

IN THE MATTER OF THE POLICE (CONDUCT) REGULATIONS 2020

POLICE SERGEANT 740 SIMON SMITH

Decision of the Panel on Defence Application for Dismissal of the Regulation 30 Notice and a Stay of Proceedings

BACKGROUND

1. The Misconduct hearing of Police Sergeant Simon Smith (the 'Officer') is currently scheduled to be heard by the Panel on 18-21 September 2023.
2. On the morning of the first hearing day, the legal representatives acting on behalf of the Officer filed an application to dismiss the Appropriate Authority's (AA) Regulation 30 allegations due to unfairness resulting from significant departures from the prescribed framework for disciplinary proceedings that occurred during the investigation process.
3. The Panel heard submissions on 18 September 2023 from Mr Russell Fortt, Counsel for the AA and from Ms Ailsa Williamson, Counsel for the Officer. This ruling sets out the Panel's ruling on the Officer's application.

The Applicable Law and Home Office Guidance

4. The parties disagree that the relevant law governing the defence's application is to be found in the reported case of R v Chief Constable of Merseyside Police ex parte Merrill [1989] 1WLR 1077. In that case the Master of the Rolls, Lord Donaldson, said at 1085 F-G '*The Chief Constable had no need to concern himself with 'abuse of process'. As a judicial tribunal, he had a discretionary power to dismiss the charge without hearing the full evidence if he was satisfied that, whatever the evidence might reveal, it would be unfair to proceed further. 'Unfairness' in this context is a general concept which comprehends prejudice to the accused but can also extend to a significant departure from the intended and prescribed framework of disciplinary proceedings or a combination of both*'.
5. The AA's submission is that the current law that applies to the defence's application is to be found in the decision of Juliana Dorairajv The Bar Standards Board [2018] EWHC 2762. The single issue in that case that arose for consideration of the Queen's Bench Division of the High Court was whether the decision by the Bar Standards Board (BSB) to commit the appellant, an unregistered barrister, to an improperly constituted five person member Panel

rather than to a properly constituted three person Panel to determine sanction was null and void, such that the incorrectly appointed five person Panel had no jurisdiction to impose the sanction it did. The BSB accepted that the decision to direct the matter to a five person tribunal was 'not valid' and a 'procedural irregularity' that did not go to the Panel's jurisdiction.

6. The AA directed this Panel to the reported decisions of R v Soneji [2005] UKHL 49 and R v Ashton [2006] ECWA Crim 794 referenced in the Dorairaj judgment. The AA invited the Panel to consider that passages cited from those decisions represented the modern jurisprudence as to the nature and consequences of procedural failures in proceedings applicable to the defence application. According to the AA, the correct approach to an alleged failure to comply with a provision prescribing the doing of some act before a power is exercised is for the court to first ask itself whether it was a purpose and intention of the legislature that an act done in breach of that provision should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue. The AA further submit that the prevailing approach to litigation, including disciplinary proceedings, is to avoid determining cases on technicalities but to ensure that they are decided fairly on their merits.
7. The Panel has carefully considered the legal arguments and finds no proper legal basis to depart from the approach taken in Merrill regarding the defence's application for dismissal. The Dorairaj decision was made in the context of a 'procedural irregularity' going to the jurisdiction of the appointed five person Panel to exercise a power to impose a sanction. It was not a decision taken within the police regulatory framework. Furthermore, there is no reference to Merrill which is not unsurprising given the decision refers to the regulatory powers of the BSB and not to the police regulatory framework. This Panel considers that the Dorairaj decision is distinguishable on its facts from the current regulatory breaches under scrutiny. Further or alternatively, the Panel finds nothing in the Dorairaj decision which suggests that Merrill has been overruled or is no longer good law.
8. Accordingly, the Panel has proceeded to consider the defence's application on the basis of the legal principle set out in Merrill. This makes it clear that '*Unfairness as a general concept not only comprehended prejudice to an accused officer but might also extend to a significant departure from the prescribed framework of disciplinary proceedings*'. There is no requirement on the Officer to establish abuse of process as the jurisdiction and duty of the Panel to dismiss is wholly different.

Home Office Guidance ('HoG') 2020 and the Police (Conduct) Regulations 2020

9. The intended and prescribed regulatory framework is set out in the 2020 conduct regulations and the Home Office guidance. The Panel is aware of several provisions in the current Home Office Guidance that are relevant to its consideration of the defence's application under the Police (Conduct) Regulations 2020. These provisions are uncontroversial and referenced below.

HoG Paragraph 1.4

The procedures described in this guidance are designed to accord with the principles of natural justice and basic principles of fairness. The process and procedures covered by this guidance, along with the accompanying legal framework should be administered accordingly and applied fairly and consistently to everyone.

HoG Paragraph 5.3

The nature of investigations should be as open as possible, appropriate and conducted efficiently and expeditiously. Proceedings should be effective and transparent and be a balanced inquiry into the officer's conduct.

HoG Paragraph 7.17

The investigator can be a police officer, a police staff member or another person providing they are the most appropriate person with the necessary level of knowledge, skills and experience, as set out in regulation 15 of the Conduct Regulations.

Regulation 15(3) provides 'No person may be appointed to investigate a matter under this regulation (a) unless they have an appropriate level of knowledge, skills and experience to plan and manage the investigation'.

HoG Paragraph 7.23

The Investigator must carry out the investigation in a fair and proportionate manner, taking account of all of the evidence given to them and coming to an assessment based on what they have reviewed.

HoG Paragraph 7.24

It is essential that the investigator ensures that they are adopting a fair and consistent approach throughout the lifetime of the investigation, including in relation to disclosure of documentation or information.

HoG Paragraph 8.7

As the legislation set out, written reports of an investigation must: (a) provide an accurate summary of the evidence of the investigator; (b) attach or refer clearly to any relevant documents.

HoG Paragraph 8.8

It is good practice to include a schedule of documents whether used or unused.

HoG Paragraph 9.8

All proceedings should be conducted in a fair and open manner following the principles of natural justice. That is to say that a duty to act fairly is incumbent on all parties to the proceedings.

HoG Paragraph 9.21

To assist in complying with the requirements for the provision of documents the investigator should, when providing the AA with the investigation report, also attach all relevant documents gathered as part of the investigation and a schedule of all material retained by the investigation. Sensitive material should be indicated on the schedule.

HoG Paragraph 9.22

It is then for the AA to determine what material should be served on the officer with the notice, beyond those documents referred to in Regulation 30(1)(b) and (c)(i). The officer concerned may request any material from the schedule which has not been provided, if they have good reason to believe it might reasonably be capable of undermining or assisting their case, notwithstanding the AA's assessment. The officer concerned may also request such material which does not appear on the schedule. The AA may also ask the investigator to make inquiries to recover such material if the AA considers the requests to be reasonable and proportionate.

Defence Grounds for Dismissal

10. The defence's application is brought individually and/or collectively on the basis of several significant departures from the prescribed regulatory framework.

Failure to comply with regulation 15 (3) of the Conduct Regulations

11. It is common ground that Chief Inspector REDACTED was appointed as the Investigating officer on 21/05/2022 but the actual investigation was conducted by Detective Inspector REDACTED, who was not at the time within the Professional Standards Department (PSD). It is also common ground that he did not undertake the necessary training in misconduct investigations delivered by the College of Policing until October 2022. In his witness statement dated 15/09/2023, DI REDACTED said that he started to assist with the Officer's Investigation under the oversight of DCI REDACTED from May 2022. It is therefore evident that DI REDACTED was untrained in conducting misconduct investigations when he started in May 2022.
12. DI REDACTED said that there was an unprecedented number of misconduct referrals made between April to September 2022 and the pace of work was excessive and difficult to manage. This is confirmed by DCI REDACTED in his witness statement dated 15/09/2023. He stated that the CNC did not have a criminal investigation department or a cadre of officers to call upon to undertake investigations when the demand required. In order to mitigate the situation, officers with an investigative background were identified Force wide to support PSD and DI REDACTED had ready been identified as one such officer. However, DCI REDACTED did not formally record the transference of the Investigation to DI REDACTED or ask the AA for its agreement to the transfer.
13. The defence alleges that DI REDACTED was not suitably trained in misconduct investigations to the appropriate level of knowledge, skills and experience to plan and manage the Officer's investigation and therefore he did not meet the requirements of Regulation 15(3). DI REDACTED stated in his witness statement that although he had not completed any misconduct specific training until October 2022, he had investigated a CNC discipline case in October 2021 that was referred to the IOPC and was also appointed to reinvestigate a complaint following an IOPC direction that involved allegations against five officers. As a result of these experiences, he had developed '*an awareness of the relevant regulations and statutory guidance covering police misconduct matters*'. On this basis the AA did not accept that DI REDACTED lacked the required knowledge to be appointed an Investigator under Regulation 15(3).

14. The Panel has considered the context of the appointment of DI REDACTED and his level of knowledge. On the question of context and his level of knowledge, the AA submitted that given the demands on the CNC to undertake an unprecedented number of investigations and the fact that DI REDACTED had some experience, the alleged departure from Regulation 15 must be looked at in its proper context. In this regard, the AA categorically stated that it did not concede that he did not have sufficient skills to carry out the investigation.
15. The Panel respectfully disagrees with the AA's position. The catalogue of failures undertaken by DI REDACTED that are later identified by the Panel in this ruling demonstrates on the balance of probabilities that whatever experience DI REDACTED possessed, it was in fact insufficient to meet the expectations of the prescribed regulatory framework and constituted a breach of Regulation 15(3).
16. As for the explanation provided by the AA that they had to deploy DI REDACTED due to the unprecedented demand, that is a deeply unsatisfactory explanation when the Officer is facing a gross misconduct hearing which could end his career on the basis of an Investigation report carried out by an unqualified Investigator. However, given that the decision was made to deploy DI REDACTED to conduct the investigation, the Panel considers that he should have been closely supervised and supported throughout the process. It is clear from the multiple regulatory failings that he was not properly supervised by DCI REDACTED. It is evident that had DCI REDACTED asked the AA to transfer the investigation to DI REDACTED as he ought properly to have done, the request would very likely have been refused as he was inexperienced. It is irrelevant that DI REDACTED appointment was an unintentional departure from the prescribed framework.

Failure to Maintain an Unused Material Schedule

17. It is common ground that the conduct regulations and HoG guidance referenced earlier make clear that DI REDACTED as the Investigating officer should have maintained an unused material schedule from the start of the investigation. That he did not do so only became clear once the defence started to make inquiries about it on or around 5th July 2023. It was at the pre-hearing on the 31 August that I directed service of the unused material schedule by 8th September 2023.
18. The AA submit the defence's assertion that no schedule was in existence is wrong as rectification was being undertaken by the AA and the schedule was being produced. DI REDACTED said in his witness statement '*I also acknowledge that there isn't a detailed log of all my decisions, actions and communications. I can't excuse my omission; I can only explain it in the context of the unprecedented workload I was managing...*'.

19. The Panel has considered the matter and finds the AA has failed to grasp the importance of the issue. The point is not that rectification was being undertaken, it is that rectification was required to happen at all. It is evident that DI REDACTED did not understand his obligations under the prescribed framework as the Investigator. Rectification did not commence until after the defence asked for the schedule. By that point he was trying to piece together a schedule based on trying to recall what had been done rather than having maintained it from the start of the investigation as he should have done. The considerable risk of losing information which can no longer be remembered due to the passage of time and the resulting potential unfairness is obvious. The Panel finds the failure to have maintained an unused material schedule constitutes a breach of the prescribed framework.

Witnesses tasked with contacting other witnesses

20. It is accepted by DI REDACTED in his witness statement that he asked Inspector REDACTED, a witness himself in the proceedings, for his assistance in contacting other witnesses to facilitate them speaking to him (DI REDACTED) about their evidence.

21. This is also confirmed by Inspector REDACTED in his witness statement dated 15/09/2023 regarding PS REDACTED and Ms REDACTED. However, Inspector REDACTED could not find any corresponding entry in his daybook for the 9th June 2022 confirming that he had spoken to Ms REDACTED as reflected in DI REDACTED day book of the same date. Instead he found an entry for the 23rd May 2022 stating that he had informed Ms REDACTED that an allegation had been made against the Officer and that she would be contacted by PSD.

22. Again, Inspector REDACTED could not find in his daybook any corresponding entry reflecting DI REDACTED daybook entry of 23rd August 2022 which mentioned that DI REDACTED had asked him to tell PS REDACTED that he (DI REDACTED) would speak to him on 25 August. Inspector REDACTED said however, that the omission was not surprising as he was PS REDACTED direct line manager and would have spoken to him, although not about the nature of the request. The AA's position is that it is simply fanciful that Inspector REDACTED would not speak to the witnesses as he was the Commander of the Unit. Furthermore, there is no evidence that he discussed their evidence. The Panel accepts this submission but observes that it fails to properly address the issue of poor record keeping as an essential part of the investigative process.

23. The defence state that the lack of proper record keeping by both DI REDACTED and Inspector REDACTED means that it is impossible to ascertain what is the correct entry date or whether there was another undocumented conversation on 9th June between Inspector REDACTED and Ms REDACTED. The Panel

agrees with this observation and finds the absence of proper record keeping has been unsatisfactory. The Panel also considers that the Investigator should have made direct contact with PS REDACTED and Ms REDACTED rather than using Inspector REDACTED as a conduit. This would have been the more professional approach to avoid any possible risk of a conflict arising given that the Inspector was a witness.

Failure to include key email from PC REDACTED In the Investigation Report and give proper consideration to the contents

24. The defence allege that an email from PC REDACTED to DI REDACTED dated 15th June 2022 which was highly relevant to the investigation was not included in PC REDACTED witness statement. The defence submit that the email should have been referred to in the Investigation report and listed as part of the documents at the conclusion of the report. What is more troubling say the defence, is that the existence of the email only came to light after the CNC had been directed by the LQC to serve an unused material schedule on the defence.
25. The email dated 15th June 2022 from PC REDACTED stated '*I am shocked and confused why this incident has escalated as PC REDACTED gave no indication at the time that she was alarmed and upset by the conversation*'.
26. The AA's response to the omission was to say that the fact that PC REDACTED did not appear to be bothered by the remark is already in PC REDACTED statement and PC REDACTED own response or reaction is irrelevant to the case.
27. Again, the Panel finds that the AA has missed the important point here. The HoG states at paragraph 8.10 that the Investigation report should include all relevant evidence. The report makes no reference to the email nor was it listed. The email should also have been included in the Reg 30 bundle. These are clearly troubling departures from the prescribed framework.

Changes to the draft statement of PC REDACTED

28. It is accepted by the AA that there were changes made to PC REDACTED account between her first draft (original) account and her final MG11, namely the removal of the word 'targeted' from the first account. There is no record of how the change came about from DI REDACTED even though an important part of PC REDACTED account was removed.
29. The AA's response is that the removal of the reference to 'targeting' is not to the officer's detriment or prejudice. On the face of it, this is correct. However, the concern is that changes have been made to the original account and no explanation can be provided by the Investigator. This raises a question mark

over the integrity of the investigative process and about what other relevant information or conversations may have been lost that cannot be remembered.

Failure to Properly Analyse and Investigate Accounts

30. The defence point to differing accounts by PC REDACTED and PS REDACTED as to who referred the matter to Inspector REDACTED. Further, there are messages that make it clear that PC REDACTED had an ad hoc meeting on 17th May 2022 with Inspector REDACTED and PS REDACTED where culture at the unit was discussed. On that same date PC REDACTED messaged PS REDACTED stating amongst other things that *'Simons is getting a bit out of hand'*.
31. According to the defence, DI REDACTED did not ask any of the three officers to explain the meeting in their statements thereby allowing independent recollection. The AA's position is to say that the matter is not central to the case and in any event the officer can call the witnesses. The Panel does not accept this explanation for several reasons. DI REDACTED failed in his role as an Investigator to explore areas which may have undermined the AA's case. Furthermore, the AA's response fails to recognise that memories fade with time and the correct approach would have been to explore the matter during the investigation with the witnesses which was not done.

Purporting to conduct a criminal investigation and unlawful data protection request

32. It is common ground that DI REDACTED in his role as the Investigator attempted to obtain evidence relating to potential criminal conduct by the Officer by making a data protection request to REDACTED on 01/09/2022 seeking information about a person under the name of REDACTED who was about to start paramedic training.
33. The defence submit that the enquiries made by DI REDACTED were outside the agreed Terms of Reference for the investigation and that information was being sought relating to a potential criminal matter when there was no Regulation 17 notice in place to cover such a request. The AA's response is to deny any unlawfulness about the data protection request.
34. The Panel has reviewed the Regulation 17 notice and agrees with the defence that there is no reference to any potential criminal conduct under investigation within the Terms of Reference. Therefore, the Panel finds that DI REDACTED was acting beyond his professional remit as the Investigator by making the data protection request which specifically stated that it was *'connected to an ongoing professional standards investigation'* when it plainly was not at the relevant

time. In the circumstances, the Panel finds this is yet another troubling aspect relating to DI REDACTED lack of knowledge, skills and experience when conducting the Officer's investigation. It is also a clear example of the absence of any proper supervision of DI REDACTED and/or oversight of the investigation by DCI REDACTED.

Miscellaneous matters

35. The defence complain about some further matters relating to identical wording in witness statements and the service of material on the full Panel without consultation with the defence first. The Panel considers that these matters do not give rise to any serious concerns when compared to the other significant regulatory departures already raised.

Conclusions

36. The Panel understands the defence's allegation of a significant regulatory departure to refer to a departure from the conduct regulations and accompanying statutory guidance; and, it is the cumulative breaches of the prescribed framework setting out how cases must be investigated and prepared for hearing that gives rise to the application for the proceedings to be stayed and the Regulation 30 notice to be dismissed. In this context, the Panel recalls that in the decision of Wilkinson and others -v- Chief Constable of West Yorkshire [2002] 2353 Admin, the court when referring to Merrill observed that Lord Donaldson stated that regulation notices '*are an essential protection for police officers facing disciplinary charges*'. As such, the Panel views an Investigator's compliance with the prescribed framework to constitute an 'essential protection' for officers facing disciplinary charges. Such matters are not merely inconvenient technicalities to be side-stepped when expedient to do so by a Force but go directly to the rule of law and fairness in the disciplinary regime.
37. The AA has sought to suggest that none of the departures from the prescribed framework have caused any prejudice or detriment to the officer who can still have a fair trial. They further submit there is a clear public interest in holding a misconduct hearing given the Officer has already admitted to many of the factual allegations which remain unaffected by the proven regulatory breaches.
38. The Panel has carefully considered these submissions and agrees that there is a clear public interest in holding officers accountable for their conduct. However, there is also a clear and competing public interest in ensuring that investigations which result in misconduct hearings are conducted only by persons who are knowledgeable, skilled and experienced in planning and managing them to ensure the integrity of the investigative process.

39. Whilst it is accepted that the Officer has admitted to some of the factual allegations, the reality of the situation is that the cumulative effect of the regulatory breaches found by the Panel means that the severity assessment of gross misconduct is undermined and brought into question as a direct result of the unfairness flowing from an investigation process which potentially lacked balance and proportionality.
40. It is possible that had a professional and compliant investigation been carried out by a qualified investigator, the severity assessment may have been lower and the Officer would currently not be facing a gross misconduct hearing and a potentially career ending outcome. That in essence is the *unfairness* flowing from the significant regulatory breaches complained of by the Officer.
41. Accordingly, the defence's application for a stay of proceedings is granted and the Regulation 30 notice is dismissed.

Submitted on behalf of the Panel

Karimulla A. Khan

Mr K. A Khan

Legally Qualified Chairperson

19 September 2023