a Wednesbury challenge.

The judicial review

36. On 14 March 2022, the Claimant applied for, and on 26 May 2022 was granted permission to pursue, judicial review of the sanctions decision by the Panel. The Claimant does not seek to challenge the finding that the officers did not act in concert.

37. The claim has two grounds.

    i) Ground No. 1 is that the process by which the sanctions decision in respect of both officers was reached was unlawful and that it should be quashed.

    ii) Ground No. 2 is that the sanction awarded against PS Russell (but not PS Strickland) was 'irrational', i.e. one which no reasonable tribunal correctly applying the law could properly have awarded. Under this Ground an alternative quashing order is sought based on a finding that the only appropriate sanction that could have been awarded against PS Russell was dismissal from the force.

38. The Claimant seeks that the sanctions decision be remitted to a differently constituted Panel, which should redetermine the sanctions against the two officers. In the case of PS Russell it is submitted that the Panel would in effect have its hands tied and be obligated to direct that she be dismissed from the force in the light of the ruling on irrationality. In the case of PC Strickland the Panel should determine sanctions de novo but in the light of the terms of this judgment.

39. Mr Luke Ponte, counsel for PS Russell, does not dispute that the process by which the sanctions decision was reached was unlawful. He does not dispute that the sanctions decision should be quashed on that ground. He disputes that the sanction awarded against PS Russell was irrational. He submits that a warning was within the remit of reasonable decisions that could have been lawfully taken by the Panel. In any event he says that, as the decision is to be quashed under Ground No. 1, I should not tie the hands of the Panel, a specialist tribunal, in determining what would be an appropriate outcome.

40. He submits that the matter should be remitted to the original Panel, and not to a new Panel, for two reasons. First, he submits that under the applicable Regulations there is no power to remit part of a decision to a different Panel. Second, if he is wrong about

that, he submits that it is more appropriate that the original Panel, which will have heard all the evidence and made findings of fact, should redetermine the sanctions.

41. Mr Ben Summers, counsel for PC Strickland, likewise does not dispute that the process by which the sanctions decision was reached was unlawful. However, he maintains that as regards his client I should exercise my discretion to go no further than a declaration of unlawfulness (as in, for example, *R (on the application of Campbell) v General Medical Council* [2005] EWCA Civ 250).

42. Mr Summers submits that it would be highly likely, particularly where the Claimant is not alleging that the sanctions awarded against his client was irrational, that the outcome would be the same and that therefore relief should be refused under s. 31(2A) of the Senior Courts Act 1981. Further, he argues that it would be a form of double jeopardy for his client to be exposed to a redetermination of sanctions in circumstances where it is not said that the original sanction was outwith the reasonable decision making powers of the Panel.

Ground 1: analysis and decision

43. Section 87 of the Police Act 1996 states:

> "(1) The Secretary of State may issue guidance as to the discharge of their disciplinary functions to:
>
> (a) local policing bodies,
>
> (b) chief officers of police,
>
> (c) other members of police forces,
>
> (d) civilian police employees, and
>
> (e) the Director General of the Independent Office for Police Conduct
>
> (1B) The College of Policing may, with the approval of the Secretary of State, issue guidance to the persons mentioned in subsection (1)(a) to (c) as to the discharge of their disciplinary functions in relation to members of police forces and special constables and former members of police forces and former special constables.
>
> …
>
> (3) It shall be the duty of every person to whom any guidance under this section is issued to have regard to that guidance in discharging the functions to which the guidance relates.
>
> (4) A failure by a person to whom guidance under this section is issued to have regard to the guidance shall be admissible in evidence in any disciplinary proceedings or

> on any appeal from a decision taken in any such proceedings."

44. Pursuant to sub-section (1B) in 2017 the College of Policing issued the *Guidance on Outcomes in Police Misconduct Proceedings* ("the Outcomes Guidance"). This guidance is therefore statutory and in my judgment has a considerably weightier status than the instances of non-statutory guidance issued in other regulatory fields. An example of non-statutory guidance is the GMC Sanctions Guidance. That was described and explained by the Lord Chief Justice in *Bawa-Garba v The General Medical Council & Ors* [2018] EWCA Civ 1879 at [83]:

> "The Sanctions Guidance contains very useful guidance to help provide consistency in approach and outcome in MPTs and should always be consulted by them but, at the end of the day, it is no more than that, non-statutory guidance, the relevance and application of which will always depend on the precise circumstances of the particular case:"

45. In my judgment in a police misconduct case a non-trivial failure to follow the Outcomes Guidance will highly likely amount to an error of law.

46. The primary guiding principles of the Outcomes Guidance are found in paragraphs 2.1 and 2.3:

> "2.1 Police officers exercise significant powers. The misconduct regime is a key part of the accountability framework for the use of these powers. Outcomes should be sufficient to demonstrate individual accountability for any abuse or misuse of police powers if public confidence in the police service is to be maintained. They must also be imposed fairly and proportionately.
>
> …
>
> 2.3 The purpose of the police misconduct regime is threefold:
>
> - maintain public confidence in and the reputation of the police service
> - uphold high standards in policing and deter misconduct
> - protect the public."

47. Chapter 4 of the Outcomes Guidance is titled *Assessing Seriousness*. The relevant paragraphs state:

> "4.1 Assessing the seriousness of the conduct lies at the heart of the decision on outcome under Parts 4 and 5 of the Conduct Regulations. Whether conduct would, if proved, amount to misconduct or gross misconduct for the purposes of Regulation

> 12 of the Conduct Regulations is also a question of degree, i.e. seriousness.
>
> 4.2 As Mr Justice Popplewell explained [in *Fuglers LLP v Solicitors Regulation Authority* [2014] EWHC 179 (Admin) at [28]], there are three stages to determining the appropriate sanction:
>
> - assess the seriousness of the misconduct
> - keep in mind the purpose of imposing sanctions
> - choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.
>
> 4.3 Assessing the seriousness of the misconduct is the first of these three stages.
>
> 4.4 Assess the seriousness of the proven conduct by reference to:
>
> - the officer's culpability for the misconduct
> - the harm caused by the misconduct
> - the existence of any aggravating factors
> - the existence of any mitigating factors.
>
> 4.5 When considering outcome, first assess the seriousness of the misconduct, taking account of any aggravating or mitigating factors and the officer's record of service. The most important purpose of imposing disciplinary sanctions is to maintain public confidence in and the reputation of the policing profession as a whole. This dual objective must take precedence over the specific impact that the sanction has on the individual whose misconduct is being sanctioned.
>
> 4.6 Consider personal mitigation such as testimonials and references after assessing the seriousness of the conduct by the four categories above."

48. Chapter 6 is entitled "*Personal mitigation*". Paragraph 6.2 states:

> "Purely personal mitigation is not relevant to the seriousness of the misconduct Tributes and testimonials should not be confused with the mitigating factors relating to the misconduct itself, as outlined above. Consider any personal mitigation after forming an assessment of the seriousness of the misconduct."

49. Mr Justice Popplewell's suggested three stage process has acquired a numinous status in this and other regulatory fields. It is now almost akin to the provisions of a statute (although I doubt that he ever intended it to have such an iron embrace, but rather

advanced the suggestion as a heuristic aide-memoire to assist the thought processes of a decision-maker). That structured process is now embedded in the field of police misconduct proceedings by virtue of its explicit adoption in the Outcome Guidance. The first stage of the process, which has to be undertaken in every regulatory case, is to assess the objective seriousness of the conduct in question. Here, the Panel can take into account, under paragraphs 4.4 and 4.5, mitigating factors connected to the conduct. An example would be illness or psychological impairment on the part of the officer, which casts light on the officer's culpability for that conduct.

50. But paragraphs 4.6 and 6.2 make clear that general, non-specific, mitigation in the form of testimonials and references is not relevant, indeed is inadmissible, when assessing the objective seriousness of the conduct. This approach echoes the famous judgment of Sir Thomas Bingham MR in *Bolton v The Law Society* [1993] EWCA Civ 32 at [16] where he stated:

> "Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be, so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

51. Ground 1 is pleaded as follows:

> "i. [The decision] failed to apply the three-stage structured approach set out in Fuglers.
>
> ii. The Panel erred in considering testimonials at stage 1.

> iii. At stage 3 – choosing the sanction which most appropriately fulfils the purpose for the seriousness of the conduct in question. The Panel have not explained how a final written warning serves the purposes of the disciplinary regime.
>
> iv. Excessive weight was given to admissions."

52. Although all the represented parties through their counsel agreed that the sanctions decision was vitiated by unlawfulness there was by no means unanimity as to whether each of these elements applied. It is therefore necessary for me to state my conclusions as to the applicability of the four elements of legal error pleaded in Ground 1.

53. As to element (i), I do not agree that the Panel failed to apply the three stage structured approach in the Outcomes Guidance paragraph 4.2. It may not have done it in the right order but it is clear that at paragraphs 24 and 25 it found both officers guilty of dishonesty (which is as about as serious a finding as it is possible to make); at paragraph 22 it mentioned that the purposes of the sanctions were to maintain public confidence in, and to inhibit a discreditable view of, the police service; and in the light of those findings at paragraph 33 it reached its decision as to the appropriate sanction.

54. Similarly, I do not consider, *pace* element (iii), that at stage 3 the Panel so completely failed in expressing its reasons for imposing what on the face of it looks like an unduly lenient sanction (having regard to the purpose of the disciplinary regime), that the whole process was thereby rendered unlawful. To be sure, the sufficiency of the sanction may be relevant under Ground 2, but I am not satisfied that its alleged insufficiency can contribute to a conclusion of unlawfulness.

55. For the same reasons, as regards element (iv), I disagree that such excessive weight was placed on admissions that the process was rendered unlawful. Again, under Ground 2 the weight that was placed on admissions may be relevant in considering the question of irrationality. However I cannot say that the fact that the Panel placed some weight, possibly even excessive weight, on admissions has the effect of rendering the process unlawful, or even contributing to such a conclusion.

56. It is axiomatic that reasons for a decision will always be capable of having been better expressed. It is well-known that a reviewing court should not subject a decision to narrow textual analysis. Nor should it be picked over or construed as though it were a piece of legislation or a contract (see *Volpi v Volpi* [2022] EWCA Civ 464 at [2(vi)] per Lewison LJ and *Re F* [2016] EWCA Civ 546 at [23] per Sir James Munby P).

57. However, I do agree with element (ii) of Ground 1 namely that the Panel erred in law by considering testimonials at stage 1 when assessing the seriousness of the misconduct. It was not a trivial error. In its decision at paragraph 31 the Panel stated:

> "31. The Tribunal heard submission from the parties on sanction, and the guidance from the *Fuglers* case [2014] EWHC 179 (Admin); considering the seriousness, that it was on duty, but not operational, to take account of testimonials, the deliberate nature of the falsification that was not done in a pressured moment, and the harm risk to others. It was recognised that the least harsh

> sanction considered by the Tribunal to be suitable, must be applied."

58. I fully recognise and accept that reasons will always be capable of being better expressed. But even allowing for that latitude, the language used in this key paragraph is very difficult to follow. Correcting the grammar, this paragraph is most clearly re-expressed as follows:

> "31. The Tribunal heard submission from the parties on sanction, and took into account the guidance from the Fuglers case [2014] EWHC 179 (Admin). In considering the seriousness of the conduct it took account of: (a) the officers being on duty, but not operational; (b) testimonials; (c) the deliberate nature of the falsification which was not done in a pressured moment; and (d) the risk of harm to others. It was recognised that the least harsh sanction considered by the Tribunal to be suitable, must be applied."

59. Expressed this way, which I believe is the only way in which sense can be made of this paragraph, it can be seen that testimonial evidence was not only admitted into the assessment of the seriousness of the conduct but must have been a, if not the, key factor in leading to the least harsh sanction. This is because the other matters in (a), (c) and (d) are all factors in aggravation clearly pulling in the opposite direction. I am afraid that no amount of latitude for poor expression can rescue the Panel's paragraph 31 from the conclusion I have reached.

60. That conclusion is that the sanctions phase of the process was vitiated by the Panel unlawfully bringing into account testimonial evidence in stage 1. It allowed the testimonial and reference evidence significantly to water down in its mind the objective seriousness of the conduct.

61. The Claimant and PS Russell agree, in the light of that conclusion, that the sanctions decision must be quashed under Ground 1. However, as I have indicated above, Mr Summers for PC Strickland submits that no formal quashing order should be made. He submits, in circumstances where it is not suggested that the final written warning administered to PC Strickland was irrational, that it is therefore very likely that a retrial of the sanctions issue would lead to the same outcome. Further, he says that it would be wrong for that issue to be retried anew with the risk that he will lose the benefit of that concession.

62. I cannot agree with these submissions. The arguments can be tested, in my opinion, by asking what the position would be if the case had proceeded under Ground 1 alone. If, in that scenario, the decision was reached that the process was unlawful, then it would inevitably follow that the sanctions outcome would have to be retried, as I could not possibly say that result of a redetermination would be the same outcome. While it is true that the warning administered to PC Strickland is not said to be irrational, I do not think that this can be construed as some kind of legitimate expectation that the merit of the sanctions would not be re-examined were the original process to be found to be unlawful.

63. Accordingly, the sanctions decision will be quashed under Ground 1 on the ground that the process by which it was reached was unlawful. It will be re-determined anew. I will deal later with the question of whether the redetermination is to be made by the original Panel or a new one.

Ground 2: analysis and decision

64. The Claimant seeks that the sanctions decision in respect of PCS Russell should be quashed on the alternative basis of irrationality.

65. Ground 2 pleads that on this alternative basis the decision was vitiated by:

> "Irrationality in that no reasonable Panel could have determined that PS Russell should receive a final written warning. Given the findings made, the only reasonable sanction was dismissal."

66. This is a classic *Wednesbury* challenge. In *R (on the application of) DSD and NBV and others* [2018] EWHC 694, where there was a challenge to the decision of the Parole Board in the John Worboys case, Sir Brian Leveson PQBD stated at [116] under the heading "The Wednesbury Challenge":

> "The issue is whether the release decision was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person [here, the Parole Board] who had applied his mind to the question to be decided could have arrived at it": see Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374 at 410G."

I would prefer to frame the test as asking if the impugned decision was one which no reasonable tribunal correctly applying the law could properly have made. This is what "irrational" means in this context. It is a term of art.

67. In paragraph 31 above I have recorded that PS Russell was found guilty of dishonesty. The Outcomes Guidance in Chapter 4 at paragraphs 4.25 et seq deals with "Operational dishonesty, impropriety or corruption". It states at 4.26:

> "Operational dishonesty is dishonesty in connection with a police operation. In *Salter*, the misconduct concerned an instruction to destroy evidence retrieved at the scene of a road traffic accident."

The reader then travels to Chapter 5 which is titled "Operational dishonesty". After referring to the decision of Burnett J in *R (Chief Constable of Dorset) v Police Appeals Tribunal* [2011] EWHC 3366 (Admin) it states at paragraph 5.3:

> "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."

68. In this case the Panel at paragraph 31 held that the dishonesty was not operational. The Outcomesl Guidance says this about non-operational dishonesty:

> "4.29 There may be cases where an officer has behaved dishonestly but the dishonesty is unconnected to a police operation or investigation and could be regarded as minor or trivial in nature. Examine the circumstances of the case with care by reference to the four categories for assessing seriousness outlined above. Cases involving any form of dishonesty on duty will always be serious because of the importance of maintaining public trust and confidence in the police service.
>
> 4.30 Police officers and staff should not, of course, be dishonest off-duty but some off-duty dishonesty may be of limited relevance to the profession as a whole when viewed in its context.
>
> 4.31 Some off-duty dishonesty may be very serious, however, particularly where it carries implications for the officer's ability to carry out their professional duties or has the potential to bring the police service into disrepute. A dishonest statement made by a police officer in the public sphere or in an official or otherwise solemn document (such as an application for a mortgage or loan, or a tax declaration) will be at the more serious end of the spectrum of off-duty dishonesty. Other serious cases might involve an officer using their status as a police officer to act dishonestly or otherwise exert improper influence. As ever, consider whether the proven dishonesty has the propensity to affect the reputation of or the public's confidence in the police service."

69. In this case PS Russell was on-duty but non-operational when she committed the relevant misconduct. This is not a scenario addressed in the Outcomes Guidance. There is a lacuna. Ms McClenaghan submits, in circumstances where PS Russell was on duty undertaking a reclassification shoot in her capacity as an authorised firearms officer and instructor, that she was very close to the line of operational dishonesty.

70. I am not completely convinced. I consider that there may be a qualitative difference between operational dishonesty such as destroying evidence in an ongoing criminal investigation and fraudulent conduct in relation to professional training. Most professions have continuing professional development requirements. Certainly solicitors and barristers do. In my opinion there would be a difference between the dishonest conduct of a solicitor who deliberately falsified evidence in an ongoing proceeding, and a solicitor who falsely claimed that he had attended certain courses giving CPD points. The former conduct destroys directly the public's right for cases to

be conducted incorruptibly, while the latter only impacts the public remotely and indirectly.

71. I am satisfied that the Panel's decision was *Wednesbury* unreasonable. The decision does not grapple with the consequences of the finding of dishonesty, having regard to the policy of the disciplinary regime. It does not attempt to calibrate this particular class of dishonesty (i.e. on-duty, non-operational) by reference to the Outcomes Guidance.

72. What were the reasons given by the Panel for adopting a written warning as its sanction? I repeat paragraph 33 of the decision:

> "We consider the public would not expect those who handle firearms would ever falsify documents, because use of firearms is a serious matter, and they would not expect such officers to carry firearms again. We take account of the admissions and the lapse against otherwise long and positive service and have considered what is the least harsh outcome"

73. The reference in the reasoning to "admissions" forming a factor in the decision is difficult to understand in circumstances where there were very few explicit admissions. In contrast, the Panel found that it had been given a great deal of untrue evidence. This received but faint recognition in determining stage 3 of the structured approach.

74. Equally, the reference to "long and positive service", as a reason for administering a warning is hard to understand in circumstances where it is inadmissible in assessing the objective seriousness of the conduct. Insofar as it is admissible at stage 3 of the exercise it has to be weighed against the seriousness of the misconduct, which, given its findings, the Panel should have held was aggravated by the untruthful evidence given to it.

75. This paragraph, which is the apex of the reasoning exercise, sheds no light on why such a lenient sanction serves the policy of the disciplinary regime namely to foster confidence in the competence and probity of the police. In my judgment this is a fatal flaw. Element (iii) of Ground 1 states that "the Panel has not explained how a final written warning serves the purposes of the disciplinary regime" (see paragraph 51(iii) above). In my judgment this averment is directly in point under Ground 2.

76. I am completely satisfied that no reasonable Panel, correctly applying the law, could "rationally" (i.e. properly) have reached the decision that this Panel did, in the way that it did.

77. I therefore quash the sanctions decision against PS Russell on the alternative basis that it is "irrational" in the term-of-art sense described above.

78. The Claimant seeks a finding from me that the sanctions decision should be quashed for irrationality on the express ground that the only reasonable sanction against PS Russell was instant dismissal. I do not go that far. In my judgment, my role under Ground 2 should be to determine if the sanction decision in respect of PS Russell was *Wednesbury* unreasonable. I do not consider it remotely appropriate that I should substitute my own sanction decision if I am so satisfied. That should be done by a specialist tribunal.

79. In my judgment, on the redetermination the Panel must apply the law correctly, and in so doing construe the Outcomes Guidance to fill the lacuna. It must then reach its own conclusion as to what the reasonable sanction should be against both officers, having regard to the policy of the disciplinary regime and to what I have stated in this judgment.

Remittal to a new Panel?

80. The final question is whether the remittal to the Panel should be to the original Panel, or to a new one.

81. There is a practical problem in remitting the matter to the original Panel, in that the legally qualified chair is unwell and is not working.

82. Section 31(5) of the Senior Courts Act 1981 provides that:

> "If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition:
>
> (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or
>
> (b) substitute its own decision for the decision in question."

83. CPR 54.19 provides:

> "(1) This rule applies where the court makes a quashing order in respect of the decision to which the claim relates.
>
> (2) The court may –
>
> (a)
>
> (i) remit the matter to the decision-maker; and
>
> (ii) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court; or
>
> (b) in so far as any enactment permits, substitute its own decision for the decision to which the claim relates."

84. The references to "to the court, tribunal or authority which made the decision" in s31(5)(a) and to "the decision maker" in CPR 54.19(2)(a)(i) are not to be interpreted literally. Literally, the remittal could only be to the actual judge or the actual decision-maker. Yet, remittals are made routinely to a fresh constitution of the body under review. It is vital that such a power exists. Imagine that the sanctions decision under review had been set aside on the grounds of actual or apparent bias. It is inconceivable that the remittal could be to the original decision-maker. In my opinion it is equally inconceivable that it is necessary in such a circumstance to remit both the findings phase (which may have lasted for days), as well the sanctions phase, to a new decision-maker.

85. Imagine that the decision-maker had died or retired. Is it seriously suggested that there would be no power to remit remaking of the decision to another decision-maker in the same body?

86. Counsel for the officers rely on the literal words of Regulation 35 of the Police (Conduct) Regulations 2012 which state that outcomes may be imposed by the "person or persons conducting misconduct proceedings". Mr Ponte's skeleton argument states:

> "It is wholly artificial to de-couple outcome from finding; an ordinary reading of the Regulations envisages that the person appointed in Regulation 25 is the person who determines procedure at the hearing (Regulation 33 (1)) and is the person who makes findings (Regulation 33 (13) and (14) and thereafter is the person who decides the outcome (Regulation 35)."

87. I would agree that an ordinary reading of the Regulations would lead to that view. However, that ordinary reading has to yield to the well-trodden interpretation of s.31(5)(a) of the Senior Courts Act 1981 and CPR 54.19(2)(a)(i), which is that there is in every case an implied power to remit an outcome decision to a fresh Panel or Tribunal.

88. The existence of that implied power has been recognised (albeit without the jurisdictional point having been taken or argument having been heard about it) in at least two Administrative Court cases namely *Chief Constable of Northumbria Police v Police Misconduct Panel* ([2018] EWHC 3533 (Admin) at [76] and *R (Chief Constable of West Midlands Police) v Panel Chair* [2020] EWHC 1400 at [67]. Mr Ponte submitted that these cases were wrongly decided. I do not agree.

89. Having dealt with the jurisdictional point I now turn to the question whether remittal to a new Panel would be appropriate.

90. In *HCA International Ltd v Competition and Markets Authority* [2015] EWCA Civ 492 at [68] Vos LJ held:

> "The principle as it seems to me must be that remission will be made to the same decision-maker unless that would cause reasonably perceived unfairness to the affected parties or would damage public confidence in the decision-making process. The basis on which the court will approach these two interlocking concepts of "reasonably perceived unfairness to the affected parties" and "damage to the public confidence in the decision making process" may depend heavily on the circumstances of the remission."

91. It seems to me that this interlocking test is an exposition of the famous aphorism coined by Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 that "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Lord Hewart is referring not merely to the perception of the affected parties but of the public generally.

92. Would these parties reasonably perceive a risk of unfairness if the matter were remitted to the original Panel (assuming it could be reassembled)? The answer is in my judgment obviously yes. They may feel, rightly or wrongly, the Panel having got it so wrong first time around, that there was a risk of history repeating itself second time around as a result of incompetence, stubbornness, or *amour propre*. The general public would probably feel the same way, namely that there was a risk, reasonably judged, of irrelevant matters contributing to the making of the decision anew. I do not think that a right-thinking member of the public would consider that she or he would see justice being done if the sanctions decision were redetermined by the original Panel.

93. For these reasons I rule that the remittal of the sanctions decision will be to a freshly constituted Panel. I am expecting that the new Panel will be assembled promptly and that the redetermination will take place as soon as is reasonably practicable.
