Neutral Citation Number: [2024] EWHC 2348 (Admin)

Case No: AC-2023-LON-001804

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2024

Before :

Mrs Justice Lieven

- -

Between :

THE KING
(on the application of)

THE COMMISSIONER OF THE POLICE OF THE METROPOLIS

Claimant

and

THE POLICE APPEALS TRIBUNAL

Defendants

and

SANDEEP KHUNKHUN

Interested Party

- -
- -

Mr Dijen Basu KC (instructed by **Jacqueline Morris** of the **Directorate of Legal Services**) for the **Claimant**
The Defendant did not attend and was not represented
Mr Allan Roberts (instructed by **Hempsons LLP**) for the **Interested Party**

Hearing dates: **13 June 2024**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is a judicial review of a decision of the Defendant, the Police Appeals Tribunal ("PAT"), concerning the appeal of Sandeep Khunkhun, the Interested Party ("IP"). The decision was made on 31 March 2023. The IP is a police officer employed by the Claimant, the Metropolitan Police Commissioner.

2. The PAT allowed the IP's appeal against the decision of the Police Misconduct Panel ("the Panel") dated 17 May 2022, which had found the IP guilty of gross misconduct and had dismissed her. The PAT quashed the Panel decision and remitted the case to a fresh panel.

3. The Claimant was represented before this Court by Dijen Basu KC, the Defendant did not attend and was not represented, and the IP was represented by Allan Roberts.

Summary of the Factual Background

4. The facts that gave rise to the Panel's decision was that the IP was appointed as the Officer in Charge ("OIC") in respect of allegations made by Denise Keane-Barnett ("DKB") that she had been subject to domestic abuse by Damien Simmons ("DS"), her husband. The IP remained the OIC until 31 March 2020, when she moved to the Child Abuse Investigation Team.

5. On 16 April 2020 DS set fire to DKB's home in the early hours of the morning. DKB died 9 days later, and DS was subsequently convicted of her murder on 31 August 2021.

6. The matter was investigated by the Independent Office of Police Conduct ("IOPC"). On 14 July 2020 the IP was served with notice of allegations pursuant to Regulation 17 of the Police (Complaints and Misconduct) Regulations 2020. On 13 October 2020 the IP provided a written response to the Regulation 17 notice. On 17 May 2022 the Panel dismissed the IP for gross misconduct. On 31 March 2023 the PAT gave its decision to set aside the decision of the Panel and remit the matter to a fresh Panel for a further hearing.

7. There are essentially two chronologies in the case. The first relates to the IP's involvement with DKB and the substantive issues which form the basis of the misconduct case against her. The second is the procedural history of the misconduct allegations and findings. I will set them out below separately.

Summary of the Issues

8. The PAT set aside the Panel's decision on the overarching basis that the Panel had not dealt with the IP's "legal argument". This argument is essentially that the IP's defaults, as originally alleged and then found by the Panel, were attributable to the IP's disabilities. As such they were a matter of "performance" and not "conduct" and the Panel could not reasonably have found gross misconduct without properly addressing this argument. The PAT found that the Panel had not addressed the "legal argument".

9. Mr Basu submits that the Panel fully and properly addressed the case as put to them and that their finding of gross misconduct was wholly reasonable. He submits that the IP's case to the Panel was clear - that her evidence was true, and the allegations made

against her were wrong because all her actions and inactions were wholly justified given what DKB and her senior officer, DS Kilmartin, had said to her. To the degree that she relied upon excessive workload and her disabilities, these went to mitigation but not to the central issue of the truth of her evidence.

10. Mr Basu submits that the IP's case at the PAT fundamentally changed when it got to the PAT, presented by Mr Roberts, who had not appeared before the Panel. However, the IP herself continued to assert that her evidence had been the truth.

11. Mr Basu therefore submits that there was no error, whether on the grounds of irrationality or unfair procedure, by the Panel and the PAT erred in law in setting aside the decision.

12. Mr Roberts submits that the Panel failed to address the IP's case and as such the PAT was correct to set it aside and there is no arguable error of law in their decision.

Chronology of the Metropolitan Police Service and the IP's involvement with DKB

13. On 26 January 2020 DKB's aunt reported to the police that DS had been drinking and wanted to hurt DKB. Officers attended and DKB told officers that DS was verbally abusive and that she was afraid of him when he was drunk. The Domestic Abuse Stalking Harassment ("DASH") risk assessment was set at standard and DKB said she did not wish her details to be referred to a domestic abuse support agency.

14. On 1 February 2020 DKB called police, reporting that DS had been very intimidating and had tried to lock her in her room. She said DS had installed a light bulb in her bedroom which contained a camera. Officers attended and seized the light bulb which did contain a camera. At this point, DKB was happy to provide a witness statement but did not wish to support any police action, including the arrest of DS. She wanted the matter reported and then closed.

15. Later on 1 February 2020 the aunt again called police and attending officers recorded the event as a non-crime domestic incident. They removed DS from the premises and warned him. No DASH risk assessment was completed.

16. On 8 February 2020, at DS's request, officers attended DKB's home to supervise him while he collected his belongings.

17. On 10 February 2020 DKB called the police, reporting harassment by DS who was sending her emails and writing false posts about her on social media. Officers arranged to attend on 13 February 2020.

18. On 13 February 2020 PCs Joshi and Boyle attended DKB's home and their attendance was captured on their body worn video cameras. The IP (appointed as OIC on 19 February 2020) failed to view the footage. The Panel did so during the hearing. Importantly, DKB told the officers that she had ended her relationship with DS, that he was no longer living there and that the locks had been changed. She said that she had blocked him on social media and on her phone. The officers completed a DASH assessment, recording that DKB is afraid of DS and that his behaviour is becoming more persistent.

19. DKB gave officers a witness statement, now indicating that she wanted action to be taken, including the arrest of DS. She also wanted action taken in relation to the light bulb camera and she told officers she would be happy to attend court and wanted action taken as events were now escalating.

20. The Panel found this to have been a marked change in her position from 1 February 2020 and the effective end of any form of relationship with DS. PC Joshi assessed the risk to DKB as medium, meaning "there are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances". An arrest CAD was created, indicating that DS was to be arrested for harassment, theft and voyeurism and that any phones or electronic devices were to be seized upon arrest.

21. On 16 February 2020 the arrest CAD is closed in error by DS Gemma lngledew who made an entry saying, "CRIS states that the victim is unwilling to pursue this matter-CRIS is screened out. CAD can be closed". The harassment and voyeurism report remained open. DS lngledew later told the IOPC that she thought that the closure of the arrest CAD was an error. The Panel found that, having been allocated the case 3 days later, on 19 February, and reviewed the CRIS reports, it would have been clear to the IP that the closure of the arrest CAD was an error. The Panel found that the IP should have followed this up, initially with her supervisor, DS Tom Lynch.

22. On 18 February 2020 CAD number 2111 is created, recording an admission by DS that he installed a camera and had been able to listen in on DKB's conversations.

23. **On 19 February 2020 DS Tom Lynch allocated the matter to the IP**, setting out an action plan, including establishing with DKB "whether she is willing to support a prosecution and provide evidence of this offence", identifying other evidence and witnesses, considering any necessary safeguarding, researching the parties, examining the 'light bulb' for forensic opportunities and for whom it is linked to and interviewing DS and seizing and downloading his phone.

24. On 20 February 2020 the IP accessed the crime reports a number of times. She later claimed at her misconduct hearing that she contacted DKB on this day, but the Panel found that she did not in fact do so.

25. At 3.34pm on 20 February 2020 DKB contacted police, reporting that DS was continuing to contact her. A CAD was created for her to be seen on 23 February 2020.

26. At 12.56pm on 21 February 2020 the IP accessed the voyeurism and harassment crime reports again. Again, she later claimed at her misconduct hearing that she contacted DKB on this day, but the Panel found that she did not in fact do so.

27. On 23 February 2020 PC Mirza attended on DKB and took a further witness statement in which she detailed harassment by DS and again confirmed that she would like to support police action and wanted DS arrested. PC Mirza took screenshots of unpleasant messages and recorded on his Body Worn Video 5 voicemails left by DS – in one, threatening that "you will suffer, you will suffer, trust me". PC Mirza emailed the IP (and she read) a copy of DKB's witness statement, the screenshots and a link to her voicemails. The IP admitted to the Panel that she did not review any of the Body Worn

Video and they found her failure to review this particular Body Worn Video to be a significant failing on her part.

28. At her misconduct hearing, the IP claimed that she had spoken with DKB on 26 February 2020 and claimed that she had told her that she was in an 'on/off' relationship with DS. In her interview with the IOPC, the IP falsely claimed that DKB had told her that she was still in a sexual relationship with DS and that she therefore considered that any harassment charge would be undermined. She claimed that DKB told her she was only reporting DS to police because her friends did not like them being together. The Panel found the IP's evidence on these points was not true. There was no conversation until March, when DKB essentially told her the opposite.

29. On 6 March 2020 DS Kilmartin eliminated DS as a suspect on the CRIS, wrongly recording that the victim was unwilling to prosecute. The IP's case before the Panel was that DS Kilmartin's intervention had effectively brought the investigation to a close, but that she had, in fact, carried on regardless.

30. At 10.43am on 9 March 2020 the IP updated the harassment crime report thus: "I have checked the cad and the arrest enquiry was cancelled as view had said she did not wish to substantiate the allegation. Victim stated that so much has happened she may have said this. **Victim states she does wish to substantiate the allegation as the susp is continuing to contact her.**" [emphasis added]

31. The IP claimed to the IOPC and to the Panel that, in fact, she meant to record, "Victim states she does **not** wish to substantiate the allegation as the susp is**n't** continuing to contact her" [emphasis added] but the dictation software (Dragon) made an error and, due to her dyslexia, she did not pick it up.

32. On 10 March 2020 the IP cancelled her planned voluntary interview with DS because she was dealing with another prisoner.

33. At 1.51am on 11 March 2020 DS Kilmartin updated the harassment crime report with the comment, "OIC is progressing", in contrast with his earlier mistake on 6th March.

34. On 15 March 2020 the IP texted DS to rearrange the interview to 19 March.

35. On 19 March the interview with DS did not take place. The IP claimed she was unable to interview DS as arranged as she had other prisoners to deal with. She also claimed that DS attended the police station and she thought he showed signs of infection with coronavirus.

36. The Panel found that the IP falsely claimed that, on this date, she was told by DS Kilmartin to not interview DS and that she would get into trouble if she did.

37. On 20 March 2020 there was further police attendance at DKB's home. They told her the arrest enquiry had been cancelled because she did not want to take matters further and she is recorded on Body Worn Video (none of which the IP ever viewed) putting them right.

38. At 2.41pm on 24 March 2020, in response to DS texting her to confirm his attendance for the next day, the IP texted him, "Hi I'm sorry I will need to cancel tomorrow. Do u hv any symptoms of covid 19". She did not rearrange the interview.

39. At 2.44pm DS texted in reply: "You keep telling me that but the only thing is my heart problems I suffer with acting up. But other than that I feel ok I think."

40. At 3.15pm on 28 March 2020 the IP updated the voyeurism crime report recording, "Suspect did attend Wembley police station on the day in question however he was coughing and due to the fact that there is a coronavirus going on I did not wish to interview the suspect in such close proximity. The risk is managed and therefore I felt proportionate to interview the suspect at a later date."

41. At 3.36pm on 30 March 2020 the IP added further entries to the crime reports claiming that DKB did not wish to substantiate the allegation as her mother had passed away (in December 2019) and she was grieving.

42. On 31 March 2020 the IP moved to the Child Abuse Investigation Team.

43. On 6 April 2020 the IP sent the crime reports for closure on the (claimed) basis that DKB did not want to substantiate the allegations.

44. On 7 April 2020 DS Kilmartin updated the crime reports to indicate that the case could be closed. The Panel determined that, as an experienced investigator, the IP would have been well aware of the various other lines of enquiry that could have been carried out following a proper review of the crime reports and that DS Kilmartin was not aware that DS had not been interviewed, there being no explicit reference to it in the request by the IP to close the crime reports.

45. On 16 April 2020 DKB called the police to report that her estranged husband, DS, was continuing to harass her. Less than an hour later, DS murdered DKB by setting fire to her home in the early hours (she died 9 days later).

46. On 29 April 2020 DS was charged with the murder of (and other offences against) DKB.

47. On 31 August 2021 DS was convicted of murder and arson with intent.

Procedural Background and Regulatory Scheme

48. The procedure for bringing misconduct allegations against a serving police officer are set out in the Police (Complaints and Misconduct) Regulations 2020 ("PCMR") and the Police Conduct Regulations 2020 ("PCR"). Set out below is an agreed summary of the Regulatory process as it applied to the facts of this case with the relevant provisions in brackets.

49. On 14 July 2020 the IP was served with a Notice of Investigation, known as a Regulation 17 notice, of *"the conduct that is the subject matter of the allegation and how that conduct is alleged to fall below the Standards of Professional Behaviour."* The notice warned her that *"it may harm [her] case if [she] does not mention when interviewed or when providing any information under regulation 20 or regulation 31*

[PCR] something later relied on in any disciplinary proceedings or appeal". (Regulation 17, 17(1)(a) and 17(1)(h) PCMR).

50. On 13 October 2020 the IP provided a written response to the Regulation 17 notice in line with Reg 20 PCMR (within 10 working days or such period agreed by the investigator).

51. On 22 December 2020 the IP was required to attend an interview with the IOPC Investigator (Reg 21 PCMR).

52. On 22 June 2021 the report on the investigation is sent to the Director General ("DG") IOPC by the Investigator. The DG IOPC sent the Commissioner the report along with the former's opinion as to whether any person to whose conduct the investigation related has a Case To Answer ("CTA") for misconduct or gross misconduct, or their performance was unsatisfactory. The DG sought the Commissioner's views as to whether any person had a CTA for misconduct or gross misconduct, or their performance was unsatisfactory. (Reg 27 PCMR; §22(5) Sch 3 Police Reform Act 2002 ("PRA") and §23(2)a Sch 3 PRA).

53. For a CTA determination, taking into account any views of the Commissioner, the DG makes a determination as to whether any person has a CTA for misconduct or gross misconduct, whether their performance was unsatisfactory and whether disciplinary proceedings should be taken against any of them and, if so, what form they are to take. (§23 (5A)(a) Sch 3 and §23(5A)(b) Sch 3 PRA).

54. In the IP's case, she had a CTA for gross misconduct and a misconduct hearing and the DG directed the Commissioner that there should be a misconduct hearing. (§23 (5A)(e) Sch 3 PRA).

55. The Commissioner was obliged to comply with the DG's direction and to secure that the proceedings, once brought, were proceeded with to a proper conclusion. The Commissioner had to keep the DG informed of the action taken in response to the direction. (§23(5B) Sch 3 and §23(5D) Sch 3 PRA).

56. The Commissioner was obliged to bring misconduct proceedings in the form of a misconduct hearing. (Reg 23(9)(a) PCR). The hearing was to be conducted by a panel of 3 appointed persons. (Reg 28(1)(b) PCR).

57. As soon as practicable, the Commissioner had to give the IP notice (known as a Regulation 30 notice) of referral of her case to a misconduct hearing, including "the conduct that is the subject matter of the case and how that conduct is alleged to amount to misconduct or gross misconduct, as the case may be". (Reg 30(1)(a) and Reg 30(1)(a)(ii) PCR).

58. Within 15 working days the IP had to supply the Commissioner with a Regulation 31 response *"where they do not accept that their conduct amounts to misconduct or gross misconduct, as the case may be, or they dispute part of the case against them, written notice of (i) the allegations they dispute and their account of the relevant events, and (ii) any arguments on points of law they wish to be considered by the person or persons conducting the misconduct proceedings".* (Reg 31, Reg 31(2)(c)(i) and Reg 31(2)(c)(ii) PCR).

59. In line with Reg 36 PCR notice of the misconduct hearing (including the name of the officer and her alleged conduct) was to be published on the Commissioner's website.

60. In line with Reg 37 PCR the IP was obliged to attend the misconduct hearing. The hearing had to be held in public, save to the extent necessary. (Reg 39(1) PCR).

61. The misconduct hearing took place between 21 April and 26 April 2022. The legally qualified chair of the misconduct hearing (Cameron Brown QC) was obliged to *"determine the procedure at those proceedings and, in so far as it is set out in these Regulations, must determine it in accordance with these Regulations".* (Reg 41(1) PCR).

62. The IP's representative was entitled to put and sum up the IP's case, to respond on her behalf to any view expressed at the proceedings and to make representations concerning any aspect, as well as questioning any witnesses. (Reg 41(7) PCR).

63. In relation to inferences from silence, Reg 41(14) read with Reg 41(12)(a) and (b) PCR states:

> *"Where evidence is given or considered at the misconduct proceedings that the officer concerned (a) on being questioned by an investigator at any time after the officer was given written notice under ... regulation 17(1) [PCMR], or (b) in submitting any information or by not submitting any information at all under regulation 18(1) or 31(2) or (3) ... or under regulation 20 [PCMR], failed to mention any fact relied on in the officer's case at the misconduct proceedings, being a fact which in the circumstances existing at the time, the officer could reasonably have been expected to mention when so questioned or when providing such information" (Reg 41(12)), "the ... persons conducting the misconduct proceedings may draw such inferences from the failure as appear proper" (Reg 41(14)).*"

64. In relation to any findings of the Panel, Reg 41(15)(b) states:

> *"The ... persons conducting the misconduct proceedings must review the facts of the case and decide whether the conduct of the officer concerned amounts ... in the case of a misconduct hearing, to misconduct, gross misconduct or neither", with the stricture (Reg 41(16) that they "must not find that the conduct of the officer concerned amounts to misconduct or gross misconduct unless (a) they are satisfied on the balance of probabilities that this is the case, or (b) the officer admits it is the case".*

65. The Panel had the power to impose a disciplinary sanction (as identified in Reg 42(2) or (3)) or, where it found the conduct amounted to neither misconduct or gross misconduct to *"direct that the matter is referred to be dealt with under the reflective practice review process"* (per Reg 42(1)(b)). The disciplinary sanctions available to the Panel were a final written warning, a reduction in rank or dismissal. In circumstances where the Panel found (as they did here) gross misconduct, it was entitled to impose disciplinary action, up to dismissal without notice. (Reg 42(1)(a), Reg 42(3) and Reg 42(1)(b) PCR).

66. On 13 August 2022, having been dismissed, the IP had the right of appeal. Should the IP wish to appeal, *"An appeal shall be instituted by giving notice of appeal within the time prescribed by rules made under section 85",* namely, within 10 days of being given a copy of the decision, in writing to the local policing body (here, the Mayor's Office for Policing and Crime). The Interested Party could appeal to a PAT in specific circumstances defined under statute. (§3 Sch 6 Police Act 1996 ("PA96"))

67. By Rule 4 of the Police Appeal Tribunal Rules 2020 ("PAT Rules") an officer can appeal a finding of misconduct or gross misconduct to the PAT on the grounds that the finding was "unreasonable" or that there has been a procedural error. Beatson J held in *R (Chief Constable of Derbyshire) v Police Appeal Tribunal* [2012] EWHC 2280 at [37] that "unreasonable" in these Rules meant "*whether the decision on finding or outcome was within the range of reasonable findings or outcomes to which the Panel could have arrived",* i.e. the *Wednesbury* test (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223).

68. "Misconduct" is defined in the PCR as being *"a breach of the Standards of Professional Behaviour that is so serious as to justify disciplinary action".*

69. The IP was required to supply *"a statement of the relevant decision and the grounds of appeal"* within 20 working days beginning with the first working day after the day on which she was supplied with a copy of the transcript of the misconduct hearing. (Rule 13(5)(a) PAT Rules and Reg 13(7)(a) PCR).

70. Under Rule 13(9) PAT Rules the Commissioner was required to provide a statement of his response to the appeal within 20 working days.

71. The PAT Chair was then obliged to *"determine whether the appeal, or one or more grounds of appeal, must be dismissed". "An appeal, or a ground of appeal, must be dismissed under this paragraph if the chair considers that the appeal, or ground of appeal, has no real prospect of success, unless the chair considers there is some compelling reason why the appeal, or, as the case may be, ground of appeal, should proceed".* If minded to dismiss (a ground of) the appeal, the Chair is obliged to give the parties written notice of her view and reasons. (Rule 15(1), Rule 15(2) and Rule 15(3) PAT Rules).

72. On 8 December 2022 the IP made representations in relation to an appeal. (Rule 15(4) PAT Rules).

73. On 15 December 2022 the PAT Chair decided that, in the light of those representations, *"it no longer seems possible for me to say that the appeal has no reasonable prospects of success".* The appeal not being dismissed, the Chair had to decide whether it should be dealt with at a hearing (or on the papers). (Rule 15(5) and Rule 16(1) PAT Rules).

74. At the Appeal on 23 and 24 April 2023 the PAT was required to determine *"whether the ground or grounds of appeal on which the appellant relies have been made out".* (Reg 26(1) PCR).

75. Where the PAT determines that *"a ground of appeal under rule 4(4)(b) or (c), … or rule 6(4)(b) or (c) has been made out, the tribunal may set aside the relevant decision*

and remit the matter to be decided again" under the PCR. (Reg 26(2) PCR). This must be by a fresh misconduct hearing panel. (Reg 26(3) PCR).

76. On 31 March 2023 the PAT Chair prepared a written statement of the PAT's determination of the appeal and the reasons for the decision. (Reg 26(5) PCR).

77. The allegations that were set out under Regulation 30 PCR against the IP which amounted to misconduct/gross misconduct were as follows:

> *"**ALLEGATIONS***
>
> *Failing adequately to investigate the offences reported by [DKB] and in particular:*
>
> *36.1 You did not arrange for the arrest of [DS] for either Harassment or Voyeurism notwithstanding:*
>
> *36.1.1 the numerous complaints and incidents set out above.*
>
> *36.1.2 The fact that the APP (College of Policing Authorised Professional Practice) on domestic abuse confirms that officers have a duty to take positive action when they deal with domestic abuse incidents;*
>
> *36.2 You did not interview [DS] notwithstanding:*
>
> *36.2.1 the numerous complaints and incidents set out above.*
>
> *36.2.2 the Instruction set out in para 5 of Det. Sgt Lynch's plan of action; Although you arranged to interview him on three occasions you cancelled each appointment and did not set a further interview date after the final cancellation.*
>
> *36.3 You did not seize [DS's] electronic devices notwithstanding:*
>
> *36.3 .1 the numerous complaints and incidents set out above.*
>
> *36.3.2 the Instruction in para 5 of Det. Sgt Lynch's plan of action;*
>
> *36.3.3 Downloading of [DS] mobile phone NO 07538339420 would have revealed as at 10th March 2020: DKT/TEl/15 - chat string between [DS] and [XS] on 28th Jan 2020 relating to delivery/receipt of the lightbulb camera and concealment thereof; DKT/TEl/10 - a chat string with [XS] on 31st Jan 2020 relating to the delivery/receipt of the lightbulb camera; an image of the said lightbulb camera; DKT/TEl/11 - an image sent to [DS] by [XS] of a voice recorder; text messages between [DS] and [ZS] dated 9th Jan 2020 and 2nd Feb 2020 to 5th Feb 2020 relating to the lightbulb camera.*
>
> *36.3.4 You did not take any witness statements as set out in the action plan set out for her by Det. Sgt Lynch on 19 February on both crime reports. Nor did you examine the light bulb or take steps to see who it was linked to;*

36.4 You did not take any action after [DKB] reported further harassment by [DS] on 23 February, despite a statement being provided by [DKB] and exhibits showing the harassment.

36.5 You did not take any action after [DS] turned up at [DKB's] home on 20 March, despite response officers attending and finding him there.

36.6 During the points of time when [DKB] indicated she would not support a prosecution you failed to give any proper consideration to pursuing an evidence led prosecution. The APP on domestic abuse confirms: "Police officers should not base a decision to arrest or not to arrest on the willingness of a victim or witness to testify or otherwise participate in judicial proceedings. Officers should focus efforts on gathering evidence in order to charge and build an evidence-led prosecution case that does not rely entirely on the victim's statement."

36.7 In any event you failed to take any positive step after being told expressly by [DKB] on 9th March 2020 that she wished to support police action.

36.8 On 30 March 2020 you recommended the closure of both crime reports as you said [DKB] "does not wish to substantiate the allegation". This was despite your having statements including from [DKB], exhibits and evidence already collected, and lines of enquiry still to pursue that could have supported a victim-less prosecution.

36.9 In support of closure of both crime reports you wrongly and knowingly assured your superior Det. Sgt Kilmartin that the instructions in Det. Sgt Lynch's action plan of 19th February had all been fulfilled when they manifestly had not.

36.10 At all times you failed to record your actions on the crime reports and to regularly update them."

The Guidance on "Outcomes in Police Misconduct Proceedings"

78. Pursuant to section 87 of the Police Act 1996 the College of Policing has produced guidance on outcomes in police misconduct proceedings. The relevant Guidance applied by the Panel and the PAT is dated 2017, although revised Guidance was produced in 2022.

79. At paragraph 2.3 it states that the purpose of the police misconduct regime is threefold; to maintain public confidence in and the reputation of the police service; to uphold high standards in policing and deter misconduct; and to protect the public. A number of cases are cited to support these purposes.

80. At paragraph 4.10 there is a section on culpability which is particularly relevant. Paragraphs 4.11 and 4.12 state:

"4.11 Conduct which is intentional, deliberate, targeted or planned will generally be more culpable than conduct which has unintended

consequences, although the consequences of an officer's actions will be relevant to the harm caused.

4.12 Where harm is unintentional, culpability will be greater if officer could reasonably have foreseen the risk of harm."

81. Paragraph 4.25 states: *"Honesty and integrity are fundamental requirements for any police officer. Treat any evidence that an officer is dishonest or lacks integrity seriously."*

The Misconduct Panel Decision (references to paragraphs in the Panel Decision Letter are to "PDx")

82. The Panel consisted of a legally qualified chair (Cameron Brown QC), a police representative and a lay representative. They sat over six days and heard evidence from the IP and a number of other police officers involved in the case. Both the IP and Claimant were legally represented, the IP by Ms Williamson of Counsel. The IP was cross examined and extensive legal representations were made on her behalf.

83. From PD45-138 the Panel set out the factual history, as summarised above. At points they set out their views and conclusions on certain factual matters. The most relevant paragraphs are as follows:

"a. At PD54: 13 February 2020 - DKB said she was happy to attend court and she wanted action taken as matters were escalating. The Panel considered this to be a marked change from her earlier position on 1 February 2020 "and the effective end of any form of relationship with [DS]";

b. At PD58: 16 February 2020 – it would have been clear that the CAD had been closed in error, and this should have been followed up by the IP;

c. At PD72: 23 February 2020 – the IP's failure to review the BWV of the interview with DKB from 13 February as a "significant failing" by the IP;

d. PD77-80 state:

"77. [The IP] stated in her response to caution that she contacted [DKB] on 20/21 February and on 26 February when she returned from leave. In relation to the latter date, she stated that [DKB] revealed to her then that she was in an on/off relationship with [DS]. In her interview the [IP] stated that [DKB] was saying she was still in a sexual relationship with [DS] and that therefore she considered any harassment charge be undermined. The [IP] says that [DKB] told her she was only reporting [DS] to police because her friends did not like them being together.

78. The Panel determined in fact that the [IP] did not make contact with [DKB] on either 20/21 and/or 26 February, contrary to what she stated, and in fact did not make actual contact with her until 9 March 2020. She made it clear in the messages of 26 February that she had not made

contact and it was similar position in the messages of 9 March, that she had not made contact prior to that date.

79. In the absence of such contact there would been no opportunity for [DKB] to state that she was in an "on and off' relationship on or around 26 February, when the [IP] had returned from leave. Furthermore, the Panel noted the absence of any such reference to an "on/ off" relationship in the crime reports, including the entry on 9 March (see below), or indeed any reference to that type of relationship in the BWV they have viewed of [DKB] up to that date. In fact the evidence from [DKB] indicated that far from being in "on/off" relationship she wanted action taken against him, per the statement given to PC Mirza on 23 February 2020.

80. The Panel determined that this was deliberately mentioned by the [IP] as an attempt to "muddy the waters" as to her approach to [DKB] and justify her lack of action. While not asserted again before the Panel, the Panel determined that this was particularly distasteful."

e. PD 87-90: 6 March – DS Kilmartin eliminated DS as a suspect on CRIS, giving the reason that DKB was unwilling to prosecute. The Panel found this was clearly an error. The IP said in evidence that this "effectively brought investigation to an end, but she had carried on regardless". The Panel rejected the IP's evidence, saying at para 91:

"91. The Panel do not accept that the above occurred for a number of reasons:

a. That she had taken witness details on 9 March, again which is at odds with a closed investigation;

b. That on 11 March 2020 Det. Sgt Kilmartin had asked for an update on the case, which is clearly entirely at odds with the proposition that the investigation had been closed down. In a further entry he had put "OIC is progressing." If that had been her thinking, that the investigation was over, the entirely natural response would have been to question Det. Sgt Kilmartin as to why he wanted an update if the investigation had been closed;

c. That she had continued to attempt to interview [DS];

d. That she had not mentioned the communication on 19 March from Det. Sgt Kilmartin to not interview [DS] in her interview or response to caution, which would have been an important feature of her case in relation to the alleged failure to interview [DS]. This communication was not recorded on the crime reports and appeared at odds with the entries by Det. Sgt Kilmartin on 11 March. It is also at odds with her reasons for cancelling the interview on the 24 March, where it was not mentioned and in fact she would speak to her boss. It was not put to Det. Sgt Kilmartin in cross examination - the Panel did not take the view that this was an oversight. While this communication was set out in her regulation 31 response at §95, "On 19th March 2020 she arranged a further interview

for 25th March 2020, but that interview was cancelled because DS Kilmartin informed her that she no longer had grounds to interview [DS] because [DKB] was unwilling to substantiate any of the allegations. The Panel noted both crime reports indicated from 9 March that [DKB] wished to support a prosecution because [DS] was continuing to harass her. There is nothing from 9 March - 19 March to indicate the position had changed. The Panel determined that this alleged communication with DS Kilmartin did not take place and no such instruction had been given."

f. PD92-98: 9 March –

"92. At 9.30am on 9 March the [IP] accessed the harassment crime report, and at 9.32am she sent [DKB] the following email: "I am the officer in your case and I have been trying to make contact with you. I have left voicemail and texts for you. I'm not sure if you have received [sic] my contact and therefore I am emailing you. Please can you call me or email me as soon as possible so we can speak".

The Incorrect Entry

93. At 10.43am on 9 March the [IP] updated the harassment crime report with the following entry:

"I have checked the cad and the arrest enquiry was cancelled as [DKB] had said she did not wish to substantiate the allegation. [DKB] stated that so much has happened she may have said this. [She] states she does wish to substantiate the allegation as [DS] is continuing to contact her. I have also taken the witness details and I have updated the report."

94. This is the first entry on either of the crime reports that records a conversation between the [IP] and [DKB].

95. In her interview she had been unable to offer an explanation as to why it read she was continuing to contact her if she did not want to substantiate the allegation.

96. However, in her evidence the [IP] stated that in fact, per her regulation 31 response, the update was wrong, in that it should have read that she did not wish to substantiate the allegation as [DS] is not continuing to contact her. She blamed her dragon dictation software for the error.

97. The Panel considered carefully this part of the [IP's] evidence and rejected it for the following reasons:

a. That although not impossible, the Panel considered it unlikely that the dragon software would have omitted the negative propositions not once but twice;

b. The Officer confirmed that as she dictated she would see her words appear on the screen. In those circumstances she would have noticed that

it was wrong on two occasions. The Panel considered it was unlikely that her medical conditions would have prevented her from identifying what was on the screen in front of her on two occasions or that these amounted to typographical errors;

c. That [DKB] on 23 February had wished to pursue matters and on 11 March had sent her a series of email and screen shots - see below;

d. That the impact of [DS] being eliminated as a suspect on 6 March by Det. Sgt Kilmartin and an indication by [DKB] that she did not wish to support any prosecution may have brought to an end any further investigation. However, the [IP's] conduct thereafter is strongly suggestive that she intended to continue with a prosecution, which was inconsistent with the case coming to an end on 6 March or [DKB] indicating she did not want to move forward on 9 March. For example: -

i. Within the crime report she indicates that she has taken witness details from [DKB];

ii. At 10.49 she updated the crime report to say that she had contacted [DS] and asked him to attend for interview. She continued thereafter to attempt to arrange to interview [DS]. While the [IP] stated in her evidence that she did this because she in effect wished to carry on with her enquiries, the Panel did not accept that this is what happened. The Panel considered that she was continuing to try to interview him as [DKB] was still supportive of a prosecution.

e. Following a conversation on 30 March, [DKB] had indicated she no longer wished to pursue the case against [DS]. This in turn had led to the [IP] recommending the crime reports be closed on 6 April. Notwithstanding that, on 9 March when [DKB] had allegedly told her she no longer wished to pursue the case, the [IP] had not closed the crime reports and carried out active enquiries thereafter. There did not appear to be justification for the differing positions.

98. The Panel determined that the [IP] had again attempted to mislead about her actual contact with [DKB], this time on or around 9 March. The Panel found what was actually recorded on the crime report to be an accurate report. The Panel found this particularly distasteful, in view of the clear inability of [DKB] to be able to correct the position. The Panel considered that the [IP] had deliberately attempted to mislead the Panel in an attempt to cover up for the lack of substantive action taken by her between 9 March 2020 and 30 March 2020."

g. PD140 onwards: The Panel set out its findings of fact in respect of the allegations. They found all the allegations save, 36.5, 36.9 and 36.10, proven.

h. PD173: The Panel noted that as allegation 36.9 was the only allegation where the standard was that of "honesty and integrity", the IP's conduct was not reviewed against that standard.

i. PD177: The Panel considered the IP's conduct against the duties and responsibilities standard and found that it amounted to a clear breach of the standard.

j. PD180: The Panel found that the breaches of the standard amounted to gross misconduct:

"180. The Panel concluded that the breaches of the standard set out above do amount to gross misconduct. When deliberating on this the Panel had reminded itself of the need to protect public confidence in and the reputation of the Police Service, the need to maintain high professional standards and the need to protect the public and officers and staff by preventing similar misconduct in the future. Save for those parts the Panel did not rely upon, the Panel also took into account the full factual matrix in finding that the [IP's] conduct amounted to gross misconduct."

k. PD181 onwards: They considered Outcomes, relying on the College of Policing Guidance.

l. PD190: The Panel summarised the submissions made by Ms Williamson on behalf of the IP and specifically referred to the fact that she suffered from dyslexia and dyspraxia. They also referred to the submission that her team had been overwhelmed with work and that she had not had adequate supervision.

m. PD190(e) states: "In relation to culpability, the Panel was asked to consider the very challenging nature of her role in the CSU - she was part of a team overwhelmed with work. She was the only PC investigator and suffered from both dyslexia and dyspraxia";

n. PD192 states:

"In relation to culpability, the Panel considered that [the IP] was entirely responsible for her actions. She was set a clear task list by DS Lynch and did not carry out the actions required of her. She failed to mention the task list in sending the case for closure. She had attempted to mislead investigators in some of her responses in interview and the Panel as to the nature and scope of her contact with [DKB]. The Panel considered the conduct was serious and that [the IP] could have reasonably foreseen the risk of harm."

o. At PD195 the Panel set out a series of aggravating factors, including that there had been previous PDRs (Performance Development Reviews) and warnings in relation to earlier behaviour of the IP:

"... 195(c): c. Continuing the behaviour - the Panel noted the history of her PDR, the warning given to her in January 2020 and the warnings given to her during the conduct in question;"

p. At PD196 the Panel set out the mitigating factors which had been put to them and they took into account:

> *"196. In terms of mitigating factors/ personal mitigation, the Panel noted the following:*
>
> *a. Disability, medical conditions and stress which may have affected the officer's ability to cope with the circumstances in question - she was undoubtedly under considerable pressure working in the CSU;*
>
> *b. [The IP's] other personal mitigation, set out in her regulation 31 notice;*
>
> *c. While there was evidence of remorse expressed by her Counsel on her behalf, this had not been evident to the Panel when she gave her evidence and in fact she had attempted to mislead investigators and the Panel as to the extent of her culpability.*
>
> *d. There were a large number of powerful references in support of her, which the Panel gave considerable weight to. [The IP] had no disciplinary record.*
>
> *However, the Panel bore in mind the "limited weight" that can be given to personal mitigation."*
>
> *q. As part of the Conclusions, PD198 stated:*
>
> *"The Panel is satisfied that the serious breaches of the standard, as we have found, are not compatible with [the IP's] continued service as a Police Officer and that the need to protect public confidence in and the reputation of the police service , the need to maintain high professional standards and the need to protect the public and officers and staff by preventing similar misconduct in the future is appropriately served by the sanction of Dismissal without Notice."*

Police Appeal Tribunal Decision (references to paragraphs in the Decision Letter are to "DLx")

84. The PAT consists of a legally qualified chair (here, Rachel Krasnow KC), a police member and a lay member.

85. On 13 August 2022 the IP put in a Personal Statement for the Appeal. In that document she reiterated her factual case, saying *"I can categorically swear that she [DKB] said to me she did not want to substantiate the allegation".* The IP continued to maintain that she had not misled the Investigator and the Panel and that she had taken the various steps that she had claimed. She is entirely clear in that statement that the evidence she gave was true. At paragraph 16 there is a section headed "How my dyslexia impacted on my ability to carry out my role". That states:

> *"16. As a result of my dyslexia and dyspraxia, I found it difficult to:*
>
> *a) spell words and my grammar often appears flawed or child-like.*
>
> *b) multi-task and do different things at the same time. I need to do one thing at a time.*

> *c) read and digest information. I need to re-read documents often several times before I can digest and understand it and act on it. I always need extra time.*
>
> *d) quickly draw conclusions and make my own salient points before I can progress with the task.*
>
> *e) Find the right words when I type or dictate especially if I get distracted or it is a noisy environment (such was the CSU on virtually every day).*
>
> *f) concentrate unless I am given time and space i.e. left alone.*
>
> *g) retain/maintain a line of thought if I am interrupted.*
>
> *h) read back what I have typed and spot errors.*
>
> *The busy office environment of the CSU and exposure to the Response teams' radios, officers walking in and out constantly asking for help and distracting me is a source of disruption to the flow of thoughts and concentration. NB: concentration is hard enough without an exceptionally busy and noisy environment. I also had a CSU mobile buzzing every few minutes with officers asking for advice."*

86. The IP's lawyers submitted a 54 page Grounds of Appeal document. The first Ground in this document was disability (see para 4A) and the second ground was discrimination arising from disability (see para 5A). This document is undated but it must be assumed to have been lodged with or very close to the time of the personal statement.

87. The Grounds of Appeal rely on no medical evidence, and produce no evidence linking the issues raised in the OH report of 2014, with the failures found by the Panel. All the linkages asserted in the Grounds of Appeal are asserted by lawyers, and not supported by either psychiatric or psychological evidence.

88. At no point in her Personal Statement did the IP suggest that the evidence she gave was not correct in material regards because of anything related to her disabilities or her overwork and poor supervision. Those factors are extensively relied upon for her failure to progress the investigation but not for her having given misleading evidence to the investigator and the Panel.

89. On any analysis, when the matter came before the PAT, the IP's case had significantly shifted from the case before the Panel. Mr Roberts, who represented the IP before the PAT but not before the Panel, in his written representations on behalf of the IP to the PAT, summarised the Grounds of Appeal as follows:

> *"5. The Appellant has provided detailed Grounds of Appeal in her 54-page document. However, the headline grounds can be summarised as follows:*
>
> *5.1. Disability: this concerned the Appellant suffering from dyslexia, dyspraxia, and anxiety-related cardio-pulmonary difficulties and stress. In particular, this ground considers the [Metropolitan Police Service] (MPS') obligations (including those of the [Appropriate Authority] (AA)*

> *and the Panel) under the [Equality Act 2010] (EqA). Specifically, the Grounds of Appeal address the issues of indirect discrimination (section 19 EqA), failure to make reasonable adjustments (section 20 EqA) and discrimination arising from disability (section 15 EqA);*
>
> *5.2. Failures of Supervision;*
>
> *5.3. Collective and Systemic Failures of MPS;*
>
> *5.4. Unreasonable Investigation;*
>
> *5.5. Unfairness and unreasonableness in MPS' inconsistency of treatment of the Appellant's conduct at different times; and*
>
> *5.6. Other unreasonable findings within the Panel's decisions.*
>
> *6. While the Grounds of Appeal are detailed (and must be read alongside these Representations) it submitted the crux of the appeal is that the Panel acted unreasonably by:*
>
> *6.1. Failing to conclude the allegations amounted to performance concerns, not misconduct (let alone gross misconduct);*
>
> *6.2. Failing to adequately take account of the Appellant's role, the lack of supervision she received, the performance issue she had experienced and the effects of her disabilities. All of this was evidence before the Panel, which was not properly considered;*
>
> *6.3. Deciding to impose dismissal as a sanction (including failing to have regard to the Appellant's circumstances and disability and concluding mitigating factors were, in fact, aggravating factors); and*
>
> *6.4. Breaching the principles of natural justice and acting unfairly (as addressed in the Grounds of Appeal but, most specifically, in finding the Appellant had misled). Further, that conclusion was unreasonable on the evidence before the Panel."*

90. In his written and oral submissions before the PAT Mr Roberts made extensive reference to the IP's disabilities, described as dyslexia and dyspraxia, and the Panel's failure to properly address the impact of those disabilities on the allegations made against her. He argued that the Panel had misunderstood the impact of dyslexia as a neurodiverse condition, see paragraph 35 of his written representations.

91. Mr Roberts' argument was that if the IP had failed in the ways found by the Panel then that did not amount to misconduct but was rather a failure of performance, attributable to her disability. It should therefore have been dealt with under the Regulations as a "performance" issue rather than a "conduct" issue.

92. A preliminary point was taken by the Claimant (described in the DL as the Appropriate Authority ("AA")) that the PAT should not consider the appeal as put because new points were being raised. The PAT rejected this at DL33. The basis of the way the IP's case was now being put and the PAT's first key finding is set out at DL35-38:

*"**ANALYSIS OF APPEAL***

30. We have looked at the decision of the Misconduct Panel below in detail (as set out in the box above).

31. The first question we ask ourselves is whether we are obliged to consider the appeal arguments if it is the case that they were not raised or presented below in the way they are now. The Appellant's counsel says the points were there below, and that even if they were not, the Panel ought to have considered them because of the public sector equality duty (PSED) under s149 Equality Act 2010 (EqA), and that in any event we the PAT ought now to consider the new points because of the binding nature of the PSED upon us.

32. The Respondent says we are barred from addressing new points upon appeal and that the Appellant could have raised such points below through her legal representatives.

33. Our view is that there is, in fact, no issue to be determined on this preliminary point since:

a. There was no new evidence before us, given that the documents in Bundle 3 we have been shown were actually before the Panel in Bundle 1 (such as the investigators' emails) and the coloured table identifying the unit's workload in Bundle 3 is not new evidence but a reformulation of the raw data which was before the Panel.

b. Similarly on the issue of taking new points of law at the appeal stage: on the issue of whether the Appellant's behaviour was "performance" rather than a "conduct" issue, which is a main thrust of the appeal submissions before us, whilst the AA averred this was a new point of law in its written submissions before us, such denial was not the focus of Counsel's oral submissions and we are content that this issue was before the Panel both in written submissions [such as in Bundle 2 pages 102-3] and also orally [Bundle 1: Transcript page 591]. We do not therefore need to, and will not decide the s149 EqA 2010 point, but we observe if we had, we believe both us and the Panel below are exercising a judicial function and therefore pursuant to paragraph 3(2) to schedule 18 of the EqA 2010 the PSED does not apply to us or Panel below.

34. Moving on to consider the grounds of appeal in substance, we recognise at all times the need for caution before disagreeing with a decision reached at a Misconduct Hearing by a decision maker who is well qualified for that task. It is only if the Appellant has been able to pass through the rule 6(4) gateway by persuading us that the Panel's decision was unreasonable or unfair that it is open to us to either substitute our views for those of the Panel below or remit the matter to be decided again pursuant to Rule 26(2) and (3) of the 2020 PAT rules.

35. The parties refined their arguments before us and the Appellant sensibly focused on her best points of appeal and those on which she now

wished us to make determinations. The key appeal point relates to the performance versus conduct issue. The Appellant's representative explained that her first limb of defence at the Misconduct Hearing was "I did not do factually what I was accused of" but that her defence was also "if I am wrong about the facts I contend my behaviour was a performance matter rather than misconduct." The factors relevant to performance included the Appellant's disability, past performance, her overloaded workload, the Respondent's knowledge of her disabilities and failure to maintain adjustments to her duties or to supervise her adequately. The issue of performance was raised by the Appellant but not adjudicated upon. Further the personal circumstances which impacted upon her performance were before the Panel below, being set out in her Regulation 31 notice, in the written closing to the Panel at paragraphs 54-61 (Bundle 2 at pages 102-4) as well as featuring in the oral submissions by Ms Williamson, Counsel for the Appellant at the Misconduct Hearing.

36. Upon appeal the factual matrix is not challenged save to a minor extent (considered below), but whether the proven behaviour might amount to a performance issue rather than one of misconduct was not considered by Panel and they have included no analysis or determination on this issue in their decision. Given the potential significance of the issue, we find that before rejecting such a submission, the Panel would have to have weighed up and shown they had weighed up these arguments.

37. We usefully heard from the parties about the potential significant evidence given by the Appellant before the Panel below, which was in essence: "if my line manager had not stopped me, I would have and could have done it all". The AA says the Panel were entitled to take the Appellant at her word and thus we should find they rightly decided her behaviour was a conduct matter However the Appellant's Counsel contends we must be careful to understand the Appellant's learning difficulties (and referred us to the Equal Treatment Bench Book). He identified the differentiation between the Appellant's factual case and her legal case, which relied upon the omissions – whether proven or not - to be matters of performance related to disability. We accept the Appellant's submissions that her evidence before the Panel does not rule out a consideration of her case on performance. We can see that the Appellant was keen to do interesting work and she may have found it difficult to concede she was not up to the job without adjustments and possibly – and we make no finding on this – should not have been given this job or this case to investigate.

38. Since there is no determination upon the Appellant's legal case that her behaviour was matter of performance not conduct, we find this is both unreasonable under rule 6(4)(a) and an unfair procedural irregularity pursuant to rule 6(4)(c) of the 2020 Rules."

93. The language used both by the PAT and the parties is somewhat opaque. The case being advanced in the PAT was that if the Panel was correct in its findings of fact, contrary to the IP's own evidence, then she had failed to tell the Panel the truth by reason of her disability, overwork and poor oversight. This was only a "legal case" in

the sense that it appears to have been advanced by the lawyers, rather than in any evidence from the IP herself. It was in truth an alternative case being advanced in the light of the Panel's unchallenged conclusion that the IP had not told the truth in a number of key regards.

94. It should be noted at this point that the PAT referred throughout to the wrong regulation, citing Regulation 6 rather than Regulation 4. Regulation 6 applies to officers who are no longer employed. However, both parties accept that this error made no difference to the outcome.

95. After having found a breach of rule 6(4)(a) and (c) at DL38, the PAT then went on to consider whether they should deal with the matter themselves or remit the case. At the end of DL40 they say:

> *"… We note that the AA agrees (at least in part) that the past PDRs were linked to disability. So the case on this issue needs to be remitted as the causal link between disability and performance must be examined, along with a consideration of those omissions, in order to decide if they were conduct or performance-related."*

96. They then turned to the factual findings which were the subject of challenge.

97. At DL43 they said:

> *"On the findings about the Appellant having misled the Panel identified at paragraphs 80 and 98 of the Panel decision and relied upon at paragraph 192 in relation to culpability (Bundle 2 page 56) and as a factor against mitigation at paragraph 196c (Bundle 2 page 57): we have considered whether it was unreasonable or unfair to make such findings in circumstances where the Appellant was not given an express opportunity to answer the point, before it was held against her. We note from the transcript - and from Mr Jenkins having very properly informed us -that he made submissions on the question of misleading but did not cross-examine the Appellant on it. We find the appeal succeeds on this ground under rule 6(4)(c). We find she cannot reopen the factual findings in paragraphs 80 and 98 save as to those matters on which she has not had an opportunity to comment thus far, that is, did the Appellant deliberately attempt to mislead the investigators and/or the Panel and, if so, whether this was distasteful because of the demise of DKB. This is a procedural point: upon remittal the Appellant should be given that opportunity to comment on whether she intended to mislead so the fresh panel can consider her evidence before making any observation on it including as to sanction."*

98. At DL45 they found that the Panel had failed to give "appropriate weight" to the Appellant's circumstances. At DL46-47 they essentially made the same point in respect of the Panel not taking into account her circumstances when considering her culpability for the default:

> *"46. There is additionally in our view an error of law in para 192 of the Panel decision in consideration of culpability, in that the Panel failed to*

> *take into account any consideration of the Appellant's circumstances when finding "she was entirely responsible for her own actions". This ignores the acknowledged and known difficulties the Appellant faced as a result of her dyslexia and dyspraxia as well as challenges arising from the unit's heavy caseload, her lack of adequate supervision and her need for adjusted duties. We note the test for culpability is –*
>
> *Conduct which is intentional, deliberate, targeted or planned will generally be more culpable than conduct which has unintended consequences, although the consequences of an officer's actions will be relevant to the harm caused."*

99. They summarised their conclusions at DL50:

> *"In summary those parts of the original decision which can be revisited or reopened are:*
>
> *a. The factual findings as to the "misled" issue in relation to paragraphs 80 and 98 of the original misconduct hearing decision;*
>
> *b. Whether the behaviour in question was a performance or conduct issue. Alongside the question of performance, the fresh panel will be able to examine the impact of the Appellant's circumstances on her behaviour in question. At the fresh hearing it will be a matter for the Appellant as to how she proves the causal link between her behaviour and disability in February and March 2020, whether by expert evidence or otherwise;*
>
> *c. If the Panel, having properly considered the issue, decides that the behaviour is essentially conduct-related, whether this amounts to misconduct alone or gross misconduct. The Panel may therefore consider whether the performance-related circumstances of the Appellant - including disability as well as her workplace circumstances such as caseload and lack of supervision - have a bearing on the standard of conduct in question;*
>
> *d. The outcome decision (including the aggravating and mitigating factors) will be taken afresh as the conclusions to the issues above will clearly impact on the question of outcome."*

The Grounds

100. The Grounds of Challenge have considerable overlap between them. The Grounds can be summarised as follows:

> a. Ground One – the PAT was wrong to hold at DL36-38 that the finding of gross misconduct was unreasonable. There was more than sufficient evidence upon which the Panel could reasonably conclude that there had been gross misconduct. The Panel had appropriately considered whether the IP's actions amounted to performance issues and not conduct issues and had reached a reasonable conclusion.

b. Ground Two – the PAT at DL43 wrongly impugned the Panel's findings at PD80 and 98. The PAT found that the Panel had acted procedurally unfairly in not expressly putting to the IP that she had sought to mislead the Panel (and the Investigator). However, the PAT left undisturbed the Panel's findings that the IP had not been truthful in key parts of her evidence, so they necessarily accepted that she had misled the Panel. There was no procedural unfairness in the way the Panel put the allegations to the IP and the IP had a full and appropriate opportunity to put her case in all material respects. The Panel erred in not asking itself (or the IP's counsel) what she would have said if it had been directly put to her that she was seeking to mislead the PAT. The IP's case was clear, and asking any further questions could have made no possible difference. Further no medical evidence had been adduced (or sought to be adduced) explaining why the IP's untruthful evidence to the Panel was in any way related to her disability.

c. Ground Three – the Panel was wrong at DL43 to find that there was an error of law in the PAT not giving "appropriate weight" to the IP's personal circumstances.

d. Ground Four – the PAT wrongly found an error of law in the Panel's approach to the IP's culpability at DL46 and 47. The Panel considered the case that was put to it.

e. Ground Five – the PAT was wrong to determine at DL48 that it was unreasonable and unfair for the Panel to refer to the IP's Performance Development Reviews ("PDRs") as aggravating features given that the PAT considered these related to the IP's disabilities.

101. There are three preliminary points before turning to the Grounds. Firstly, this is a judicial review of an expert tribunal, the PAT. Therefore to be successful the Claimant must show an error of law by the PAT, and if the challenge is on reasonableness grounds, then the test is ***Wednesbury***. A judicial review court will be slow to overturn an expert tribunal on matters that fall within its expertise. However, this is a statutory scheme where the PAT itself was overturning the decision of a specialist tribunal, which had heard the oral evidence.

102. Secondly, Mr Basu throughout his submissions refers to the PAT only having jurisdiction to allow an appeal on the grounds that the finding of misconduct was unreasonable. He submits that the PAT is not considering whether a finding of fact is itself unreasonable. However, in my view, and Mr Basu largely accepted this in Reply, a finding that the PAT's ultimate decision was not reasonable, will necessarily to some degree rest on its view as the Panel's approach to the primary findings of fact. There is therefore necessarily some nexus between the primary findings and reasonableness of the ultimate conclusions.

103. Thirdly, it is clear from the Outcomes Guidance and the caselaw that at the heart of the entire process is the need to ensure that public confidence is retained in the police.

The Claimant's Case

Ground One

104. Mr Basu submits that there was more than sufficient material upon which the Panel could lawfully have found gross misconduct. The IP had been found to have failed to conduct the required investigatory steps; failed to deal properly with the perpetrator, including not having him arrested; and a number of serious failings of professional standards. The PAT has failed to address the correct legal question, namely whether the finding of gross misconduct fell within the range of reasonable responses applying the Wednesbury test, on the facts which the Panel had found and which the PAT did not overturn.

105. The dispute before the Panel was whether the IP had taken the actions that she alleged or not, and whether she was justified in the steps she had taken because of what DKB had said to her and the directions she had been given, i.e. it was a case concerning factual dispute as to what had happened. At that stage of the process that was undoubtedly the way that both parties were framing the issues.

106. In her response to the Regulation 17 notice, the IP was clear as to her evidential position. The IP's case before the Panel was squarely that she was telling the truth and the three key incidents had occurred.

107. Firstly, the IP alleged that on 26 February 2020 DKB had told her that she and DS had continued to be in an "on-off" sexual relationship. This led the IP to feel that any harassment charge would be undermined. The Panel dealt with this at PD77-80 and concluded that the IP's evidence was not true and that she had deliberately mentioned the alleged on-off sexual relationship in order to "muddy the waters".

108. Secondly, the IP alleged that DS Kilmartin had closed the case on 6 March 2020, and that he had told her not to interview DS. The Panel rejected the IP's case at PD87-91.

109. Thirdly, that on 9 March 2020 DKB had told the IP that she did not want any further action taken. The IP alleged that the entry on the crime report was wrong for that date and should have said that that DKB "does not wish to substantiate the allegation". The IP alleged the entry was a failure of the Dragon software. The Panel carefully considered this at PD93-97and rejected the IP's case. Again they found that she had not been truthful.

110. Mr Basu submits that these findings were more than sufficient for the Panel to reasonably conclude that the IP was guilty of gross misconduct. The PAT did not address its mind to that issue, i.e. whether gross misconduct was open to a reasonable Panel on the basis of the findings of fact, which they did not overturn and which are not challenged by Mr Roberts.

111. He submits that the argument set out in the PAT's decision at the middle of DL37 that the omissions that they found were "matters of performance related to disability", rather than conduct, was not the way the case was put to the Panel. I note at this point, that in my view it is not correct to characterise the findings that the Panel found to be simply matters of "omission". The Panel had found that the IP's misconduct included that she had recommended the closure of both crime reports concerning DKB and had falsely

said that DKB had said she did not want to substantiate the allegation. This is both a positive act, and not merely a matter of poor performance. Further, the Panel found that the IP had deliberately sought to mislead them in the evidence she gave, that was not an "omission", it was rather a positive act. Mr Basu submits that at no point did the PAT take into account the finding that the IP had chosen to lie and had given no reason for this lie, other than to further her case.

112. Mr Roberts' answer to this ground is that the PAT were correct to say that if the Panel had not addressed the "legal case", then the decision was not reasonable. He says that a "key plank" of the IP's defence was not adjudicated upon by the Panel.

113. Mr Roberts' submission, with which I agree on this point, is that all the Grounds ultimately turn on the same issue. The PAT found that the IP had advanced a "legal" case which, in their view, the Panel had failed to address. The PAT found that the Panel had not reached a reasonable conclusion because the PAT took the view that the Panel had not, but should have, considered the "alternative case", see DL38. They then go on to make the same point in relation to whether the IP's behaviour was a matter of performance rather than conduct, by reason of her personal circumstances, see DL44; and whether appropriate weight was given to those personal circumstances, see DL45; and whether the Panel took into account her circumstances in deciding she was responsible for her own actions, see DL46-47; and when taking into account her PDRs they failed to take into account her disabilities. Therefore at every stage of the PAT's analysis it was the Panel's failure to grapple with the IP's personal circumstances, in particular her disabilities, which was key.

114. Mr Roberts submits that this is a simple case where the Panel only dealt with the first part of the IP's defence, i.e. the factual case, and not the second part, that if she did do them it was not misconduct but rather a performance issue caused by her disabilities.

115. It is for this reason that Ground One is inextricably linked to the other Grounds.

Ground Two

116. Mr Basu submits that the PAT were wrong to say at DL43 that the allegation that the IP was seeking to mislead the Panel was not put to her. The truth or falsity of her evidence was clearly put to her in cross examination and in questions from the Panel and there was no legal requirement upon them to go further than that.

117. The most relevant parts of the transcript of the IP's evidence to the Panel is at p.1378 of the bundle:

> *"a. "THE CHAIR: I wonder if we could just get back to the point that you were making a moment ago, Mr Jenkins. Just about what appeared in the interview. One of the things. What Mr Jenkins was talking about, I just want to make sure you understand the point that Mr Jenkins and then we can hear what your response is to it. One of the things he mentioned that you mentioned that he has read out to you is that you talked in the interview about their being involved in an on/off relationship. All right. What he has drawn your attention to on this page, on page 584, is there is no reference to on/off relationships within the reasons for not continuing with the investigation. All right. And so I think what Mr Jenkins is driving*

at is, why if that was a relevant factor, does it not appear in the list of reasons that we see in the CRIS report? Why would you not include that. If you thought about it in the interview, why would you not include that in the list of reasons we can see in the CRIS report?

[IP]: I don't remember, sir.

THE CHAIR: Don't remember. All right.

Just let me follow this then. What killed off this investigation, you are saying, stopped you really doing anything meaningful, you are saying, is Kilmartin's elimination of the suspect on 6 March?

[IP]: He's told me I'm going to get in trouble if I pursue this any further.

[CHAIR]: Yeah

[IP]: And that's enough for any PC to back off.

[CHAIR]: Something like that might be seared on your memory, might it not? It is something you would not forget.

[IP]: If a sergeant tells you to back off, you're not going to forget that very easily.

[CHAIR]: Yeah. Emily Cairnes interviewed you for six hours or over six hours, for a period over six hours. You remember, 22 December 2020?

[IP]: I had Covid, sir.

b. "MR JENKINS: Thank you. Can we just finish off where we were last evening, PC [IP]? It is the fact, is it not, that before yesterday afternoon you had never said that Kilmartin on 6 March, having eliminated the suspect was what prevented you from pursuing the investigation further.

[IP]: DS Kilmartin is my sergeant and it's evident on the page, on the suspect's page that this is the case. I don't need to say it, it's there.

[JENKINS]: To be fair you went through an interview spread over six hours and were asked about all these events and you never once said that it was Kilmartin's stricture or his decision of 6 March that prevented you from pursuing the investigation.

[IP]: I don't want to mention my sergeant myself, because I don't want to get bullied when I get back to work."

c. "[THE CHAIR]: Sorry, elimination of that suspect, effectively meant the end of the investigation or not? On 6 March, what did it mean to you?

[IP]: I believe it was the end of that investigation really. I should have put in a – invited him to put in a closure plan at that point. When someone's eliminated, you're supposed to do a closure plan.

[CHAIR]: So you understood at that point that was the end of the investigation and that he wanted you to put in a closure plan. So is that something he discussed with you?

[IP]: No, that's my understanding. If they eliminate somebody they don't – that means that's the end of the matter.

[CHAIR]: Yes

[IP]: Put in a closure plan, that's it.

[CHAIR]: Did he say that to you that he wanted you to put in a closure plan or did you have a discussion about that?

[IP]: No

[CHAIR]: No, but that is what your understanding was because presumably that decision had been taken is that right? Thank you.

[MR JENKINS]: You see I am suggesting to you that just is not true, he never said that to you.

[IP]: Sir, my entries are all on CRIS and I think it all speaks for itself, please."

d. "[THE CHAIR]: Just before we move on. Just in relation to "on/off" you do agree though, I think, that there is not any record on 9 March of her making reference to "on/off" or words to that effect. It is "I am with him, I am sometimes with him, I am sometimes", there is certainly no record of that on the CRIS entries we have seen. I think you would probably agree with that statement.

[IP]: Yes, I do.

[CHAIR]: Yes. Can you think of any reason why you would not have put that in?

[IP]: Because I have been told that I write too much. I ramble on, even DS Lynch told me, I ramble on sometimes. Try and keep my reports concise."

e. A little later in the transcript the police member of the Panel comes back to the "on/off relationship" and gives the IP another chance to consider her evidence.

f. "[D/SUPT WILLIAMS]: Thank you. I know we have just discussed quite a bit about this on/off relationship and that she said to you on 9th, it was an on/off relationship. Can you think of why, when she spoke to PC

Boyle on 20 March, and PC Boyle says to her "Since he was last escorted from the premises though, is this the first time he has come back?" and she says "Yes". He was last escorted on 8 February, which was six weeks previously, why would she tell PC Boyle that, and your submissions on/off relationship seem to be coming round, talking about things, sorting things out. Then she tells PC Boyle that he hasn't been there since 8 February, when he was last escorted back.

[IP]: I don't know, ma'am."

118. The question of precisely what needs to be put in cross examination, in order for a hearing (or process) to be fair, is highly context and fact specific. The ultimate question must be whether the person has had a fair opportunity to respond to any allegation, or to put their case on any important and controversial issue. In *Haringey LBC v Hines* [2010] EWCA Civ 1111 the Court of Appeal was dealing with a case concerning Right to Buy, where the Local Authority did not put to the individual that they were alleging fraud. The Court considered what needed to be put in cross examination at [34]–[39] and the key conclusion is:

"39. Haringey's omission so to put its deceit case to Ms Hines in cross-examination was in my judgment a serious omission. It is a basic principle of fairness that if a party is being accused of fraud, and is then called as a witness, the particular fraud alleged should be put specifically to that party so that he/she may answer it. That was never done in this case, as Mr Grundy accepted. As it happens, on 30 July 2010 (the day after we reserved judgment), that principle was expressly endorsed by Lewison J in his judgment in Abbey Forwarding Ltd (in liquidation) v. Hone and others [2010] EWHC 2029 (Ch) . He said this:

'46. As May LJ observed in Vogon International Ltd v. The Serious Fraud Office [2004] EWCA Civ 104 :

"It is ... elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."

47. Thus it is the case that before a finding of dishonesty can be made it must not only be pleaded, but also put in cross-examination. In Dempster v. HMRC [2008] STC 2079 HMRC alleged that certain alleged transactions were a dishonest sham. On appeal from the VAT Tribunal HMRC argued that because their statement of case before the tribunal had constituted a case of dishonesty, it was unnecessary for it to be put specifically in cross-examination to the taxpayer either that he was a knowing party to a VAT fraud, or that he knew, or turned a blind eye to the fact, that the software which he traded was fake or worthless. Briggs J said (paragraph 26):

"I emphatically disagree with that submission. First, the tribunal's summary of what was not put in cross-examination is stated with clarity

on no less than three occasions in the decision and I was provided neither with a transcript, nor notes (whether by the tribunal itself or the by the parties) of the cross-examination with which to be in any position to conclude that the tribunal's summary of the cross-examination was other than fair and accurate. Secondly, it is a cardinal principle of litigation that if a serious allegation, in particular allegations of dishonesty are to be made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross-examination. In my judgment the tribunal's conclusion that it was constrained, notwithstanding suspicion, from making the necessary findings of knowledge against Mr Dempster (necessary that is to permit the consequences of the alleged sham to be visited upon him) was nothing more nor less than a correct and conventional application of that cardinal principle."

48. I respectfully agree. These principles have had an important effect in the present case; because a number of essential building blocks in the claimant's case depend on allegations that, in the case of witnesses, were never put to them; or, in the case of third parties, on conclusions based on allegations that were never made.""

119. In *Sait v General Medical Council* [2018] EWHC 3160 Mostyn J considered the scope of the requirement to a put a case in cross examination. He said at [41] that the rule in *Browne v Dunn* was now obsolete given the procedural rules that prevent a party being "ambushed", see [41]. He did however go on to set out the dicta in that case at [42]-[44]. At [44] Mostyn J said:

"44. However, Lord Herschell was clear that if notice of the disputed fact had been given then his strictures would not apply. At page 71 he went on:

"Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

Lord Morris at page 79 put it this way:

My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that those witnesses are not to be credited. But I can

> *quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit."*

120. At [45]-[46] he said:

> *"45. In Williams v Solicitors Regulation Authority [2017] EWHC 1478 (Admin) Carr J said this about the so-called rule at [73]:*
>
> *"The rule is not an absolute or inflexible one: it is always a question of fact and degree in the circumstances of the case so as to achieve fairness between the parties. Civil litigation procedures have of course moved on considerably since the 19th Century. Witnesses now have the full opportunity to give their evidence by way of written statement served in advance, and then verified on oath in the witness box."*
>
> *46. It is impossible to conceive that the modern system of pleadings, witness statements and skeleton arguments will not give the necessary notice of impeachment of credit. The modern system requires all cards to be put face up on the table and forensic ambushes are basically impossible."*

121. Mr Basu relies in particular on [44] above and the test Lord Herschell set in ***Brown v Dunn*** that the witness must be given an opportunity to respond to an allegation. The IP here was given plentiful opportunity to deal with the issues in evidence. He submits that the Panel, having rejected the IP's factual evidence and found that she had given untrue evidence on a number of important points, were entitled to conclude that she had chosen to mislead the Panel and the investigator. These were findings of fact that they were entitled to reach. There was no obligation on the Panel to ask her "are you trying to mislead us?", both because it adds nothing but also because there is nothing more than she could have said.

122. Mr Basu refers to the IP's response to the Investigator:

> *"… as far as I am concerned she [DKB] did not wish to substantiate the allegation and I'll stand firm by that. … I can categorically swear that she said to me she did not want to substantiate the allegation."*

123. He submits that the PAT asked itself the wrong question. The question is whether the alleged unfairness could have affected the outcome, when there was no more that the IP could have said even if she had been given "an express opportunity to answer the point" (DL43).

124. He submits that the IP's evidence remained consistent between the Panel and the Appeal. She said in her Personal Statement to the PAT that her evidence to the Panel had been true and the Panel's error was that they had reached the wrong conclusions on

the evidence. Therefore there can be no doubt what the IP would have said to the Panel if they had directly asked her "are you seeking to mislead us?".

Ground Three

125. At DL45 the PAT found that the Panel had failed to give "appropriate weight" to the IP's personal circumstances. The PAT had earlier found that the Panel had failed to address the IP's learning difficulties and the impact of her disabilities on what had occurred.

126. Mr Basu's submission is that the PAT did take into account personal circumstances when considering mitigation at PR196(b), including referring to the IP's Regulation 31 notice. It is important to understand the way that the IP's personal circumstances were being put before the Panel in Ms Williamson's Closing Submissions:

> *"In my submission, it is relevant again here, the fact that the officer was working in extremely pressured environment, where she, as you will have seen, quite eloquently expressed in some of the character evidence, she is an officer who performs well under close supervision with clear, simple tasks to follow, but has clearly not performed well in this investigation that you are concerned with where she was juggling multiple tasks and clearly overwhelmed with the nature of the role. It is also relevant, when you are considering her own personal circumstances, some of the matters that the officer referred to in her evidence to you during the hearing, which I won't go into further detail in relation to now, otherwise I'd need to ask you to go into a closed session. But you will recollect that you did hear evidence in closed session at the start of her evidence to you during the hearing, matters that had been historically difficult for the officer but also, at this particular time, were matters that meant that her home life was particularly difficult and she was struggling with a number of personal circumstances and had –"*

127. The Panel had gone into Closed session, with the agreement of Ms Williamson, to deal with the personal circumstances that were being put. These went to mitigation in respect of the IP's defaults but were not being put as suggesting that the evidence she had given was not true. The personal circumstances were being advanced as diminishing her culpability for whatever defaults the Panel found.

128. Mr Basu submits that the Panel was correct in its approach that personal mitigation has limited weight, particularly in cases concerning impropriety or dishonest. Mr Basu relies on a line of cases about the importance of propriety in professional conduct and particularly cases concerning police officers. In *R (Chief Constable of Dorset) v Police Appeals Tribunal and Salter* [2011] EWHC 3366 (Admin), at [22] Burnett J (as he then was) said: *"Honesty and integrity in the conduct of police officers in any investigation are fundamental to the proper workings of the criminal justice system".*

129. At [32] Burnett J said:

> *"The language of the tribunal suggests that it did not approach its decision-making on the basis that a finding of operational dishonesty normally called for dismissal or a requirement to resign from the force.*

> *Furthermore, it is clear from the way in which it discussed the question of mitigation that it gave very great weight to personal mitigation in circumstances where it was not appropriate to do so, for the reasons given by Sir Thomas Bingham MR in Bolton. The strength of the personal mitigation available to Mr Salter was regarded by the tribunal as of great significance. That is clear from para 6.4 of its written decision, where it described his unblemished career and the character evidence as "exceptional"; and also from para 6.9 where it indicated that he should be entitled to feel that he can meaningfully call upon his record in times of trouble. It follows that in my judgment the tribunal misdirected itself in law in both these respects."*

130. *Salter* went to the Court of Appeal [2012] EWCA Civ 1047 and Maurice Kay LJ emphasised the importance of upholding propriety and public confidence in police disciplinary cases. At [23] he said:

> *"As to personal mitigation, just as an unexpectedly errant solicitor can usually refer to an unblemished past and the esteem of his colleagues, so will a police officer often be able so to do. However, because of the importance of public confidence, the potential of such mitigation is necessarily limited. The PAT found the letter from the Coroner to be "a particularly powerful piece of mitigation". I do not consider that it was justified in treating it as such. On any reasonable view, it misunderstood or misstated the seriousness of the offence, although I do not question the sincerity of the Coroner's opinion. Like Burnett J, I cannot see this as "a finely balanced case" or one of the "very small residual category" in which operational dishonesty or impropriety need not result in dismissal or a requirement to resign. Burnett J derived assistance from the judgment of Underhill J in R (Bolt) v Chief Constable of Merseyside Police [2007] EWHC 2607 (QB) . There, Underhill J said (at paragraph 28):*
>
> *"While I would certainly accept that not every untruth or half truth told by a police officer, however trivial and whatever the circumstances, would necessarily constitute misconduct justifying dismissal, the misconduct found by the Panel ... constituted deliberate dishonesty in an operational context. As para 1 of the Code rightly emphasises, integrity is a fundamental requirement for a police officer. I should, frankly, be dismayed to think that such conduct was not of a kind which was normally thought to merit dismissal."*
>
> *Whilst I acknowledge that the misconduct of Mr Salter was in some ways less serious than that in Bolt , the comments are apt. It may not be profitable to speculate about a case which might fall within the "very small residual category" but Mr Beggs proffered as an example a situation in which, hypothetically, Mr Salter had, for humane reasons, denied the existence of the affair to DC Morton's partner. He described that as "a white lie", not involving the destruction of evidence or interference with proceedings. I consider that there is force in his suggestion."*

131. Mr Basu submits that the Panel's approach to personal circumstances was entirely correct in the light of the caselaw. The ***Salter*** principle is not limited to cases where misconduct involves dishonesty, see ***R (Williams) v PAT*** [2017] ICR 235, and it applied here because of the nature of the findings. Mitigation based on personal circumstances, in a case where the Panel had found the IP had deliberately misled them, would necessarily carry very limited weight. The PAT's conclusion in this regard is itself ***Wednesbury*** unreasonable on the facts of the case.

Ground Four

132. Mr Basu submits that the PAT erred in law at DL46 when they said that the Panel failed to take into account the IP's personal circumstances when they were considering her culpability for her actions. This Ground is in effect very close to Grounds One and Three.

133. The PAT referred to para 4.11 of the Outcomes Guidance, which goes to the degree that conduct is intentional, deliberate or targeted, but Mr Basu points out that the Outcomes Guidance at para 4.12 states that even where the action is unintentional the culpability is greater if the risk of harm from the action is reasonably foreseeable, see [80] above. The finding at PD192 that the harm was reasonably foreseeable was not disturbed by the PAT so it is submitted that there is no error of law in the conclusion that the Panel reached.

134. Further, the PAT refer to the impacts of the IP's dyslexia and dyspraxia but there was no evidence as to how those conditions were said to have impacted on the IP's actions. The IP herself had not given evidence in this regard, save for saying that the dyslexia was relevant to the record on the Dragon software notes, and there was no expert evidence to support the PAT's reasoning.

Ground Five

135. At DL48 the PAT said it was unreasonable and unfair for the Panel to have relied on the IP's numerous PDRs given that the PAT considered many of these may themselves have related to the IP's disabilities.

136. Mr Basu points out that the Outcomes Guidance at 4.67 refers to continuing the behaviour "after the officer should have realised it was improper" as being a potential aggravating factor in a misconduct case. The fact that the IP continued to the behaviour, which were the subject of the Panel's findings, even after she had gone through the various PDRs, was itself an aggravating factor. There was nothing outside the bounds of reasonableness in the Panel's reliance on the PDRs. Again this Ground relates closely to whether the Panel wholly considered the case put to them and the nature of the IP's reliance on her disabilities.

The IP's case

137. Mr Roberts' submissions rest on the assertion that the IP put the "legal case" to the Panel and they failed to address it. The PAT was therefore plainly correct to set the decision aside on the grounds of unfairness and an unreasonable conclusion of gross misconduct. He says that the IP's dyslexia and dyspraxia were fundamental to her case and was raised by her counsel (Ms Williamson) throughout the hearing.

138. He refers to the IP's Regulation 31 response where reference is made to Professor McLoughlin's July 2014 Occupational Health report and the IP's dyslexia and dyspraxia. I note, and I return to this in more detail in the Conclusions below, that the Regulation 31 response is focused on the IP's dyslexia and disability impacting on her work rate and her need for supervision. It does not provide support for the alternative case that if the IP's factual evidence in certain key regards was not true, the reason for that related to her disabilities.

139. Professor McLoughlin's report and the Occupational Health ("OH") report, both dated 2014, were documents placed before the Panel. Professor McLoughlin had supported the diagnosis of dyslexia and dyspraxia. His report is 4 pages and the conclusion is as follows:

> *"Conclusion*
>
> *[The IP] is of average verbal ability. Her performance in silent reading speed and comprehension, as well as proofreading is inconsistent with this. Her spelling skills are unreliable. Diagnostic testing does show that her working memory ability is inefficient. As this would explain the inconsistencies in her performance in literacy skills it is appropriate to conclude that [the IP] is dyslexic. Her low non-verbal score , as well as her difficulty with processing speed and her completion of a checklist would suggest that she is also dyspraxic."*

140. The OH Practitioner medical report dated 26 August 2014 Ms Olatunsunbosun, a registered nurse, states:

> *"I am now in receipt of occupational psychologist report that confirms underlying learning difficulty conditions that cause memory and processing difficulties. This situation is likely to come under the remit of disability provisions of the Equality Act making reasonable adjustments appropriate on the part of the employer.*
>
> *The report states that "in general, dyslexic people are more visual in their approach to tasks, and are good at strategic thinking and planning. They often perceive things differently and approach problems from an alternative perspective. Out of necessity they can become very thorough in their approach to tasks." The Occupational psychologist is of the opinion [the IP] is likely to thrive in a role that she can take time over a fewer number of activities rather than one in which there is a heavy demand on being able to multi task quickly.*
>
> *[The IP] feels more comfortable in an investigative role; she has asked to be moved back to her previous role on current hours of work. I have asked her to discuss the request with her line manager for consideration.*
>
> *Current Capacity for Work*
>
> *She is fit for full duties with adjustments*

> *ADVISED ADJUSTMENTS or RESTRICTIONS (Action to be undertaken by management in relation to Functional Capability*
>
> *The adjustments that would likely accommodate current functional difficulties are:*
>
> *• Allow extra time to complete tasks due to her reduced rate of silent reading and difficulty with comprehension*
>
> *• Provide her with written instructions*
>
> *• Use of technological aids such as Test to Speech Software, allows reading by listening compensation for reading and difficulty with comprehension.*
>
> *• Voice Recognition Software to help produce work more easily*
>
> *• Training sessions and meetings – [the IP] is to adopt minimalist note taking technique and back up by the use of a Recording Device*
>
> *• Consider appointing a buddy/Mentor provided by someone who has experience of supporting dyslexic/dyspraxic individuals in the workplace.*
>
> *• [The IP's]' memory and processing difficulties would account for reduced work rate therefore expectations with regard to the times"*

141. Ms Williamson (the IP's lawyer) had raised the reference in the PDRs to restrictions by reason of the IP's health issues. She had cross examined the Metropolitan Police Service witness (DS Tom Lynch) about the need to "use more structure in her complex investigations as there are occasions when direction is lost". She had also cross examined another Metropolitan Police Service witness (DS Kilmartin) about his knowledge of the IP's dyslexia and dyspraxia.

142. In her oral closing Ms Williamson had addressed the Panel on their need to consider that if "any" of the allegations were proved, whether they breached professional standards and amounted to gross misconduct.

143. In her Closing Submissions Ms Williamson, at p.14, set out a section under the heading "Do any factual findings that an allegation is proven amount to breaches of professional standards". This is where she addressed whether any findings of fact contrary to the IP's evidence would amount to conduct or performance issues. This turned on the degree of culpability that the IP should bear. This section focuses on the supervision and support that the IP received, and whether she was given an appropriate caseload. I note that there is no reference in this section of the Closing to the IP's disabilities, to the 2014 OH report, or to any suggestion that the IP's evidence, if untrue, was caused by her disabilities.

144. On Ground One Mr Roberts submits that the issue of whether any factual findings amounted to misconduct was clearly raised in the cross examination and in Ms Williamson's closing submissions at paragraphs 54-61 and 62-66. I note that the latter is entirely general about the Professional Conduct Regulations. The former focuses on the IP's problems filling in forms and her problems with focus during the investigation.

It does not address the issue of how her disabilities could have been relevant to her giving untruthful evidence to the Panel.

145. On Ground Two Mr Roberts submits that the suggestion the IP was being dishonest in her evidence was not put to her. He said that the allegations in the Regulation 30 notice did not involve dishonesty and therefore it was essential that if she was being accused of being dishonest it had to be expressly put to her.

146. He also submits that Mr Basu is wrong to suggest that the PAT ought to have asked what would the IP have said had she been cross examined on the point. He submits that it is not for the PAT to undertake an evidence gathering exercise and it would therefore have been wrong in principle for them to have asked this question.

147. On Ground Three he essentially makes the same arguments as under Ground One. The Panel did not consider the IP's personal circumstances and the PAT was therefore correct to say that the Panel had not given them appropriate weight.

148. On Ground Four Mr Roberts submits that the PAT were correct to conclude at DL47 that the Panel erred in finding that the IP was "entirely responsible for her own actions". This follows from the submissions on Ground One.

149. On Ground Five it is submitted that the PAT were correct to find that the Panel was unreasonable to rely on the PDRs as an aggravating factor. The PDRs were linked to the IP's disability and as such they should have been treated as a mitigating factor not an aggravating one.

Conclusions

150. In considering the Grounds advanced, this Court can only interfere on the grounds of error of law, and in terms of a reasonableness challenge, the test is ***Wednesbury***. I am also conscious that the PAT is a specialist Tribunal, although the Panel itself is also a specialist body. The test for a PAT overturning a Panel on reasonableness grounds is somewhat different, see ***R (Chief Constable of Durham) v Cooper*** [2012] EWHC 2722 (Admin) at [6] to [7].

151. The fundamental issue in this case is the degree to which the IP's case had changed by the time it came before the PAT. In particular whether the reliance being placed upon the IP's disabilities and those disabilities being put forward as the explanation for the IP's actions and inactions had materially changed before the PAT. Therefore whether the PAT acted ***Wednesbury*** unreasonably in overturning the conclusions, although not the findings of fact, of the Panel.

152. I agree with Mr Basu that the IP, or at least her lawyers, had fundamentally altered her case by the time the appeal came before the PAT. Before the Panel her case was squarely that the factual allegations made against her were not true and that she had good reason for the actions she took in respect of the investigation. She gave positive evidence about her actions, which the Panel did not accept. The Panel focused on three key incidents as set out at [107]- [109] above. They had heard the oral evidence and it was entirely open to them to consider these three factual issues as critical. They found that the IP had misled them in respect of those issues, and that in respect of the first (26 February 2020 and the reference to an on/off sexual relationship) that she had done so

deliberately to "muddy the waters", i.e. to advance her case. The findings in respect of the allegations and the finding that a police officer had deliberately lied both to the Investigator and the Panel on important issues is plainly a matter which could reasonably lead to a finding of gross misconduct.

153. There is no doubt that Ms Williamson referred to the IP's disabilities (dyslexia and dyspraxia) on a number of occasions, and to the IP's excessive caseload and poor supervision, both in cross examination and Closing Submissions. However, she did so as mitigation, not to alter the factual evidence or to provide an explanation for the IP's untruthful evidence. It was no part of Ms Williamson's case, or the IP's evidence, that she may have become muddled or been mistaken in her evidence because of these disabilities. That was not an alternative case being put before the Panel.

154. On the issue of whether those failings (actions and omissions) occurred, and the fact that the IP had not been truthful about them, the Panel had to consider whether they were attributable to conduct or performance (in practice the degree of culpability the IP had). However, the Panel could only consider that issue on the evidence and submissions before them.

155. As set out above, at no point did the IP in her evidence say that if the various failings did happen it was as a result of her disabilities (save perhaps for the Dragon software record keeping). Nor did she at any point say that she had given untrue evidence to the investigator because of her disabilities. This was not an alternative or "legal" case, it simply was not her case. In her statement to the PAT she continued to say that she was "adamant" that her evidence on the three issues was true. Her reliance through her oral evidence and Ms Williamson's presentation at the Panel was that the disabilities went to her record keeping and to mitigation, in terms of being overburdened with work, contrary to the OH recommendations. It was not put to the Panel that her disabilities in any way lay behind her giving the Panel misleading evidence, and to put it starkly, why she had lied to the Panel on three key points.

156. The way the case was put before the PAT, and relied upon before this Court, was a new legal argument at the appeal stage, and notably not even supported by the IP's own personal statement, which continued to assert the truth of her evidence.

157. Further, importantly in my view, there was no evidence before the PAT to explain how the IP's disabilities had any causative link to the findings that the Panel had made against her. The PAT at DL37 refer to her "omissions" being matters of performance related to disability. As I have explained about these were not mere omissions. But in any event, the PAT does not address how they could have been related to disability, or the fact that the findings relate not simply to omissions but to the IP having been untruthful on a number of occasions both to the investigator and the Panel.

158. The disabilities referred to in the OH report, which is the only medical document which appears to be relied upon by the IP, are dyslexia and dyspraxia. Neither of these conditions have any obvious causative link with her having been untruthful in her account of events. There was no evidence to the Panel making such a linkage, and no medical evidence was adduced to the PAT.

159. Again, there is no obvious causative link between any other unspecified learning difficulty and the lack of truthfulness of her account. If it was seriously being suggested

that the reference to "memory and processing difficulties" accounted for the IP not being truthful in three key regards then it would be reasonable for the Panel to have expected clear submissions on that point and almost certainly psychological or psychiatric evidence to support such a claim. Instead of which there was no evidence either from the IP or from any healthcare professional or expert.

160. Mr Roberts refers to the Equal Treatment Bench Book and the IP having a neuro-divergent condition. However, this is wholly generalised and there is no evidence which supports the IP having a neuro-divergent condition which leads her to give false accounts of her actions.

161. But that does not come close to an evidential case before the Panel that if the IP's evidence was not truthful the reason for that related to her disabilities. In order to make a submission that someone has been untruthful in their evidence, certainly in a matter where the need for public confidence is so great, there needs to be evidence that links the neuro-divergent condition with the matters in issue. Here the IP had said both to the Investigator and the Panel that DKB had said she was still in a relationship with DS. The Panel found that evidence was untrue. If the case being advanced was that the IP's memory was so bad that she could not remember critical matters and her neuro-divergent condition led her to make things up, even when repeatedly asked about them then, in my judgement, specific evidence about the condition would be required. That was not her case before the Investigator or the PAT and there was no evidence to support such a case.

162. It is in the light of the case that was put to them, and the paucity of evidence supporting any possible conclusion that the findings did not reasonably lead to a finding of gross misconduct, that Ground One succeeds. If the PAT were to lawfully overturn the Panel's decision the finding of gross misconduct had to fall outside "the range of reasonable findings or outcomes to which the Panel could have arrived", see ***Derbyshire*** at [37]. In the light of the findings the Panel had made and the evidence that was presented to them, the conclusion of gross misconduct was entirely within the range of reasonable findings. The PAT therefore acted unlawfully in overturning those conclusions.

163. Ground Two challenges the PAT's conclusion at DL43 that it was unfair for the Panel to have found that the IP misled the Panel without the "misleading" allegation being expressly put to her. Mr Jenkins (on behalf of the Metropolitan Police Service) had conceded that he had not cross-examined the IP on whether she had given deliberately misleading evidence.

164. The authorities referred to above show that whether a person has had a fair opportunity to respond turns critically on the facts and the context. Mr Roberts submits that on the authority of ***Hines*** if there is an allegation of dishonesty it must be expressly put. But these cases are necessarily fact specific. It was clearly put to her, certainly by the Panel Chair, that he doubted the truth of her evidence on the on/off sexual relationship, and by counsel that her instruction from DS Kilmartin was not true. She was adamant that it had been said to her. Here the IP had had ample notice of the three factual allegations in issue. She said both in response to the Investigator and in oral evidence to the Panel that the allegations were factually incorrect and her evidence as to what had been said to her was true.

165. The Panel gave her a clear opportunity to correct her evidence and tell the truth. The only complaint is that they did not go the extra step of saying to her "you are deliberately misleading us". However, in my view that step is unnecessary. It was the only conclusion open to the Panel on the case as advanced to them. At no point did she say that she might have got confused or that she had memory problems which may have caused her to misremember what DKB or DS Kilmartin had said to her.

166. On those three points the Panel concluded that the IP had given untrue evidence, which could only have been to advance her case, given what she had said in evidence. The case against her was clearly put and she had a full opportunity to respond to it.

167. Mr Roberts submits that it would have been wrong for the PAT to ask itself, or indeed ask him, what would have the IP have said if she had been directly asked "are you being dishonest?" I agree with Mr Basu that the PAT should have asked itself this question. A failure to put a point in cross examination is a potential breach of natural justice, because it may cause unfairness to the witness. It is trite law that there is no such thing as a technical breach of natural justice, there has to be some substantive unfairness for the alleged breach to have any effect.

168. The effect of Mr Roberts' submission is that even if there was no more that the IP could possibly have said if the point had been put to her, then there was still a breach of natural justice. In this case if the IP had been directly asked "are you deliberately misleading the Panel?", she would undoubtedly have said "no". She had said to the Panel, and continued to say in her written document on the appeal, that her evidence was true.

169. In those circumstances the PAT erred in law in finding that the Panel was procedurally unfair in not putting the "misleading" point to the IP. There was no unfairness because she had been given an ample opportunity to deal with the points and there was nothing more that the IP could or would have said to the Panel.

170. Ground Three challenges the PAT decision at DL45 that the Panel did not "give appropriate weight" to the IP's personal circumstances. The weight attached to evidence is generally a matter for the decision maker, subject to a reasonableness challenge, so presumably the PAT were finding the Panel's approach to personal circumstances was unreasonable.

171. Ground Three is closely related to Ground One. The Panel in its reasons did not address the "legal" case as put to the PAT, namely if the IP was wrong in her factual evidence then that was because of her dyslexia and dyspraxia. In my view they made no error of law in not addressing the case in that way because it was not the way the case had been presented to them.

172. However, the Panel did address her personal circumstances as it related to the case being put to them.

173. At PD196 (a) and (b) the Panel did refer to the IP's disabilities and her personal circumstances, as set out in the Regulation 31 notice and to the submissions made by Ms Williamson referred to in PD190, particularly (h). It is apparent both from the terms of the Panel's decision and the way that the Chair had dealt with the personal circumstances when the IP was giving evidence, that the Panel were trying to deal with the matter sensitively. The personal circumstances referred to in the Regulation 31

notice included the IP's marriage and domestic violence. Given the potential public interest in the case, they were trying to handle the issue with some delicacy in the reasons. But it is wholly wrong for the PAT to suggest that the Panel did not deal with the personal circumstances that were being advanced.

174. They could deal with it relatively swiftly in their reasons as personal circumstances were only one of many points being put in mitigation, see PD190.

175. Further, it is clear from the caselaw set out above, that in cases where it is alleged that a police officer has acted improperly and dishonestly and in analogous cases, here that she had given untrue evidence, personal circumstances are very unlikely to carry much weight in mitigation.

176. Ground Four is entirely subsumed in the same issue as Ground One. The Panel, on the evidence that they had heard, were entitled to reach the conclusion that the IP was "entirely responsible for her own actions". PD192 in respect of culpability has to be read in the context of the decision as a whole. The Panel the IP's case had been that she DKB had told her she did not want to take action, that she was still in a relationship and that DS Kilmartin had instructed her not to continue. The Panel found these were false claims, and that she had been responsible for her own actions and choices. They had heard no evidence which would have supported a finding that the IP's untruthful evidence about the three incidents was outside her responsibility or control by reason of her disabilities.

177. Therefore the Panel's conclusions were well within the range of their reasonable findings.

178. On Ground Five, the Panel were entitled to rely on the PDRs as aggravating factors. Mr Roberts submits that the PDRs themselves were linked to the IP's disabilities. It is correct that there is reference in the PDRs to disability related issues. However, the IP had been given specific warnings about needing to improve her performance in relation to matters that then arose again in the allegations before them. In these circumstances there was nothing unreasonable in the Panel relying on the fact of the PDRs as being an aggravating factor.

179. The Outcomes Guidance specifically refers to an officer repeating conduct that s/he should realise is improper, i.e. that she had been previously warned about in the PDR, as being a potential aggravating factor. The fact that the IP had disabilities, which were referred to in the PDR, does not mean that that points simply ceases to apply. The Panel had taken into account the disabilities, in the way that they had been relied upon, and their reference to the PDRs was entirely reasonable in the circumstances of the case.

180. For all these reasons I allow the judicial review application and quash the PAT's decision.