<u>IN THE POLICE APPEALS TRIBUNAL</u>

<u>IN THE MATTER OF DISCIPLINARY PROCEEEDINGS UNDER THE POLICE APPEAL TRIBUNAL RULES 2020</u>

B E T W E E N:

FORMER PC Sandeep Khunkhun

<u>Appellant</u>

- and -

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

<u>Respondent</u>

WRITTEN DECISION WITH REASONS PURSUANT TO RULE 26 OF THE 2020 POLICE APPEAL TRIBUNAL RULES

<u>DECISION AND REASONS</u>

1. This is a determination made in accordance with the Police Appeals Tribunals Rules 2020 which provide for the hearing of appeals made by a police officer against a decision made under the Police (Conduct) Regulations 2020.

2. This decision is made in the appeal of former PC Sandeep Khunkhun ('the Appellant'), who appeals against the decision made on 17 May 2022 that she be dismissed from the Metropolitan Police Service without notice.

3. The appeal at the Police Appeal Tribunal (PAT) took place on 23-24 March 2023 where submissions were made arising from the grounds of appeal and the MPS response.

4. Pursuant to rule 26 of the 2020 PAT Rules –

   (5) The chair must prepare a written statement of the tribunal's determination of the appeal and of the reasons for the decision.

   …

   (8) As soon as reasonably practicable after the determination of the appeal, the chair must cause the appellant, the respondent, the relevant person and, where functions have been delegated under rule 6, the relevant local policing body to be given a copy of the written statement; but, in any event, the appellant must be given written notice of the decision of the tribunal before the end of 3 working days beginning with the first working day after the day on which the appeal is determined.

5. Where these reasons differ in any respect from the oral summary for the decision given to the parties on 24 March 2023, this written version remains conclusive.

RELEVANT FACTUAL BACKGROUND

6. Former PC Khunkhun joined the Metropolitan Police in 2004 and in due course joined the CSU as a PC investigator . She left to join another unit on 31 March 2020. The period in which she was in charge of the investigation into alleged harassment or voyeurism by an ex-partner of Ms Keane-Barnett (hereafter referred to as DKB) was 19 February to 31 March 2020. On 15 April 2020 this man set fire to DKB's house and she died. The Appellant's purported failures during this February to March period led to the allegations which the Misconduct Panel considered in April and May 2022. After DKB's death in April 2020 there was an investigation into steps taken by the Appellant's unit prior to her death. In due course a decision was taken to charge the Appellant with misconduct allegations.

7. A notice of investigation under Regulation 17 was served on the Appellant on 14 July 2020 in relation to her conduct. After the investigation the IOPC Investigating Officer on 29 June 2020 recommended the Appellant attend a Misconduct Hearing. The Appellant provided a written response to caution on 13 October 2020 and was interviewed on 22 December 2020. She did not accept her actions were inappropriate or amounted to misconduct.

8. The Appellant was in due course served with a Regulation 30 Notice identifying the allegations against her. In a Regulation 31 to the allegations of gross misconduct, the Appellant continued to dispute the allegations of misconduct in their entirety and whilst not denying all the facts alleged against her argued that other officers had had responsibilities as well.

9. The Appellant faced eleven specific allegations in relation to her conduct in February and March 2020.

10. On 6 days between 21 April and 17 May 2022 at the offices of the Metropolitan Police at the Empress State Building, London SW6, the Misconduct Panel made up of Chair Mr Cameron Brown, Independent Member Ms Margie Leong and Police Member DS Helen Williams proceeded to hear the evidence and submissions going to the allegations, following which they deliberated and then delivered their findings on 17 May 2022. The other officers involved in the DKB investigation gave evidence and the Appellant was cross examined at length.

11. The deliberations leading to the Panel's findings were set out over 60 pages. On the allegations before them the Panel found the following allegations proven (see reasoning from page 45 of the decision):

Under the heading of failing adequately to investigate the offences reported by Ms Keane-Barnett and in particular:

> ***36.1 You did not arrange for the arrest of Mr Simmons 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 Mr Simmons 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 after the final cancellation.

"36.3 You did not seize Mr Simmons' 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 Mr Simmons mobile phone NO 07538339420 would have revealed as at 10th March 2020: DKT/TEL/15 - chat string between Mr Simmons and Delicia Simmons on 28th Jan 2020 relating to delivery/receipt of the lightbulb camera and concealment thereat DKT/TEL/10- a chat string with Delicia Simmons 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 Mr Simmons by Delicia Simmons of a voice recorder; text messages between Mr Simmons and Louise Simmons dated 9th Jan 2020 and 2 Feb 2020 to 5 Feb 2020 relating to the lightbulb camera. 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 Mrs Keane-Barnett reported further harassment by Mr Simmons on 23 February, despite a statement being provided by Mrs Keane Barnett and exhibits showing the harassment.

The Panel noted the existing obligation to take action following Ms Keane-Barnett's indication that she **did** support police proceedings on 9 March. It noted when finding allegation 36.6 not proven that save for 30 March 2020, the only times Ms Keane-Barnett indicated that she did not wish to pursue a prosecution was between 1-13 February, when PC Khunkhun had not been appointed as the OIC.

"36.7 In any event you failed to take any positive step after being told expressly by Ms Keane-Barnett on 9 March 2020 that she wished to support police action.

The Panel noted it rejected PC Khunkhun's assertion that Ms Keane-Barnett wished to withdraw her support after 9th March. The reverse was in fact true and PC Khunkhun failed to arrest and/or interview Mr Simmons, or at the very least explore the possibility of such action with Det. Sgt Kilmartin.

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

The Panel noted PC Khunkhun failed to properly investigate a victim-less

prosecution.

37. You failed to safeguard Ms Keane-Barnett. In particular:

37.1 You failed to put in place or consider an IDVA, special schemes, panic alarm or Tee SOS for Ms Keane-Barnett, despite this being part of Det. Sgt Lynch's action plan on 19 February.

12. Seven allegations were made out and the Panel found three allegations not proven (36.6, 36.9 and 36.10). On the question of breaches of standards and whether any misconduct was made out the Panel found –

174. In relation to Duties and Responsibilities, this is defined in schedule 2 of the regulations as "Police officers are diligent in the exercise of their duties and responsibilities."

175. The 2014 Code of Ethics provides that Officers must: -
a. carry out your duties and obligations to the best of your ability;
b. take full responsibility for, and be prepared to explain and justify, your actions and decisions;
c. use all information, training, equipment and management support you are provided with to keep yourself up to date on your role and responsibilities.

176. Examples of meeting this standard include an efficient and effective use of policing resources and keeping accurate records of actions

177. Taking into account the matters set out above, the Panel considered that the conduct of PC Khunkhun did amount to a clear breach of the standard, in that she had failed to act diligently in the exercise of her duties. In particular she had failed to promptly investigate the crime reports involving Ms Keane-Barnett, had failed to action the clear task list set to her by Det. Sgt Lynch and had recommended closure of those crime reports relating to Ms Keane-Barnett, despite a failure to action that task list and properly investigate and/or consider a non-victim led prosecution.

Gross Misconduct or Misconduct
178. Having found breaches of the standards as set out above, the Panel has carefully considered whether the breaches amount to gross misconduct or misconduct.

179. Gross misconduct is defined in the Regulations as meaning a breach of the standards of professional conduct so serious that dismissal would be justified. We have again reminded ourselves of the circumstances of this case and the breaches that we have found.

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 PC Khunkhun's conduct amounted to gross misconduct.

13. The determinations going to outcome were as follows -
Outcome
Outcome Approach

181. We have been reminded of and reviewed the College of Policing Guidance on outcomes in police misconduct proceedings ('the guidance')13.
182. We have also considered the three-stage, structured approach in Fuglers LLP v SRA [2014] EWHC 179 (Admin) when assessing outcome, at paragraph 28.
183. "There are three stages to the approach which should be adopted by a Solicitors Disciplinary Tribunal in determining sanction. The first stage is to assess the seriousness of the misconduct. The second stage is to keep in mind the purpose for which sanctions are imposed by such a tribunal. The third stage is to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.11
184. This three-stage approach is reflected in the guidance. As to the first stage (seriousness), the Guidance directs attention to four central reference points, as stated in Fuglers at paragraph 29 and now repeated in the Guidance at paragraph 4.4:
a. The officer's culpability for the misconduct;
b. The harm caused by the misconduct;
c. The existence of any aggravating factors;
d. The existence of any mitigating factors.
185. As to the second stage, the purpose of the police conduct regime is threefold (Guidance, paragraph 2.3):
a. maintain public confidence in and the reputation of the police service;
b. uphold high standards in policing and deter misconduct;
c. protect the public."
186. As set out at §4.5 ''The most important purpose of imposing disciplinary sanctions is to maintain public confidence in and the reputation of the policing profession as a whole. This dual objective must take precedence over the specific impact that the sanction has on the individual whose misconduct is being sanctioned".
[13 College of Policing's 'Guidance on outcomes in police misconduct proceedings', 2017.]

187. As to the third stage, choosing the sanction which most appropriately fulfils that purpose, we have considered the entire range of the disciplinary sanctions open to us. We have reminded ourselves that the object of misconduct is not to punish Police Officers and that the Panel should consider less severe outcomes before more severe outcomes, choosing the least severe outcome which adequately addresses the issues identified while protecting the public interest. We have kept in mind the purpose of imposing sanctions. We have chosen the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.

Evidence
188. The Panel has considered again the full detail of this case and the entirety of the factual context. We have read all of the evidence presented to us regarding PC Khunkhun's record of service and the character evidence.
189. We have carefully considered the submissions of the parties. The Appropriate Authority made the following points:
a. While the consequences of her conduct were not intended, the potential for ha rm was clearly foreseeable;
b. There was a clear plan of action set out by DS Lynch but this officer did not follow it. She knew about the plan but did not reveal she had not followed it to her line manager;
c. Her conduct did not occur on the spur of the moment. This was a course of conduct over a period of time;
d. The level of culpability was accordingly high;
e. In relation to harm, the harm actually caused to the victim was not caused by this Officer. However, the risk of harm was increased by her failure to properly investigate;
f. In considering outcome, an important feature was the impact on the standing and reputation of the profession as a whole. Her conduct had clearly damaged the reputation of the MPS.

g. In relation to aggravating features, this officer had a lack of insight into her failures;
h. In relation to mitigating features, that this was a pressured environment and that she was remorseful for what had occurred. In any event, based on the authorities the Panel should only give limited weight to personal mitigation;
i. In all the circumstances, that the officer should cease to be a member of the MPS.

190. Ms Williamson on behalf of PC Khunkhun submitted the following:
a. She drew the Panel's attention to the reference of the Borough Commander and that he did not personally know PC Khunkhun. He made reference to her conduct during the investigation but it was submitted that she had been fully co-operative during the investigation, including attending her lengthy interviews when arguably not well;
b. The reference from DS Walker, her current line manager, was a particularly powerful statement in support and contrasted with the view of the Borough Commander;
c. She invited the Panel to approach matters in a structured way but this was not one of those cases where dismissal would in effect follow automatically as the only possible outcome;
d. Invited the Panel to consider the way others were dealt with in relation to this case, including Det. Sgt lngledew who was not the subject of any action;
e. 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;
f. The suggestion of concealment made by the AA was not a fair characterisation and the conduct was not sustained - it lasted no more than six weeks;
g. In terms of harm it was correct to point out that she had no insight as to what Mr Simmons was going to do.
h. In relation to mitigating factors, the Officer was working in a pressurised environment and did in fact perform well under close supervision with clear tasks to follow, but that level of supervision was not available. The Panel was also referred to matters set out in her regulation 31 Notice;
i. She had found the investigation into her conduct an horrendous experience.
j. That the appropriate sanction was one of written warning or final written warning. A warning should ensure that she was closely monitored and any concerns would be allayed due to close supervision. The length of a final written warning could be extended to up to 5 years;
k. That the panel was not in the territory of dismissal without notice. She had exceptional references and could provide valuable service to the MPS, perhaps in a different role;
I. Her references spoke of her kindness, empathy and pride at being a police officer. She was devastated to be the subject of police misconduct allegations. She had a huge amount of pride and tried to act with integrity. She was mortified if she had brought any discredit on the MPS. She was referred to as professional and honest by a number of senior officers. Working with their teams, she had a positive attitude and other qualities;
m. A final written warning would send a message how seriously the MPS take this sort of case - but this is not a case where dismissal should be the outcome.

191. Both parties submitted that any disciplinary action taken in relation to other Police officers involved in respect of these matters could be taken into account by the Panel, but the AA submitted it was dangerous to do so, as the Panel only had a limited snapshot and not the full picture. The Panel should also exercise caution in considering it. The Panel gave some weight to the submission.

Culpability

192. In relation to culpability, the Panel considered that PC Khunkhun 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 Ms Keane Barnett. The Panel considered the conduct was serious and that PC Khunkhun could have reasonably foreseen the risk of harm.

Harm

193. In terms of harm, the Panel made it plain that PC Khunkhun could not have known the course of conduct that was to be ultimately pursued by Mr Simmons, but her actions put Ms Keane Barnett at risk of physical injury, damage to health and psychological distress. There was also considerable reputational harm to the MPS and the undermining of public confidence by her failure to act, which was significant.

194. The Panel also took into account the guidance at §4.65 - "Where gross misconduct has been found, however, and the behaviour caused or could have caused, serious harm to individuals, the community and/or public confidence in the police service, dismissal is likely to follow. A factor of the greatest importance is the impact of the misconduct on the standing and reputation of the profession as a whole."

Aggravating Factors

195. Taking into account the factual findings set out above, particular aggravating features were as follows (we note that there is a significant degree of overlap but have set them out in full for the sake of completeness -we make it plain we have not double counted matters when considering the issue of seriousness).

a. Concealing wrongdoing in question and lack of insight into the seriousness of her behaviour;
b. Sustained behaviour - the Panel did not accept that her conduct was limited in time;
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;
d. Serious physical or psychological impact on the victim;
e. Vulnerability of the victim - Ms Keane Barnett was plainly a vulnerable victim;
f. Significant deviation from instructions;
g. Failure to raise concerns or seek advice from a colleague/ senior officer;
h. Multiple proven allegations

Mitigating Factors & Personal Mitigation

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. PC Khunkhun'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. PC Khunkhun had no disciplinary record.

However, the Panel bore in mind the "limited weight" that can be given to personal mitigation.

Conclusion

197. Having considered carefully all of the circumstances and in particular chapter 4 of the College of Policing Guidance we have concluded that the appropriate and lowest possible sanction is that of Dismissal without Notice.

198. The Panel is satisfied that the serious breaches of the standard, as we have found, are not compatible with PC Khunkhun'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.

14. Following her dismissal, the Appellant submitted Grounds of Appeal comprising grounds under rules 6(4)(a), (b) and (c) of the PAT Rules 2020, challenging both the finding and outcome of the Panel and putting forward arguments for why no misconduct should be found against her. These appeal grounds were disputed by the Appropriate Authority ('AA'). In particular it was contended that the case on appeal was argued in a different way than the allegations were defended before the Misconduct Panel and the Appellant was not entitled simply to repeat or recast her arguments from below. However in a final determination in January 2023 the PAT Chair allowed the appeal to progress a full hearing and set out detailed case management directions ensuring that the relevant issues would be addressed effectively before the PAT.

THE LAW

15. The Police Appeals Tribunals Rules 2020 came into force on 1 February 2020, and apply to this appeal against a decision made in accordance with the Police (Conduct) Regulations 2020.

16. The Home Office Guidance (published 5 February 2020) applying to this case covers the Standards of Professional Behaviour for police officers and sets out the procedures for dealing with misconduct and for appeals to the Police Appeals Tribunal. The guidance refers to the Standards of Professional Behaviour set out in Schedule 2 of The Police (Conduct) Regulations 2020. The following standards are relevant in this case: duties and responsibilities, defined in schedule 2 as "*Police officers are diligent in the exercise of their duties and responsibilities.*"

17. The circumstances in which a former police officer may appeal to a tribunal pursuant to Rule 6(4) of the 2020 Rules are:

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

18. In terms of rule 6(4)(a), it is not open to us the PAT to simply substitute our views for that of the Panel below unless we have already reached the view that the outcome was unreasonable. Different and opposing conclusions can both still be reasonable. With regard to the meaning of unreasonable under rule 6(4)(a) of the PAT Rules 2020 we take into account the observations of the Administrative Court in *R (Chief*

Constable of Durham) v PAT & Cooper [2012] EWHC 2733 (Admin) at [6]-[7] in particular that it is a lower standard than the Wednesbury unreasonableness test. A pertinent question in this case is therefore whether the outcome of the Panel fell outside the range of decisions that could reasonably be made on the facts as presented to them.

19. If the PAT has concluded that the unreasonableness test is met, it is entitled to substitute its own view, addressing the matter afresh and dealing with the appellant in any way in which she or he could have been dealt with by the Misconduct Panel. See HHJ Saffman in *R (Chief Constable of Cleveland) v PAT & Rukin* [2017] EWHC 1286 (Admin) at [53]: *"once the gateway is negotiated, the PAT can deal with the matter on a clean slate basis and can make an order dealing with the appellant in any way in which he could have been dealt with by the panel whose decision is appealed."*

20. When reaching a decision on disciplinary sanction, a Misconduct Panel must not only follow a structured approach to its decision making but show that it has done so: see *R (Chief Constable of Greater Manchester Police) v Police Misconduct Panel "Roscoe"* (HHJ Pelling QC, 13 November 2018). Further in a recent decision, the Administrative Court ruled that PATs must also explain their decisions on disciplinary outcome in a structured manner: *R (Chief Constable of Nottinghamshire Police) v (1) Police Appeals Tribunal (2) Flint* [2021] EWHC 1248 (Admin).

21. Accordingly it is important that a Misconduct Panel has followed the correct approach as outlined in the College of Policing's Guidance on Outcomes in Police Misconduct Proceedings ("the COP Guidance") and derived from *Fuglers LLP v SRA* [2014] EWHC 179 (Admin) per Popplewell J at [28] by taking the three-stage approach of:
    - (i) Assessing the **seriousness** of the misconduct; (with due regard to culpability for misconduct, harm caused by misconduct, and any aggravating and mitigating factors);
    - (ii) Keeping in mind the **purpose** of imposing sanctions (with particular emphasis upon maintaining public confidence in the reputation of the police service, upholding high standards in policing and deterring misconduct and protecting the public); and
    - (iii) **Choosing the sanction** which most appropriately fulfils that purpose for the seriousness of the conduct in question.

22. This approach – outlined in the COP Guidance – requires the Panel or Chair to have regard to the purpose of the misconduct proceedings when deciding on disciplinary action, including the maintenance of public confidence in the profession: a factor of particular importance in policing (see *R (Green) v Police Complaints Authority* [2004] 1 WLR 725 per Lord Carswell at [78]).

23. Also relevant to this point is the case law dealing with the weight to be given to personal mitigation in such misconduct cases. In short, the case-law confirms that while personal mitigation may be relevant, the protection of the public and the interests of the profession will be given greater weight because of the nature and purpose of disciplinary proceedings, particularly where serious misconduct has been proven: see *Salter v Chief Constable of Dorset* [2012] EWCA Civ 1047, *Williams v Police*

Appeals Tribunal [2016] EWHC 2708 (Admin) at [67] and *Bolton v Law Society* [1994] 1 WLR 512 at 519B-E.

24. But it is not the case that personal mitigation will be ignored. In cases where it is not suggested that nothing less than dismissal is considered appropriate, there is also a public interest in keeping on officers who possess skills and experience: *Giele v General Medical Council* [2005] EWHC 2143 (Admin) at [30]. In other words there is a sliding scale as to the weight carried by personal mitigation: the more serious the misconduct, the greater the weight given to the interests of the profession, and the protection of the public (confirmed in *Williams* at [67]).

25. In the case of *R (on the application of the Chief Constable of West Midlands Police) v Police Misconduct Panel and Officer A* [2020] EWHC 1400 (Admin) the Divisional Court heard a judicial review challenging the outcome of a final written warning in respect of racist misconduct by police officers. Mrs Justice Eady allowed the challenge and said at [58]-[59] that Police Misconduct Panels are to be afforded a *"degree of latitude"* in their reasoning; it being *"right to adopt a generous approach to the reasoning provided by a misconduct panel"*. However she also noted at [53] that while the Panel was not involved in a tick-box exercise, it was "*required to apply the structured approach laid down as a way of ensuring that its Outcome Decision properly took account of all relevant matters and afforded the necessary primacy to public confidence*".

26. An appeal under Rule 6(4)(c) alleging "other unfairness," can only succeed if the unfairness could have had a material effect on the finding or decision on disciplinary action. A breach of the Regulations would be unlikely to result in a successful appeal where the proceedings are fair despite the breach and where there is no consequential prejudice to an officer. It is for the Appellant to show the breach could have had a material effect on the finding or outcome.

THE APPEAL HEARING

27. The Tribunal was made up of Panel members: Chair Rachel Crasnow KC together with ACC Elliot Foskett and independent member Rachel Ellis. The March 2023 appeal hearing was able to proceed in person and it was a public hearing.

28. The Tribunal has been provided with the documentation available at the Misconduct Hearing, together with transcript of the hearing ("Bundle 1"), the appeal documents including the outcome document, the Appellant's grounds of appeal and the Respondent's response to the appeal as well as the parties' further written submissions which addressed the issues directed by the Chair in her final determination ("Bundle 2"). The Appellant also provided a small bundle of unused material ("Bundle 3").

29. Counsel for the Appellant and the AA both made detailed submissions augmenting their written appeal arguments.

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 to 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.

39. Having found this key aspect of the appeal to be made out under rule 6(4)(c), we have had to decide whether to deal with the matter ourselves, or to remit the matter for rehearing. Our powers stem from the Police Act 1996, which states:

> *85. — Appeals against dismissal etc.*
>
> *(1) The Secretary of State shall by rules make provision specifying the cases in which a member of a police force or a special constable [, or a former member of a police force or a former special constable,] may appeal to a police appeals tribunal.*

(2) A police appeals tribunal may, on the determination of an appeal under this section, make an order dealing with the appellant in any way in which he could have been dealt with by the person who made the decision appealed against.

(3) The Secretary of State may make rules as to the procedure on appeals to police appeals tribunals under this section.

40. We note the wording of Rule 26(2) gives us the discretion to remit the case for rehearing. Remission may be necessary where there is a procedural default or other unfairness which could have materially affected the decision appealed against, but the PAT are not in the best position to decide how the matter would have been decided **had** that procedural failure or other unfairness not occurred. In this case we do not think we can decide key parts of the defence case. This is because the defence case includes weighing up factual points. It also involves considering if the omissions in spring 2020 were linked to the Appellant's disability. 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.

41. In terms of the other errors of law which are said to us to arise from the Panel's decision – these only arise if the Panel at a fresh hearing do not deem the Appellant's behaviour to be performance-related.

42. We next turn to the PAT's factual findings under challenge: firstly, we reject the submission by the Appellant that it was perverse for the Panel below to make a finding about an omission occurring over 22 days: such evidence was before the Panel and they were acting within their discretion to reach those findings on the facts.

43. 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.

44. We next find that the failure of the Panel to consider and determine the conduct versus performance issue impacts upon the standard of conduct. This means if the fresh panel, having properly considered the issue, decides that the behaviour is essentially conduct-related, they need also to consider whether the performance-related circumstances of the Appellant (including disability alongside her workplace circumstances such as her caseload and her lack of supervision) have a bearing on the standard of conduct in question - misconduct or gross misconduct. So we remit that issue to a fresh hearing to be decided again in accordance with the relevant provisions of the Conduct Regulations.

45. Further we find it was an error of law not to give appropriate weight to the Appellant's circumstances point, as identified in her appeal grounds and arguments before us. Whilst the performance issue goes hand in hand with the circumstances factor, should the new Panel decide this is a conduct matter, all the issues concerning the Appellant's circumstances should go before the fresh hearing upon remittal to be considered as part of mitigation and culpability, so the Panel can make a reasoned decision on whether and how such circumstances impact upon the outcome decision.

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.

47. There is no evidence that the circumstances we have heard about were weighed in the balance here. We note that Ms Williamson said at the hearing on this issue of culpability (see Bundle 1 transcript page 645): "*But I would urge you to also look at the challenging nature of the role within the CSU and the fact that the officer was certainly part of a team that was overwhelmed with work. Her ability to perform her duties was impacted by her dyslexia and her dyspraxia, which you have seen the reports in relation to and, of course, she was the only officer within that team who was a PC investigator*". So the evidence was there and the submissions were made by the Appellant's Counsel at the Misconduct Hearing, but the Panel's decision does not demonstrate that they were considered. This is unfair under rule 6(4)(c) and we think remittal is apt and fair.

48. We think it was unreasonable and unfair for the Panel to count as an aggravating feature the fact of the numerous PDRs which the AA agreed were at least in part linked to disability. The fresh panel should retake the decision on the question of aggravating features leaving out this factor.

49. Clearly at the remitted hearing the question of sanction will be re-taken, given all the points we have made above. Other than this we do not give leave for other matters which go to the allegations to be reopened and/or redetermined upon remittal.

50. 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.

BACK-PAY

51. The Appellant also sought from us an order as to back-pay and her costs. The AA did not resist the application to reinstate. We have already identified that this appeal has succeeded on rule 6(4)(a) and (c) of the 2020 rules. Our power to reinstate is set out in those rules but has its source in the Police Act 1996. Schedule 6 to the Police Act 1996 states, at paragraph 7:-

    Where an appeal is allowed, the order shall take effect by way of substitution for the decision appealed against, and as from the date of that decision or, where that decision was itself a decision on appeal, the date of the original decision appealed against.

    Where the effect of the order made by the police appeals tribunal is to reinstate the appellant in the force or in his rank, he shall, for the purpose of reckoning service for pension and, to such extent (if any) as may be determined by the order, for the purpose of pay, be deemed to have served in the force or in his rank continuously from the date of the original decision to the date of his reinstatement.

52. We confirm that, by operation of law, our decision takes effect from the date of the Panel decision below which is 17 May 2022. The effect of the decision is the reinstatement of the Appellant. We note this does not mean the Appellant has a right to return to work before the AA has carried out a full risk assessment and considered whether there is work she can do in the interim or whether she would have to be suspended.

53. In the circumstances, we determine that the AA should pay the Appellant back-pay owing for the period from 17 May 2022 to 31 March 2023, subject to a deduction equivalent to any income she received in respect of other employment during that period.

COSTS

54. The Appellant applies for her costs. She submits that paragraph 8 of Schedule 7 to the Police Act 1996 affords the PAT the power to award costs in favour of the Appellant. In particular: '*An appellant shall pay the whole of his own costs unless the police appeals tribunal directs that the whole or any part of his costs are to be defrayed out of the police fund of the relevant local policing body.*'

55. The Appellant seeks that her costs be paid from the police fund and provides these reasons for her application:

    a. This case involved a considerable body of documentation, including: the original bundle, a lengthy transcript, the Panel's decision and additional material. This was not a hearing PC Khunkhun could have approached without legal representation, who would need to undertake substantial work.

    b. The Misconduct Panel's decision (which has been quashed) has put PC Khunkhun to a considerable financial (not to mention emotional) cost. In addition to suffering the financial disadvantage of losing her salary, PC Khunkhun has incurred substantial legal expenses in presenting this appeal. In light of the numerous grounds upon which the appeal was allowed, it is respectfully submitted this is a cost to which PC Khunkhun should not have been put.

    c. Further, the PAT's decision to remit the case to a fresh Panel means not only has the Misconduct Panel's decision put the Appellant to the cost of the appeal, but to the costs of another Misconduct Panel hearing. In circumstances where PC Khunkhun ought only to have faced a single hearing, she will now have to face three. While PC Khunkhun takes no issue with the PAT's decision to remit, it nevertheless stems from the unreasonable and procedurally flawed findings of the Misconduct Panel.

    d. PC Khunkhun has only been able to meet her legal costs through the considerable generosity of her family, who have provided financial support. Their assistance is not unlimited. A costs order will allow PC Khunkhun to have reserve funds for the remitted hearing. Absent the ability to be legally represented, PC Khunkhun will suffer a significant prejudice (particularly as a disabled officer) in attending that hearing.

    e. There is clearly an inequality of arms in these proceedings. The AA has considerably greater resources than PC Khunkhun, both in terms of evidence gathering but also legal representation.

f. On quantum Counsel's fees for preparation, conference and attendance at the two-day March 2023 appeal hearing were £8,500 + VAT and her solicitors' costs were [some £10,700]."

56. The Appellant also put forward these submissions on 27 March:

The Appellant contends that this gross misconduct case was misconceived and in using her disabilities as exacerbating factors including the misleading of the panel, the panel provided the PAT with good reasons to award the Appellant's costs.

The Appellant was known by the MPS to have longstanding disabilities and was an officer of 20 years standing. The PAT has found the case brought against her to be unfair and, in the Appellant's view may objectively be considered as containing elements of "confirmation bias," whereby the "guilty party" was identified and evidence sought to prove the guilt rather than investigating with the view that the truth should be disclosed enabling genuine learning (and an improvement of services to victims of domestic abuse) to take place. The impact on the Appellant's life, including her physical and mental health, friendships and reputation have been immense. The Appellant is now greatly financially indebted and will be disadvantaged from defending herself in any rehearing.

Apart from the fees to Counsel of £8500 + VAT, the Appellant has had to fund solicitors' reasonable discounted fees of £10,700 (no VAT). In terms of the time expended, the true costs are recorded on invoices and amount to £25,500 at an hourly rate of £150/hour. All of the fees in excess of what was charged by the writer were borne by the writer himself.

Whilst the solicitor with conduct has retired from practice, and was only able to charge nominal costs, we respectfully suggest that it should not be for access to justice in police conduct matters (nor indeed generally) to depend on goodwill.

Whilst this is a summary breakdown of costs, all our invoices are open to inspection and can be provided to the PAT if required.

We hope that the PAT will find that this is indeed an exceptional case and that in these unusual circumstances, all of the Appellant's legal costs can be met from the Police fund."

57. The AA in response refers us to the Home Office Guidance 2020 at para 26.110 to 26.112.

PAYMENT OF COSTS

26.110 *All fees and expenses of the tribunal members are paid for by the local policing body – including where the administration of the tribunal has been delegated to another local policing body as the relevant person.*

26.111 *An appellant must pay their own costs of the appeal unless the tribunal directs that the whole or part of their costs are to be paid by the local policing body. Absent dishonesty or a lack of good faith,* ***a costs order should not be made against the local policing body unless there is good reason to do so. In considering an award of costs against the local policing body the tribunal must balance the financial prejudice to the particular complainant, against the need to encourage public bodies to exercise their public function of making***

reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision were to be successfully challenged*.*
26.112 *Where the tribunal decides to award costs in favour of the appellant, it is suggested that the tribunal sets out the reasons for this and identifies any lessons to be learned for the force as a result of the case*. [emphasis added]

58. The AA has also submitted written argument on why costs should not be paid, contending this appeal is not out of the ordinary.

59. Our decision on this application is that the Appellant's case does not fall into an exceptional category where costs might be awarded. Whilst we have found that the Panel below did not consider all parts of her defence as they should have, our view is that this at least in part arises from the emphasis she and her representatives put on the factual aspects of the defence. We have reached no finding that the case against her was "*misconceived*" or seen evidence of *"confirmation bias"*. The costs application is refused.

CONCLUSION

60. Our order is that we quash the Panel decision of May 2022 and remit the case to a fresh panel for adjudication as identified above.

61. We wish the Appellant all the best for the future and thank the parties for their submissions.

RACHEL CRASNOW KC
ACC ELLIOT FOSKETT
RACHEL ELLIS

31 March 2023