OUTER HOUSE, COURT OF SESSION

[2018] CSOH 19

P713/17

OPINION OF LADY PATON

in the petition

ROSS DICKSON

Petitioner

against

(FIRST) ASSISTANT CHIEF CONSTABLE STEVE JOHNSON AND

(SECOND) DEPUTY CHIEF CONSTABLE IAIN LIVINGSTONE

Respondents

Petitioner: Sandison QC, Fordyce; Kennedys Scotland (for PBW Law)
Respondents: McGregor; Clyde & Co (Scotland) LLP

1 March 2018

Police disciplinary procedure

[1] On 24 December 2015 the petitioner, a police constable then aged 32 with seven years service, signed for a non-appearance warrant at Dumfries Divisional Headquarters. The petitioner was then distracted partly by conversation with another officer, and partly by a direction to attend a priority 2 incident. The warrant went missing.

[2] A misconduct investigation notice was served on the petitioner on 22 February 2016 in terms of regulation 11 of the Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68). An amended notice was served on 28 April 2016. The amended charge which the petitioner faced was:

> "On or about 24 December 2015, between Divisional Headquarters, Cornwall Mount, Dumfries and Loreburn Street Police Office, Dumfries, having signed for a Justice of the Peace Non Appearance Warrant, you did lose said warrant and failed to fulfil your Duties and Responsibilities."

[3] The petitioner appeared at a misconduct hearing before Chief Superintendent Roddy Irvine on 3 October 2016. The petitioner was represented by James Foy, Conduct Secretary of the Scottish Police Federation. Evidence was led. Submissions were made. CS Irvine then gave an oral decision that there had indeed been misconduct on the part of the petitioner.

[4] Thereafter, to assist in determining the appropriate disposal, it was proposed to lead the evidence of a chief inspector (Chief Inspector Stiff) speaking to a report which he had prepared. Chief Inspector Stiff's name had not been included in any witness list in terms of regulation 15(4)(b), nor had the petitioner or his representative received, in advance of the hearing, a copy of his report in terms of regulation 15(4). They were given a copy of the report there and then, and allowed a few hours to consider it. They found much to challenge, but had little time to research or deal properly with the issues raised. Despite Mr Foy's repeated objections, Chief Inspector Stiff's evidence was allowed to be led in terms of regulation 17(5), which provides:

> "The person conducting the misconduct proceedings must not decide, in pursuance of paragraphs (3) or (4) [the selection of witnesses, listed or unlisted, who should give evidence], that any witness is to give evidence at those proceedings unless the person conducting the misconduct proceedings reasonably considers that it is necessary for the witness to do so."

Mr Foy was permitted to put questions in cross-examination.

[5] In the petition, the petitioner avers that:

> "… CI Stiff's evidence was overwhelmingly negative and collateral to the issues that CS Irvine required to determine. It contained inaccurate and misleading information that PC Dickson had no opportunity to rebut; referred to hearsay and opinion evidence on matters not before the Chair; made negative comments on the officer's

> attendance record and attitude towards others; referred to other potential performance issues that had never been determined; made reference to file notes that the subject officer was not even aware existed; made inappropriate comments regarding his off duty activities and opinion on medical advice; and, inexplicably, extracts from correspondence with a Procurator Fiscal regarding the officer's involvement in an unrelated case."

[6] On 14 October 2016 the petitioner received written notification of the Chief Superintendent's determination dated 3 October 2016. That determination held *inter alia* that the conduct amounted to a lack of diligence which constituted misconduct at a time when the petitioner was already the subject of a live final written warning due to expire at the end of October 2016. The existing final written warning was to be extended by 18 months, and could not be extended thereafter.

[7] On 24 November 2016 the petitioner appealed both the determination and the disposal. His notice of appeal took the form of a covering letter and paper apart from Mr Foy dated 24 November 2016, addressed to Deputy Chief Constable Iain Livingstone, the second respondent. There were two grounds of appeal:

> "1. That there was a breach of the procedures set out in the 2014 Regulations which could have materially affected the determination in terms of regulation 24(3)(c) of the 2014 Regulations.
>
> 2. That, in any event, the determination and disciplinary action ordered by CS Irvine was unreasonable in terms of regulation 24(3)(b) of the 2013 Regulations."

In support of ground 1, the petitioner submitted in his notice of appeal (page 3 of the paper apart) that:

> "Thirdly, … CS Irvine erred in law in considering that it was open to him to admit evidence from CI Stiff in the middle of a misconduct hearing without any prior notice, intimation, or determination that he would give evidence. The admission of such evidence was inevitably prejudicial to [the petitioner]. CI Stiff's evidence was overwhelmingly negative [and thereafter the matters quoted in paragraph [5] above were set out]."

The petitioner's note of appeal requested an appeal hearing.

[8] Thereafter the petitioner heard nothing. In terms of regulation 26(3), he should have received written notice of the appeal decision not more than 60 working days from 24 November 2016, ie by 17 February 2017. On 14 April 2017, Mr Foy wrote to DCC Iain Livingstone requesting that the determining officer provide his determination, or inform the petitioner and Mr Foy of "any reasons for any exceptional circumstances that exist to justify a delay".

[9] The petitioner then received a letter dated 3 May 2017 from Superintendent Andrew McDowall of the Professional Standards Department (PSD) in the following terms:

> " … Your appeal has been referred to ACC Steve Johnson, in terms of regulation 25, to determine. As you may be aware, in the usual course of events his determination of this appeal should be given within 60 working days from the date when your Appeal Notice was received. In consequence, however, of the papers in this appeal only coming to the attention of ACC Johnson relatively recently, he has decided to extend the period for determination of appeal, as he is entitled to do, in terms of regulation 26(4). The new deadline, accordingly, is 120 working days from the date of receipt of your Appeal Notice (which was 24 November 2016)."

[10] Subsequently, by letter dated 11 May 2017, the petitioner received ACC Johnson's decision dated 10 May 2017. The request for an appeal hearing had been ruled unnecessary, as follows:

> "4. Request for an Appeal Hearing
>
> 4.1 Before I deal with the substantive points in the Appeal I note that the Notice of Appeal presented by the Appellant requests an Appeal Hearing in respect of this matter in terms of Regulation 25(3) of the Conduct Regulations.
>
> 4.2 I have given consideration as to whether to hold an Appeal Hearing or whether I am able to determine the Appeal without holding such a Hearing.
>
> 4.3 Having done so I am satisfied that the material available to me is sufficient for the purpose of my determination of the Appeal. I do not need to clarify anything within the Appeal documents. I am therefore able to determine this Appeal without holding a Hearing …"

[11] ACC Johnson then considered the documents (which included a transcript of the

proceedings at the misconduct hearing, statements from witnesses, certain productions, and the grounds of appeal). He dismissed the petitioner's appeal.

[12] His determination dated 10 May 2017 stated *inter alia*:

> "6.26 There are no arguments and no material before me that persuade me that Chief Superintendent Irvine was in any way misled by [Chief Inspector Stiff's] report or that he relied on alleged inaccuracies. Indeed other than a bald assertion that Chief Inspector Stiff's report was inaccurate and misleading, the appellant makes no attempt to set out why he believes that was the case. Nor is there any attempt by him to explain in what respect he believes that Chief Superintendent Irvine relied on misleading or inaccurate information in reaching the decision set out in his Notification of Determination and Action. Instead the appellant has simply made bald assertions, unsupported by arguments, which I therefore reject …
>
> 6.42 I have no doubt that Chief Superintendent Irvine was correct in his assessment of the appellant's conduct as misconduct for the reasons he has set out. The appellant's conduct was such that performance management would not have been an appropriate response. He knew or ought to have known about the seriousness of the loss of an apprehension warrant in circumstances where the apprehended person was being detained and taken to court. He knew he was required to collect the warrant and deposit it safely with the procurator fiscal or at the police custody suite. He knew or ought to have known about the consequences of the loss of an apprehension warrant in these particular circumstances.
>
> 6.43 Yet against that background the appellant has shown a lack of diligence amounting to a disregard for the security of the warrant to the extent that he admits that he had no idea whatsoever what happened to it after he signed for it. In those circumstances his failure was nothing short of *reckless* and was undoubtedly a misconduct matter [emphasis added].
>
> 6.44 I agree with Chief Superintendent Irvine's conclusion that the loss of the warrant had caused 'considerable inconvenience to the Procurator Fiscal causing her to view the Police Service in this case as very unprofessional.' I note that in order to 'salvage' the situation, there was a lengthy legal debate among the Fiscal and her colleagues, which resulted in a hearing that should have lasted ten minutes taking up to three hours. I have no doubt that this delay was caused by the appellant's actions and that it discredited the Police Service. Nor have I any doubt that his conduct impacted negatively on the confidence in the Police Service of those adversely affected by his failure to keep the warrant safe.
>
> 6.45 I do not accept the appellant's submission that Chief Superintendent Irvine 'relied heavily on the perceived consequences, rather than the level of failure to exercise diligence'. Even if the perceived consequence of the appellant's conduct had been trivial, his actions would nevertheless still have amounted to misconduct, having regard to his *reckless* disregard for the safekeeping of an important document

[emphasis added].

> 6.46 Having said that, I do not believe that the perceived consequences are entirely irrelevant. The appellant knew or ought to have known about the importance of keeping the warrant secure and the possibility that if it was lost then an apprehended accused person may be able to obtain their liberty in circumstances where they could otherwise be lawfully detained. The potential consequences of such misconduct cannot therefore be entirely disregarded because they bring into sharp focus the importance of the [petitioner's] duty to take care of the warrant; a duty that he ultimately so *recklessly* disregarded [emphasis added]."

[13] It subsequently transpired that when the petitioner's appeal notice was received by Police Scotland on 24 November 2016, Police Scotland sent an email about the appeal to Chief Superintendent Speirs. At that stage, as was subsequently explained to the petitioner in a letter dated 30 October 2017 from Superintendent Andrew McDowall:

> "… Due to human error, the email from DCC Livingstone's office to Chief Superintendent Speirs was erroneously filed, immediately, by a member of PSD staff and was not formally 'logged' [onto the computer system]. This resulted in a breakdown in established procedures …"

It was only on receipt of Mr Foy's letter of inquiry that steps were taken to investigate the petitioner's appeal, an appropriate appeal officer was identified and appointed and the papers were sent to ACC Johnson for his attention. It was a matter of some irony, as senior counsel for the petitioner pointed out, that Police Scotland's failure to comply with the 60-day requirement in terms of regulation 26(3) was the result of the erroneous mislaying (or misfiling) of the petitioner's appeal document.

[14] The petitioner now seeks judicial review of both the decision of 3 May 2017 (extending the 60-day period) and the decision of 10 May 2017 (dispensing with an appeal hearing and dismissing the petitioner's appeal).

[15] In the course of the judicial review, the petitioner received Superintendent Andrew McDowall's letter of 30 October 2017, referred to in paragraph [13] above. In that letter the superintendent described instructing ACC Johnson to conduct the appeal procedure

as follows:

> "… I explained to ACC Johnson the stringent procedures in place to deal with Notices of Appeal received by the Deputy Chief Constable's Office … I explained the unprecedented circumstances in this particular case, namely that, due to human error, the [relevant email] was immediately filed by a member of … staff, rather than being formally 'logged' …
>
> I assured ACC Johnson that PSD's standard processes for dealing with Notices of Appeal are clear, robust and well established, and that to my knowledge there had been no previous occurrence that had resulted in a Notice of Appeal being erroneously filed as had happened in your case. I explained that, in my view, the irregularity in the present case was abnormal and constituted an isolated, unprecedented failure to follow standard procedures.
>
> Given the circumstances outlined above, I invited ACC Johnson to consider whether there were 'exceptional circumstances' which would justify extending the time period for the appeal to be determined from 60 working days to 120 working days …"

Grounds for judicial review of the police disciplinary procedure

[16] The grounds for judicial review set out in the petition, read short, are as follows:

- The purported extension of the 60-day period was *ultra vires* (paragraph 23 of the petition).
- The purported extension was unreasonable and retrospective (paragraph 26).
- The petitioner had a legitimate expectation that he would receive the determination within 60 days (paragraph 27).
- There were no "exceptional circumstances" justifying an extension in terms of regulation 26(4); there had been a significant departure from the regulatory framework; thus the extension had been *ultra vires,* procedurally unfair, and unreasonable (paragraph 28).
- It was unreasonable not to hold an appeal hearing (paragraph 29).
- There had been a breach of natural justice in that the petitioner had been found guilty of "reckless disregard", when he had never been charged with such

conduct: in the circumstances, he should have been allowed an opportunity to appear and reply (paragraph 30).

The court was invited to reduce the decisions of 3 and 10 May 2017 and to declare the disciplinary proceedings to be at an end (or alternatively, to appoint an appeal hearing).

The petitioner's affidavit

[17] In an affidavit prepared for the judicial review hearing, the petitioner explained that:

"Health and Family Life

4. My mental health was adversely affected after I was issued with misconduct papers in February 2016. I worried all the time about what was going to happen. I was very negative and short tempered with everyone, especially my son and wife. My relationship with my wife suffered, and I didn't enjoy the birth of my new baby on 31 March 2016 as much as I should have, due to everything hanging over me. Things just kept getting worse and on 15 April 2016 my GP signed me off work and I was prescribed anti-depressants and also medication for anxiety and blood pressure.

5. I returned to work shortly after the initial misconduct hearing took place on 3 October 2016, but my ongoing depression and anxiety led me to have a breakdown at work shortly afterwards, on 13 December 2016. I went to my GP the following day, and spoke about my increasing thoughts of suicide and harming myself, and I was signed off sick again.

6. I was referred to local mental health services and assessed by a psychiatrist and mental health nurse who diagnosed me with an adjustment disorder. I was obsessed about what the outcome of the appeal from the misconduct proceedings might be, and it took over my every waking moment. This was incredibly difficult and embarrassing for me, as my wife is a mental health nurse, and these were her colleagues I had to speak with. I felt very alone and lacking in confidence around this time. I deliberately avoided seeing anyone I worked with, as I felt that I would be judged by them.

7. I returned to light duties at work in February 2017. I was expecting to have the result of my appeal by the middle of that month, but in fact it did not come for nearly another three months. On return to operational policing in March 2017, I was advised by line management (Inspector Rory Caldow and Sergeant Steven Saunderson) that I was being placed on an Action Plan for poor performance. The Action Plan was designed to monitor my performance and required me to have weekly review meetings with senior officers. This was

completely unexpected as I had never been told that my performance was not satisfactory. When I asked for evidence of my poor performance, I was told that I was not allowed to view it. I was given a verbal account of the alleged performance issues from October 2015, and these were the same issues that had been raised for the first time during the misconduct hearing in October 2016, although they had not been brought to my attention at the time they were alleged to have occurred. I pointed out that I had not had the opportunity to explain my side of the story, but I was told that the Action Plan was non-negotiable. The only reason for putting me on the Action Plan appears to be that these allegations were made during the misconduct hearing. I still had no indication of what the outcome of my appeal was going to be. This made me feel completely demotivated and extremely angry and embarrassed. It felt like I was being punished for a second time, and it was another severe blow to my mental health. I often thought about suicide, and came close to it on numerous occasions.

8. After I returned to work, my mental health problems continued as I still had the worry of not knowing what was going to happen with my job. I was still on prescriptions for anti-depressants and sleeping tablets. My GP would have continued to sign me off sick if I had not had to return to work for financial reasons. I was scared that the Management Absence process would have started if I had remained off sick, and that I would have lost my job as a result. The Management Absence process can be triggered by long or repeated sickness absences. After my long period of sickness absence, and two subsequent absences for minor illness, I was unable to take any more sick leave without it being deemed 'poor performance', which could have triggered further procedures leading to dismissal.

9. My previous written warning had been due to expire around the time when the new one was imposed following the misconduct hearing. While I was waiting to hear for months about the outcome of my appeal, I struggled with policing due to the constant worry of someone making a complaint, whether genuine or not, which would have caused serious issues for me due to the final written warning remaining live. I was unable to see any further than week to week, as I believe that another complaint against me would be the end of my police career."

In relation to the affidavit, the minute of proceedings of a hearing before Lady Wise contains the following entry:

> "Lady Wise noted during the course of discussion with parties that [the petitioner] confirmed there was no case of specific prejudice due to health difficulties of [the petitioner]. Paragraph 3.6 [of the petitioner' note of argument referring to the failure to adhere to the time-limit and the prejudicial effects upon the petitioner] relates only to prejudice which necessarily arises where statutory time-limits were not complied with."

The first respondent's affidavit

[18] The first respondent, in an affidavit prepared for the judicial review hearing, explained in some detail the administrative mishap in misfiling the petitioner's appeal. In particular he stated *inter alia*:

> "10. I was advised that in relation to the appeal by Constable Dickson, there had been an unprecedented failure to follow the standard procedures. Due to human error, an email from the Deputy Chief Constable' Office sending the Notice of Appeal to Chief Superintendent Alan Speirs, Head of PSD, had been erroneously filed by a member of PSD staff. Rather than having been filed, it should have been logged on the computer system. If it had been logged onto the computer system, this would have triggered the appointment of a decision maker and have ensured the timely progression of the appeal. I was informed that the error only came to light when a letter from the Scottish Police Federation, acting on behalf of Constable Dickson, dated 14 April 2017, outwith the original 60 working day period, was received requesting the Determination or the reasons for the delay.
>
> 11. I was advised by Superintendent McDowall that, given the procedures routinely followed in relation to appeals in misconduct proceedings, there was no awareness within PSD of such an error ever having occurred previously.
>
> 12. I was advised by Superintendent McDowall that the failure to follow the standard procedures in the present case was unprecedented. It arose as a result of human error, namely the notice of appeal being filed in the wrong place. He advised that he considered that the error was unlikely to occur again. On the basis of what I was told by Superintendent McDowall, I was satisfied that exceptional circumstances arose in the present case.
>
> 13. Therefore, in these unusual and unprecedented circumstances, I considered that there were indeed exceptional circumstances which justified extending the time limit for the appeal to be determined from 60 working days to up to 120 working days in terms of Regulation 26(4) of the Regulations."

The police conduct regulations

[19] The Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) came into effect on 1 April 2014. They provide *inter alia* as follows:

> "15(4) The deputy chief constable must send with the misconduct form –
>
> (a) copies of any statements made by the constable during the investigation;

(b) the name and address of any witness on whom the deputy chief constable proposes to rely at the misconduct proceedings and a summary of the evidence each witness will give (or notice that the deputy chief constable does not intend to rely on any witnesses); and

(c) unless paragraph (13) applies, a copy of –

(i) the report submitted by the investigator in accordance with regulation 13(1)(b); and

(ii) any other relevant documents obtained during the course of the misconduct investigation.

17(3) Not more than 10 working days after receiving lists of witnesses under paragraph (2), the person conducting the misconduct proceedings must –

(a) decide which, if any, of the listed witnesses should give evidence at those proceedings; and

(b) notify the constable and the deputy chief constable of that decision.

17(4) The person conducting the misconduct proceedings may determine that witnesses not included in any list under this regulation or regulation 15(4) and (6) (whether joint or otherwise) are to give evidence at those proceedings.

17(5) The person conducting the misconduct proceedings must not decide, in pursuance of paragraphs (3) or (4), that any witness is to give evidence at those proceedings unless the person conducting the misconduct proceedings reasonably considers that it is necessary for the witness to do so.

24(3) An appeal under this regulation may be made only on the grounds that –

(a) any determination under regulation 21(1) or any disciplinary action ordered is unreasonable;

(b) there is evidence that could not reasonably have been considered at the misconduct proceedings which could have affected materially such a determination or the decision to order particular disciplinary action; or

(c) there was a breach of the procedures set out in these Regulations which could have affected materially such a determination or decision.

25(3) If the constable requests an appeal hearing, the person determining the appeal must decide whether to –

(a) hold an appeal hearing; or

(b) determine the appeal without holding such a hearing.

26(2) The person determining the appeal must notify the constable in writing of the decision under paragraph (1) and the reasons for that decision.

(3) A notice under paragraph (2) must be given not more than 60 working days from the date the appeal notice was submitted under regulation 24(4).

(4) But the period mentioned in paragraph (3) may be extended to not more than 120 working days if the person determining the appeal considers there to be exceptional circumstances to justify doing so."

The Standard Operating Procedure (SOP)

[20] The Police Service of Scotland (Conduct) Regulations Standard Operating Procedure (SOP) provides *inter alia*:

"10.4.5 The person conducting the misconduct proceedings may determine that witnesses not included in any list are to give evidence at those proceedings …

10.12.2 In considering the question of disciplinary action the person conducting the meeting/hearing will need to take into account any previous written warnings that were live at the time of the conduct in question, any aggravating or mitigating factors and have regard to the subject officer's record of service, including any previous disciplinary outcomes in accordance with the transition arrangements. The person conducting the meeting/hearing may (only if deemed necessary and at the person conducting the meeting/hearing's discretion) receive evidence from any witness whose evidence would in their opinion assist them in this regard …

11.7.2 The person determining the appeal must complete a Determination of Appeal – Notice of Decision Form notifying the subject officer in writing of the decision and the reasons for that decision … This notice must be given as soon as practicable and no later than 60 working days from the date the appeal notice was submitted, however in exceptional circumstances this may be extended to 120 working days. Where dismissal is confirmed; or demotion in rank is confirmed or ordered, the notification must inform the officer of the right to appeal to a police appeals tribunal and the procedure for making such an appeal …"

Submissions for the petitioner

(1) The 60-day time-period

Retrospective extension

[21] Senior counsel for the petitioner submitted that the 60-day time-period could not be extended retrospectively. Retrospective extension was quite different in nature from prospective extension (*Robert* v *Momentum Services* [2003] 1 WLR 1577 paragraph 33). The disciplinary scheme was a self-contained statutory scheme. There was no general power to discipline police officers outside the scheme. Officers were statutory office-holders, not employees, and had subjected themselves solely to the statutory scheme (in contrast with criminal law and procedure: *R* v *Chief Constable of Merseyside ex parte Calveley* [1986] QB 424, at pages 434F to 435B). The starting-point in construing the regulations was therefore not that the regulations implicitly allowed retrospective extension. Nor did the statutory scheme confer a right on Police Scotland to "self-excuse" their own failure to comply with the statutory time-limit. Their attempt to do so was *ultra vires.*

Exceptional circumstances and legitimate expectation

[22] In any event, on a proper construction of the 2014 Regulations, no exceptional circumstances had been demonstrated. While it was accepted that ACC Johnson had the power to decide whether or not there were exceptional circumstances, his decision was not immune from review. His decision to extend the time-period had been irrational in the *Wednesbury* sense, but even if not irrational in that sense, he had proceeded on a seriously unbalanced view of the facts. "Exceptional circumstances" required a sensible or adequate explanation for the failure to comply with the 60-day time-period (*R(Peacock)* v *General Medical Council* [2007] EWHC 585 paragraphs 320-33). The non-statutory guidance contained

in the "Police Service of Scotland (Conduct) Regulations 2014 – Standard Operating Procedure" (SOP) paragraph 11.7.2 and the "Police Service of Scotland (Conduct) Regulations 2014 – Guidance" document paragraph 7.3.2, provided that notice of the appeal determination was to be given "as soon as practicable and no later than 60 working days from the date the appeal notice was submitted". That gave rise to a legitimate expectation such that it was difficult for Police Scotland to demonstrate exceptionality. It could not be said that it was not reasonably practicable for the 60-day time-period to be met. "Exceptional" meant something comprehensively outwith the norm, such as the emergence of new evidence. Further, ACC Johnson was acting in a quasi-judicial capacity when making the decision about exceptional circumstances. He had therefore to give reasons which met the scrutiny of judicial review (*R (Wilkinson)* v *Chief Constable of West Yorkshire* [2002] EWHC 2353 (Admin) at paragraph 3 *et seq* and paragraph 49). No adequate reasons had been given. There appeared to be no fail-safe mechanism in the disciplinary system to combat the human error which had occurred. But for Mr Foy's inquiry, the appeal might never have resurfaced. There might have been other similar mistakes in the past, resulting in other untraced appeals. The petitioner had made calls in the pleadings in an attempt to ascertain features which might be regarded as amounting to exceptionality in the circumstances, but there had been no response. Unless and until there were answers, there was no proper basis upon which "exceptional circumstances" could be claimed. In deciding that there had been exceptional circumstances, ACC Johnson had either proceeded irrationally, without making adequate investigations, or had failed to explain why he considered that there were exceptional circumstances.

Consequences of failure to comply with the time-period

[23] *R* v *Soneji* [2006] 1 AC 340 was the leading authority in this context. Failure to comply with a time-limit resulted in a spectrum of possible consequences, depending upon the imputed intention of Parliament. This was a question of statutory interpretation: there was no room for the court to exercise a discretion. In the present case, it was in the public interest to have a timely procedure for disciplining police officers. The 60-day time-period struck a balance between public and private interests: thus substantial compliance was not enough, and failure to comply with the 60-day time-period meant that the petitioner's appeal must be deemed to be allowed. *Esto* the court had a discretion, (i) there was no adequate explanation; (ii) the misconduct was relatively trivial; and (iii) the failure to comply with the time-period had resulted in prejudice to the petitioner, as set out in his affidavit. Any discretion should be exercised in favour of the petitioner.

(2) Request for an appeal hearing

[24] The decision not to hold an appeal hearing was, in the circumstances, unreasonable in the *Wednesbury* sense. The petitioner had made specific detailed criticisms supporting an allegation of an error of law, but ACC Johnson considered that the petitioner had failed properly to explain his position. In such circumstances an appeal hearing should have been allowed, in order to ascertain the basis of the substantial arguments advanced. Failure to hold such a hearing was procedurally unfair, unreasonable, and contrary to natural justice. As a result of the lack of a hearing, ACC Johnson had not been properly informed when he made his decision. Even if only to assist in the disposal of the case, the petitioner should have been granted a hearing. No reason had been given for the refusal (for example, lack of resources, or the resultant delay). The outcome of the disciplinary procedure could be the loss of a career. In such circumstances the quality of the decision-making (and in particular

paragraph 6.26 of the determination quoted in paragraph [12] above) fell so far short of the required standard as to attract the review of the court. The decision-making failed to meet the requisite test, whether the *Wednesbury* test or a lesser test.

(3) Characterisation of conduct as "reckless"

[25] Part of the rationale of ACC Johnson's decision to uphold the finding at first instance was that there had been a "reckless disregard" for the safekeeping of the warrant. But it was possible to lose a piece of paper without being reckless. There could be misfortune, or lack of due care. The petitioner had not been charged with reckless conduct. For proceedings to be fair, if it was intended to bring such an accusation, advance notice was required to enable the petitioner to take such steps as were necessary when seeking to rebut the allegation. Not only had the charge not referred to reckless conduct, but also there was no mention of recklessness in the course of the evidence led and the submissions made in the disciplinary hearing. The live issue at that hearing was whether mere carelessness could amount to misconduct. By determining that the petitioner's conduct was "reckless", ACC Johnson had side-stepped that issue, and also had reached an irrational, unreasonable, and procedurally unfair conclusion. The petitioner had been given no opportunity to respond to, or to rebut, an allegation of reckless conduct. If ACC Johnson had in mind reckless behaviour, it was necessary to hold an oral hearing, rather than make a decision on paper.

(4) Remedies

[26] Senior counsel for the petitioner submitted that the court had several options. In relation to the first chapter concerning time-limit, the court could reduce the determinations and hold the proceedings to be at an end. In relation to the second and third chapters (appeal

hearing and "reckless" conduct) the court could reduce ACC Johnson's determination and remit back for an appeal hearing. Alternatively the court could decide that "enough is enough" and hold the proceedings to be at an end (cf Sir J Donaldson in *R* v *Chief Constable of Merseyside Police ex parte Merrill* [1989] 1 WLR 1077).

Submissions for the respondents

(1) The 60-day time-period

Retrospective extension

[27] Counsel for the respondents submitted that, on a proper construction of the 2014 Regulations, the 60-day period could be retrospectively extended. Regulation 26(2) and (3) had to be read with regulation 26(4) – a "safeguard" provision. Regulation 26(4) permitted the time-period to be extended to 120 days, and (importantly) did not provide that any such extension had to be made within the 60 days. It was therefore open to the decision-maker to extend the period at any time within the 120-day period, provided that he found that there were "exceptional circumstances".

Exceptional circumstances and legitimate expectation

[28] It was for the decision-maker to decide whether or not there were "exceptional circumstances" (cf *Murnin* v *SLCC* 2013 SC 97 paragraphs 27 to 33). The respondents' position was that the error of misfiling was unprecedented. It was open to the decision-maker to conclude that what had occurred was not regular, routine, or normal in the disciplinary procedure. It could not be said that no reasonable decision-maker could find that there were exceptional circumstances (*Murnin* paragraph 33). The finding of exceptional circumstances was within the range of reasonable responses open to the decision-maker, and

was not irrational. The provisions of the SOP and the Guidance were merely consistent with the 2014 Regulations, and added nothing. Their non-statutory provisions could not fetter the clear and unambiguous statutory discretion (cf *dicta* of Lord Bingham in *R* v *Inland Revenue Commissioners ex parte MFK* [1990] 1 WLR 1545 at pages 1568D-E, 1569F-G, 1573H).

Consequences of failure to comply with the time-period

[29] Even if the court concluded that there had been a failure to comply with a mandatory provision of the statutory scheme, the court had a discretion whether or not to grant reduction. There was a public interest in the administration of justice. The police officer in this case had been found guilty of misconduct. The only consequence of the respondents' failure to comply with the time-period was that the petitioner suffered the generic "prejudice" of not receiving his appeal determination as quickly as he should have. The intention of the 2014 Regulations, including the 120-day long-stop, could not be that if the appeal decision was not issued within the first 60 days, the appeal must be allowed. Following the guidance given in *R* v *Soneji* [2006] 1 AC 340 paragraphs 14 to 17, there might be a spectrum of consequences, and the court had a flexible, discretionary jurisdiction over a range of matters of degree. Missing a deadline did not mean that there could no longer be a procedure. In the present case, the non-compliance error had been made in good faith; the resultant delay had not been lengthy; the cause of the non-compliance was understandable; there had been no material prejudice to the petitioner; there were no breaches of fundamental human rights or issues whether the trial had been fair or unfair. Simply missing a deadline did not mean that, in every case, there was no jurisdiction or that there should be no further procedure.

(2) Request for an appeal hearing

[30] Counsel for the respondents further submitted that the 2014 Regulations did not require an oral hearing: it was a discretionary decision to be taken by the decision-maker (regulation 25(3)). Many judicial decisions were taken "on paper" (for example, in judicial review procedure). In an administrative decision-making procedure, it was exceptional to have an oral hearing, particularly in the context of an appeal. Simply alleging errors in the first instance decision could not mean that, in every such case, there must be an appeal hearing.

[31] In the present case, ACC Johnson considered whether to have an oral hearing, and decided that it was unnecessary. When making that decision, he had all the relevant information, including a full transcript of the proceedings at the disciplinary hearing and the grounds of challenge. In his deliberations, he noted that CS Irvine had correctly left out of account a file entry which the appellant had not previously seen, and certain comments regarding the petitioner's off duty activities and absence from work with stress. The *Wednesbury* test of irrationality applied, and it was not clear why no decision-maker would have taken the view that he was not bound to hold an oral hearing. The petitioner had attempted to make a "lack of reasons" challenge, but the pleadings and the note of argument did not permit such an argument.

(3) Characterisation of conduct as "reckless"

[32] The chief inspector's report had been introduced solely in relation to disposal. Also it was unfair to categorise his report as completely negative: on the contrary, there were positive references, such as a description of the petitioner as "a capable officer when … motivated". A fair reading of ACC Johnson's decision in the round showed that the use of the

word "reckless" was simply shorthand for "lack of diligence". It was inappropriate to focus solely upon the word "reckless": rather, the word should be read in context. It had been noted that the petitioner did not act with malice or deliberately, but had failed to act with the diligence required.

[33] Ultimately there was nothing in the petitioner's challenge to the word "reckless". There was no material error and no procedural unfairness justifying interference. The same decision was always going to be reached.

(4) Remedies

[34] Counsel submitted that an error had to be material before the court would interfere.

[35] If the court concluded that, had a different procedural route been followed, the same result was nevertheless inevitable, then the court should not grant decree of reduction (*R* v *Kensington and Chelsea Royal London Borough Council ex parte Bayani* [1990] 22 HLR 406 at pages 416 to 418; *King* v *East Ayrshire Council* 1998 SC 182, Lord President Rodger at page 194).

[36] In relation to the second and third chapters (request for an appeal hearing and characterisation of conduct as "reckless"), the court would usually remit the case back to the decision-maker without any particular guidance. It would be unusual for the court to ordain a public body such as Police Scotland to carry out any particular step. If necessary, the case could be put out for a hearing on the By Order roll before a final interlocutor were granted.

[37] Ultimately counsel for the respondents invited the court to sustain the respondents' first and second pleas-in-law and to refuse the petition, which failing to sustain their third, fourth, and fifth pleas-in-law, and to refuse the petition.

Discussion

Decision dated 10 May 2017 dismissing the petitioner's appeal without a hearing

[38] The second and third chapters (lack of an appeal hearing and characterisation of the misconduct as "reckless") are in my view interlinked, and I deal with them first.

[39] It is the respondents' position that the report by Chief Inspector Stiff was introduced in evidence solely for the purpose of disposal. That may be. But it does not follow that the concepts of fair notice, equality of arms, and *audi alteram partem,* do not apply. In the present case, there was no advance intimation to the petitioner or his representative that such a report would be produced and spoken to by its author, a chief inspector. No copy of the report was provided to the petitioner in advance of the disciplinary hearing. While, on the day of the disciplinary hearing, the petitioner and his representative were given a few hours to consider the contents of the report, they did not have the time or opportunity to carry out their own researches or to call a witness or witnesses, and lodge documents, in an endeavour to counter any views expressed in, or negative inferences arising from, the report.

[40] The lack of fair notice, and the consequences, formed part of the petitioner's appeal. As was set out at page 10 of the paper apart attached to the appeal letter dated 24 November 2016:

> "Thirdly, and following from the second point, CS Irvine erred in law in considering that it was open to him to admit evidence from CI Stiff in the middle of a misconduct hearing without any prior notice, intimation, or determination that he would give evidence. The admission of such evidence was inevitably prejudicial to PC Dickson. CI Stiff's evidence was overwhelmingly negative and collateral to the issues that CS Irvine required to determine. It contained inaccurate and misleading information that PC Dickson had no opportunity to rebut; referred to hearsay and opinion evidence on matters not before the Chair; made negative comments on the officer's attendance record and attitude towards others; referred to other potential performance issues that had never been determined; made reference to file notes that the subject officer was not even aware existed; made inappropriate comments regarding his off duty activities and opinion on medical advice; and, inexplicably, extracts from correspondence with a Procurator Fiscal regarding the officer's

involvement in an unrelated case."

[41] From the nature of the points made above, it is clear, in my opinion, that advance warning to the petitioner and his representative was required, thus giving time for preparation to answer and/or rebut certain parts of CI Stiff's report and evidence. The 2014 Regulations recognise the need to give an officer charged with misconduct advance notice of what is said against him, what witnesses will be relied upon, and what each witness will say (see, for example, regulations 15 and 17). Thus the officer charged is given an opportunity to gather information and evidence which might assist him in rebutting or qualifying any negative inference. The exceptional power given to the decision-maker by regulation 17(5) (namely to allow evidence to be given by someone who was not included in any witness list if the decision-maker "considers that it is necessary for the witness to do so") – a power reflected in the SOP quoted in paragraph [20] above – when properly construed in the context of the 2014 Regulations as a whole including regulations 15 and 17, allows, in my opinion, last-minute, unexpected, or unforeseen evidence which has suddenly become important and which should, in the interests of justice, be heard. But properly construed, regulation 17(5) does not give the decision-maker an unfettered discretion to allow evidence from any witness not named on a list, even if solely for the purposes of disposal, particularly a witness who could have been easily identified prior to the hearing and whose name and expected evidence could have been added to a witness list in advance of the hearing without difficulty. The appropriate disposal for a one-off inadvertent loss of a warrant might be very different from the appropriate disposal for the loss of a warrant when taken with a list of criticisms and complaints (some untested) such as is referred to in the petitioner's paper apart (quoted in paragraph [40] above). If there was an intention to rely upon such criticisms and complaints for the purposes of disposal after a finding of

misconduct had been made, I consider that fair notice to the petitioner was necessary, particularly where dismissal was a possible outcome. I do not agree that it would be invidious to give the officer advance notice of a witness or report relevant to disposal before it has been decided that the officer had committed misconduct (as suggested in ACC Johnson's determination, paragraph 6.13). All that would be required would be intimation that a particular witness would be led and/or a report referred to "in the event that there was a finding of misconduct".

[42] Thus in the present case, there was in my opinion a lack of fair notice which was contrary to the intention of the 2014 Regulations read as a whole, and resulted in an unfair procedure amounting to a breach of natural justice. That in turn materially affected the outcome (cf ACC Johnson's observation at paragraph 6.33 of his determination).

[43] Faced with such a ground of appeal (see paragraph [7] above), it is my opinion that no reasonable decision-maker could legitimately refuse to hold an oral appeal hearing. Without such a hearing, the petitioner would not be given a reasonable opportunity to rebut or qualify, if necessary by leading a particular witness or referring to a certain production, certain important matters contained in Chief Inspector Stiff's report and evidence. Being given a few hours at the disciplinary hearing (following upon the finding of misconduct) in order to consider the report, together with an opportunity to ask Chief Inspector Stiff questions in cross-examination, did not in my opinion give the petitioner such an opportunity.

[44] Thus while regulation 25(3) empowers the appeal officer to decide whether or not to hold an appeal hearing, I consider that, in the particular circumstances of this case and standing the ground of appeal outlined in paragraph [7] above, the decision not to hold an oral appeal hearing was irrational in the *Wednesbury* sense and resulted in an unfair process.

[45] The unfairness was made worse by ACC Johnson's conclusion that the petitioner's conduct had been "reckless". The law – both civil and criminal – recognises a spectrum of acts or omissions, ranging from pure accident or misfortune through carelessness (of which there maybe varying degrees) to recklessness and ultimately acts or omissions which are deliberate or malicious. "Recklessness" is accepted in law to be more culpable than mere inadvertence or absent-minded carelessness. The characterisation of the conduct as reckless meant that the petitioner emerged from an appeal procedure with a finding against him of more serious misconduct than that which had been charged or found established after evidence and submissions at the original disciplinary hearing.

[46] In the present case, the petitioner was charged as follows:

> "On or about 24 December 2015, between Divisional Headquarters, Cornwall Mount, Dumfries and Loreburn Street Police Office, Dumfries, having signed for a Justice of the Peace Non Appearance Warrant, you did lose said warrant and failed to fulfil your Duties and Responsibilities."

The petitioner was not charged with reckless conduct. According to senior counsel for the petitioner, much of the focus of the disciplinary hearing was upon the question whether inadvertent carelessness could amount to "misconduct". As already noted, reckless conduct is a more culpable matter than inadvertent carelessness. Thus the appeal decision, which refused the appeal on the basis that the petitioner's loss of the warrant constituted "reckless conduct" when no such matter had been charged or had been the subject of evidence and submissions at the original disciplinary hearing, was unfair and contrary to natural justice on that ground also.

[47] As a consequence of the above defects in the appeal procedure, it is my opinion that the decision of 10 May 2017, determining the appeal without an appeal hearing and dismissing the appeal, falls to be reduced.

Decision dated 3 May 2017 extending the time-period

Retrospective extension

[48] The leading authority in the context of time-limits in statutory disciplinary schemes is *R* v *Soneji* [2006] 1 AC 340, particularly paragraphs 14 to 17, and 23. As was said by Lord Hailsham in *London & Clydeside Estates Ltd* v *Aberdeen District Council* [1980] 1 WLR 182, quoted in *Soneji* at paragraph 15:

> "[Previous decisions have] led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity …"

Lord Slynn was noted at paragraph 16 of *Soneji* as posing such a question:

> "… did the legislature intend that a failure to comply with [the] time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?"

In paragraph 17 of *Soneji*, the Privy Council's approach in a disciplinary case *Charles* v *Judicial and Legal Services Commission* [2003] 2 LRC 422 at page 438 was referred to:

> "… A … fetter of such a kind [namely a time-limit, breach of which brought proceedings to an end] on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime … the delays were in good faith, they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no unfair trial considerations were or could have been raised, and no fundamental human rights are in issue …"

[49] In the present case, I consider that the intention underlying the 2014 Regulations was to provide a workable scheme with a clear structure and timetable which takes account of both the private interests of the officer charged and the public interest in discipline and the administration of justice. Following the guidance in *R* v *Soneji* [2006] 1 AC 340, the failure to comply with a particular time-period in the timetable may not necessarily be fatal to those

proceedings.

[50] Against that background, it is my opinion that both a literal construction and a purposive instruction of regulation 26(3) and (4) allow for an extension of time to be granted outwith the 60-day period (and for present purposes, there is no need to decide the question whether such an extension could be granted outwith the 120-day period). Regulation 26(3) and (4) must be construed together and in the context of the 2014 Regulations as a whole. While regulation 26(3) provides that the appeal decision "must" be given in writing not more than 60 working days from the date on which the appeal notice was submitted, that is immediately qualified by the following clause – "but [the 60 days] may be extended to not more than 120 working days". The deadline of 60 days is not therefore to be regarded as a final definitive deadline which, if not complied with, would bring the whole proceedings to an end. Furthermore, there is no prohibition against an extension of time being granted at any time within the 120 days, thus *prima facie* permitting an extension granted at a time outwith the 60 days but within the 120 days. In the present case, the provision of the 120 days, without any power to extend the time-period beyond 120 days, acts as a safeguard or long-stop protection for the officer awaiting the appeal decision. The petitioner, who has, it must be remembered, been found guilty of misconduct at the original disciplinary hearing, suffered no more than the generic prejudice which any appellant would suffer when an appeal decision was not issued on time. Moreover the guidance given in the case of *Charles* quoted in *Soneji* is applicable in the present case: the delay in the present case occurred in good faith (there was no deliberate or malicious hiding of the appeal), was not lengthy (the decision was issued within the 120 days), was understandable (human error), with no material prejudice to the petitioner (as noted above), did not raise any "fair trial" considerations, and did not raise any issue of fundamental human rights.

[51] In the result therefore it is my opinion that ACC Johnson had the power to grant a retrospective extension at any time within the 120 days, and that his decision to do so was not *ultra vires.*

Exceptional circumstances and legitimate expectation

[52] In order to succeed in the submission that the decision-maker was not entitled to conclude that there were "exceptional circumstances" within regulation 26(4) in this case, the petitioner would, in my opinion, have to satisfy the test of irrationality or unreasonableness in the sense referred to in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223. In the light of the explanation given in the letter dated 30 October 2017 from Superintendent Andrew McDowall and the first respondent's affidavit (see paragraphs [15] and [18] above) pointing to a single, isolated, unprecedented incident of human error in misfiling the petitioner's appeal, and the fact that no information has been placed before this court suggesting otherwise, I am not persuaded that no reasonable decision-maker could have formed the view that the circumstances which had arisen concerning the mislaying of the petitioner's appeal fell within the description "exceptional circumstances" (*Murnin* v *Scottish Legal Complaints Commission* 2013 SC 97, paragraphs [30] to [33]). I consider that any legitimate expectation which the petitioner might have had (for example, that the appeal decision would be issued "as soon as practicable" in terms of SOP and the Guidance) did not prevent the decision-maker from regarding the particular circumstances which had arisen as being exceptional. On the material available to ACC Johnson, he was entitled to reach that view.

Conclusion in respect of the extension of the time-period

[53] In the result it is my view that the decision to grant an extension of time was not *ultra vires*, or unreasonable, or procedurally unfair, nor did it represent a significant departure from the regulatory framework. The decision to grant an extension of time was competent and unchallengeable. It follows that the decision letter of 3 May 2017 does not fall to be reduced.

Decision and disposal

[54] For the reasons given above, I shall sustain the first and third pleas-in-law for the petitioner; repel the first, second and third pleas-in-law for the respondents; reduce the decision dated 10 May 2017 (dismissing the petitioner's appeal without a hearing); sustain the respondents' second plea-in-law so far as relating to the decision dated 3 May 2017 (extending the time-period); and put the case out for a hearing on the By Order Roll to deal with further procedure and expenses.