POLICE APPEALS TRIBUNAL
IN THE MATTER OF POLICE ACT 1996
AND IN THE MATTER OF POLICE APPEALS TRIBUNAL RULES 2020
AND IN THE MATTER OF FORMER PC SUKHDEV JEER
Heard at International Dispute Resolution Centre, 1 Paternoster Lane, London EC4M 7BQ on 19 May 2023
Before: Assistant Chief Constable D Thorne, Ms L Beckford and Ms S Fenoughty (Chair)

Between

FORMER PC SUKHDEV JEER

Appellant

AND

COMMISSIONER OF POLICE OF THE METROPOLIS

Respondent

Representation
For the Appellant: Mr Ben Summers
For the Respondent: Mr Vishal Misra

DECISION AND REASONS

1) This decision is 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 Jeer who appeals against the decision of 1 July 2022 that he be dismissed from the Metropolitan Police Service without notice.

BACKGROUND

3) The allegation before the misconduct hearing panel ("the Panel") between 28 June and 1 July 2022 arose from messages exchanged in a WhatsApp group between December 2017 and December 2018, containing inappropriate, highly offensive and discriminatory material. The Panel heard allegations against the appellant, his colleague and a former colleague, who were members of the same WhatsApp group.

4) The parties were represented at the hearing by counsel; the appellant was represented by Mr Ben Summers, and the respondent by Mr Vishal Misra.

5) The allegations were set out in the Regulation 30 Notice as follows:

Allegation 1:

PC JEER, PC HEFFORD and former PC HAMMOND, between December 2017 and December 2018, were part of a WhatsApp messaging group titled "But they promised" and which was used to exchange messages, memes and other content which was

inappropriate, highly offensive and discriminatory. The content was discriminatory on grounds of sex, race, religion, sexual orientation and disability.

Allegation 2:

PC JEER, PC HEFFORD and former PC HAMMOND, between December 2017 and December 2018, failed to challenge and/or report the other members of the said WhatsApp messaging group after receiving messages, memes and other content from them which was inappropriate, highly offensive and discriminatory.

If proved, allegation 1 amounts to gross misconduct for the following reasons:

(a) the content of the inappropriate material was highly offensive and discriminatory;

(b) the content was so obviously inappropriate and offensive that it ought not to have been exchanged;

(c) the conduct was repeated and prolonged; and

(d) the conduct seriously discredits the reputation of the Metropolitan Police Service and damages public confidence in policing.

If proved, allegation 2 amounts to misconduct.

6) The appellant admitted the allegations, and that they amounted to misconduct. He did not admit that they amounted to gross misconduct.

7) The Panel concluded that the breaches of the Standards of Professional Behaviour were so serious that dismissal without notice was the appropriate outcome.

LAW

The Police Appeals Tribunals Rules 2020

Circumstances in which a police officer may appeal to a tribunal

Rule 4 (4) The grounds of appeal under this rule 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.

Home Office Guidance (published 5 February 2020) sets out the procedures for dealing with misconduct and for appeals to the Police Appeals Tribunal.

The Police (Conduct) Regulations 2020 Schedule 2, sets out the Standards of Professional Behaviour. The following standards are relevant in this case:

Equality and Diversity

Police officers act with fairness and impartiality. They do not discriminate unlawfully or unfairly.

Discreditable Conduct

Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty.

Challenging and Reporting Improper Conduct

Police officers report, challenge or take action against the conduct of colleagues which has fallen below the Standards of Professional Behaviour.

APPEAL

8) On the appellant's behalf, his representative submitted his grounds of appeal, dated 15 September 2022. He submitted that the Panel's findings of fact, the finding of gross misconduct and the decision to dismiss were all unreasonable. Three of the grounds of appeal were dismissed pursuant to Rule 15. The grounds of appeal are as follows:

   a) The Panel erred in not following the appellant's evidence or the submissions on his behalf. He did not say that current attitudes were not in place when he posted the content. This submission was made on behalf of PC Hefford, and the Panel wrongly ascribed it to the appellant. As a result, it failed to consider the change in understanding on the part of officers as to the consequence of sharing such content in a small private group.

   b) The Panel found the appellant should have been more aware of the consequences of acting in a racist and discriminatory manner. There was no evidence that he had engaged in active discrimination, and the Panel seemed unable to draw the distinction between active discrimination and forwarding content freely circulating on social media in an attempt to amuse. The panel was wrong to conclude that the appellant had acted in a discriminatory manner.

   c) Dismissed under Rule 15.

   d) Dismissed under Rule 15.

   e) As a result of the unreasonable findings above, individually or collectively, the Panel unreasonably assessed the seriousness of the appellant's conduct as justifying dismissal.

   f) Dismissed under Rule 15.

   g) The Guidance speaks of active discrimination "towards" others; there was no evidence of discrimination towards others in this case. The Panel sought to sidestep the Guidance saying that it provided *"guidelines not tramlines"*. The category of the appellant's conduct is not identified by the Guidance as "especially serious" and should not have been dismissed without proper basis.

The Panel's failure to distinguish between "*active*" discrimination and the conduct in this case was unreasonable and led to an unreasonable assessment of seriousness.

h) As a result of the individual and combined errors above, the Panel unreasonably concluded that the only appropriate outcome was dismissal without notice.

Oral Submissions

9) The severity assessment was unreasonable because of the findings of fact, and the outcome decision was unreasonable as a consequence.

10) The appellant had accepted that his behaviour breached the standards of equality and diversity, failing to challenge, and discreditable conduct. The sole issue for the panel was whether this amounted to simple misconduct or gross misconduct; assessing the seriousness of the conduct is at the heart of this issue, and it is fundamental to assess culpability properly, and in context.

Failure to distinguish the argument advanced by the appellant

11) Whilst they cannot be entirely divorced, a distinction needed to be made in the Panel's thinking between the appellant's conduct in propagating material, and the content of the material. This distinction is important when considering severity or culpability.

12) The panel over-calculated the seriousness of the appellant's misconduct, and its reasoning was unreasonable. The most significant argument on behalf of the appellant is that the Panel erred in not following his evidence and the submissions made on his behalf; it was not about assessing the content.

13) The Code of Ethics concerns an officer taking responsibility for their own behaviour. The College Guidance on outcomes in misconduct proceedings indicates that a person will be more culpable where actions are intentional, deliberate or planned. The context of the actions must be considered. In this case the appellant was not accused of having actually discriminated against anyone on the basis of a protected characteristic. The issue was the corrosive effect of the messages to the appellant's five colleagues in a private, encrypted group over a number of months.

14) Events had moved on in the four years since 2018. The point made on behalf of the appellant was that rank and file police officers had not absorbed the message which had been absorbed, or ought to have been absorbed, by 2022. This message was that an officer's right to privacy was no barrier to investigations by PSD looking at private messages, and the right to privacy did not prevent the application of professional standards of behaviour.

15) The point had been made on behalf of PC Hefford that there had been a change in societal attitudes of what was acceptable humour; this point was not made on behalf of the appellant.

16) It was submitted on the appellant's behalf that the issue was not the seriousness of the images, but having sent them. This does amount to an act, but is different from dealing with a member of the public in a way which discriminated against them because of one's attitudes or beliefs.

17) Considering culpability and mitigating features, it had been submitted to the Panel that *"an appreciation of how, when shared in private between a tight knit group, content like this has*

a corrosive effect, has moved on." This is different from attitudes about what is acceptable and what is not.

18) By the time the Panel heard the submissions on outcome, the appellant knew that it had not fully absorbed the point made on his behalf, that the thinking of officers had moved on. This was either because the Panel did not understand, or because they ascribed to him an argument which he had not made.

19) In its decision the Panel said *"current attitudes were not in place"*. If this is a reference to what is appropriate, rather than an appreciation that privacy is no bar to the application of standards, they got it wrong.

20) The Panel said it was *"unconvinced by arguments seeking to diminish the effect of the postings as it was within a closed group"*. The argument was not that he was seeking to diminish the corrosive effect, or how offensive or discriminatory the posts were.

21) The Panel said *"he would always have known and been aware that such postings were out and out racist/ ablest and sexist."* Whilst this is a reasonable conclusion, the appellant never argued to the contrary. The Panel went on to say it was unconvinced by the argument that they would be viewed differently a mere 4 - 5 years ago. This is a clear reference to the argument that, in 2018, the messages would not have been regarded as offensive or discriminatory. This argument was not made on behalf of the appellant.

22) In its findings on outcome, the Panel said *"The Panel heard submissions from Mr Summers who indicated that there were factors in relation to PC Jeer's case meaning that dismissal was not the appropriate outcome. He referred to the fact that the postings were in a closed group and that society's attitude to postings in these circumstances have changed…"* This had not been the argument. The argument had been about the officers' understanding. The Panel was slightly off-beam, and it made a fundamental miscalculation in the severity assessment.

23) If the Panel had understood the appellant's argument, it could have made a finding that, for example, it was just as unacceptable in 2018 to share offensive material privately. Disagreeing with a submission is not the same as failing to engage with the argument. It is not reasonable for a Panel to misunderstand and not to engage with a central plank of the submissions.

24) The appellant accepted that his actions amounted to misconduct. If it was acknowledged that there had been a change in understanding, and, since then, the *"penny had dropped"*, the appellant's conduct should have been assessed before the *"penny had dropped*".

25) The Panel concluded that the appellant's actions caused a high degree of harm. It arrived at this conclusion without engaging with the central plank of the officer's case. If the Panel had acknowledged the submission that his understanding of the corrosive effect of such posts had moved on, they could have rejected it, or they could have indicated whether they had sympathy with the argument, but still found that his conduct amounted to gross misconduct. However, the Panel did not engage with the point.

26) Mere failure to mention a particular submission does not necessarily result in the failure of a decision. However, in this case, the Panel took an argument that was not made, and this obscured the argument that was made.

27) Severity was the sole issue at the fact finding stage. Culpability was central to the assessment and crucial to making a reasonable decision. The context of the officer's behaviour was a central theme, and a central plank of this argument was whether that

context mitigated the seriousness of the misconduct. The Panel's error flavoured both the finding of gross misconduct, and the outcome of dismissal.

Failure to make the distinction between active discrimination and forwarding content

28) The Panel said it *"noted that Mr Summers sought to diminish PC Jeer's actions by stating that he had difficult personal circumstances"*. The appellant's representative was not trying to diminish his actions, but to mitigate the context. The Panel went on to say that the appellant *"should have been more aware of the negative consequences of acting in a racist and discriminatory manner."* These are not mere words. They show that the Panel regarded the appellant as acting in a racist and discriminatory manner.

29) There was no evidence that the appellant had discriminated on the basis of protected characteristics. This was not alleged, and it had not been put to him. This shows that the Panel mischaracterised and over-assessed the seriousness of his admitted misconduct.

30) The requirements in the Code of Ethics relating to equality and diversity are broader than simple "active discrimination". An officer is required to act with fairness and impartiality, and not to discriminate unlawfully or unfairly. Paragraph 3.1 states:

> *According to this standard you must:*
>
> *•uphold the law regarding human rights and equality*
>
> *•treat all people fairly and with respect*
>
> *•treat people impartially.*

The standard gives examples, including considering the needs of the protected characteristic groupings, and actively seeking or using opportunities to promote equality and diversity. On this basis, the appellant accepted that he had breached the standards relating to authority respect and courtesy, and equality and diversity. However, this is not the same as acting in a discriminatory manner. Discrimination is just one part of equality and diversity.

31) Guidance on discrimination is found in the College Guidance at paragraphs 4.51 to 4.54. It says that active discrimination is particularly serious, and refers to discrimination towards people, whether conscious or not, stating that both can be equally serious. There is a proper distinction between active discrimination and the appellant's conduct; by unreasonably confusing one with the other, the Panel went wrong.

32) The appellant acknowledged that the content was highly offensive, discriminatory and inappropriate. There is a distinction between the forms of discriminatory behaviour

33) The College Guidance states that any element of unlawful discrimination would indicate a higher level of culpability of harm. This is one element of the equality and diversity standard. The Panel should look at the conduct in fact-specific circumstances, but it made a mistake in doing so, as the appellant did not act in an unlawfully discriminatory way.

Side-stepping the Guidelines in assessing the seriousness of the conduct

34) The case law is clear, a panel has to adopt a structured approach. Whilst guidance does not bind a panel, its consideration was conspicuous by its absence in this case. There would be no complaint if the Panel had noted the guidance and disagreed. It should have said that the conduct fell within the guidance, or it did not fall within the guidance but it was still serious

misconduct. Here, in glibly saying it was *"guidelines not tramlines"*, the Panel effectively set the guidance to one side and ignored it.

35) The guidelines require a panel to identify the conduct and deal with it. It was not argued on the appellant's behalf that discriminatory conduct was active or passive; the submission set up a contradistinction of what the officer did.

36) In its decision on outcome, the Panel undertook the exercise it should have done at the fact finding stage. However, at the earlier stage, it had erred in failing to take on board the arguments on behalf of the appellant, it swept to one side the submission that the appellant's conduct did not fall within the guidance; it set the guidelines to one side altogether at the findings stage, and this over-calculation carried over to the outcome stage.

RESPONDENT'S SUBMISSIONS

37) In his response to the appeal, in documents dated 29 September and 22 November 2022, the respondent's representative, Mr Misra resisted the appeal, and invited the Tribunal to dismiss the appeal. In particular he submitted as follows:

Failure to distinguish the argument advanced by the appellant

38) The appellant says that the Panel failed to distinguish between submissions made on his behalf, and those made on behalf of PC Hefford. However, his representative had submitted that the misconduct should have been considered by reference to standards of the time, rather than current attitudes and standards. The appellant sought to suggest that attitudes towards sharing content had changed, and the Panel could reasonably conclude that he was asserting that the cultural zeitgeist had shifted, albeit specifically pertaining to sharing such content in private groups.

39) The Appellant did not provide any evidence to suggest that attitudes had changed towards the sharing of discriminatory material in private.

Failure to make the distinction between active discrimination and forwarding content

40) The appellant says he has not acted in a discriminatory manner. He accepted the allegation that he had exchanged inappropriate, highly offensive and discriminatory content, and he accepted that this was, at the very least, misconduct. It was his choice to share this content, and it was an "act".

41) It was submitted on behalf of the Appellant that the Panel *"draw a distinction between active discrimination and a lack of equality and diversity."* It was further submitted that the Appellant's conduct did *"not involve the treatment of people, save in the most indirect and notional sense",* and the Guidance only refers to discrimination "towards" people. However, it also says:

> *4.52 Discrimination may involve language or behaviour. It may be directed towards members of the public or colleagues. It may be conscious or unconscious…*
>
> *4.66 Aggravating factors are those tending to worsen the circumstances of the case either in relation to the officer's culpability or the harm caused.*
>
> *4.67 Factors which indicate a higher level of culpability of harm include…*
>
> - *Any element of unlawful discrimination."*

42) The conduct in question was the sharing of content, and it was accepted throughout that the nature of the content was *"explicitly"* discriminatory. The content was routinely captioned, this is plainly the use of language, and it was directed at people who are members of the group that were being lampooned in the content.

43) There is no requirement for the Panel to draw the distinction which the appellant invites them to draw. The considerations in the guidance are not an exhaustive list, and the Panel was entitled to look at the appellant's conduct in fact specific circumstances.

Side-stepping the Guidelines in assessing the seriousness of the conduct

44) The Panel was reasonably entitled to conclude that the appellant's conduct was gross misconduct.

45) The 2017 Guidance does not speak purely to *"active"* discrimination, as the appellant suggests. He does not contest that the content he shared was discriminatory. It was not contested that it was racist, sexist, ableist, homophobic and Islamophobic. It is plainly obvious that the discrimination chapter of the guidance was triggered. The guidance is not prescriptive. It was accurate for the Panel to say that the guidance provided *"guidelines not tramlines"*.

46) The Panel found that the appellant's actions were not the result of a lack of thought or consideration. It considered the postings were not at the lower end of the scale of the breach of standards and must be regarded as extremely serious. It found the reputational harm to be significant, widespread and extremely damaging. It was entitled to reach its conclusion, and thus the sanction was not unreasonable.

47) The Panel followed the structured approach of **Fuglers LLP & Others v Solicitors Regulatory Authority [2014] EWHC 179 (Admin)**. In **R (Chief Constable of Greater Manchester Police) v Police Misconduct Panel & Roscoe (13 November 2013)**, the judge said:

> *"16. …The only way a court or anyone else reading the decision can be satisfied that the correct structured approach has been adopted is if either the panel identifies the structured approach that it is required to adopt expressly in the body of its decision and then explains how it has arrived at the relevant decision applying that approach. If that ideal approach is not adopted but it is apparent from the language used by the tribunal that in substance such an approach in fact has been adopted then the court will not intervene. Obviously however the court will not guess or assume that a correct approach has been adopted if that is not apparent on the face of the decision."* (emphasis added).

48) The Guidance does not suggest that discrimination is either "active" or "passive". It does not state that discrimination must be directed towards others. The appellant had accepted that the Guidance is precisely that, guidance. The Panel did not seek to "sidestep" the Guidance, but followed the guidelines contained therein.

49) In conclusion, the Panel came to a reasonable decision on the facts, on its decision of gross misconduct, and it provided a reasonable sanction.

Oral submissions

50) In his submissions to the tribunal, Mr Misra rejected the submission that the Panel had been unable accurately to assess the severity of the appellant's misconduct. It was submitted that in sharing material in a private group, it was not obvious to the appellant that it was

inappropriate, until DC Edmead flagged it, and *"the penny dropped"*. The Panel had rejected that. It said the appellant should have been aware, at the time, that it was inappropriate to act in the manner that he did, and that this consideration was even more applicable in the current climate.

51) The Panel's reference to the standards of the time applies both to public confidence, and to the level of awareness of officers making postings in private groups. Officers would have known at the time that there was harm in sharing offensive material in private groups. It was known to be inappropriate, as demonstrated by the fact that one of the group members challenged the behaviour in December 2018.

52) The Panel did not simply attribute the argument made on PC Hefford's behalf to the appellant. It made findings on the basis of the facts of the appellant's case.

53) The appellant accepted that his behaviour was discriminatory, and breached the standard of Equality and Diversity. His actions, in sharing discriminatory material was the behaviour which breached his duty. It is not mitigation that he did not produce the material.

54) The Guidance sets out the protected characteristics and states that discrimination *"may involve language or behaviour"*. It is not prescriptive. It states that discrimination will be particularly serious if it is conscious or deliberate, but that unconscious discrimination can also be serious, and can have a *"significant impact on public confidence in policing."*

55) In assessing the seriousness of the misconduct, the Panel took into account the impact on public confidence. It considered the length of time over which the postings had been made, the volume of material and the extent of the appellant's participation in the group.

56) The discriminatory language in the postings is obvious, the appellant's actions were to share the material, and the Panel took a structured approach to its findings and conclusion. It considered culpability, it took into account the mitigation, including the fact that the appellant had stopped posting, the fact that he had positive testimonials, and showed remorse for his actions. The Panel did not err in the assessment of harm, or the severity of the misconduct, and there was a reasonable basis for its finding and decision on outcome.

EVIDENCE

57) The tribunal was provided with the documentation and other material available to the hearing Panel, a transcript of the misconduct hearing, the Outcome document, appellant's grounds of appeal, the Respondent's response to the appeal, and its further representations.

DECISION

58) The appeal is based on Rule 4(4)(a), that the finding and decision to impose disciplinary action was unreasonable.

59) The meaning of "*unreasonable*" in this context is a matter of law. In order to show that a finding or a decision to impose disciplinary action was unreasonable, the appellant must show that it did not fall *"within the range of reasonable findings or outcomes to which the panel could have arrived"* **Chief Constable of the Derbyshire Constabulary v Police Appeals Tribunal [2012] EWHC 2280 (Admin)** at §36.

60) In **R (Durham) v Police Appeals Tribunal [2012] EWHC 2733 (Admin)** the Court said:

"…an appeal will not succeed simply because the appeals tribunal concludes it would have reached a different decision… Where the decision reached by the panel was within the range of reasonable decisions to which the panel could have come, and appeal will nevertheless fail, even if the appeal tribunal would have reached a different decision to that reached by the panel."

61) In **Commissioner of Police of the Metropolis, R. (On the Application Of) v Michel & Anor [2022] EWHC 2711 (Admin)** the Court set out the applicable principles, adding:

> *57. Accordingly, consistent with this case law and the consequences of upholding a rule 4(4)(a) appeal, in determining whether a Panel's finding of misconduct / gross misconduct was "unreasonable" within the meaning of rule 4(4)(a):*
>
> > *i) The PAT must ask itself whether this finding was one that was within or outside of the range of reasonable findings that the Panel could have made;*
> >
> > *ii) The PAT should keep in mind that the rule 4(4)(a) test is not met simply by showing a deficiency in the Panel's reasoning or a failure to consider a particular piece of evidence or similar error, if the finding of misconduct / gross misconduct was nonetheless one that the Panel could reasonably have arrived at. The question is whether that finding is unreasonable;*
> >
> > *iii) The PAT will be careful not to substitute its own view as to what should have been the outcome of the charges. Whether the PAT agrees or disagrees with the Panel and whether it thinks it would have found the allegations proven if it had been hearing the disciplinary proceedings is not in point, as this in itself does not indicate that the Panel's finding was "unreasonable". In many circumstances, different and opposing views can both be reasonable; and*
> >
> > *iv) The PAT should consider all of the material that was before the Panel, whether or not the Panel made express reference to it in the decision.*

62) The tribunal considered the grounds of appeal in turn, noting that there was some overlap in the arguments.

Failure to distinguish the argument advanced by the appellant

63) It was argued on his behalf that the appellant knew that the material he shared was discriminatory and offensive, but he had not appreciated that it was inappropriate to share content in a private group, and this was in line with the thinking of officers at the time. Mr Summers argued that this was not taken into account, the Panel did not even engage with this argument, it was confused in its thinking, and thereby came to an unreasonable conclusion about the severity of the conduct.

64) The tribunal found that the Panel had understood and engaged with the argument about attitudes towards postings in a private group. The respondent observed that there was no evidence given on this matter, and Mr Summers confirmed that it had been a submission made on the appellant's behalf.

65) In its decision, the Panel first set out the allegations, then under the heading "*Background*" it set out a brief description of the evidence it had seen and two paragraphs summarising the appellant's evidence. It said:

> *"PC Jeer in his evidence stated that he posted the offensive content because he was not in a good place at the time, experiencing a number of personal issues, having*

experienced racism himself in the past and as an attempt to deflect from his experiences and having a propensity for dark humour. He was remorseful for his previous behaviour and actions. Current attitudes were not in place at the time that the content was posted by him."

66) Having heard the appellant's evidence on his attitude at the time he posted the content, the Panel had briefly set out his explanation. It then noted his evidence about current attitudes. The Panel did not specifically say so, but as this point followed directly from the description of his reasons for posting the offensive content, it is likely to refer to attitudes about such posting. There is no indication that the Panel was under the impression that the appellant's argument was that attitudes towards the material itself had changed since he posted it.

67) The tribunal did not consider that this part of the decision, read alone, or in the context of the whole decision, submissions and evidence, revealed any confusion on the part of the Panel regarding arguments made on the appellant's behalf as to culpability, or any mitigating factors which might reduce its assessment of the seriousness of the misconduct.

68) Under the next heading in its decision, *"Findings on Gross Misconduct/Misconduct"*, the Panel considered the arguments made on the appellant's behalf. In a paragraph which started *"Having regard to the four stage test to be applied, in respect of culpability…"* it said:

"The panel were unconvinced by arguments seeking to diminish the effect of the postings as it was within a closed group."

Mr Summers submits that his argument was not that the corrosive effect or offensive nature of the posts was diminished. However, it was clear to the tribunal that the Panel took this submission to be mitigation relating to the seriousness of the appellant's actions in sharing offensive content in a closed group. It understood his argument that the private nature of the forum was a relevant factor in reducing his culpability for his actions because of contemporary attitudes to sharing such material privately. The Panel was entitled to reject this submission.

69) The tribunal accepts that the wording of the Panel's decision could be clearer in some respects. Notwithstanding this observation, reading the decision as a whole, and taking into account the forceful submissions which it had heard, there is no indication that the Panel conflated the extreme nature of the content with the appellant's actions in sharing it. As Mr Summers observed, there is an obvious connection between the two. It is clear from reading the decision as a whole, that the Panel focused on the appellant's conduct; the nature of the material was properly taken into account as a key factor in its assessment of severity.

70) In addition to the offensive nature of the material, the Panel said that other factors included the duration over which the conduct took place, the mixed nature of the population policed by the appellant, and the environment of the Metropolitan Police, where *"knowledge concerning equality and diversity and the necessity of avoiding engaging in any behaviour which could bring discredit to him or the police service have been enforced for many years"*. It is unsurprising that the Panel recorded its findings relating to the offensive nature of the postings, and it does not follow that it lost sight of its task, which was to assess the severity of the appellant's actions in sharing highly offensive material in a small private group.

71) The tribunal considered the comment by the Panel that the postings would not have been viewed differently in 2017 – 18. It accepted that, out of context, this comment might be taken to mean the content of the posts. However, read in the context of the submissions and the rest of the decision, which focuses on the appellant's conduct in sharing the material, the tribunal found that the Panel had adequately distinguished between the offensive nature of

the images and the seriousness of the appellant's behaviour in sharing them.

72) On behalf of the appellant it is argued that the Panel made a fundamental miscalculation by referring to the change in society's attitude to postings in a closed group. The Panel was described as being *"off-beam"*, as the argument had been that it was the understanding of officers, not society, that had changed. The tribunal did not consider there to be any appreciable difference in what the appellant's representative said and what the Panel recorded. The transcript shows that the submission on this point was as follows:

> *"Can I also add this, it was not argued on the officer's behalf that opinions have changed as to what is or is not appropriate content. What was argued was that the attitude to the corrosive effect of sharing, even in a private and small group, has changed. In other words, the attitude that was once taken, or may have been taken, that well, what is shared in private between two, three, four or even five people does not matter to the outside world because it is private, no-one knows about it, that has fundamentally changed in the last four or five years, and what is now appreciated is, even if the outside world does not know about it, and even if there was only five of you, it still has that corrosive effect. You have got to understand that it is not about the direct use of these memes or repetition of these stereotypes, just the mere private sharing has an effect, and thinking has caught up with that. That was the submission, it is the attitude towards private sharing in a forum such as WhatsApp, as opposed to the public dissemination over Twitter or Facebook, or whatever it may be."*

73) It was not clear to the tribunal that the submissions materially distinguished the attitudes of society from the attitude of officers in sharing offensive content privately. The tribunal found that the Panel's reference to these submissions was not so *"off-beam"* that it was unreasonable, or that it represented a *"fundamental miscalculation"* in the assessment of the severity of the appellant's misconduct.

74) It was submitted that, if it was acknowledged that there had been a change in understanding, and the *"penny had dropped"*, the appellant's conduct should have been assessed before that had happened. The tribunal noted that the Panel had rejected the argument that the appellant stopped posting after a *"mirror was held up to him"*. It is clear from the Panel decision that it assessed the appellant's conduct on the basis that he would have known that it was inappropriate to be sharing the material that he did. The Panel explained why this was the case, by reference to the context of policing in the Metropolitan Police, which had an extremely diverse and ethnically mixed population.

75) It was argued that the Panel concluded that there had been a high level of harm without engaging with the central plank of the officer's case. The tribunal did not find that the Panel had taken an unreasonable approach in its assessment of harm. At the findings stage, it set out and followed the *"four stage"* approach. It dealt with culpability and harm in one paragraph, and aggravating and mitigating features in the next. In the following paragraph it concluded:

> *"In the light of the totality of the evidence before them, the panel concluded that the highly offensive postings made by PC Jeer which were discriminatory in nature were serious in nature."*

76) In reaching its conclusion, the Panel had listed the factors relevant to harm and culpability, including the argument that the postings would have been viewed differently at the time. The Panel concluded that, whilst there had been no direct harm, the reputational harm would be significant, widespread and extremely damaging. It gave reasons for making this finding, stating that the posts were mocking, highly discriminatory and racist to many of the sectors of society that the appellant and the Metropolitan Police Service were responsible for policing.

The Panel found that the nature of the material being shared was highly likely to indicate that the person posting them was highly likely to have unconscious bias. This was a conclusion which was open to the Panel. Irrespective of the understanding of those sharing the content, the perpetuation of discriminatory messages and memes fosters discriminatory attitudes and behaviour, and the Panel was justified in classing the appellant's behaviour as more serious.

77) The tribunal was satisfied that the Panel had understood the arguments advanced on behalf of the appellant, and had taken a reasonable approach to its findings.

Failure to make the distinction between active discrimination and forwarding content

78) On the appellant's behalf it was suggested that there was no attempt to diminish his actions, but to mitigate the context, and that there was no allegation that he had discriminated on the basis of protected characteristics. He had admitted the breach of the standard of equality and diversity, but it was argued that his conduct did not fall into the *"particularly serious"* category list in the Guidance.

79) The tribunal noted that the submissions on the appellant's behalf had focused on the words "*act*" and "*active*", in order to show that his conduct did not amount to *"active discrimination"*. At the first stage his representative submitted:

> *"…to properly assess seriousness requires, we respectfully submit, drawing a distinction between active discrimination, which we do not have, from conduct which we do have, which is the repetition of tired and ignorant prejudices for comic effect. We respectfully submit that that other category, active discrimination, treating people differently on the basis of protective characteristics and generally in a negative way, represents a more serious breach of the standard of equality and diversity than this particular conduct. That is not to say it is not; it is, it is accepted it is. The active form is more serious, and by extension, this form is less serious than that."*

80) At the outcome stage, the appellant's representative submitted:

> *"You have got to understand that it is not about the direct use of these memes or repetition of these stereotypes, just the mere private sharing has an effect, and thinking has caught up with that."*

81) Whilst the appellant's representative was at pains to describe discriminatory conduct which would be more serious than the conduct of the appellant, this, of itself, does not mean that the appellant's misconduct was not particularly serious. The Panel did not directly address the argument by use of the phrase *"active discrimination"*, but it did focus on the actual conduct of the appellant, which was contained in the allegation, and which the appellant had admitted. It recognised that it had been argued on the appellant's behalf that he had not engaged in direct discrimination. It stated:

> *"It was argued that PC Jeer's conduct was not of the most serious nature because he had not directly discriminated against any individuals."*

82) The tribunal accepts the respondent's submissions that the Panel had no need to address the distinction which the appellant sought to make. The appellant had admitted the breach of the standard of equality and diversity, and that his conduct amounted to misconduct. In order to make a proper assessment of the severity of his misconduct, by reference to the framework outlined in the College Guidance, the Panel had no need to find that he had not engaged in "*active*" discrimination.

83) The tribunal did not accept the submissions on behalf of the appellant that the Panel confused *"active discrimination"* with the conduct of the appellant, and was in error by finding it was particularly serious. The Guidance makes no mention of "*active*" discrimination. It says discrimination may involve language or behaviour, may be directed towards members of the public or colleagues, and may be conscious or unconscious. It goes on to state that, where it is conscious or deliberate, that will be particularly serious, but unconscious discrimination can also be serious. The Panel considered the effect of unconscious bias, and concluded that the appellant's actions would cause serious reputational harm.

84) The tribunal did not find that the Panel was confused about the proper categorisation of the appellant's actions. The Panel was in no doubt about what he had done, and it explained why it found it to be very serious, by reference to the framework outlined in the Guidance.

85) The assessment of seriousness must take into account all the relevant features of the misconduct in question, including any features listed in the Guidance, and any other features which the decision maker considers to be relevant. The Guidance offers a framework within which to assess seriousness, by reference to culpability, harm, aggravating and mitigating factors. Case law has confirmed that it is important to follow this structured approach, and to provide an explanation of how the Panel has arrived at its decision, applying that approach. The Judge in the case of **Roscoe** added:

> *"16. …If that ideal approach is not adopted but it is apparent from the language used by the tribunal that in substance such an approach in fact has been adopted then the court will not intervene. Obviously however the court will not guess or assume that a correct approach has been adopted if that is not apparent on the face of the decision."*

86) The tribunal was satisfied that the Panel had not taken an unreasonable approach, nor drawn any unreasonable conclusions by virtue of the structured and reasoned approach it took to assessing the seriousness of the appellant's misconduct.

Side-stepping the Guidelines in assessing the seriousness of the conduct

87) The fact that the Guidance contains examples of features of more serious misconduct does not preclude a panel from finding that misconduct without those features is particularly serious. Any finding must, however, be reasoned by reference to the evidence in the case, as confirmed by the caselaw above.

88) The appellant's representative said he was not arguing that discrimination was active or passive, but he was setting up a contradistinction of what the officer did, and the Panel should have addressed this argument and said whether the conduct fell within the guidelines or not. He submits that, in failing to do so, the Panel wrongly set the guidelines to one side altogether.

89) The appellant acknowledges that the Panel took a structured approach in its decision on outcome, but by this time, he submits that its assessment of seriousness had been tainted by the finding of gross misconduct, in which it ignored the Guidance.

90) It had been argued that the appellant's conduct was not the most serious, because had had not directly discriminated against any individuals. Noting this, the Panel said the guidelines were *"not tramlines"*, but it does not follow that it was departing from them. The Panel observed that the nature of the discriminatory material was very serious, and it is clear to the tribunal that the Panel considered this, and the grave reputational harm, to be weighty factors in assessing the seriousness of the appellant's conduct in sharing such offensive material.

91) The tribunal did not agree that the Panel had set aside or ignored the Guidance. In the decision leading to its finding of gross misconduct, the Panel explicitly identified the appellant's conduct, dealt briefly with the main arguments on his behalf, then adopted the structured approach to the assessment of seriousness as set out in the Guidance, taking into account culpability, harm, aggravating and mitigating features. The weight it gave to each of these factors was a matter for the Panel, and its conclusions were explicitly formed on the basis of the totality of the evidence before the Panel.

Conclusion

92) The tribunal found that the approach of the Panel and its conclusions in respect of the finding of gross misconduct or the outcome of dismissal were not unreasonable. It had properly reached its decisions by reference to the recommended structured approach. Accordingly the appeal is dismissed on all grounds.

Sara Fenoughty
Chair of the Police Appeals Tribunal
26 May 2023