OUTER HOUSE, COURT OF SESSION

[2024] CSOH 58

P821/23

OPINION OF LADY DRUMMOND

in the Petition of

DEPUTY POLICE CONSTABLE (DESIGNATE) FIONA TAYLOR, QPM

Petitioner

for

Judicial Review of a decision of the Police Appeals Tribunal

Petitioner: Crawford KC; Clyde & Co
Respondent: Dean of Faculty, D Blair, Advocate; MacRoberts LLP

17 May 2024

[1] The petitioner, the Deputy Police Constable (Designate), seeks reduction of a decision by the Police Appeals Tribunal of 6 July 2023 in which it made a finding of misconduct by the respondent and issued him with a final written warning.

[2] The respondent is AB, a Detective Constable in the Police Service of Scotland. In March/April 2022 he was served with three allegations of misconduct. The allegations were that he had taken part in inappropriate discussions through WhatsApp messages and had made derogatory and offensive comments about fellow police constables as follows:

> "1. On or between 10 February and 17 July 2016, you did behave in an improper manner by taking part in discussions with others on WhatsApp chat group 'PC PIGGIES' concerning Constable A c/o Police Scotland and did make

derogatory and offensive comments and/or were complicit in others making derogatory and offensive comments about said Constable A including remarks regarding her being dyslexic, thereby failing to treat her with respect and courtesy.

2. On or between 10 February and 17 July 2016, you did behave in an improper manner by taking part in discussions with others on WhatsApp chat group 'PC PIGGIES' concerning Constable B c/o Police Service of Scotland and did make derogatory and offensive comments and/or were complicit in others making derogatory and offensive comments about said Constable B, thereby failing to treat her with respect and courtesy.

3. On or between 10 February and 17 July 2016, you did behave in an improper manner by taking part in discussions with others on WhatsApp chat group 'PC PIGGIES' concerning Constable C, c/o Police Service of Scotland and did make derogatory and offensive comments and/or were complicit in others making derogatory and offensive comments about said Constable C, thereby failing to treat her with respect and courtesy. "

[3] Misconduct proceedings were taken under the Police Service of Scotland (Conduct) Regulations 2014. On 28 June 2022 the Chief Superintendent determined that allegations 1 and 2 amounted to gross misconduct. She did not uphold allegation 3. She determined that the respondent should be dismissed without notice.

[4] The respondent appealed. The appeal was determined by the Assistant Chief Constable without an oral hearing on 28 October 2022 and the respondent's appeal dismissed.

[5] The respondent next appealed under section 56 of the Police and Fire Reform (Scotland) Act 2012 to the Police Appeals Tribunal. He accepted that allegations 1 and 2 amounted to misconduct. He proceeded with two grounds of appeal: (i) that the finding of gross misconduct in relation to allegations 1 and 2 was unjustified and unreasonable and (ii) that the sanction of dismissal without notice was disproportionate in the event that a finding of gross misconduct was justified and reasonable. He sought reinstatement to the

office of constable. He submitted that a final written warning was sufficient in the circumstances.

[6] On 6 July 2023 the tribunal decided that the conduct alleged in allegations 1 and 2 was misconduct and not gross misconduct. The tribunal reinstated the appellant to the office of constable and imposed a final written warning.

Petitioner's submissions

[7] The petitioner invited the court to reduce the tribunal's decision on the following grounds.

(1) Lack of adequate reasons and taking into account irrelevant considerations

[8] It was submitted that the tribunal failed to provide adequate and comprehensible reasons on the principal and important issue of why allegations 1 and 2 did not amount to gross misconduct *(South Bucks District Council* v *Porter* (No 2) [2004] 1 W.L.R 1953 at paragraph 36). In giving its reasons the tribunal adopted the submissions of the respondent at paragraph 34 of its decision. The tribunal did not distinguish between the respondent's submissions. The tribunal incorporated these submissions in substance and form into its reasoning without qualification or exception. It is ambiguous whether paragraphs 15 to 24 of the tribunal's decision are the tribunal's reasons. If those are to be taken as the tribunal's reasons the adequacy of the reasons is periled upon those submissions alone.

(2) Irrelevant considerations

[9] On the assumption that the reasoning of the tribunal is to be found in paragraph 34, the tribunal does not provide a proper basis upon which to determine allegations 1 and 2

give rise merely to misconduct. What is a relevant consideration is a matter for the court: *Tesco Stores Limited* v *Secretary of State for the Environment* [1995] 1 WLR 759 at 780. A failure to have regard to a material or relevant consideration is an error of law: *SS* v *Secretary of State* [2010] CSIH 72 at paragraph 13 and *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223 at p228.

[10] A decision maker may also act irrationally by failing to have regard to an obviously important consideration. Irrationality is established by a decision which does not add up, is robbed of logic: *Usman Asim* v *The Secretary of State for the Home Department* 2018 SLT 1251, paragraphs 8 and 9.

[11] It was necessary for the tribunal to draw an appropriate distinction between factors that were relevant to the determination of conduct and, in contrast, factors that were relevant to the determination of disciplinary action. The tribunal must determine first if the conduct is gross misconduct, misconduct or neither. Why the officer behaved in that manner, and the mitigatory context, may be relevant to the second stage of the tribunal's decision making and its decision as to disciplinary action. This distinction arises not only as a matter of logic but from a proper construction of the 2014 Regulations (Regulations 21 and 22); *R (ex parte Campbell)* v *General Medical Council* [2005] EWCA Civ 250; [2005] 1 W.L.R 3488 at paragraphs 18 to 33. It is therefore necessary to ensure that at each stage the conduct and disciplinary action are addressed separately and not inappropriately conflated. The tribunal did not draw that distinction. Factors properly relevant to disciplinary action have led to the decision that the conduct in question was not gross misconduct.

[12] In particular the petitioner submitted that before the tribunal the respondent relied on the following irrelevant matters:

(i) The messages were in a group chat with colleagues

[13] The fact that communication was with colleagues is irrelevant to whether or not the conduct was gross misconduct. The respondent ought to have known that the messages were not private and that officers are under a clear obligation to report messages that fall below the standards of police behaviour. There was no reasonable expectation of privacy (*C* v *The Chief Constable* 2020 CSIH 6 at paragraph 143) and, regardless of the respondent's belief, the communications were not private. As a matter of law the distinction the submission sought to make was irrelevant to the classification of the conduct.

(ii) Lack of training on use of WhatsApp

[14] The extent, existence or lack of training for police on WhatsApp communications is strictly and logically irrelevant to the classification of the conduct as misconduct or gross misconduct. It may be relevant in mitigation but does not affect the intrinsic seriousness of the conduct.

(iii) Encouragement of use of WhatsApp

[15] Whether WhatsApp messaging was encouraged is irrelevant to an assessment of the intrinsic quality of the conduct although may be relevant to the sanction. In any event it is irrational to excuse offensive communications on the basis that Police Scotland encourage the use of WhatsApp. It is obvious that this encouragement was not encouragement or tacit consent to communicate in an offensive manner. Rather it was encouragement in a professional context to support professional purposes. That encouragement cannot rationally discount the seriousness of the improper use of WhatsApp for improper purposes.

(iv) *A desire to fit in*

[16] That the respondent wished to "fit in" is irrelevant to whether or not the conduct was gross misconduct. It does not affect the seriousness or the character of the conduct, although it may be relevant to sanction.

(v) The offending messages were a small proportion of the full group chat

[17] The fact that the respondent's offending messages were a small proportion of the overall messages is irrelevant. It avoids an objective evaluation of the content of the messages and the conduct. It leaves out of account what was said and dilutes the seriousness of the conduct based on an arbitrary measure namely the number of total messages sent by him.

(vi) The messages were not sexist

[18] This consideration is internally inconsistent and illogical. The submission by the respondent that the messages ridiculed performance and appearance alone is hard to reconcile with the acceptance by the tribunal at paragraph 34 that "one comment in particular was unquestionably sexist in nature and the images were derogatory and offensive…" Acceptance of the respondent's submission on this is at odds with the tribunal's own observations in a manner which gives rise to confusion and illogicality.

[19] Moreover the tribunal left out of account the allegation concerning an officer who was subject to criticisms of dyslexia. The respondent submitted that this fact was not known to him. However the matter was nowhere resolved by the tribunal. The tribunal's finding that the conduct did not amount to gross misconduct is inconsistent with its earlier description at paragraph 34, and cannot be logically reconciled with the finding at

paragraph 39 that the comments were "vulgar, demeaning, inappropriate and wholly disrespectful".

[20] There is an inconsistency and illogicality in the tribunal accepting on the one hand in paragraph 34 that one comment was unquestionably sexist in nature but on the other hand appearing to accept that making a derogatory comment about someone's appearance or ridiculing behaviour were not sexist and did not disparage disability.

[21] In the event that the court considers that paragraph 34 of the decision constitutes the tribunal's reasons, those are all considerations that point to the seriousness of the conduct and are at best a summary of the petitioner's submissions and suffer from the same criticisms.

[22] It is difficult to work out what were the reasons for the tribunal deciding that the conduct was misconduct and not gross misconduct, it having failed to distinguish between culpability and sanction. If the tribunal has relied on the respondent's submissions those contain many irrelevant matters. The reader is left in real and substantial doubt about what the reasons were for the decision.

(3) Failure to apply the test of misconduct/gross misconduct

[23] The test applied by the tribunal at paragraph 40 of its decision namely whether the "conduct was of such a reprehensible nature that he should be dismissed, with or without notice" is not the test for gross misconduct. The test is whether it "may" justify dismissal. Whether it does or not is a question for disciplinary action. The tribunal applied a materially higher test and erred in law.

Respondent's submissions

[24] The respondent invited the court to sustain his fourth and fifth pleas-in-law and to refuse the petition. The respondent submitted that the tribunal's decision is not vitiated by any failure to give adequate reasons, by having had regard to any irrelevant considerations or by applying an incorrect test.

(1) Inadequate reasons

[25] The respondent submitted that the tribunal's decision when read as a whole clearly articulates the basis on which it reached its decision. The reader is left in no real or substantial doubt as to its reasons for making a finding of misconduct and imposing a sanction of a final written warning. There was no real dispute on the facts. The respondent admitted the allegations and gave unchallenged evidence. The sole issue for the tribunal was whether the admitted conduct was, in light of the mitigating evidence provided by the respondent, so serious as to (i) amount to gross misconduct and (ii) require the sanction of dismissal. The tribunal plainly directed itself to those questions.

[26] The tribunal set out in detail at paragraphs 15 to 29 of its decision the submissions of both parties. It is clear that it understood the arguments which each party relied on. As regards the finding of misconduct the tribunal notes at paragraph 34 that it "accepted the submissions on behalf of the appellant". In reading the tribunal's decision as a whole the only possible reading is that the tribunal accepted the submissions made by the respondent under the heading "Ground of appeal 1". In circumstances where it indicated that agreement, it was not necessary for it to rehearse those arguments again.

[27] It is clear from the rest of paragraph 34 that the tribunal also had regard to the arguments on behalf of the petitioner, that it accepted the seriousness of the allegations but

that it considered in all the circumstances that the conduct did not reach the high threshold to amount to gross misconduct.

[28] Paragraph 34 ought to be read in the context of the reasoning set out at paragraph 37. Whilst that passage comes under the heading of "Sanction" a number of the factors relied upon by the tribunal speak to the inherent seriousness of the allegations, an issue which is clearly relevant to the question of misconduct. Where the very definition of "gross misconduct" in the 2014 Regulations is tied to the issue of sanction one must take this reasoning (which is consistent with the submissions made for the respondent at paragraphs 15 to 16 of the tribunal's decision) as also having been relevant to the tribunal's decision as regards misconduct.

(2) Irrelevant considerations

[29] The petitioner's argument that the context or circumstances of the allegations cannot inform the issue of whether the conduct amounts to gross misconduct and will only sound in the determination of sanction is misconceived. The tribunal in assessing the seriousness of the conduct can appropriately consider the wider circumstances of that conduct (*Mallon* v *General Medical Council* 2007 SC 426 at paragraph 18).

(i) The messages were in a private group chat with colleagues

[30] The petitioner's argument that the fact the messages were in a private group chat is irrelevant to the question of misconduct is misconceived. It elides two separate issues. In *C* v *Chief Constable of Police Scotland* [2020] CSIH 61, the court confirmed that an officer could not challenge the reliance by the Chief Constable on private WhatsApp messages on the basis that any type of confidentiality or privacy was attached to them. In other words

the Inner House confirmed that such messages were admissible as evidence in the misconduct proceedings.

[31] The respondent submitted that is a separate question from the submission made to the tribunal in the present case which was that the seriousness of the conduct was mitigated to some extent by the fact that the messages were not directed at, or communicated to, the officer who was the subject of the comments. The tribunal was entitled to consider that there was a material difference between making (unacceptable) comments about a colleague as opposed to making comments to a colleague. Whilst neither is appropriate behaviour the tribunal was entitled to consider that this was a relevant consideration in determining the seriousness of the conduct. In oral submission it was argued that the fact it is a private group chat is entirely different from a public blog and is part of the circumstances relevant to categorisation of misconduct.

(ii) Lack of training

[32] The reference to lack of training did not form any part of the respondent's submissions to the tribunal as regards misconduct. In approaching the issue of sanction, the tribunal was entitled to have regard to the fact that there was no training or guidance as regards the standards to be adhered to in the WhatsApp messages. It found as a matter of fact that the respondent laboured under the "mistaken belief" that it was appropriate to make such comments to impress colleagues. The reasons why he may have laboured under that mistaken belief (including a lack of training or guidance) are relevant to the question of appropriate sanction.

[33] In oral submission the respondent submitted that in any event, inexperience or a lack of training could be highly relevant to classification of the conduct. A particular action by a

naïve and untrained officer might well be viewed differently in terms of gross misconduct from the same action by an experienced fully trained officer. This is a factor relevant to conduct and not just mitigation.

(iii) Encouragement of use of WhatsApp

[34] The respondent made the same argument as regards the training issue ie that this formed no part of the respondent's submissions on misconduct. The fact that Police Scotland encourage the use of informal WhatsApp groups is relevant to how the respondent formed his "mistaken belief" that the messages were appropriate**.** It is relevant to the question of sanction, what weight to apply to that factor is a matter for the tribunal.

(iv) *A desire to fit in*

[35] There is no basis to conclude that this formed part of the tribunal's decision on misconduct. To the extent that the tribunal considered this issue when considering the question of sanction, it was entitled to do so.

(v) The offending messages were a small proportion of the full group chat

[36] The respondent submitted that there was no basis to conclude that the tribunal had regard to this matter, which was set out in the factual background section of the respondent's submissions, in relation to either its decision on misconduct or sanction.

[37] In oral submission the respondent submitted that in any event, the number of messages were part of the circumstances: a distinction is appropriate between sending one message and a thousand and all of that was relevant to the assessment of the misconduct.

(vi) The messages were not sexist

[38] It is clear that this submission by the respondent was not accepted by the tribunal. The tribunal made clear findings that one image was "unquestionably sexist" it also concluded that the messages were "vulgar, demeaning, inappropriate and wholly disrespectful". But there is nothing impermissible about finding nonetheless that the threshold for gross misconduct had not been meet. It cannot be said that such a finding meant that the only rational conclusion was that it amounted to gross misconduct. There is no basis to conclude that the tribunal adopted a more lenient approach to either misconduct or sanction on the basis of any belief that the messages were not sexist.

[39] The tribunal recognised and made clear that the respondent's actions amounted to misconduct. It marked the seriousness of that conduct by imposing the second most severe sanction available to it. However it also appropriately had regard to (i) the context in which the messages were sent, (ii) the respondent's intentions when sending those messages and (iii) the significant remediation which the respondent had demonstrated. It was entitled to do so. It was entitled to make the findings and separately impose the sanction that it did. Its decision is adequately reasoned.

[40] In oral submission, it was further submitted that it is appropriate to consider the decision as a whole and consider the respondent's gross misconduct submissions as those set out at paragraph 16, sub-paragraphs 21 and 22. Those were the respondent's arguments that the conduct was not so serious to amount to gross misconduct. It is enough for the tribunal to make it clear that the conduct did not reach that threshold. It is an evaluative and discretionary judgment that is being exercised. The parties know that means that it is conduct which is not serious enough to justify dismissal. The reason it is not gross misconduct is because of the context in which the messages were sent. Some circumstances

might be relevant to both culpability and the sanction. The main question is as to the seriousness of the conduct and various factors can appear in both.

(3) Failure to apply the test of misconduct/gross misconduct

[41] There was no misapplication of the test for gross misconduct in paragraph 40. The tribunal set out its reasoning why a finding of gross misconduct was not warranted and was disproportionate.

Decision

The legal framework

[42] The disciplinary proceedings took place under Part 3 of the 2014 Regulations. Regulation 2 defines "misconduct" as meaning, unless the context otherwise requires, conduct which amounts to a breach of the standards of professional behaviour (but does not, unless the context otherwise requires, include gross misconduct). "Gross misconduct" means a breach of the standards of professional behaviour so serious that demotion in rank or dismissal may be justified.

[43] Under Schedule 1, the standards of professional behaviour include:

- Honesty and integrity (constables are honest, act with integrity and do not compromise or abuse their position);
- Authority, respect and courtesy (constables act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy. Constables do not abuse their powers or authority and respect the rights of all individuals);

- Equality and diversity (constables act with fairness and impartiality. They do not discriminate unlawfully or unfairly).
- Discreditable conduct (constables behave in a manner which does not discredit the Police Service or undermine public confidence in it, whether on or off duty);
- Challenging and reporting improper conduct (constables report, challenge or take action against the conduct of other constables which has fallen below the Standards of Professional Behaviour).

[44] Where a misconduct allegation comes to the attention of the Deputy Chief Constable, under Regulation 10, the Deputy Chief Constable must assess whether the conduct would amount to misconduct, gross misconduct or neither. If after investigation the Deputy Chief Constable determines that there is a case to answer the Deputy Chief Constable must refer the misconduct allegation to a misconduct hearing under Regulation 14. The misconduct proceedings must determine if it is established that the conduct of the constable amounts to gross misconduct, misconduct or neither (Regulation 21). Various disciplinary actions can be imposed including a verbal warning, a written warning, a final written warning, demotion in rank, dismissal with notice or dismissal without notice (Regulation 22).

[45] Thereafter a constable may appeal against any determination and any disciplinary action ordered. Where dismissal or demotion of rank is ordered, the constable has thereafter the right to appeal to a Police Appeals Tribunal.

[46] The appeal before the tribunal it is not restricted to a point of law. It is a rehearing before the tribunal, not a review of the prior disciplinary decisions. It follows that the tribunal does not have to take as its starting point the previous decision nor does it require to analyse the reasoning of the earlier decision makers or identify some error of law on their

part. It may look at their reasoning, and may take it into account, but it is free to agree or differ from it. The tribunal can substitute its own view for that reached by the earlier decision maker. In doing that the tribunal does not have to explain why the earlier decision maker was wrong. It is free to decide how to categorise the conduct itself (*Rae* v *Strathclyde Joint Police Board and Others* [2005] CSOH 131 at paragraph 15).

[47] The function of this court in these proceedings is a supervisory one. It is not for this court to substitute its judgment for that of the tribunal. Nor is it appropriate that this court engages in any evaluation of whether or not the respondent's behaviour amounted to misconduct, gross misconduct or neither. These are matters for the tribunal alone.

[48] In exercising its supervisory jurisdiction, the starting point for the court is that the conclusion of the tribunal must be given proper respect. The court should take a modest line (*Mooney* v *Secretary of State for Work and Pensions* 2004 SLT 1141 (per Lord Brodie at p1151B). The court ought to recognise, and pay sufficient deference to, the expertise of the tribunal in its determination as to whether any allegations amount to misconduct or gross misconduct (*R (ex parte Campbell)* v *General Medical Council* [2005] 1 WLR 3488 at paragraph 23; *Mallon* v *General Medical Council* 2007 SC 426 at paragraph 19.) Sanction is also a question which is pre-eminently a matter for the tribunal's expertise; *Mallon* at paragraphs 29 to 30.

[49] The decision of the tribunal may only be interfered with if the court is satisfied that the tribunal erred in law. An error of law will occur where a tribunal has misdirected itself in law; entertained the wrong issue; proceeded upon a misapprehension or misconstruction of the evidence; taken into account irrelevant matters or failed to take account of relevant ones; or has reached a decision so extravagant that no reasonable tribunal, properly directing itself on the law, could have arrived at. An error of law cannot be said to have

occurred simply where a tribunal has wrongly assessed the evidence in some way or weighed it in a manner with which a party disagrees *(SS* v *Secretary of State for the Home Department* 2010 CSIH 72 at paragraph 13).

[50] What is a relevant consideration is a matter for the court (*Tesco Stores Limited* v *Secretary of State for the Environment* [1995] 1 WLR 759 at p780). Where a statute is silent on what considerations to take into account, and what weight to place on those, the decision is only subject to challenge on *Wednesbury* irrationality grounds (*Re Findlay* [1985] AC 318 at p333). The decision in every case as to whether misconduct is gross has to be made by the tribunal in the exercise of its own skilled judgment on the facts and circumstances and in light of the evidence (*Mallon* v *General Medical Council*, paragraph 18).

[51] The tribunal must provide reasons for its decision (rule 16(6)(b) of the 2013 Rules). The reasons for a decision must be intelligible and they must be adequate. The decision must leave the reader in no real and substantial doubt as to what the reasons for its decision were and what material considerations were taken into account (*Wordie Property Co Limited* v *The Secretary of State for Scotland* 1984 SLT 345 at 348). They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. Decision letters must be read in a straightforward manner, recognising that

they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision (*South Bucks District Council* v *Porter* (No 2) [2004] 1 W.L.R 1953 at paragraph 36). It is necessary to read the decision as a whole, rather than to focus on specific passages in isolation (*Barakat* v *General Medical Council* [2013] EWHC 3427 (Admin) at paragraph 18).

[52] In the context of reasons challenges in police disciplinary cases, similar observations were made in *R (Chief Constable of Northumbria Police)* v *Police Misconduct Panel and M* [2022] EWHC 1217 at paragraphs 8 and, at paragraph 11, citing Stanley Burnton J in *R (Ashworh Hospital Authority)* v *Mental Health Review Tribunal for West Midlands* [2001] All ER (D) 135 (9 November 2001) at paragraph 77: reasons must be sufficient for the parties to know whether the tribunal made any error of law; it is unnecessary for the tribunal to set out the evidence and arguments before it or the facts found by it in detail; in assessing the adequacy of reasons, one must bear in mind that the decision will be considered by parties who know what the issues were. However, the reasons must sufficiently inform both parties as to the findings of the tribunal. A tribunal must also bear in mind that its decision may have to be considered by those who were not present at or parties to the hearing.

The tribunal's decision

[53] The challenge made is as to both the adequacy of reasons and the relevancy of considerations taken into account. To some extent these overlap as it is said the tribunal's reasoning is unclear to the extent that it is confused and illogical and uncertain what it took

into account at each stage of its decision making, or at least which parts of the respondent's submissions it accepted when making the finding of misconduct alone.

[54] To assess the tribunal's reasoning, it's necessary to understand what was at issue, what submissions were made and what reasons were given for the conclusions reached. It was an appeal to the tribunal from earlier decisions that had concluded that the respondent's conduct in allegations 1 and 2 were gross misconduct. The messages were said to breach the standard of professional behaviour of "Authority, Respect and Courtesy" by virtue of the derogatory and offensive comments (paragraph 16(13)). Before the tribunal the respondent's evidence was unchallenged. The respondent having accepted the allegations amounted to misconduct, the sole focus of the appeal was on the seriousness of the conduct, did it amount to gross misconduct or misconduct alone? What was the appropriate sanction?

[55] The primary submission for the respondent was that the earlier decision to dismiss for gross misconduct was erroneous because it took too general an approach and did not take into account the specific messages and the context in which they were made (paragraph 16, sub-paragraphs (2), (4) to (6), (16), (17), (20), (21), and (24)).

[56] Various points were made about the context of the messages as set out in paragraph 16, sub-paragraphs 4 to 6 (that the respondent had been given no training, was encouraged to use WhatsApp, had (wrongly) understood the messages were private and had wanted to fit in with his colleagues). Thereafter submissions were made about the content of the messages, that they were part of a larger otherwise inoffensive conversation, that whilst unpleasant were not of a sufficiently serious character to meet the threshold for gross misconduct when a proportionate and contextual approach was taken, they were inappropriate remarks between colleagues, not sexist and did not bear any of the

aggravating features referred to in *C* v *the Chief Constable*. They were intended to be private, not communicated to their subjects, something that the earlier decision maker had not given any weight to, having held there was always a possibility of them being disclosed to their subjects. It was said that the reporting standard was an unrealistic and disproportionate standard for officers to adhere to. The messages, viewed in their context, did not amount to gross misconduct.

[57] In response before the tribunal the petitioner submitted that it was irrelevant that the messages were never disclosed or directed at people that were subject to them. The fact that they were within a private group chat did not diminish their seriousness. The messages were sexist and degrading about female colleagues. They also mocked a female colleague's disability. The respondent had breached professional standards. Positive character references provided by him only went to personal mitigation and carried little weight. The respondent was not being held to an impossible standard, only the standards set out in the legislation. The respondent had acted in a way that was contrary to the standards of professional behaviour essential to the high standards of policing rightly expected by the public at large. The conduct fell to be considered in the context of policing and personal mitigation was necessarily limited because of the importance of public confidence (*Salter* v *Chief Constable of Dorset* 2012 EWCA Civ 1047). Public confidence in the police force is a factor of great importance and would be undermined if the respondent not dismissed. The public expected its police officers to perform their duties without ill will towards those with protected characteristics. The respondent's conduct had shown ill will to others on grounds of protected characteristics.

[58] Having set out the submissions of parties, the tribunal identifies that there was no dispute on the facts, but that the respondent took issue with the approach that had

previously been taken, namely there was a failure to take into account the specific messages and the context (paragraph 32).

[59] The tribunal's reasoning on the question of whether the conduct was misconduct or gross misconduct is at paragraph 34. The tribunal states it accepts the respondent did not intend to cause upset or to be malicious. It then describes the comments as having "created a hostile environment", as being "wholly inappropriate" directed at individuals who the respondent worked with or may work with in the future, not generic and "were far removed from the team building and supportive approach" that the respondent should have adopted. The tribunal next stated:

> "One comment in particular was unquestionably sexist in nature and the images were derogatory and offensive. That said, the Tribunal accepted the submissions on behalf of the appellant and was unanimously of the view that the allegations as admitted and proved did not amount to gross misconduct. They did however amount to misconduct for the reasons set out. The appellant did not exercise the self-control expected of him nor did he treat his colleagues with respect and courtesy."

Decision

[60] It is clear that the tribunal addresses the question whether the conduct amounted to misconduct or gross misconduct. It is also clear that the conclusion they reach is that the behaviour amounts to misconduct alone.

[61] Reading paragraph 34 in a straightforward manner, the tribunal have accepted the comments are wholly inappropriate, have rejected the respondent's submissions in relation to one comment which they held was sexist, and took the view that the images were derogatory and offensive. They otherwise appear to have accepted the respondent's submissions that the behaviour was not gross misconduct. The finding of misconduct is for "the reasons set out". It is said that the appellant did not exercise the self-control expected of him nor treat his colleagues with respect and courtesy.

[62] I accept that the tribunal's reasoning can be brief, particularly where it has already set out the submissions of parties in full terms. Nor is there is any difficulty in principle with the tribunal adopting the submissions of the respondent when providing its reasons. However exactly which parts of the respondent's submission the tribunal accepted was a matter of dispute before me.

[63] I disagree with the respondent's submission that the only possible reading is that the tribunal must have only accepted the submissions set out under the heading "Ground of Appeal 1" ie sub-paragraphs 21 and 22 only. The tribunal don't make any such qualification when accepting the respondent's submissions. The thrust of the respondent's submissions, reflected in the grounds of appeal and throughout the submissions, is that the correct approach for the tribunal was to look at the messages in their context. The respondent's submissions on context are set out by the tribunal in paragraphs 15 and 16 (sub-paragraphs 1 to 24) and are not restricted to sub-paragraphs 21 and 22.

[64] Nor do I accept the respondent's submission that the tribunal's reasoning for concluding that the conduct did not amount to gross misconduct is supplemented by paragraph 37. That paragraph is part of the decision addressing sanction and not the assessment of the conduct. Whilst the definition of gross misconduct is conduct which may justify dismissal, a straightforward reading of the decision is that the reasons for the conclusion that the conduct amounted to misconduct alone is found in that part of the decision addressing that question. By paragraph 37, the tribunal has already concluded that the conduct is not gross misconduct. It would make little sense when reading the decision to suggest that once the tribunal has set out its decision on a matter on the categorisation of the conduct the reader should look to passages referring to sanction to understand why the

conduct was so categorised. That is not a straightforward approach and not one that the reader could expect to engage in.

[65] Nor is it clear that the tribunal accepted all of the respondent's submissions at paragraphs 15 and 16. The tribunal from its reasoning appears to have rejected the respondent's submission that none of the comments were sexist. The statement that the tribunal accepts the respondent's submissions is ambiguous. It is unclear whether the tribunal are relying on all of the respondent's submissions from paragraphs 15 and 16 (subject to exceptions), only sub-paragraphs 21 and 22 alone, or also its reasoning in paragraph 37 in making its finding on misconduct. The reasons leave the informed reader in real and substantial doubt about what the reasons were for its decision. That in itself is enough for this ground of challenge to succeed.

[66] On the assumption that the tribunal upheld all of the respondent's submissions from paragraphs 15 and 16, other than those it expressly rejected, the further argument is made that it has taken into account irrelevant considerations and has reached a decision which is illogical.

[67] The parties appeared to agree that it was necessary for the tribunal to draw a distinction between factors relevant to the assessment of conduct and factors relevant to the determination of disciplinary action. This distinction arises from a proper construction of the 2014 Regulations which distinguishes between the tribunal making a determination on conduct and thereafter on sanction (Regulations 21 and 22). The distinction is recognised in *R (ex parte Campbell)* v *General Medical Council* [2005] 1 W.L.R 3488 at paragraphs 18 to 33 and 46. The tribunal did deal with these two matters distinctly under separate headings: conduct is determined at paragraph 34 before sanction is considered at paragraphs 35 to 40.

[68] In assessing the seriousness of the conduct the tribunal can appropriately take into account the facts and circumstances in which the messages were made (*Mallon* v *General Medical Council* paragraph 18). I accept that the same facts may be relevant to both the assessment of the conduct and the sanction but the decision maker should keep separate in their mind what facts are relevant to the assessment of the conduct and those to mitigation. Although the decision maker can consider the circumstances in which the person found themselves when carrying out the conduct, they should always be alert to the possibility that those matters may be more relevant to the question of sanction rather than the seriousness of the conduct. Decision makers should not use personal mitigation to downgrade what would otherwise be serious misconduct to some lesser form of misconduct. (*R (ex parte Campbell)* v *General Medical Council*, paragraphs 19-21 and 46). That point was made by the petitioner in submissions, contending that personal mitigation should carry little weight (paragraph 21).

[69] The facts and circumstances in which the messages were made include most obviously the number and content of the messages that are the subject of the allegations, who made them and to whom. The fact that messages were sent to colleagues during a training event in a WhatsApp group, that they were comments made about someone rather than sent directly to someone are all part of the circumstances. That the messages were part of a wider conversation is a circumstance in which they were made too, the weight to be attached to any of these circumstances a matter for the tribunal.

[70] That the officer intended the messages to be private and not sent to the subject of the messages must be assessed in light of the legal position explained by the Inner House in *C* v *The Chief Constable*. In that case the Court was considering, amongst others, the same messages that were before the tribunal. It held that because the messages were capable of

bearing a categorisation of being blatantly sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability, had included a flagrant disregard for police procedures, and were capable of calling into question the ability of officers to discharge their duties, the officers had no reasonable expectation of privacy (paragraphs 99-100).

[71] The tribunal, in accepting the respondent's submissions, is presumed to have accepted all his submissions about considering the context the messages were sent. Those included submissions that could be categorised as personal mitigation. An example of that is the respondent's explanation of why he sent the messages and was complicit in the messaging, namely a desire on his part to fit in. The tribunal's decision notes at sub-paragraph 6 of the respondent's submissions that factor was not relied upon as mitigation but was relied on as providing an indication of the context that the messages were being sent. It was the context that the respondent argued made the behaviour less serious. In accepting that submission it can only be assumed the tribunal took that factor into account in deciding the behaviour was not gross misconduct. Another factor relied on by the respondent was the encouragement of the use of WhatsApp. It is doubtful that had relevance to the assessment of the conduct since it was never suggested that there was encouragement to make derogatory or offensive remarks. Such encouragement cannot rationally discount the seriousness of the behaviour, although it may be relevant to the question of sanction. Similarly the submission that a lack of training on appropriate use of WhatsApp may go to mitigation but cannot rationally reduce the seriousness of the remarks made. On the face of it, by accepting the respondent's submissions on such matters the tribunal have accepted irrelevant matters as amongst the factors that lead it to the conclusion that the conduct was misconduct alone.

[72] The further difficulty in having accepted all of the respondent's submissions on context, is that it is not clear which of the many factors within the submission were material in reaching the conclusion that the behaviour was not gross misconduct. Moreover, it is unclear what the tribunal made of the respondent's belief the messages were private in light of the legal position that he could have no reasonable expectation of privacy. The matter was put in issue by the petitioner but not resolved. It is not clear that the tribunal have taken into account the correct legal position which was that the respondent could have no reasonable expectation of privacy.

[73] There is in addition an internal inconsistency in the tribunal's reasoning. The finding in paragraph 34 that one (unidentified) comment was unquestionably sexist is difficult to reconcile with the respondent's submission, apparently accepted for the other comments, that the comments only attacked performance and appearance and were not sexist. It is unclear on what basis one comment was considered unquestionably sexist whilst the others were not sexist. It is also unclear what the tribunal made of the submission about the officer subject to criticism's dyslexia. The tribunal made no finding about whether the comment was mocking of disability or not. These were all matters put at issue by the petitioner. Not every argument has to be dealt with but these formed part of the principal important controversial issues which the tribunal do require to address (*South Bucks District Council* v *Porter* (No 2) paragraph 36).

[74] Overall the informed reader is left in real and substantial doubt about the reasons for the decision. It is difficult to work out what were the reasons for the tribunal deciding that the conduct was misconduct and not gross misconduct. If the tribunal did indeed accept all that was said in the respondent's submissions about context having a bearing on seriousness, some of the factors relied on were irrelevant to the assessment of conduct. It is

unclear which resulted in a lower categorisation of the conduct. The tribunal failed to resolve some of the main issues in contention. I uphold the petitioner's submissions on grounds of inadequacy of reasons and irrelevant considerations.

Failure to apply correct test on gross misconduct

[75] I am not satisfied that the tribunal applied an incorrect test on gross misconduct at paragraph 40. The petitioner's criticism relates to one sentence in paragraph 40 where the tribunal refers to the respondent's conduct being "of such a reprehensible nature that he should be dismissed" rather than behaviour that may justify dismissal.

[76] The decision must be read as a whole rather than focusing on one sentence (*Barakat* v *General Medical Council* at paragraph 18). By this stage of its decision, the tribunal had concluded, at paragraph 34, that the conduct was misconduct but not gross misconduct. Having reached that conclusion the tribunal in the following paragraphs considers the appropriate sanction. Read short, the tribunal state that they are unanimously of the view that a reasonable member of the public, as fully informed as the tribunal would not consider the respondent's conduct was so reprehensible that he should be dismissed with or without notice but would consider that the respondent's conduct was at the threshold of such a disposal for which a final written warning was appropriate.

[77] The tribunal appear only to be contemplating how they think the proposed sanction would be viewed by the public and no more. I am not convinced that at paragraph 40 they are applying any test in relation to any assessment of the misconduct. It would not be appropriate for them to do so at this stage, since they have already reached a conclusion on that matter. Read in a straightforward manner in the context of a heading on sanction, the wording from that sentence in paragraph 40 does not of itself suggest the tribunal applied

the wrong test. Such adverse inference will not readily be drawn (*South Bucks District Council* v *Porter* (No 2) paragraph 36). The tribunal members state that they all agree about how they think the public might view the penalty of a final written warning and that the public would think that sufficient.

Remedy

[78] The petitioner has succeeded on the majority of its submissions. Having reached the view that there has been a failure to provide adequate reasons and an error in law in taking into account irrelevant considerations, the petitioner invites me to reduce the decision. The parties indicated at the hearing that they wished to make further submissions on remedy should I uphold the petitioner's submissions on the merits, I will put the case out by order for further submissions on that issue alone to be made. I reserve expenses meantime.

Postscript

[79] On 28 May 2024 at a by order hearing, I heard parties on the question of the appropriate remedy. Parties were agreed that the court should order reduction of the decision as craved. I heard competing arguments about whether the court should remit the matter to the same or to a differently constituted tribunal.

[80] The petitioner submitted that the matter should be remitted to a differently constituted tribunal. The errors identified by the court were significant errors going to the heart of the decision which was held to have taken into account irrelevant considerations and to have failed to provide adequate reasons. Without in any way seeking to impugn the integrity and impartiality of the tribunal which made the decision, that was necessary to avoid any perception of unfairness and damage to public confidence in the decision making

process. In police disciplinary matters, in order to ensure public confidence in the police and the decision making process, it is important that the tribunal is, and is perceived to be, impartial and free from preconceptions (*Chief Constable, Lothian and Borders* v *Lothian and Borders Police Board* [2005] SLT 315 at paragraphs 74-75).

[81] The respondent submitted that the court should order that the matter be reconsidered by a differently constituted tribunal. There is a presumption against a freshly constituted tribunal (*HCA International Ltd* v *Competition and Markets Authority* [2015] 1 WLR 4341 per Vos LJ at paragraphs 66, 68-71, 96, 97, 99) unless that would cause reasonably perceived unfairness to the affected parties or would damage public confidence in the decision making process. There is no suggestion of actual or apparent bias and no reason to think the same tribunal would act unfairly. The absence of proper reasons is a matter best attended by those whose reasons were originally found wanting. It would be quicker and cheaper for those familiar with the issues arising from the court's decisions to consider the matter.

[82] As the respondent noted in submissions, the remedy sought in this petition for judicial review is reduction of the decision and such other orders as may seem to the court just and reasonable in all the circumstances of the case. Whether the matter should go back before a differently constituted tribunal is not a matter raised within the substantive arguments. *HCA International Ltd* v *Competition and Markets Authority* did not concern judicial review procedure, far less Scottish judicial review proceedings. In *Chief Constable of Lothian and Borders* v *Lothian and Borders Police Board*, the petitioner argued the court should reduce the decision and order a rehearing before a differently constituted tribunal. The respondent argued that the court should not reduce the decision but only require it to provide reasons. Alternatively if it did reduce the decision, there did not require to be a

rehearing and the same tribunal could issue a fresh decision. The court reduced the decision and ordered a rehearing of the matter by a different tribunal.

[83] The circumstances in this petition are different. The only substantive order that was sought in the petition was reduction of the decision. The parties accept that following the opinion of this court, the tribunal's decision should be reduced which will inevitably result in a rehearing. In judicial review proceedings the court is involved in reviewing how the tribunal's decision was arrived at, deciding whether there are any errors in law and ultimately deciding whether to grant the petition or not. Whether the matter is reheard by the same or a differently constituted tribunal was not raised by the petition and is a matter for the specialist tribunal. The tribunal that rehears the case will do so in light of the court's findings about the errors made in the decision on 7 July 2023 including that an unfair procedure was adopted and that there was failure to provide adequate reasons.

[84] On discussion with parties, both accepted that it would be appropriate for the court to reduce the decision and to direct that it be remitted back to a police appeals tribunal to proceed as accords. I will do that. I will sustain the petitioner's first and second pleas in law and repel the respondent's second to fifth pleas in law.

[85] The respondent conceded expenses should be awarded in favour of the petitioner, with the exception of the expenses of the by order hearing. It was submitted those expenses should be in the cause since neither party's motion was successful in terms of remedy. The petitioner submitted all expenses should be awarded in her favour.

[86] Ultimately the petitioner was successful in having the decision reduced. The hearing to discuss remedy is a product of that success. I award the expenses of the whole proceedings in favour of the petitioner.