Decision of the Police Appeals Tribunal

IN THE MATTER OF THE POLICE ACT 1996

AND IN THE MATTER OF THE POLICE APPEALS TRIBUNALS RULES 2020

Heard remotely

BETWEEN

FORMER PC GOFF (APPELLANT)

AND

NORFOLK CONSTABULARY (RESPONDENT)

DECISION AND REASONS OF THE POLICE APPEALS TRIBUNAL
PREPARED BY THE CHAIR PURSUANT TO RULE 26(5)

Before:

Ms Justine M Davidge, PAT Chair
Assistant Chief Constable, Rob Jones
Mrs Margaret Walsh, Lay Panel Member

Representation:

Ms R Nagesh for the Appellant

Mr A Jenkins for the Appropriate Authority

1. This is a decision made in accordance with The Police Appeals Tribunals Rules 2020 (the "Rules"), which provide for the hearing of appeals made by a police officer against a decision made under the Police (Conduct) Regulations 2020 (the "Regulations").
2. This decision is made in the appeal of former PC Andrew Goff (the "Appellant") who appeals against decisions made during a misconduct hearing, on 7 October 2021, that he committed gross misconduct and should be dismissed from Norfolk Constabulary (the "Respondent") without notice.
3. The Tribunal heard this appeal and made its decision on 22 July 2022. The Appellant's hearing was held in public in accordance with Rule 22 of the Rules. At the end of the hearing the Chair summarised, orally, the Tribunal's decision and indicated that a full and detailed written decision and reasons would be provided within the time frame provided for by Rule 26.

Background to the Appeal

4. Between 5 and 7 October 2021 the Appellant appeared before a misconduct hearing panel (the "Panel") chaired by Mr P Nicholls (the "Legally Qualified Chair"). The misconduct hearing was heard at Police Headquarters, Wymondham, Norfolk. The Appellant was both represented by counsel and supported by a Police Federation Representative.
5. The Appellant faced a single allegation of gross misconduct based on one breach of the police standards of professional behaviour (the "professional standards"). The allegation, as set out in the Regulation 30 notice served on 28 June 2021, was that on six occasions, between September 2020 and January 2021, the Appellant submitted "fraudulent overtime claims by falsely claiming that, on each day, you had worked over one hour into your rest day, thereby entitling you to a minimum of four hours paid overtime". Each overtime claim was made on a rest day following the Appellant having worked a night shift.
6. The Appellant's conduct was alleged to breach the professional standards in respect of "honesty and integrity", i.e. that police officers act honestly, with integrity and do not compromise or abuse their position, and to amount to gross misconduct.[1]
7. The oral evidence relied upon by the Respondent at the misconduct hearing was provided by two witnesses: Mr Richards (the Investigating Officer) and DC King. Their evidence was supplemented by documentary exhibits relating to the matters they gave evidence about and statements from other witnesses. A copy of the Appellant's interview under caution, conducted on 12 May 2021, was also produced and relied on.
8. In essence, the Respondent's case was that it could be shown from the following pieces of evidence that it was more likely than not the Appellant arrived home at a time before that when he was entitled to begin claiming overtime (0800 hours):
    a. Evidence of the time that the Appellant booked himself off duty and his police equipment into the relevant store at the end of his operational duties on each of the relevant dates (on each occasion this was before 0700);
    b. Evidence of the times that the Appellant's car passed a fixed-point police camera 6.2 miles from his home address on each of the mornings in question (ANPR data) (on each occasion this was before 0800);
    c. Evidence of how long it took DC King to drive the distance from the Appellant's home to the fixed-point police camera on 25 February 2021 at 0820 (the "test run") (approximately 10 minutes); and

[1] Para 2.26 of the Home Office Guidance, Conduct, Efficiency and Effectiveness (Feb 2020). Also Part 3.1 of the Police College, Code of Ethics, published July 2014.

d. Evidence of the first time that the Appellant's mobile phone locked onto the phone mast nearest to his home address on the mornings in question (cell site data) (on each occasion this was before 0800).

9. In addition, the Respondent relied on what it submitted was a failure by the Appellant to keep a note in his pocket notebook (PNB): of his shift times, whilst on sensitive duties generally and on the relevant dates in particular, and of the times he arrived home on the dates of his overtime claims: as evidence of his likely dishonesty. The Respondent submitted that the Appellant's actions were contrary to Norfolk Constabulary guidance on the competition of PNBs and that his explanations for not making any notes were not credible. The Respondent's case was that the Appellant's lack of notes was part of a deliberate attempt by the Appellant to ensure that there was no contemporaneous record of the times he returned home.

10. Thereafter, at the conclusion of the Respondent's case, the Appellant called an expert witness, Mr Kilby to give evidence on the subject of cell site analysis. Mr Kilby had produced two reports for the purpose of these proceedings, dated 1 September 2021 and 9 September 2021. Mr Kilby's evidence, in summary, was that none of the cell-site data could indicate that the Appellant was actually in his home before 0800 on any of the given dates. In his view, even the most reliable data (referred to as the "CDR" data) could not give precise locations of the phone's whereabouts. The phone could be located anywhere within the coverage of the relevant cell covered by the mobile mast in question, an area of up to 2km, which would include the home address of the Appellant.

11. Following Mr Kilby, the Appellant gave evidence. He denied the allegations and maintained the position he had advanced in his Regulation 31 response, dated 15 July 2021, and (in part) in his earlier interview. That position was summarised, by the Panel in its written decision as follows:

    a. He honestly believed that he returned home after 0800 on each of the dates listed;
    b. He had the belief that the claims made were accurate when submitted and not dishonest;
    c. He could not remember any specific journey;
    d. He could not remember the exact times he would have arrived home on the day in question;
    e. He stated (at interview) that it could be possible that he arrived home earlier but at the time he made the overtime claim he believed it had been after 0800;
    f. He stated (in interview) he did not know the exact time he arrived home but it was his belief that he was getting home after 0800;
    g. There may have been some occasions when he was home before 0800 but he had no knowledge of being home at such time;
    h. When he submitted the overtime claims, he believed that they were accurate and had no intention to commit an act of fraud; and
    i. He disputed that the data disclosed led to the conclusion that it is more likely than not that he arrived at his home before 0800 on any of the dates in question.

12. In addition, the Appellant gave oral evidence as the factors that he believed could have contributed to him arriving home later than 0800 on each day in question, in terms of travelling conditions etc.

13. In relation to the question of why he had not made relevant notes in his PNB, the Appellant stated (as per his Regulation 31 response) that he had been instructed, orally, during induction training for sensitive duties that he should not make any notes in his PNB whilst carrying out the same. He stated that he could not recall the name of the trainer in question and confirmed that he had not contacted any of his colleagues to give evidence in support of his account. He had also stated, when interviewed under caution, that he had not made any notes of the times he arrived home as he was too tired to do so.

14. In addition to his oral evidence, the Appellant submitted the following written evidence to the Panel for its consideration:

    a. Email correspondence showing that in January 2020 he had pro-actively alerted the finance department to errors in his mileage claims;
    b. A credit card statement showing a fuel purchase on one of the relevant dates;
    c. Three google map routes showing the journey from his place of work to home at times close to his shift ending;
    d. A scanned copy of his entire PNB; and
    e. Five character references and a Chief Constable's Certificate of Commendation.

15. On day two of the hearing, after hearing closing submissions from counsel for both parties, the Panel retired to consider the questions of which facts they found proved, whether those facts amounted to a breach of the professional standards and, if so, whether the Appellant's actions amounted to misconduct or gross misconduct. The Panel gave its decision at 1432 on day three of the hearing. In summary, the Panel's decision was that they found it more likely than not that the Appellant arrived home before 0800 on each of the relevant dates, that this, together with his failure to make any contemporaneous notes of the times his shift ended and he arrived home, indicated that he had "wrongfully and fraudulently, repeatedly submitted overtime claims on the basis that he returned to his house after 0800 hours" and therefore his conduct both breached the professional standard of honesty and integrity and amounted to gross misconduct.

16. In particular, the Panel made the following factual findings:

    a. The Panel rejected the Appellant's suggestion that the reason he made no notes of his shift times in his PNB was because he had been told not to do so as part of his training for sensitive duties.

        i. The Panel considered that the Appellant had had ample time to consult with other colleagues to check whether this was also their practice and to find the name of the trainer concerned (and thereby corroborate his account).
        ii. In addition, the Panel noted that the Appellant left his PNB at his place of work although he remained on duty after his operational duties ended and the guidance on completing PNBs requires an officer to have their PNB in their possession and available for use at all times, unless it would be impractical or inappropriate to do so.
        iii. Finally, the Panel noted that the Appellant had stated in interview that the reason he didn't complete his PNB when he got home was because he was tired, rather than because he had been told not to. Consequently, the investigating officer was unable to verify during the investigation what the Appellant later said was the correct reason i.e. that he had been instructed not to complete his PNB when on sensitive duties.
        iv. The Panel concluded that overall, the situation in respect of the PNB was indicative of an attitude to claiming of overtime without any evidence to support such claim.

    b. The conclusion that could be reached from the times that the Appellant passed the fixed point (the ANPR data) and the test run conducted by the Investigating Officer was that it was more likely than not that the Appellant did arrive home before 0800 on each of the relevant dates.

        i. This was despite the fact that the Panel "were troubled and surprised that the length of time from the fixed point to the officer's home was not checked more carefully" as "the check was carried out by travelling from the officer's home to the fixed point at approximately 0820 in the morning…" and the Panel "felt that a more appropriate and helpful test would have been to have checked the journey time from the fixed point to the home at a time equivalent to when the officer would have been travelling the route in the direction of his home".

ii. The Panel stated that it was however satisfied that "it would be reasonable to assume the roads were busier at 0820 than they would have been when the officer passed the fixed point between 0700 and 0800" and "proceeded on the basis that the journey would take at least 10 minutes and probably on occasions slightly longer but the distance of 6.2 miles was not challenged".

c. The cell site (CDR) data was not conclusive in locating the whereabouts of the Appellant's phone save that it shows on each date, prior to 0800, the phone was in an area within a distance of 2km from the Appellant's home address, which could include that home address. Therefore, the Panel's view was that the CDR data simply added to the conclusion already achieved from the fixed-point analysis that it was more likely than not that the Appellant arrived at his home, prior to 0800 hours and the panel rejected the suggestion of the Appellant's counsel that, in some way, the CDR data showed significantly varying journey times from the APNR fixed point location to the Appellant's home address.

17. In relation to whether the factual findings amounted to a breach of the professional standard of honesty and integrity, the Panel's view was that "the evidence of the AA, particularly with regard to the fixed-point evidence, clearly shows the officer finishes duty by returning to his home address at a time before 0800 hours therefore any claim to overtime and additional 4 hours was wrongful and fraudulent". The Panel also "took into account the lack of any record or evidence to the contrary which might otherwise have assisted the officer's claim. The officer was not able to provide any evidence other than his mere assertions in response to the claim and the conclusion reached is that there has been a breach of the Standard of Honesty and Integrity".

18. Finally, in relation to whether the breach of the standard amounted to misconduct or gross misconduct, the Panel stated as follows: "The public expect the police to do the right thing in the right way and to apply the policing principles on decisions that they make. The decision of this officer not to provide any corroborative evidence supporting his overtime claims is significant. The panel's conclusion was not only that it was more likely than not that he returned home before 0800 hours but he knew that and yet continued, on each of the occasions listed, to claim additional overtime to which he was not entitled. This amounts to a serious breach of the Standard of Honesty and Integrity and one which is self-serving for the officer. The panel conclude that the breach of the standard and the misconduct amounts to gross misconduct in this situation."

19. Subsequently, the Panel received the Appellant's record of service and both counsel for the Respondent and counsel for the Appellant addressed the Panel on outcome, with Ms Nagesh mitigating on behalf of the Appellant.

20. The Panel thereafter retired to consider the appropriate outcome in this matter and returned the same afternoon, having reached the decision that the appropriate outcome was for the Appellant to be dismissed without notice. For reasons that will become clear later in this decision, the reasons given by the Panel for this decision do not need to be set out here.

The approach of the Police Appeals Tribunal[2]

21. Under Rule 4(1) of the Police Appeals Tribunal Rules 2020 the Appellant may appeal against either:

[2] The following section was provided to the parties appearing before the Police Appeals Tribunal prior to the Tribunal hearing commencing. The Tribunal invited the parties to make submissions on any of the matters set out and both parties agreed that the approach as outlined was uncontroversial and correct.

a. the finding referred to in paragraph (2)(a), (b) or (c) made under the Conduct Regulations;
b. any decision to impose disciplinary action under the Conduct Regulations in consequence of that finding.

22. He may only appeal against either or both of those decisions on the grounds set out under Rule 4(4):[3]

a. that the finding or decision to impose disciplinary action was unreasonable;
b. that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action; or
c. that there was a breach of the procedures set out in the Conduct Regulations, the Complaints and Misconduct Regulations or Part 2 of the 2002 Act or unfairness which could have materially affected the finding or decision on disciplinary action.

23. An appeal to the Police Appeals Tribunal is not an appeal by way of re-hearing. Under Rule 26(1) of the Rules the Tribunal is required to determine whether the ground or grounds of appeal on which the Appellant relies have been made out.

24. When determining whether a decision was "unreasonable" under Rule 4(4)(a) the Appeals Tribunal should be guided by a number of principles:

a. In reaching a decision on appeal the duty of the Appeals Tribunal is to consider all relevant material before it and to reach its own conclusion as to whether the decision is one that a reasonable person would not have reached in all the circumstances.[4]
b. The term "unreasonable" does not mean Wednesbury unreasonableness, but something less.[5] The question should be asked whether the panel in question has made a finding or imposed a sanction which was within the range of reasonable findings or sanctions upon the material before it.[6]
c. Under the Rules an appeal will not succeed simply because the Appeals Tribunal concludes it would have reached a different decision to that appealed against. The Appeals Tribunal is only allowed and permitted to substitute its own views once it has concluded either that the approach was unreasonable, or that the conclusions of fact were unreasonable.[7] In those circumstances the Appeal Tribunal's duty is to ensure the correct result.
d. Where the Appeal is under Rule 4(4)(a), and where the decision against was within the range of reasonable decisions which could have been made, an appeal will nonetheless fail even if the Appeals Tribunal concludes it would have reached a different decision to that reached.

25. When considering whether there is evidence that could not reasonably have been considered at the original hearing that could have materially affected the finding or decision on disciplinary action under Rule 4(4)(b) the Tribunal should have regard to the following:

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[3] Subject to Rule 4(3): "A police officer may not appeal to a tribunal against the finding referred to in paragraph (2)(a), (b) or (c) where that finding was made following acceptance by the officer that his conduct amounted to misconduct or gross misconduct (as the case may be)".

[4] Montgomery v Police Appeals Tribunal [2012] EWHC 936 para 18. R (Commissioner of the Metropolis) v Police Appeals Tribunal (2013) EWHC 4309 para 28-30.

[5] Per Lord Justice Moses in R (Chief Constable Durham) v Police Appeals Tribunal & Cooper CO/10571/2011, dated 20/07/12 [2012] EWHC 2733 at paras 6 & 7. R (Chief Constable of Wiltshire) v Police Appeals Tribunal (Woollard) [2012] EWHC 3288.

[6] R (Chief Constable of Derbyshire) v Police Appeals Tribunal [2012] EWHC 2280, per Beatson J.

[7] As per note 4 above.

a. Under 4(4)(b) evidence can only be adduced if it is evidence which could not reasonably have been considered at the original hearing. The law on this is clear, namely that if that evidence could have been obtained without any real difficulty then it would not fall within 4(4)(b).[8]
b. It is not sufficient to say that simply because it was not there, it could not have been reasonably considered by the Panel. It would be a question of fact in any given case whether it could be said that it was reasonably available.[9]
c. The inclusion of the word "materially" is significant. Therefore, it must be the case that the unfairness could have materially affected (not just affected) the finding or decision on outcome for the appeal to succeed.

26. When deciding whether there was a breach of the procedures or other unfairness which could have materially affected the finding or decision on outcome under Rule 4(4)(c) the Tribunal should bear in mind that:

    a. The Regulations are directory, not mandatory, and therefore it follows that a breach of the Regulations does not necessarily vitiate proceedings.[10] Where there is no consequential prejudice to an officer, it is unlikely that a breach of the Regulations will have had a material effect of the decision(s) appealed and therefore result in a successful appeal.
    b. Similarly, if an appeal under 4(4)(c) alleges other unfairness it can only succeed if it had a material effect on the decision(s).
    c. Unfairness in this context means unfairness to the individual police officer which results from something done or not done either by the panel in question or by the Appropriate Authority, or those representing it. Failures by a person's legal advisers or representatives cannot be relied on to show that there was a breach of fairness.[11]
    d. The grounds under 4(4)(a) and (c) may overlap. Unfairness may lead to an unreasonable conclusion.[12]
    e. The inclusion of the word "materially" is significant.

27. In respect of all appeals, insofar as there are any matters of fact to be determined, the standard of proof is on the balance of probabilities.

28. The purpose of police professional misconduct proceedings is threefold: to maintain public confidence in and the reputation of the police service, to uphold high standards in policing and deter misconduct and to protect the public.

29. The Tribunal should (where appropriate) take account of, but will not be bound by, the Policing Code of Ethics, Home Office Guidance provided in relation to those standards and the Guidance on Outcomes in Police Conduct Proceedings.

30. Where the Tribunal decides that a finding or outcome may be unsafe due to new evidence under Rule 4(4)(b) of the PAT Rules or procedural unfairness under Rule 4(4)(c), then the tribunal has a discretion (under Rule 26(2)) to set aside the relevant decision and remit the matter back to the relevant police force to be decided again in accordance with the relevant provisions of the Conduct Regulations. Alternatively, it may substitute its own decision for that of the previous decision-maker.

[8] CC of British Transport Police v Police Appeals Tribunal [2013] EWHC 539 at para 14.
[9] As per note 8 above.
[10] Ex parte Calveley [1986] 1 QB 424 at 1085H.
[11] Al-Mehdawi v Secretary of State for the Home Department [1990] 1 AC 876, CC of British Transport Police v Police Appeals Tribunal (Whalley) [2013] EWHC 539.
[12] CC of Durham v Police Appeals Tribunal [2013] ACD 20 at para 5.

31. Where the Tribunal decides that a finding or outcome was unreasonable under Rule 4(4)(a) then it should go onto substitute its own decision for that of the previous decision-maker.

32. The Tribunal, when re-determining any disciplinary outcome imposed, may impose any outcome that the original panel/person could have imposed. In this matter, which was determined at a misconduct hearing and resulted in a finding of gross misconduct, this would involve: a final written warning; reduction in rank; and dismissal, without notice.[13]

Evidence and other documentation

33. The evidence and other documentation before the Tribunal was as follows:

    a. the bundle of papers and submissions that were before the previous hearing Panel;
    b. the misconduct hearing transcript from the hearing held on 5 to 7 October 2021;
    c. the Appellant's grounds of Appeal dated 29 November 2021;
    d. the Respondent's response to the same dated 28 December 2021;
    e. the Appellant's addendum grounds of appeal dated 24 January 2022, and attached email evidence;
    f. the Respondent's further response dated 1 February 2022;
    g. the Appellant's application to extend time to submit an additional ground of appeal dated 4 April 2022; and
    h. the Respondent's final response dated 21 April 2022.

34. All references below to the "bundle" of documents relate to the paginated bundle provided to the Tribunal containing all of the above material.

The Appeal

35. The Appellant's original grounds of appeal, dated 29 November 2021, as supplemented by his addendum grounds dated 24 January 2022, sought leave to appeal against both the finding that his actions amounted to gross misconduct and the outcome imposed, under two of the grounds of appeal set out in Rule 4(4).

    a. that the decision imposed was unreasonable (4(4)(a)); and

    b. that there was a breach of the procedures or other unfairness which could have materially affected the decision being appealed (4(4)(c)).

36. Following an application to amend his original grounds of appeal out of time, dated 4 April 2022 and decided by the Chair to the Tribunal sitting alone on 15 May 2022, the Appellant subsequently put forward a third ground of appeal, brought under Rule 4(4)(b) - that there was evidence that could not reasonably have been considered at the original hearing that could have materially affected the finding of gross misconduct or decision on disciplinary action.

37. On the morning of 22 July 2022, the Police Appeals Tribunal heard submissions from counsel Ms Nagesh, appearing on behalf of the Appellant, on all three grounds of appeal. Ms Nagesh's submissions were divided into: submissions related to what was referred to as the "notebook evidence", under Rules 4(4)(a) and (c); submissions as to the evidence relied on by the Respondent to support its case that the Appellant was at home before 0800 on each of the relevant dates, under Rules 4(4)(a) and (c); submissions as to the way in which the Panel dealt with the question of whether the Appellant's actions were dishonest, under Rules 4(4)(a) and (c); submissions made in relation to fresh evidence sought to be submitted, under Rule 4(4)(b); and, finally, submissions on the imposed outcome, under Rule 4(4)(a).

[13] Regulation 42(2)(b), Police (Conduct) Regulations 2012.

38. Ms Nagesh's submissions on the notebook evidence were, in summary:

    a. That it was procedurally unfair for the Panel to place the reliance that it did on the PNB when, in her submission, it had not formed any part of the AA's case until the hearing, and so the Appellant had not been given the opportunity to properly answer that issue. In support of her argument that the Appellant had effectively been 'ambushed' by the Respondent's approach she made three main points:

        i. No reference was made in the particulars for the alleged misconduct to the lack of PNB entries and at no time in the time before the hearing (including at the pre-hearing discussion) did the Respondent indicate that they would rely upon a lack of entries in the PNB when the Appellant was on his sensitive posting.
        ii. The investigating officer's report only exhibited the first and last pages of the Appellant's PNB, which could only provide evidence of the date of his last entry. It was the Appellant who provided his whole PNB as evidence, in order to ensure that the Panel were not simply provided with a snapshot and to explain why he could not recall the exact times he returned home on the relevant dates.
        iii. No mention of the PNB was made in the Appellant's interview. No questions were asked as to why he hadn't made notes within it as to his shift times or overtime claims.

    b. It was submitted that where the Panel was inclined to place as much reliance on the lack of PNB entries as they did, they should have considered granting an adjournment for the Appellant to seek evidence in rebuttal. She also submitted that it was incumbent on the Respondent to make enquiries about the lack of entries in the Appellant's PNB, at the latest when they received the Appellant's Regulation 31 statement, although she did not take the Tribunal to any Regulation, Guidance or procedure in support of this argument.
    c. That it was unfair for the Panel to have effectively reversed the burden of proof by holding that the Appellant's failure to provide evidence in relation to the PNB was 'significant' and that "the lack of evidence supporting the length of the officer's duties and his arrival back at his home was indicative of an attitude to claiming of overtime without any evidence to support such claim".
    d. That it was unfair to have apparently discounted the evidence from the Appellant's supervisor, PS Larkin, as to his part in checking the Appellant's PNB and the fact that the guidance on competition of PNBs stated, at paragraph 4.1 (page 117 of the hearing bundle) that "notes may not be taken when it was impractical or inappropriate to do so, such as during surveillance and undercover duties".
    e. That based on the above, the Panel's conclusion as to the significance of the notebook evidence was unreasonable.

39. Ms Nagesh's submissions on the Panel's conclusions from the cell site data, ANPR data and the test run timing were, in summary:

    a. Given that the cell site data could not specifically pinpoint the location of the Appellant's phone, the Panel could only reach a decision as to whether the Appellant was home before 0800 on any given day by relying on the ANPR data and test run timing. However, the evidence of the test run was so flawed that it was procedurally unfair for the Panel to place any significant reliance on it whatsoever. Although the Panel acknowledged that it was flawed evidence they proceeded to rely significantly on it.
    b. It was unfair for the Panel to reject the Appellant's account of the factors that could affect his journey to his home address, when there was no evidence to the contrary about the area, the traffic at the relevant times, the weather on the relevant dates, the construction site near the home or the school patterns.
    c. It was unfair for the Panel to conclude that the journey would be quicker before 0800 than afterwards, with no evidence whatsoever to lead to that conclusion.

d. It was unreasonable for the Panel to conclude that the difference in times between the Appellant passing the ANPR point and the time that he first cell-sited near his house did not indicate that every journey was different and that his journey could take longer than ten minutes. The Panel appear to have presumed that on each of the dates in question the Appellant was at home before the time that his phone first locked onto the mast nearest his home despite there being no evidence of any telephone calls taking place before the cell site time and the expert, Mr Kilby's, evidence that the rapidity of events was consistent with the phone being in a car.
e. It was unreasonable in all the circumstances for the Panel to conclude that the Appellant was more likely than not to have arrived home before 0800 on the relevant dates.

40. Ms Nagesh's submissions as to the issue of dishonesty can be summarised as follows:

a. Even if the Panel were to conclude that the Appellant had arrived at his home address before 0800, they still had to be satisfied that he had acted dishonestly when making his claims (rather than making an honest mistake). There was no evidence that the Panel did analyse whether the Appellant had acted dishonestly, his dishonesty appears to have been assumed. It was unfair of the Panel not to address the question of dishonesty separately from their consideration of whether he did in fact arrive at his home before 0800.
b. In the absence of any cogent evidence that the Appellant was prone to acting dishonestly or had acted in any way other than honest mistake if he did arrive at his home before 0800, it was unreasonable for the Panel to conclude that he had acted dishonestly. This is particularly so when considering the short timeframes being discussed, even on the AA's case. The possibility of honest mistake could not, then, have reasonably been discounted.
c. It was particularly unfair for the Panel not to explain why they chose to discount the character references attesting to his excellent character, the Appellant's unblemished record and his commendation in favour of drawing the conclusion that he was dishonest. Such references were relevant to the question of his credibility as a witness, and not just to the question of outcome and mitigation. It would not have been enough for the Panel to state that they did take the references into account, they would also need to demonstrate how they did.
d. Likewise, it was unfair for the Panel not to explain why they apparently did not afford any weight to the Appellant's evidence of his honesty when he had previously realised that he had claimed travel expenses wrongly.
e. When asked by the Tribunal, she accepted that at no point during the original hearing was the different between honesty and integrity or the relevant case law on the test to be applied to assess dishonesty considered or referred to by the Panel or counsel.

41. In respect of the additional ground of appeal brought under Rule 4(4)(b), Ms Nagesh made four main points, summarised below.

a. Those representing the Appellant came into possession of an email (dated 6 December 2021) sent to those working in the same position as the Appellant's previous posting. It included a paragraph which indicated that further guidance was being given to officers in relation to their PNBs. It told them that they should not fill out any detail of their posting in their PNBs, but specifically told them that they did need to fill out their hours worked.
b. As a result of the email obtained, those representing the Appellant applied for disclosure of the PNBs of protection officers on protection duties over the dates spanning the allegations. On 24 March 2022 a schedule of disclosure was received. That schedule indicated that 14 officers working on protection duties over the relevant dates were asked to provide copies of their PNBs. Of those

officers, seven were recorded as making no entries in relation to their sensitive duties, one had lost their PNB and the other PNBs had been requested. On 25 March 2022, PNBs were provided for the remaining officers. These demonstrated that the vast majority put no information in their PNBs while on sensitive duties and those that provided information did not consistently record the hours or even dates of the shifts worked.

c. The reason that this evidence could not reasonably have been considered at the original hearing was because there was no indication before the hearing was well underway that: i) the Respondent would make a significant part of their case the assertion that the Appellant was deliberately falsifying his PNB; or ii) that the Panel would devote a significant part of their deliberations to whether the Appellant had provided evidence to support his answers given in response to the Respondent's cross-examination. The evidence was therefore not sought before the hearing as it was not seen as a key issue at that time.

d. The PNB could have materially affected the finding of the Panel in two key ways: i) in relation to their assessment of whether or not the Appellant behaved dishonestly in relation to his overtime claims; and ii) in relation to their assessment of the Appellant's credibility when giving his account.

42. Finally, Ms Nagesh argued that the outcome imposed upon the Appellant was unreasonable, particularly given that there was strong public interest in keeping competent officers in post. It was submitted that this was one such case where dismissal ought not to have been the outcome, for a number of reasons. The Panel provided no reasoning as to why they concluded that the public interest was better served by dismissing the Appellant from the police rather than allowing an officer with demonstrable skills and competence to remain in the force.

The Response

43. Meanwhile, Mr Jenkins, counsel appearing on behalf of the Respondent, made submissions with reference to his three responses to the grounds of appeal, dated 28 December 2021, 1 February 2022 and 21 April 2022.

44. Mr Jenkins began by referring to the unattributed hearsay evidence that initiated this matter, which was also referred to in the misconduct hearing, although as he accepted no weight could be attached to it and it had no bearing on the decisions the Tribunal had to make (there was no complaint from the Appellant that this evidence had unfairly affected the decision of the misconduct Panel). Mr Jenkins then went on to respond to each of the Appellant's submissions. His submissions are summarised below in relation to each ground of appeal responded to, rather than the order they were made.

45. Mr Jenkins submitted that the overall picture in this case was of an officer who submitted an overtime claim every time he had a theoretical opportunity to make one (i.e. for a shift worked prior to a rest day), and that this was a pattern rather than a coincidence. He emphasised that the overtime system for this type of duty relied wholly on an officer's integrity as there was no way of independently checking the validity of the claims. Both counsel confirmed that the overtime claims were submitted electronically and were approved by civilian staff in the payroll department.

46. It was submitted that the Panel's finding that the claims were false was properly based on the APNR data and the cell site (CDR) evidence, together with the test run. Mr Jenkins took the Tribunal through the evidence relating to the times when the Appellant booked his equipment into the relevant store at the end of his operational duties, through to the APNR capture times and then the times that the expert, Mr Kilby, said showed when the telephone mast nearest the Appellant's house was triggered. Mr Jenkins accepted that the test run was not ideal but argued that it would have been impossible to completely recreate the conditions in any event. He accepted that the evidence could not be conclusive that the overtime claims were false but argued that

the Panel were entitled to find the falsity of the claims proved on the balance of probabilities based on it. He therefore argued that the Panel's conclusion that the Appellant arrived home before 0800 on the relevant dates was neither unfair nor unreasonable.

47. Mr Jenkins submitted that the Appellant's lack of record keeping as to his shift times and details of overtime was significant, as was the fact that he did not mention this either in his initial statement, given under Regulation 17 at the early stage of the investigation, or when interviewed under caution. It was submitted that the Appellant had failed to comply with the guidance on completing PNBs issued by Norfolk Constabulary and that this revealed a failure to comply with standing orders and rules, although that was not an allegation advanced by the Respondent (for example, as an alternative to the allegation of a breach of honesty and integrity).

48. The submissions made by the Appellant that it was unfair to rely on the notebook evidence were dismissed by Mr Jenkins as "nonsense". He argued that the was no duty on the Respondent to make reasonable enquiries as to the reason put forward by the Appellant as to the lack of entries in his PNB at the point that the Rule 31 statement was served, as by this point the investigation had ended. Mr Jenkins, like Ms Nagesh did not take the Tribunal to any Regulation, Guidance or procedure that would assist on this point. It was submitted that as the Appellant had offered no names or other details of who may have told him that he did not need to make notes while on sensitive duties or any other officers who may have adopted the same approach, that the Respondent had no way to even begin making such enquiries.

49. Mr Jenkins also made the point that if the Appellant felt that he had been ambushed, it was open to him to apply for an adjournment, rather than relying on the Panel to take the initiative, which he did not do. The inference here was, he argued, that the Appellant chose not to as he considered that this could worsen his position.

50. Mr Jenkins additionally submitted that there had been no reversal of the burden of proof in this case. The Panel, he argued, were entitled to both: (a) expect the Appellant to provide some evidence in corroboration of his assertions that he had been told not to complete his PNB whilst on sensitive duties – there was an evidential burden for him to satisfy; and (b) draw an adverse inference against him where he had not given the reason he later relied upon in evidence in his interview under caution. Mr Jenkins accepted that the Appellant could have satisfied the evidential burden by his own evidence if he had provided sufficient details to make his assertions credible, but he argued that the Appellant's evidence did not do this. Essentially, the Panel were unimpressed with the Appellant's assertions.

51. Mr Jenkins' response to the Appellant's submissions on the Panel's approach to assessing dishonesty were that it was clear from paragraphs 12 to 16 of the Panel's decision on the finding of gross misconduct (page 445 to 445 of the bundle) that they did consider whether the Appellant's conduct was dishonest and concluded that it was. He also argued that the Panel's comment that they had taken into account all of the evidence (paragraph 14 of its decision) indicated that it had considered the Appellant's character evidence at that stage of the decision process, and its further reference to the character reference at the point of deciding outcome (paragraph 8 of its decision, page 449 of the bundle) supported this too.

52. In respect of the Appellant's arguments in relation to the ground of appeal brought under Rule 4(4)(b), he argued that the email evidence provided by the Appellant and the evidence since obtained by the Respondent during its disclosure exercise, from the 14 officers who regularly worked the same shifts as the Appellant as to what was in their PNBs, could not possibly be regarded as 'fresh' evidence because it was clearly available to be obtained by the Appellant at the time of the misconduct hearing. Mr Jenkins refuted the argument that the Appellant had been ambushed at the misconduct

hearing, pointing out that the Hearing bundle contained a number of exhibits that would have indicated the significance of the lack of PNBs entries, and the investigation report made specific reference to the notebook evidence. He also drew the Tribunal's attention to the fact that the issue was addressed in the opening note he had provided to the Panel and the Appellant's representatives ahead of the hearing.

53. It was also submitted that the evidence would not, in any event, have made a material difference to the Panel's findings as: (a) the email from Sergeant Barney could be interpreted as stating that the guidance had always been that shift times should be recorded in PNBs, not that the procedure had recently changed; and (b) there was no evidence available as to whether the other officers also claimed overtime and/or made false claims, and therefore no proper comparison could be made with the Appellant's position. Mr Jenkins explained that this evidence was not obtained as the Appellant did not request its disclosure and the Respondent made the decision not to investigate whether any of the other officers had made false overtime claims for fear of "scaring the horses" and "causing dismay".

54. It was maintained that the Respondent still had no way of establishing who might have given information to the Appellant (and potentially other officers) to the effect that he did not need to complete his PNB while on sensitive duties and Mr Jenkins submitted that the Respondent could not be expected to prove a negative.

55. When asked by the Tribunal, Mr Jenkins accepted that there was no specific requirement either in the guidance on completing PNBs or elsewhere that required officers to record details of overtime to be claimed.

56. Finally, in respect of the appeal against the outcome decision Mr Jenkins submitted that it was clear from the Panel's decision that they had gone through the process that they should have, taking into account the relevant sanctions guidance and the steps set out therein. Proper consideration was given to the question of outcome and therefore the Panel's decision was not unreasonable.

Decision and Reasons

57. The decision of the Tribunal is that the finding of the Panel, that the Appellant had breached the standard of honesty and integrity and committed gross misconduct, was unreasonable in that it fell outside of the range of reasonable findings that could have been reached on the evidence before it. In reaching this decision, the Tribunal considered the submissions as to the Panel's finding advanced by the Appellant under both Rule 4(4)(a) and 4(4)(c) together, as that is how the arguments were presented by the Appellant's counsel. In addition, as set out in paragraph 25(d) above, these two grounds of appeal can, and often do, overlap with instances of procedural unfairness leading to the reaching of an unreasonable decision.

58. Given that it is the decision of the Tribunal that the findings of the original Panel were unreasonable under Rule 4(4)(a), and as in those circumstances there is no discretion under the Rules to remit the matter, the result is that the decision is quashed and the Appellant should be reinstated with immediate effect.

Decisions under Rule 4(4)(a) and Rule 4(4)(b) in relation to the finding of gross misconduct

<u>The Pocket Notebook (PNB) evidence</u>

59. The Tribunal first considered the question of the Panel's assessment of the evidence as to what the Appellant's PNB did or did not contain.

60. The Appellant's first assertion on this matter was that it was procedurally unfair for the Panel to place such reliance on the PNB when it had formed no part of the AA's case until the Hearing and accordingly the Appellant had not been given the opportunity to

properly answer that issue. However, the Tribunal did not agree with that assertion as, in its view, it should have been sufficiently clear to the Appellant that the content of the Appellant's PNB and the question of why he did not record his shift times whilst on sensitive duties, was highly likely to be a point in issue given the documents contained within Appendix D to the Investigation Officer's report, specifically the Force Policy Document on Police Notebooks (pages 116 to121 in the bundle). In addition, the fact that the Appellant himself addressed the issues in his Regulation 31 response and produced a full copy of his own PNB indicates that he was aware that these were points in issue, something that would have been confirmed when the Respondent's opening note was received before the hearing. The Tribunal also noted that whilst it was open for the Appellant to make an application to adjourn the hearing at the time, this was not done.

61. The Tribunal accepted that there was no specific allegation before the Panel regarding a breach of the professional standard of complying with standing orders or rules and that the particulars of the allegations themselves made no reference to the lack of record keeping. However, that was because in this case the Respondent's case was always that the Appellant had acted dishonestly and the evidence of a lack of PNB records was being adduced in support of this point, rather than as a separate instance of misconduct. The Tribunal considered that the Respondent was not required to specify in the allegations each and every aspect of the evidence it relied upon, rather that the obligation upon it was to ensure that the case against the Appellant was clear enough that he could defend himself.[14] Therefore, the Tribunal found there was no 'ambushing' of the Appellant, as he claimed.

62. On the point raised as to whether there had been a duty on the Respondent to make reasonable enquiries as to the practices of officers on the same sensitive duties as the Appellant when completing their notebooks, and whether this had been breached, the Tribunal reached no conclusion on this point in the absence of being referred to any specific Rules, Guidance or Authority on this point by counsel. The Tribunal did, however, remind itself of the following paragraphs of the Home Office Guidance, which tended to support the Respondent's position that the Appellant's specifically raising of a matter at the point of serving his Regulation 31 Notice may have been too late a point to trigger this duty.

> *7.27 The officer concerned, or their police friend where acting on the officer concerned's instructions, is encouraged to suggest any lines of enquiry at an early stage which would assist the investigation and to pass any material they consider relevant to the investigator. This is particularly important when providing a response to the investigator following the notice of investigation, outcome of the severity assessment and terms of reference for the investigation.*
>
> *7.28 The investigator has a duty to consider the suggestions submitted to them within the timeframe set out in Regulations, as well as submissions made by a complainant or other relevant parties. They should document reasons for following or not following any submissions made by the officer concerned or their police friend in order to ensure that the investigation is as fair and transparent as possible. This will allow a balanced investigation report to be prepared and, where appropriate, made available for consideration at the misconduct meeting or hearing stage.*

63. However, the Tribunal considered that the narrow approach to the investigation seemingly adopted by the Respondent had not been the most helpful approach, considering the serious nature of the allegation being made against the Appellant (one

[14] Simms v Law Society [2005] EWHC 408 (Admin)

of dishonesty). The Tribunal did not accept the Respondent's submission that no further enquiries of the relevant practices could have been made by the Investigating Officer, either before or after producing the investigation report as he, effectively, had nowhere to start. That the Respondent would have been able to, at least, pursue reasonable lines of enquiry as to what other officers working with the officers at the relevant time did or did not write in their notebooks was clear from the fact that such information was later obtained as a result of the disclosure request made during these appeal proceedings. It was also open to the Respondent to check whether other officers who had not made PNB notes also made overtime claims (albeit it may choose not to also investigate whether these were false) but they chose not to do this. The Tribunal noted that reasonable lines of enquiry are not pursued only for the purpose of proving the Respondent's case (referred to in this matter as 'proving a negative') but also for the purposes of establishing facts that may undermine the Respondent's case and/or support the Appellant's.

64. In relation to the Appellant's second assertion, that the Panel had both unfairly and unlawfully reversed the burden of proof by holding that his failure to ascertain the position of his colleagues on whether they likewise did not record their shift times when on sensitive duties was significant, the Tribunal found this argument to be less than convincing. As submitted by counsel for the Appellant, it is trite law to say that the burden of proof rested with the Respondent in this case, and it was clear from the transcript of the misconduct hearing that this was uppermost in the mind of counsel for the Respondent when questioning and making submissions on the lack of corroboration for the Respondent's account (page 245 of the bundle, line 16 of the transcript).

65. In the Hearing, counsel made it clear that his submission was that:

    a. the issue raised by the Appellant was of such nature that it raised an evidential burden that required him to call evidence in support of it (which could include his own credible account), the issue being one that if it were determined in his favour would excuse him from the allegations faced; and
    b. the fact that the Appellant had not mentioned when interviewed a matter he later relied upon in his defence at the hearing, meant that the Panel would be entitled to draw an adverse inference against him on the point – to the effect that the account he gave at the hearing was untrue.

66. These were the options presented to the Panel by counsel for the Respondent both at the misconduct hearing and before this Tribunal. The Tribunal noted that no contrary submissions were made by the Appellant's counsel to suggest that they were not applicable.

67. The Panel's written decision on findings (at paragraph 10 i – v, pages 436 to 438 of the bundle) set out its assessment of this aspect of the evidence and was consistent with them finding both that the Appellant's own evidence was insufficient on its own to satisfy any evidential burden arising and also that they had found an adverse inference arising from the fact that he had not mentioned in interview what he later said was the true reason for not making a PNB note of his shift times (although the Panel did not make any specific mention itself as to which approach it was adopting in its written decision). Neither of these approaches, would amount to a reverse of the legal burden of proof and there was nothing additional in the Panel's reasons for making the findings to suggest that it was so reversed.

68. However, when examining the Panel's findings on this issue, the Tribunal noted that the Panel did appear to place a very significant amount of weight on the lack of entries in the Appellant's PNB to support its finding both that he arrived home before 0800 on each date in question that he acted dishonestly, rather than, for example, innocently or negligently making an error, when submitting his overtime claims. The question of

whether the weight given to this evidence was appropriate would need to be examined further in respect of the Appellant's further submissions on these issue (see below).

69. In respect of the other elements of the Appellant's submissions on the notebook evidence, the Tribunal found as follows.

    a. The argument that the Panel unfairly discounted the evidence that the Appellant's PNB had been inspected with no complaint by his supervisor when he was on 'regular' duties didn't advance the appeal any further. As the Sergeant's statement showed (page 125 of the bundle), he had no role in approving the Appellant's PNB for any shifts other than those he supervised and had no knowledge of the practices of those on sensitive duties. Therefore, his evidence could only be, at best, neutral on the question of whether the Appellant's approach was right or wrong.
    b. The argument that the Panel unfairly omitted to consider paragraph 4.1 of the PNB guidance (page 117 of the bundle), "which indicated that notes may not be taken when it was impractical or inappropriate to do so, such as surveillance or undercover duties" likewise did not assist the Tribunal. In fact, paragraph 4.1 requires that "officers and staff required to maintain PNBs must have their book in their possession and available for use at all times whilst on operational duty, unless it would be impractical or inappropriate to do so e.g. when on surveillance or undercover duties". It does not excuse an officer from making notes completely, only from carrying their PNB with them when impractical or inappropriate to do so. It also provides no reason for not complying with the separate requirement at paragraph 5.9 – "The PNB should not be regarded as a minute by minute account of an officer's/staff tour of duty. If no entries are required, no entry needs to be made but details of each tour of duty should be recorded i.e. date and time of the shift, start and finish and refreshment times" at a practical or appropriate time e.g. at the end of a shift.

70. Consequently, the Tribunal did not find that there was any procedural unfairness in the way that the Panel dealt with the notebook evidence, which could have had a material effect on the findings made. However, the Tribunal kept under consideration the question of whether the Panel's findings on what time the Appellant likely arrived home and on dishonesty were made unreasonable by the weight attributed to the notebook evidence at that stage of the proceedings.

<u>The evidence as to whether the Appellant more likely than not arrived home at before 0800 on the dates in question</u>

71. The Tribunal went onto consider the evidence relied upon to establish that the Appellant reached his home on each of the relevant dates before 0800 hours.

72. In doing so, and although this had not been referred to by counsel for the Respondent, the Tribunal reminded itself that typically an appeal tribunal should be slow to interfere with the fact-finding decisions of a lower tribunal, particularly where the previous decision-makers had had the advantage of hearing and seeing witnesses give evidence.[15] It considered that it should only do so where the findings of fact could be said to be outside of the range of findings that a reasonable panel could have made, and that unreasonableness could be found where a Panel had clearly failed to grapple with the factual evidence before them.[16]

73. The Tribunal also reminded itself of the general principles relating to the application of the standard of proof in disciplinary cases involving allegations of dishonesty .i.e. the seriousness of the allegation and the severity of the consequence is a factor that the

[15] GMC v Amgad Nakhla [2014] EWCA Civ 1522 and Enemuwe v NMC [2016] EWHC 1881 (Admin).
[16] CC Durham v PAT CC [2012] EWHC 2733.

regulatory authority will need to take into account when applying the civil standard of proof. It is, again, trite law to say that the standard of proof can adjust to the context and, in dishonesty cases, should be applied with sufficient care.[17]

74. The Tribunal considered the three main strands of evidence relied upon by the misconduct Panel to reach its conclusions that it was more likely than not that the Appellant arrived home before 0800, as well as the comments on the same made by the Appellant's and the Respondent's counsel: the APNR data, the test run and the cell site (CDR) data. The Tribunal also noted that the Panel had before it evidence of the times that the Appellant was booked off shift at his place of duty and the times his police equipment was booked in, although neither of these matters featured in the Panel's written decision as to its factual findings.

75. The Tribunal considered the evidence both individually and overall, and the reasonableness of the Panel's assessment of it as demonstrated in its written reasons. Having done so, it concluded that the Panel failed to consider the reliability of the evidence, in light of relevant standard of proof, with sufficient rigour and that its reasons highlighted a failure to grapple with the fundamental weaknesses in and limitations of the evidence.

76. Taking first the evidence of the time that the Appellant drove past the fixed point APNR camera 6.2 miles from his home, this was both factual and undisputed evidence of where he was at the location on each of the relevant dates. However, any assistance it could provide in determining the ultimate question, of whether he was more likely than not to have arrived home before 0800 on each date, was wholly dependent on the reliability of the timing of the test run (discussed further below). It was, in of itself, of very limited value to the determinative question to be addressed by the Panel.

77. Secondly, the Tribunal considered the cell site data, adduced to demonstrate the time that the Appellant's mobile phone first connected to the phone mast closest to his home on the mornings of the relevant dates, and the expert evidence of Mr Kilby analysing its relevance to the case. This was another piece of evidence that was accepted by all parties, as well as the Panel, as being unable to provide any conclusive or determinative evidence as to the question of when the Appellant arrived home on the relevant dates. At its highest, it demonstrated, using the more reliable CDR data available, that the Appellant's mobile phone had connected to the phone mast and was therefore within an area up to (and including) 2km from the Appellant's home address before 0800 each morning.

78. Mr Kilby's evidence was summarised by the Panel as being that, in five cases the phone was within that area "immediately" before 0800 and in one case "in the period" before 0800, but more accurate references were made to the Tribunal by counsel, demonstrating that the earliest cell site timing was 0738 (on 29 December). In its written decision the Panel concluded that "the CDR data simply added to the conclusion already achieved from the fixed point analysis that it was more likely than not that the officer arrived at his home prior to 0800" (see paragraph 11(h), at page 445 of the bundle).

79. Therefore, as was apparent from the decision of the Panel, the evidence of the "test run", and the assertion that it demonstrated that it would take the Appellant around 10 mins to travel that route was the primary piece of evidence relied upon by it to conclude that the Appellant arrived home before 0800 on each of the relevant dates. However, it also was accepted by both parties and the Panel in its decision that this evidence was "far from ideal".

[17] Moseka v NMC [2014] EWHC 846 (Admin).

a. The Appellant submitted that it was evidence that was fundamentally flawed, pointing to both the conditions it was carried out under and also the evidence given by the Appellant to contradict the Respondent's assertion that, at the time he drove the journey, the roads would have been quieter.
b. The Panel went as far as to record that it was both "troubled and surprised that the length of time from the fixed point to the officer's home was not checked more carefully".
c. The Respondent accepted that while no "test run" could exactly replicate the Appellant's journey, more could have been done to at least make this a closer representation of it.

80. Overall, therefore, the Tribunal considered that the Respondent's primary evidence on this issue consisted of three strands of circumstantial evidence, of which, only one could truly form the basis of the Panel reaching the decision that it did – the test run evidence – and this was the evidence that the Panel expressed trouble and surprise in respect of, in relation to the fact that it had not been checked more carefully.

81. Nonetheless, despite its concerns, in an apparent contradiction of its own initial assessment of the evidence, the Panel went onto rely significantly the estimation of 10 minutes journey time as an accurate estimate, stating that "However, the panel were satisfied that it would be reasonable to assume the roads were busier at 0820 than they would have been when the officer passed the fixed point between 0700 and 0800. The panel proceeded on the basis that the journey would take at least 10 minutes and probably on occasions slightly longer but the distance of 6.2 miles was not challenged".

82. The Tribunal viewed this contradiction as significantly undermining the reasonableness of the Panel's decision, particularly given the weakness of its reasoning as to why it had changed its position i.e. that it was making "an assumption" that the roads would be busier at 0820.

83. The approach of the Panel to state that they were making "an assumption" on this basis, rather than reaching a conclusion based on the evidence they had heard, was one that no reasonable Tribunal should have adopted. Even if the Panel had approached this piece of evidence by considering whether they could, rather than make an assumption, draw a reasonable inference that the roads were quieter before 0800 than they were afterwards, the Panel would have first had to identify other evidence available to them that could provide a basis for such an inference being drawn, which they did not do. In addition, the Panel provided no reasoning for dismissing the Appellant's evidence as to the area between the APNR fixed point and his experience of driving that route at the relevant time other than to describe it as "rather opportunistic". This comment of itself is insufficient to explain why no weight was given to the Appellant's account and, in the Tribunal's view, it was further evidence of the Panel adopting an unreasonable approach to assessing the evidence. Overall, the Panel's approach demonstrates, in the Tribunal's view, one that lacked sufficient rigour to reflect the seriousness of the matters being alleged.

84. For completeness, the Tribunal also considered counsel for the Appellant's argument that the Panel acted unreasonably in rejecting her submissions in closing regarding what she said that the time variances between the ANPR data and cell site connection times could show. The Tribunal considered that given the limitations of both sets of data the submission made as to the potential variances took the matter no further.

85. In the absence of any real cogent evident to support the allegation that the Appellant arrived home before 0800 each day, it appears that both the Respondent and the Panel chose instead to rely significantly on the notebook evidence. In paragraph 15 of the Panel's decision (page 446 of the bundle) it was emphasised that "the decision of this officer not to provide any corroborative evidence supporting his overtime claims is significant" and, at paragraph 10(v) (page 437 of the bundle) the Panel referred to his

failure to maintain notes, along with a habit of making his overtime claims four days after the relevant dates, as being relevant in terms of a "lack of contemporaneous evidence of the times that would have been involved in calculating overtime".

86. However, it was not, in the Tribunal's view, reasonable for the Panel to have given the lack of contemporaneous notes as to his overtime claims the weight it did in assessing whether the Appellant arrived home before 0800 on each day in question. The Tribunal noted two main points:

    a. Firstly, that the Appellant made no notes in his PNB at any time when he was on sensitive duties, as to either shift times (which were independently verifiable) and overtime claims, not just on the relevant dates; and
    b. that even if the Appellant should have noted down the start and end times of his shifts in his PNB, there was no requirement in the PNB guidance or elsewhere for him, or his colleagues, to record times of arrival home, which would be relevant to any overtime claims to be made. This was accepted by counsel for the Respondent during the appeal hearing.

87. Any weight that could therefore be placed on the lack of contemporaneous notes to support the Respondents case that the Appellant arrived home was limited and could not reasonably play a significant part in satisfying a reasonable panel on the balance of probabilities that the Appellant arrived home before 0800 each day.

The approach to dishonesty

88. The Tribunal next considered the Panel's approach to the question of whether the Appellant's conduct in submitting, what they had found to be incorrect, overtime claims was dishonest.

89. The Tribunal considered carefully the aspect of the Panel's written decision on findings that dealt with dishonesty and the Appellant's submission that paragraphs 12 and 13 of the decision (page 445 of the bundle) demonstrated that the Panel did not grapple at all with the questions that needed to be asked to establish dishonesty, but simply made an assumption that, as the overtime claims were, in its view wrong, that the Appellant acted dishonestly. The Tribunal was also directed to paragraphs 14 to 17 (page 445 to 446 of the bundle) of the decision, which the Respondent argued demonstrated that the Panel did grapple with those questions. The Tribunal noted that all of these paragraphs contained the Panel's finding as to whether the professional standard of honesty and integrity had been breached, following the section on factual findings which, in turn, addressed whether the Appellant's submitted overtime claims he was not entitled to.

90. In the Appellant's submission the Panel had not, in its reasons, considered first, whether the overtime claims were wrong and then, second, whether this meant that the Appellant was dishonest, as it should. The Tribunal agreed that in matters relating to dishonesty there were a number of steps to be gone through and a number of questions to be asked. Specifically, the Tribunal considered that questions had to be asked and answered as to the Appellant's state of knowledge and belief at the time he submitted the overtime claims, at the point of the Panel making its factual findings, before reaching the point of deciding whether the professional standard of honesty and integrity had been breached.

91. The Tribunal reminded itself of the test for dishonesty laid down in *Ivey v Genting Casinos* [2017] UKSC 67, referring specifically as to the need to consider (subjectively) what an individual's state of mind is even when applying an objective test of dishonesty, although it noted that (as confirmed by both counsel) that at no point during the misconduct hearing was the Panel, and in particular the Legally Qualified Chair, directed to any particular test that it should apply when determining whether the

Appellant acted dishonestly or to any relevant legal authority as to how a misconduct panel should approach the question.

92. Finally, the Tribunal considered it to be uncontroversial that, in a matter involving a case of dishonesty, the Panel was required to apply the standard of proof with particular rigour and to only make the finding of dishonesty if sufficiently cogent evidence was available to support the same,[18] and (as argued by the Appellant) they could exclude another innocent or alternative explanation advanced by the Appellant.[19]

93. On considering the Panel's decision on factual findings (in paragraphs 10 and 11, pages 436 to 445 of the bundle), the Tribunal could see no evidence to suggest that the Panel had gone through the exercise of carefully weighing the evidence in relation to the Appellant's state of mind, as required in a case of this nature. The only factual finding that the Panel appeared to have made in respect to the Appellant's knowledge or belief as to the nature of the overtime claims he submitted was that in paragraph 10(v). i.e. "Overall, the situation in respect of the PNB led the Panel to conclude the lack of evidence supporting the length of the officer's duties and his arrival back at his home was indicative of an attitude to claiming of overtime without any evidence to support such claim". However, finding that the Appellant had a negligent or reckless attitude to his overtime claims is not the same as finding that he was, in fact, acting in the knowledge of belief that the claims were wrong, and therefore his actions were dishonest.

94. Nonetheless, the Panel went on, at paragraph 14 (page 445 to 446 of the bundle) to conclude that the Appellant had breached the professional standard of honesty and integrity as he had "wrongly and fraudulently repeatedly submitted claims…". Paragraph 15 the Panel states that this conclusion is based on the evidence that "clearly shows the officer finishes duty by returning to his home address at a time before 0800 hours", and that "the Panel took into account the lack of record or evidence to the contrary which might otherwise assisted the officer's claim".

95. The Tribunal considered that this aspect of the Panels' reasoning specifically demonstrated a lack of consideration as to the particular rigour with which the standard of proof should be applied in cases of dishonesty. The weak nature of the evidence that was relied upon to establish that the Appellant arrived home before 0800 on each relevant date has already been discussed whilst the inappropriate weight that the Panel chose to give, in contrast, to the fact that the Appellant had made no notes of his shift or overtime times in his PNB has likewise been considered.

96. In relation to the latter point, the Tribunal took the view that whilst a lack of contemporaneous notes of the times the Appellant arrived home might have been considered to be evidence of an attitude to claiming of overtime without any evidence to support such claim, it was unreasonable for the Panel to move straight from this to conclude that it also showed that the Appellant deliberately avoided keeping notes that would enable a proper check to be made of his overtime claims, and therefore that he was dishonest. In this regard, the Panel failed to demonstrate that it had safely reached a conclusion that potential alternative explanations for the Appellant's actions could be discounted i.e. that he had honestly, albeit possibly negligently or reckless, submitted erroneous overtime claims.

97. Two further submissions advanced by the Appellant were also considered by the Tribunal. Firstly that the Panel failed to given any consideration to the character evidence advanced by the Appellant, when he was entitled to have it taken into account in respect of both the question of whether he was more likely than not to have acted dishonestly and whether he could be relied upon as a credible witness. Likewise, the

[18] See Moseka v NMC, cited above, and Lawrence v GMC [2015] EWHC 596 (Admin).

[19] Soni v GMC [2015] EWHC 364 (Admin).

Panel failed to give any weight to the evidence the Appellant had put before it as to his previous approach, in early 2020, to correcting errors that he had identified in travel claims.

98. The Tribunal considered these matters as a single point, and one of considerable concern. It is well established law that evidence of a person's good character and honesty is relevant to an allegation of dishonesty, both in terms of his propensity to commit a dishonest act and his credibility as a witness.[20] It is also well established that it is not enough for a disciplinary Panel to indicate that it has taken such matters into account in its decision-making, but that it must also demonstrate that it has done so. In this matter, however, the Panel did not state anywhere in its findings that it had. Whilst counsel for the Respondent argued that it could be 'taken as read' that the Panel had taken the character references into account, because it had made reference to considering all of the evidence before them, the Tribunal considered that this was insufficient to indicate that they had actually done so in a way that was both fair and reasonable.

99. In addition, the Tribunal considered that the Respondent counsel's argument that there was further evidence that the Panel took the character references into account in making their findings, because it specifically referred to them in its decision on outcome was, in fact, more likely to show that the Panel failed to give them proper consideration at the findings stage, where they did not mention them at all.

100. Consequently, the Tribunal's views was that the Panel's approach to the question of dishonesty was unfair, in a way that could have had a material effect on the decision it reached as to the finding of gross misconduct, and that this in turn led to the Panel reaching an unreasonable decision. The unfairness can be characterised overall by a lack of demonstrable legal and analytical rigour in making the decisions required to reach the conclusion that the Appellant was dishonest, and to this end we feel that it was unfortunate that counsel appearing before the Panel did not seek to assist it to a greater extent on the application of the law.

Conclusions

101. The decision of the Police Appeals Tribunal is that the finding of the Panel that the Appellant breached the professional standard of honesty and integrity, specifically on the basis that he was dishonest, and that this amounted to gross misconduct to be unreasonable, in respect of the three original grounds of appeal advanced in the Appellant's first set of appeal grounds.

102. Overall, the Tribunal concludes that the factual findings made by the Panel were beyond the range of reasonable findings open to a Panel presented with the evidence that it was and considers that one of the key factors that led the Panel to make its unreasonable decision was that the fact that the Panel appear to have failed to properly consider the question of dishonesty, as demonstrated by a lack of proper reasoning on this point in its decision.

103. As already stated, given that it is the decision of the Tribunal that the findings of the original panel was unreasonable under Rule 4(4)(a), and as in those circumstances there is no discretion under the Rules to remit the matter, the result is that the decision is quashed and the Appellant should be reinstated with immediate effect.

[20] Pope v GDC [2015] EWHC 278 (Admin).

Decisions under Rule 4(4)(b) in relation to the finding of gross misconduct and under Rule 4(4)(a) in relation to outcome

104. As a result of the decisions made above it is unnecessary for the Tribunal to consider either of these additional grounds of appeal.

7 August 2022

J M Davidge, PAT Chair