



Neutral Citation Number: [2025] EWCA Civ 27

Case No: CA-2023-002445

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION (ADMINISTRATIVE COURT)**  
**THE HONOURABLE MR JUSTICE SWIFT**  
**AC-2022-LON-64; CO/68/2022**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/01/2025

**Before :**

**LORD JUSTICE BEAN**  
**LORD JUSTICE BAKER**  
and  
**LADY JUSTICE NICOLA DAVIES**

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**Between :**

**REX (on the application of KRISTINA O'CONNOR)** **Appellant**  
- and -  
**PANEL CHAIR (POLICE MISCONDUCT PANEL)** **Respondent**  
- and -  
**JAMES MASON** **Interested Party**

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**Maya Sikand KC and Rosa Polaschek (instructed by Bindmans LLP) for the Appellant**  
**Ailsa Williamson (instructed by Reynolds Dawson) for the Interested Party**  
**The Respondent is not participating in this appeal**

Hearing date: 4 December 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10am on 22 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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### **Lady Justice Nicola Davies:**

1. This is an appeal in respect of the decision of the Administrative Court (Swift J) dismissing the appellant's claim for judicial review against the Police Misconduct Panel (the Panel). The Panel concluded that the interested party, James Mason, a former police officer, used his position of authority to sexually harass the appellant both in person and subsequently by email and that such behaviour constituted gross misconduct. The sanction of a final written warning was imposed. The Panel's approach, its assessment of the police officer's conduct and the sanction which it imposed, is the focus of the appellant's challenge. No challenge is made to the finding of gross misconduct. Permission to appeal was granted by Nugee LJ on 31 May 2024.

### **Factual background**

2. On 23 October 2011 the appellant was the victim of a violent attempted street robbery as a result of which she sustained bruising and a black eye. The appellant telephoned the police, a crime report was opened and she was taken to Kentish Town police station.
3. Another officer had been allocated as the Officer in the Case (OIC) but it was Mr Mason, a Detective Sergeant and the officer's supervisor who was in charge of the police station at the time, who assumed the responsibility for the taking of the appellant's statement. During the course of this procedure Mr Mason asked the appellant a series of intrusive questions concerning her personal and professional life. Mr Mason also asked the appellant if he could take her out for dinner that evening, an approach which the appellant deflected but one which made her feel uncomfortable and she declined.
4. On 24 October 2011 the appellant contacted Mr Mason using the Metropolitan Police email address in order to request a fingerprint examination of her phone. In response Mr Mason sent a series of email messages to the appellant in which he asked her to go out for a drink with him, offered to take a picture of her, and told her that despite her injuries: "I am sure you still looking amazingly hot". When the appellant attempted to persuade him to desist, he emailed that: "Coming on to victims is positively encouraged, it's all part of the friendly and accessible face of the Met Police. It's the rejection that is frowned upon". The appellant replied: "You have no shame! You could get fired for this!" In response he stated: "You are probably right on both counts. I can assure [sic] that I am as determined in my pursuit of criminals as I am of beautiful women if that helps. You know where I am if you ever change your mind or need a friendly Police Officer" and told her that she had: "taken top spot as my favourite Camden victim of crime". The appellant was 24 years old at the time of the incident; Mr Mason was ten years older than her. The appellant posted excerpts of the emails on her Facebook page on 24 October 2011, adding: "Can't quite believe what I am reading from the Detective Sergeant dealing with my mugging".
5. The appellant found Mr Mason's behaviour "confusing, distressing and frightening." She felt vulnerable and having been physically assaulted in the original incident and taken advantage of by Mr Mason, once again felt like a target.
6. The impact of the incident upon the appellant was significant. She subsequently entered into an abusive relationship, considered calling the police but did not do so due to her experience with Mr Mason as she feared she would not receive the support she needed.

It was only some years later that she felt sufficiently secure to make a complaint. Her action was prompted by a Facebook memory which appeared on 24 October 2020 showing the original emails. On 26 October 2020 the appellant made a formal complaint to the Metropolitan Police.

### **Police disciplinary proceedings – statutory and regulatory provisions**

7. Disciplinary proceedings against police officers are governed by the Police Reform Act 2002 (the 2002 Act), the Police (Complaints and Misconduct) Regulations 2020 (the Complaint Regulations 2020) and the Police (Conduct) Regulations 2020 (the Conduct Regulations 2020), issued under powers conferred by sections 50 and 51 of the Police Act 1996 (the 1996 Act). The Conduct Regulations 2020 provide for independent misconduct hearing panels to investigate alleged instances of misconduct. Under Regulation 23, misconduct proceedings must be held if there is a case to answer for gross misconduct. As required by paragraph 4 of Schedule 3 to the 2002 Act, the Commissioner (in fact his Directorate of Professional Standards) referred the appellant's complaint to the Independent Office for Police Conduct (the IOPC) on 4 November 2020. By paragraph 14 of Schedule 3 to the 2002 Act, it is for the IOPC to decide whether to investigate a complaint itself or if there is a matter for local investigation, in this case it meant investigation by the Commissioner.
8. Schedule 2 to the Conduct Regulations 2020 identifies the Standards of Professional Behaviour, it includes the following:

#### **“Honesty and Integrity**

Police officers are honest, act with integrity and do not compromise or abuse their position.

#### **Authority, Respect and Courtesy**

Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.

Police officers do not abuse their powers or authority and respect the rights of all individuals.

#### **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.”

9. Paragraph 29 of Schedule 3 to the 2002 Act and Regulation 2(1) of the Conduct Regulations 2020 define “gross misconduct” as a breach of the Standard of Professional Behaviour that is so serious as to justify dismissal.

10. Regulation 42(3)(b) provides that following a determination that the conduct of the officer amounts to gross misconduct the following sanctions can be imposed: (i) a final written warning; (ii) reduction in rank; (iii) dismissal without notice.

### **Guidance on outcomes in Police Misconduct Proceedings**

11. Statutory guidance pursuant to section 87 of the Police Act 1996 has been issued by the College of Policing which is intended to assist persons appointed to conduct police misconduct proceedings. It may also be used to inform assessment of conduct under Regulation 12 of the Conduct Regulations 2020 or paragraph 19B of the 2002 Act. The Guidance for the purpose of these proceedings was published in 2017 (the Outcomes Guidance). Relevant parts of the Guidance are set out in Appendix 1 to this judgment.
12. In *Fuglers LLP and others v Solicitors Regulatory Authority* [2014] EWHC 179 (Admin) (*Fuglers*), a case involving the Solicitors Disciplinary Tribunal which had imposed fines on the firm of solicitors and two of its members following misuse of funds in the firm's account, Popplewell J (as he then was) made observations on the approach the Tribunal should take in determining sanction as follows:

“28. 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.

29. In assessing seriousness the most important factors will be (1) the culpability for the misconduct in question and (2) the harm caused by the misconduct. Such harm is not measured wholly, or even primarily, by financial loss caused to any individual or entity. A factor of the greatest importance is the impact of the misconduct upon the standing and reputation of the profession as a whole. Moreover the seriousness of the misconduct may lie in the risk of harm to which misconduct gives rise, whether or not as things turn out the risk eventuates. The assessment of seriousness will also be informed by (3) aggravating factors (eg previous disciplinary matters) and (4) mitigating factors (eg admissions at an early stage or making good any loss).

....

30. At the second stage, the Tribunal must have in mind that by far the most important purpose of imposing disciplinary sanctions is addressed to other members of the profession, the reputation of the profession as a whole, and the general public who use the services of the profession, rather than the particular solicitors whose misconduct is being sanctioned. “

13. Popplewell J referred to the observations of Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512 at 518 – 519 which include the following:

“The second purpose is the most fundamental of all: to maintain reputation of the solicitors’ profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain its reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. ... A profession’s most valuable asset is its collective reputation and the confidence which that inspires.”

### **The Misconduct Proceedings**

14. On 24 December 2020 Mr Mason, now a Detective Chief Inspector, provided his response to the allegations. He accepted the details regarding the email correspondence of 24 October 2011 but disputed the appellant’s claims in respect of the events at the police station on the previous evening in particular he denied inviting the appellant to dinner.

15. The local investigation was concluded on 26 February 2021, it found that Mr Mason had a case to answer for gross misconduct. Upon referral to him, Chief Inspector Byrne agreed with the local investigation’s findings and noted that he “did not think that DCI Mason can continue to serve as a police officer”. However, the Chief Inspector stated that:

“In my opinion, despite the fact that the incident was historic and DCI Mason has made an admission and offered an apology, this matter is a serious breach of trust and could seriously undermine confidence and trust in the police. As such I do not think that DCI Mason can continue to serve as a police officer.”

16. A hearing was convened. Mr Mason was alleged to have breached the Professional Standards relating to (i) Authority, Respect and Courtesy and (ii) Discreditable Conduct in respect of 23 October 2011 and (iii) Honesty and Integrity as to the email messaging on 24 October 2011. Mr Mason formally accepted breaches of (i) and (ii) and of the “Integrity” limb of (iii). He did not accept that the breaches amounted to gross misconduct.

17. At the misconduct hearing on 4 October 2021 the appellant and Mr Mason gave evidence. He admitted six of the eight allegations which amounted to acceptance of the facts that he had: (i) taken the appellant’s statement at the police station despite being the supervisor and not the OIC; (ii) asked the appellant personal questions when taking the statement and (iii) sent the relevant emails. Mr Mason accepted full responsibility for what had happened but maintained that he had asked the appellant questions relating to her work and to her relationship status for legitimate policing purposes. He denied asking to take the appellant out to dinner on the 23<sup>rd</sup> stating that it would have been impossible for him to leave the busy police station at the time and denied that his behaviour had in any way compromised the investigation.

18. On 5 October 2021 the Panel gave its decision and concluded that all three breaches of the Standards had been made out. It found that Mr Mason had been attracted to the appellant and was interested in pursuing a relationship with her. The Panel rejected Mr Mason's claim that his questions regarding the appellant's relationship status were to check whether she had support at home, it found that the question was related to his wish to pursue a relationship with her. The Panel also found that Mr Mason had asked the appellant out to dinner and rejected his account that he could not have left the busy station that evening. It found that he had inappropriately asked the appellant whether she wore the "bunny girl" outfit in her work at the Playboy Club, it did not accept his account that he had referred to the "iconic uniform". It was the Panel's conclusion that these questions were all attempts by Mr Mason to establish a relationship with the appellant while taking her statement as a recent victim of street robbery. No findings were made in respect of Mr Mason's alleged dishonesty.
19. The Panel noted that misconduct had been admitted by Mr Mason. It regarded the breaches of three different Standards as a significant departure from the behaviour expected of a police officer. The Panel found that Mr Mason had "sought to exploit his chance encounter with [the appellant] when he interviewed her." It stated that: "He clearly found her attractive and took a number of steps during the interview and the next day in email messages to establish a relationship with her. His description of her as looking amazingly hot and his admission in the email messages of being determined in his pursuit of beautiful women makes it clear that he was attempting to pursue a sexual relationship with her. This was such a fundamentally inappropriate way for him to have acted that the Panel are in no doubt that his behaviour constituted Gross Misconduct."
20. The Panel then considered the issue of sanction. Its reasoning and determination were as follows:

**"Finding on outcome including any aggravating or mitigating factors affecting the seriousness of the failures in standards**

**AGGRAVATING FACTORS**

1. There was a sexual motive for the actions of DCI Mason.
2. He was guilty of a breach of trust in the way that he dealt with Maria.
3. He continued his behaviour after Maria had suggested that he was acting inappropriately.
4. He knew that his actions were inappropriate at the time but continued in his attempt to create a personal relationship with Maria.
5. His behaviour had an adverse impact on Maria in that it caused her to have much less trust in the police and not seek their assistance subsequently.

6. Maria was the recent victim of a robbery and as a result was vulnerable.
7. There is a very significant level of public concern at the present time about the way in which police officers behave towards female members of the public.
8. DCI Mason has been found to have breached 3 separate Standards of Professional Behaviour.

#### MITIGATING FACTORS

1. The misconduct was confined to a limited period of time over 2 successive days.
2. DCI Mason made admissions to most of the factual allegations he faced and admitted that his behaviour amounted to Misconduct.
3. DCI Mason had a further opportunity to attempt to create a personal relationship with Maria when she contacted him a few months later to report a burglary but he passed the investigation on to other officers.
4. DCI Mason has shown significant remorse for his inappropriate behaviour.”
5. The AA has provided evidence of the excellent service record of DCI Mason since 2011.
6. There are no reports of any inappropriate behaviour or misconduct by DCI Mason since the events which are the subject of this case.
7. DCI Mason has provided 7 character references, all of which speak very highly of his abilities as a police officer.
8. DCI Mason has achieved a number of promotions since 2011, rising from Detective Sergeant to Detective Inspector in 2015 and to Temporary Detective Chief Inspector in 2017. He is now a Detective Chief Inspector on the Flying Squad and was recently successful in a Superintendent promotion assessment centre.
9. In 2013, 2015 and 2018 he received commendations for his service in the Metropolitan Police Service (MPS). The award in 2018 was from the Assistant Commissioner for extraordinary leadership, professionalism, resilience and dedication while providing counter-terrorism support to the investigation in response to the Westminster Bridge terrorist attack.

10. The events with which the Panel is concerned today occurred almost 10 years ago when public concern about the type of behaviour exhibited by DCI Mason was less pronounced.
11. The Code of Ethics which assists police officers in understanding their duties and obligations was formalised and published in 2014. Prior to this the guidance to police officers was less comprehensive.

## OUTCOME

In considering outcome the Panel bore in mind that the purpose of the police misconduct regime is threefold:

1. To maintain public confidence in and the reputation of the police service
2. To uphold high standards in policing and deter misconduct
3. To protect the public

The Panel considered the 3 possible outcomes in ascending order of seriousness. The Panel had in mind that it should choose the least severe outcome which deals adequately with the issues identified. The Panel first considered a final written warning. This would remain in place for at least 2 years and not more than 5 years.

The Panel has determined that the appropriate and proportionate outcome is that DCI Mason is given a final written warning. In considering the appropriate length of time that the final written warning should remain on the officer's record the Panel took into account:

- (a) The seriousness of the conduct
- (b) The circumstances that gave rise to the misconduct
- (c) The public interest
- (d) The mitigation offered by the officer including previous record of conduct.

The seriousness of the conduct appears from the list of aggravating factors mentioned above. The Panel do not minimise the seriousness of DCI Mason's behaviour. However, this was misconduct over 2 days in an otherwise blameless career which has spanned 22 years and includes several promotions and 3 commendations.

The lapse of time since the events occurred is significant. It is now 10 years since DCI Mason attempted to pursue a



relationship with Maria. The delay in this matter coming before this Panel is mainly due to the delay in Maria making a complaint to the MPS. The issues arising in this case are currently very topical but were much less so in 2011. The matters referred to in the list of mitigating factors above provide strong reasons to support the imposition of a Final Written Warning of less than the maximum duration. However, the public interest in discouraging this type of behaviour is high. This type of behaviour and more serious examples of police officers abusing their position of trust when dealing with female members of the public have been prominent in the media in recent months. The Panel are mindful of this. In the final analysis the Panel must impose an outcome that is proportionate to the harm caused by the actions of DCI Mason. The outcome must deter misconduct in the future by members of the MPS. The outcome must aim to maintain public confidence in and the reputation of the police service. The Panel has concluded that a Final Written Warning for 3 years is the appropriate outcome. The more serious outcomes of Reduction in Rank or Dismissal without Notice would be disproportionately harsh in the Panel's judgment in all the circumstances."

### **Judicial review proceedings**

21. The appellant instituted proceedings for judicial review on 5 January 2021 against the Panel (the first defendant), the Commissioner of the Police of the Metropolis (the second defendant), and Mr Mason and the IOPC (interested parties). The hearing took place on 16 and 17 May 2023. In the interim, Mr Mason resigned from the Metropolitan Police on 1 November 2022. In grounds contesting the claim, the Commissioner disputed alleged public law errors in the recording and investigation of the appellant's complaint but in respect of outcome it was stated that the Commissioner did not "seek to justify or support the outcome imposed by [the respondent]", and noted that officers who conduct themselves in this way "are not suitable to continue to serve as police officers".
22. Before the Administrative Court, the appellant, the second defendant and Mr Mason were legally represented and took part in the proceedings. The second defendant and the second interested party have played no part in the proceedings before this court. The issues for the Administrative Court were wider than those before this court. For the purpose of this appeal, the challenged aspects of the judgment of the Administrative Court are focused upon the Panel's findings in respect of the Outcomes Guidance, the evaluation of the seriousness of Mr Mason's gross misconduct and the imposition of a final written warning as the appropriate sanction.
23. At [29] Swift J noted that the Outcomes Guidance is very detailed but stated that: "it would be wrong to conclude it is some form of route map for Misconduct Panels that either removes or significantly reduces the opportunity for a panel to assess matters for itself." He referred to paragraph 1.3 and 1.4 of the Introduction and concluded that the Outcomes Guidance "does not purport to be a straitjacket." He noted that nothing that appears in the Outcomes Guidance ought to be or could be construed as derogating from any provision in the Conduct Regulations.

24. Swift J considered the reference in the Outcomes Guidance to the judgment of Popplewell J in *Fuglers* and the observations of Sir Thomas Bingham MR in *Bolton*. In particular he considered Chapter 4 (Assessing Seriousness) of the Outcomes Guidance and the contention of the appellant that the Panel had failed to comply with it by failing to follow a “structured approach”. At [35] Swift J noted the reliance of the appellant on the judgment of HHJ Pelling KC in *R (Chief Constable of Greater Manchester Police) v Police Misconduct Panel and Roscoe* (unreported 13<sup>th</sup> November 2018) (*Roscoe*), in particular the judge’s observations at paragraphs 16 and 18 as to the use of a ‘structured approach’ by a Police Misconduct Panel in approaching sanction, which state:

“16. In my judgment this panel fell into error in the way it approached the sanction. The only way a court or anyone else reading the decision can be satisfied that the correct structured approach had 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.

...

18. Although the panel states in the second and third line of its sanction decision that it has applied the principles in the guidance that falls far short of what is required in my judgment. It does not set out expressly or even refer expressly to the correct structured approach identified in *Fugler* summarised in the guidance even though the parties formerly cited *Fugler* to the panel. Even if the language used by the panel could be regarded as sufficient in the circumstances that of itself is not enough unless the reasoning that follows shows that effect has been given to the structured approach by reference to the purpose of sanctions identified in the guidance. The panel has identified certain aggravating factors and certain mitigating factors before then concluding that a final written warning was appropriate. By adopting that approach the panel fell into error because it did not attempt to assess how serious it concluded the misconduct to be. Seriousness is not a binary question. The focus of Chapter 4 of the guidance is on assessing how serious the misconduct is, not whether or not it was serious. Hence the reference for example in paragraph 4.15 to conduct that should be considered ‘especially serious’. The panel should have but has failed to assess the level of seriousness by reference to culpability, harm, aggravating factors and mitigating factors in the structured manner required by the guidance. Having reached a conclusion as to the level of seriousness displayed in circumstances of this

case exhibited by the misconduct found to have occurred, the panel ought then to have considered sanction specifically by reference to the need to maintain public confidence in and the reputation of the police service, to uphold high standards, to deter misconduct and to protect the public. There is not a hint within the language used by the panel that this has been its approach.”

25. Of this approach, Swift J stated at [35]:

“HHJ Pelling was correct to make it clear that compliance with the obligation to have regard to Outcomes Guidance is a matter of substance, not form. However, it would be wrong to consider this or any other part of his judgment as applying some form of gloss either to the Outcomes Guidance such that it should be read as requiring a panel’s reasoning to follow one specific course in all cases, or to the well-known content of statutory “have regard” obligations as they apply to statutory guidance.”

26. At [36], addressing the appellant’s contention that there was a need to follow a “structured approach” Swift J stated:

“As the Outcome Guidance states, it is a general framework for assessing seriousness of misconduct. It does not require decisions to be expressed or laid out in any prescribed form. In this sense it is unhelpful to speak in terms of a “structured approach”. When the submission is to the effect that a panel failed to have regard to Outcomes Guidance when assessing the seriousness of the conduct before it, the court must consider the decision and reasons as a whole and assess whether the four elements referred to at paragraph 4.4 of the Outcomes Guidance have been considered. It would be wrong to assume that those four elements must be considered separately from each other or in separate parts of the reasoning. Paragraph 4.4 of the Outcomes Guidance is not, in this sense, a template. Depending on the facts of the case in hand one or more of the elements may overlap. For example, one person’s “culpability” or “harm consideration” could be another’s “aggravating factor”. Which category the matter is put into is less important than the fact that the panel has taken it into account. Put shortly, the Outcomes Guidance is not to be applied as if it was intended to create a series of traps for an unwary misconduct panel. The only sense in which a “structured approach” is required is that, considering a decision overall, it should be apparent that the seriousness of the misconduct found to have occurred has been considered methodically in a manner that is consistent with the panel’s obligation to have regard to the Outcomes Guidance.

27. At [37] Swift J concluded that the Panel’s reasoning, considered in the round, was consistent with the assessment of seriousness explained in Outcomes Guidance. He found that the Panel had made clear findings of fact, it set out its conclusions on the

consequences of those matters in so far as they concern the application of the Standards of Professional Behaviour. Swift J recorded the written findings of the Panel and stated:

“40. It may fairly be said that the way the Panel set out this part of its reasons does not follow the list at paragraph 4.4 of the Outcomes Guidance, as a template. However, looking at the substance of the reasons there was no failure to have regard to the Guidance. The Panel’s list of aggravating factors includes the matters going to culpability (items 1, 3 and 4) and considers the harm caused (items 5 and 6). Later, under the heading “Outcome” the Panel referred to its list of aggravating factors as explaining the seriousness of the conduct. This was consistent with the Guidance. The Claimant submitted otherwise, relying in particular on the observation made by Judge Pelling in the *Greater Manchester* case that “seriousness is not a binary question” (see the passages quoted above, at paragraph 35). That phrase means no more than that a panel should explain its conclusion on seriousness by reference to facts of the case in hand. In the present case the Panel did this; the extent of the seriousness of the misconduct was explained by reference to the list of aggravating factors.

41. I am also satisfied that when the Panel made its decision on the penalty to impose, it did consider the need to maintain public confidence in the police. The Panel said as much under the heading “Outcome”. Further: (a) it identified public concern at the treatment of women by the police as an aggravating factor; and (b) recognised that such public concern was greater now than it had been in 2011 when the events giving rise to the complaint had occurred.

42. The Claimant’s submission to the contrary relies on paragraph 4.65 of the Outcomes Guidance which is to the effect that where “serious harm” has been caused either to people or public confidence in the police “dismissal is likely to follow”. However, in the present case, the submission cannot really be that the Panel disregarded paragraph 4.65 of the Guidance since the passages I have mentioned show that the Panel had the need to maintain public confidence well in mind. Rather, the submission can only be that the Panel fell into error by failing to categorise the harm in this case as “serious harm”. In this way the submission is not so much about an error of principle as about an alleged error of assessment. The submission fails because, absent error on some matter of principle, evaluation of how serious the harm is, is for the Panel, save for example where the conclusion reached was supported by no evidence. On this matter too, therefore, the Panel’s approach was consistent with the Outcomes Guidance. Overall, therefore I reject the Claimant’s submission that the Panel failed to have regard to the Outcomes Guidance.”

## Grounds of appeal

28. The appellant appeals on three grounds:

(1) The Court erred in finding that the Panel lawfully followed the Outcomes Guidance because the Panel was not obliged to follow a “structured approach” to decision-making.

(2) The Court erred in finding that the Panel lawfully followed the Outcomes Guidance in its approach to evaluating the seriousness of Mr Mason’s gross misconduct; and specifically erred in concluding that the Panel’s decision on the seriousness of the harm caused to the complainant could only be interfered with on judicial review if the decision reached was “supported by no evidence”.

(3) The Court erred in finding that it was not irrational for the Panel to impose a written warning as the appropriate penalty for the finding of gross misconduct notwithstanding the seriousness of the gross misconduct.

## The appellant’s submissions

29. The appellant contends that the challenge set out in grounds of appeal 1 and 2 relates both to form and substance. The appellant does not accept that the Panel’s reasoning followed the correct “structured approach” nor that the substance of its findings complied with the Outcomes Guidance. Each failure is said to represent an unlawful error.

30. It is the appellant’s contention that the Outcomes Guidance mandates a “structured approach” to decision-making. The approach must reflect the three stage approach set out in *Fuglers* above, an approach which is adopted in the Outcomes Guidance. The appellant also relies upon the authority of *Roscoe* as support for her contention that a ‘structured approach’ is required.

31. The court was referred to a number of subsequent decisions by High Court or Deputy High Court judges in which the phrase “structured approach” has been adopted. The authorities cited to the court included: *R (Chief Constable West Midlands Police) v Panel Chair, Police Misconduct Panel* [2020] EWHC 1400 (Admin); *R (Chief Constable of Dyfed Powys Police) v Police Misconduct Tribunal* [2020] EWHC 2032 (Admin), [2020] IRLR 964; *R (The Chief Constable of Nottinghamshire Police v Police Appeals Tribunal and Flint* [2021] EWHC 1248 (Admin); *R (Commissioner of Police of the Metropolis) v Police Appeals Tribunal* [2022] EWHC 1951 (Admin); *R (Humpherson) v The Police Appeals Tribunal* [2022] EWHC 2424 (Admin), [2022] IRLR 1049; *Commissioner of the Police of the Metropolis v A Police Conduct Panel* [2022] EWHC 2857 (Admin); *R (Chief Constable of the British Transport Police) v Police Misconduct Panel* [2023] EWHC 589 (Admin).

32. It is the appellant’s case that the Panel failed to assess the seriousness of Mr Mason’s conduct and within that assessment, it failed to assess the level of culpability or of harm. 4.10 of the Outcomes Guidance identifies a direct relationship between the level of culpability and the severity of the outcome. A position of trust and a level of responsibility of a police officer can affect culpability (4.13). The appellant submits

that on the part of Mr Mason there was sexual impropriety (4.39) and breach of a position of trust (4.42). These factors increased his culpability. The vulnerability of the appellant as a victim of crime was a factor which heighten the seriousness of the misconduct. As to harm, it was incumbent on the Panel to assess the impact of the officer's conduct and the victim's particular characteristics (4.58). Harm is relevant to the undermining of public confidence in the police. The fact that these offences occurred in 2011 does not reduce the nature of the misconduct, which was unacceptable at the time it occurred.

33. The appellant contends that listing aggravating and mitigating factors does not represent an analysis of the issues of seriousness, culpability or harm. The absence of such evaluations represents a public law error. The appellant further contends that the Panel erred in considering personal mitigation at the seriousness stage which is contrary to the Outcomes Guidance and is unlawful (*Commissioner of the Police of the Metropolis v Police Conduct Panel* [2022] EWHC 2857 (Admin)). In any event, personal mitigation is of limited weight in this case.

### **The submissions of the interested party (Mr Mason)**

34. The interested party contends that the finding of the Administrative Court was not that no structured approach was required, it found that it was necessary for the Panel to follow the staged approach set out in *Fuglers*. Following this approach, the first stage is an assessment of the seriousness of the misconduct, within that assessment four factors are important, namely: culpability; harm; aggravating and mitigating factors. The factors do not have to be considered separately as they can overlap.
35. It is the submission of the interested party that the approach taken by Swift J does not represent a departure from previous authority. There is extensive guidance in the Outcomes Guidance but no requirement for an approach by means of an identified structure with regard to culpability and harm and subsequently aggravating and mitigating factors. The term "structured approach" as used by HHJ Pelling in *Roscoe* has led to confusion in later authorities, as one "structured approach" refers to the approach of Popplewell J in *Fuglers* and another refers to the three stage approach in *Roscoe* which encompasses not only the three stages identified by Popplewell J but also includes the assessment of seriousness involving the four identified factors.
36. The interested party accepts that there is no analysis by the Panel upon the specific issues of culpability or harm nor an analysis of the resultant level of seriousness. However, it is submitted, that all relevant matters were addressed which adequately encompassed the stages identified in *Fuglers*.
37. As to the assessment of seriousness, it is contended that the Panel did consider the substance of the four factors. It correctly viewed the aggravating factors of breach of trust and vulnerability of the victim which were relevant to culpability. Factors 1, 3 and 5 in the list of aggravating factors were addressed, there was no requirement to expressly refer to them as being "especially serious". It noted that Mr Mason had "behaved inappropriately towards a vulnerable woman and that such behaviour was sexually motivated". Further, the Panel had regard to the impact that Mr Mason's misconduct had upon public confidence in policing. It cited its findings on the appellant's lack of trust in the police, attention was paid to the public concern regarding

the treatment of women by police officers. The issue of the appellant's vulnerability was identified by the Panel as relating to an issue of harm.

## **Discussion and conclusion**

### **A 'mandated' or 'structured' approach**

38. The purpose of the Police Misconduct regime is identified as being threefold namely: (i) to maintain public confidence and the reputation of the police service; (ii) to uphold high standards in policing and (iii) to deter misconduct and protect the public. The Outcomes Guidance provided to Police Misconduct Panels in determining issues of misconduct is detailed. It "outlines a general framework for assessing the seriousness of conduct, including factors which may be taken into account". (1.4). The Guidance "does not override the discretion of the person(s) conducting the meeting or hearing. Their function is to determine the appropriate outcome and each case will depend on its particular facts and circumstances. Guidance cannot and should not prescribe the outcome suitable for every case." (1.3). The wording of these paragraphs, to be found in the Introduction to the Outcomes Guidance, does not support the appellant's contention that the Guidance mandates a specific approach. It is of note that an 'outline' of a 'general framework' is provided. The discretion of the Panel to determine outcome depending on the facts of an individual case is highlighted. These are not concepts which reflect the imposition of a 'mandated' approach by the Outcomes Guidance.
39. Part 4 of the Outcomes Guidance addresses the issue of seriousness, its assessment and, within that assessment, the issues of culpability and harm. It is within this section that reference is made to the authority of *Fuglers* and the three stages identified by Popplewell J in determining the appropriate sanction namely: (i) assess the seriousness of misconduct; (ii) keep in mind the purpose of imposing sanctions and (iii) chose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question. In assessing seriousness, Popplewell J identifies the most important factors as being culpability, harm, aggravating and mitigating factors (para 29).
40. I regard the attempt by HHJ Pelling KC in *Roscoe* to place a gloss upon the clarity of Popplewell J's approach as unnecessary, further it has led to differing judicial interpretations. Some judges have interpreted the phrase "structured approach" as reflecting the three stages identified by Popplewell J in *Fuglers* and others have read it as also encompassing the assessment of seriousness which includes a further four factors. No gloss is required. The guidance of Popplewell J is clear: there are three stages in the determination of sanction; within the first stage of seriousness are four factors which fall to be considered. These factors can overlap.
41. The nuanced consideration of Eady J in *R (Chief Constable West Midlands Police) v Panel Chair, Police Misconduct Panel* [2020] EWHC 1400 (Admin) correctly reflects the guidance in *Fuglers*. Eady J acknowledged that the Panel was required to follow the three-stage approach laid down in the Guidance which reflected the *Fuglers* guidance but stated that the issue was one of substance rather than form, the Panel was not involved in a tick box exercise (para 53). At (para 55) Eady J stated that: "although the Panel was required to adopt the three-stage approach laid down in the Guidance, the further provisions relating to seriousness were advisory rather than prescriptive – detailing how this element in the structure should be approached, not dictating a further structural requirement." I agree.

42. I also agree with the observation of Swift J that it is unhelpful to speak in terms of a “structured approach”. This is not a template. There can be overlapping of the different factors/elements and that is why the attempt by the appellant to impose a mandated or structured approach does not reflect the discretion identified in the Outcomes Guidance still less the approach set out in *Fuglers*. As Swift J stated at [29], notwithstanding the detail contained in the Outcomes Guidance “...it would be wrong to conclude it is some form of route map for Misconduct Panels that either removes or significantly reduces the opportunity for a Panel to assess matters for itself.” The Outcomes Guidance recognises the role and responsibility of the Misconduct Panel in assessing misconduct and sanction and that should be respected.
43. It follows, and I so find, that the Panel was not obliged to follow a ‘structured approach’ nor was the same mandated by the Outcomes Guidance. Accordingly, ground 1 of this appeal is dismissed.

### **The Panel’s reasoning and determination**

44. Adopting the approach of Popplewell J in *Fuglers*, the first issue for the Panel to assess was the seriousness of the misconduct of the interested party and within that consideration, assess and accord appropriate weight to issues of culpability and harm. The Outcomes Guidance includes the following: “the more culpable or blameworthy the behaviour in question, the more serious the misconduct and the more severe the likely outcome.” (4.10) Conduct which is “intentional, deliberate, targeted or planned will generally be more culpable than conduct which has unintended consequences...” (4.11) “Culpability will also be increased if the officer was holding a position of trust or responsibility at the relevant time.” (4.13)
45. Misconduct involving sexual impropriety is stated to undermine public trust in the profession and is therefore serious. This includes cases involving harassment towards members of the public, account should be taken of the vulnerability of the other party. More serious action is likely to be appropriate where the officer has demonstrated predatory behaviour motivated by the desire to establish a sexual or inappropriate emotional relationship with a colleague or a member of the public. (4.39 – 4.41)
46. Where an officer has used their position to pursue a sexual or improper emotional relationship with a member of the public, this should be regarded as an abuse of authority for sexual gain. Such conduct can cause substantial damage to public trust and confidence in the police and is particularly serious where the subject of the officer’s behaviour is a vulnerable person. (4.42). In addition an officer may hold the position of trust or responsibility, such positions may be defined in relation to rank. (4.43). As to the issue of vulnerability officers must not use their professional position to initiate or pursue a sexual or improper relationship with a vulnerable person. (4.47).
47. The Outcomes Guidance notes that misconduct may affect particular individuals and harm caused may depend on the victim’s personal characteristics and circumstances. It is likely to undermine public confidence in the police (4.57).
48. As to aggravating factors, those which indicate a higher level of culpability or harm include taking deliberate or predatory steps, an abuse of trust, position or authority, continuing the behaviour after the officer realised or should have realised that it was improper and the vulnerability of the victim. Double counting must be avoided. (4.67)



– 4.69). As to mitigating factors, in the context of the seriousness of the misconduct, factors which indicate a lower level of culpability or harm include a single episode or episode of brief duration, open admissions at an early stage, evidence of genuine remorse, insight and acceptance of responsibility. (4.71). At 4.72 it is stated that: “In cases where the misconduct occurred several years prior to the hearing the Panel should consider the outcome by reference to the standards of the time rather than current attitudes and standards.” It states that the Panel should: “Give due account to the officer’s conduct in the intervening years, for example, whether they performed their duties to a high standard.”

49. A distinction is drawn between mitigating factors in respect of the issue of seriousness of the misconduct and personal mitigation. Purely personal mitigation is not relevant to the seriousness of the misconduct. Tributes and testimonials should not be confused with mitigating factors relating to the misconduct itself. (6.2).
50. The Panel found that the interested party had breached the Professional Standards relating to Authority, Respect and Courtesy, Integrity and the Standard to relating to Discreditable Conduct. It identified the breaches of the Standards as representing a significant departure by Mr Mason from the behaviour expected of a police officer and found that he had behaved in such a fundamentally inappropriate way that his behaviour constituted gross misconduct. In my view, what the Panel did not do in making its findings was to provide any analysis of the seriousness of Mr Mason’s misconduct, in particular in respect of culpability and harm. I accept the appellant’s contention that listing the aggravating and mitigating factors does not of itself represent the required analysis, indeed counsel on behalf of Mr Mason did not seek to suggest otherwise.
51. This was deliberate and targeted misconduct by a police officer holding a position of trust and authority. It involved sexual impropriety towards a vulnerable victim. No reference is made by the Panel to the fact that misconduct involving sexual impropriety, of itself, is serious (4.39) and that more serious action is likely to be appropriate where the officer has demonstrated predatory behaviour motivated by a desire to establish a sexually inappropriate emotional relationship with a member of the public (4.40). The Panel recognised the vulnerability of the victim but did not identify the part this played in its assessment of seriousness and harm. The Panel did identify aggravating factors but it failed to properly assess or identify the weight to be attached in terms of harm or culpability to such factors and ultimately to the issue of the seriousness of the misconduct.
52. As to the mitigating factors, the appellant contends that purely personal mitigation was included within the list of such factors. At first sight, that would appear to be correct eg. reference to the service record of Mr Mason, to the fact that there were no other reports of inappropriate behaviour or misconduct and the inclusion of references to promotions and commendations. The difficulty for this court is the wording of the Outcomes Guidance at 4.72 which contemplates that in the conduct proceedings, where the misconduct occurred several years prior, due account can be given to the officer’s conduct in the intervening years. In my view there is force in a contention that save for purely personal mitigation (character references) the factors identified in this paragraph could fall within paragraph 4.72. Character references should not have been included in mitigating factors relating to the issue of seriousness as they represented personal mitigation.

53. As to the passage of time, the conduct of Mr Mason in 2011 was as reprehensible then as it is today. It may be said that there exists greater recognition of the seriousness of such conduct today but that cannot and does not minimise the serious nature of the misconduct.
54. Notwithstanding the listing of aggravating and mitigating factors, I am satisfied that the Panel did not provide an adequate analysis and, resulting from it, adequate reasons for its findings in respect of seriousness and within the finding of seriousness the levels of culpability and harm. These findings were important as they provided the factual basis for the first stage of the Panel's determination upon sanction. In my view the absence of such reasoning is a significant omission and represents an error of law.
55. The Panel determined that the sanction should be that of a final written warning, the least that could be imposed. It is difficult to identify the reasoning of the Panel as to why such sanction was appropriate rather than the more serious outcomes of reduction in rank or dismissal. The Panel's statement that such outcomes would be disproportionately harsh does little to assist an understanding of its reasoning as to the appropriateness of the sanction.
56. My finding that the absence of analysis and reasoning by the Panel on the issues of seriousness, culpability and harm represents an error of law, means that the essence of ground 2 of the appeal, as it was presented to this court, is made out. However, it should be recorded that this ground does not fairly represent what was stated by Swift J at [42] of the judgment. Swift J also contemplated interference by means of judicial review on the grounds of error on a matter of principle.
57. Following from the finding as to the error of law made by the Panel, the upholding of its decision by the Administrative Court also represents an error of law. Accordingly ground of appeal 2 is allowed and the decision of the Panel in respect of the sanction of a final written warning is quashed.
58. Given the determination in respect of ground 2, ground 3 does not require determination by this court.

### **Conclusion**

59. The court was assisted by counsel for the appellant and the interested party as to the course it could take in the event that one or more grounds of appeal succeed given that Mr Mason is no longer a serving police officer.
60. Regulation 2 of Schedule 1 of the Conduct Regulations 2020 has been modified to include officers who are no longer serving police officers. It states that: "disciplinary action for gross misconduct" means a finding that the officer concerned would have been dismissed if the officer had not ceased to be a member of a police force..." It would appear that such a finding is the only sanction open to a Panel following a finding of gross misconduct for an officer who is no longer a serving member of the police force. There appears to be no provision for a finding that a lesser sanction of a warning or reduction in rank would have been appropriate.
61. I am satisfied that as a result of the modification of Regulation 2 the fact that Mr Mason is no longer a serving police officer does not preclude this matter being remitted to a

Police Misconduct Panel. That being so, the court will remit this matter to a Panel. If possible, the same Panel should be convened to consider what finding as to sanction should be made in respect of the original finding of gross misconduct.

**Lord Justice Baker:**

62. I agree.

**Lord Justice Bean:**

63. I agree with Nicola Davies LJ and with Swift J that the Outcomes Guidance is not “a route map that removes or significantly reduces the opportunity for a Panel to assess matters for itself”. The more nuanced approach of Popplewell J in *Fuglers* and of Eady J in the *West Midlands Police* case is preferable to that of Judge Pelling KC in *Roscoe*. I too would therefore dismiss the appeal on ground 1.
64. However, I also agree with Nicola Davies LJ that in the present case the Panel did not properly analyse the seriousness of Mr Mason’s misconduct by reference to the factors of culpability and harm. This should have been done before consideration was given to the personal mitigation available to him. The Panel may have been misled by the inclusion in part 4 of the Outcomes Guidance, dealing with the assessment of seriousness, of the second sentence of 4.72: “Give due account to the officer’s conduct in the intervening years, for example, whether they performed their duties to a high standard.” This should have been included in part 6 of the Guidance, which deals with personal mitigation.
65. Personal mitigation such as an outstanding record of service does not reduce the seriousness of the misconduct. It may be considered, but only once the seriousness of the misconduct has been assessed. Whether it carries weight when set against the principles set out in cases such as *Bolton v Law Society* is a fact-specific balancing exercise for the Panel in each case.
66. Having made a finding of gross misconduct against Mr Mason, the Panel had three possible sanctions open to them: dismissal, reduction in rank or a final written warning to have effect for between two and five years. I do not consider that the appropriate outcome in this case was so obvious that this court should take the exceptional step of making the decision ourselves. Accordingly, I too would allow the appeal on ground 2 and remit the case to the Panel to consider the issue set out at the conclusion of Nicola Davies LJ’s judgment.

## Appendix 1

### Guidance on outcomes in Police Misconduct Proceedings (Outcomes Guidance)

#### “1 Introduction

....

1.3 The guidance does not override the discretion of the person(s) conducting the meeting or hearing. Their function is to determine the appropriate outcome and each case will depend on its particular facts and circumstances. Guidance cannot and should not prescribe the outcome suitable for every case.

1.4 Instead, this guidance outlines a general framework for assessing the seriousness of conduct, including factors which may be taken into account. These factors are non-exhaustive and do not exclude any other factor(s) that the person(s) conducting the proceedings may consider relevant.

#### 2 Police misconduct proceedings

...

2.3 The purpose of the police misconduct regime is threefold:

- maintain public confidence in and the reputation of the police service
- uphold high standards in policing and deter misconduct
- protect the public.

2.4 These aims derive from the following authorities on the nature and purpose of professional disciplinary proceedings:

a. *Bolton v Law Society*, in which Sir Thomas Bingham MR (as he then was) explained the apparent harshness of sanctions imposed by the Solicitors Disciplinary Tribunal:

‘The second purpose is the most fundamental of all: to maintain the reputation of the solicitors’ profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A

profession's most valuable asset is its collective reputation and the confidence which that inspires.'

....

2.10 Misconduct proceedings are not designed to punish police officers. As stated by Lord Justice Laws in *Raschid v General Medical Council*: 'The panel then is centrally concerned with the reputation or standing of the profession rather than the punishment of the doctor.'

2.11 The outcome imposed can have a punitive effect, however, and therefore should be no more than is necessary to satisfy the purpose of the proceedings. Consider less severe outcomes before more severe outcomes. Always choose the least severe outcome which deals adequately with the issues identified, while protecting the public interest. ...

### 3 Available outcomes

3.1 Misconduct is generally defined as unacceptable or improper behaviour and for police officers will involve a breach of the Standards of Professional Behaviour set out in Schedule 2 to the Conduct Regulations.

3.2 Regulation 33(13) of the Conduct Regulations provides that the person(s) conducting the misconduct proceedings shall:

'...review the facts of the case and decide whether the conduct of the officer concerned amounts—

in the case of a misconduct meeting, to misconduct or not; or

in the case of a misconduct hearing, to misconduct, gross misconduct or neither.'

....

### 3.4 Under Regulation 3(1):

■ misconduct means a breach of the Standards of Professional Behaviour

■ gross misconduct means a breach of the Standards of Professional Behaviour which is so serious that dismissal would be justified.

...

### 4. Assessing seriousness

4.1 Assessing the seriousness of the conduct lies at the heart of the decision on outcome under Parts 4 and 5 of the Conduct

Regulations. Whether conduct would, if proved, amount to misconduct or gross misconduct for the purposes of Regulation 12 of the Conduct Regulations is also a question of degree, ie, seriousness.

4.2 As Mr Justice Popplewell explained, there are three stages to determining the appropriate sanction:

- assess the seriousness of the misconduct
- keep in mind the purpose of imposing sanctions
- choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.

....

### Culpability

4.10 Culpability denotes the officer's blameworthiness or responsibility for their actions. The more culpable or blameworthy the behaviour in question, the more serious the misconduct and the more severe the likely outcome.

4.11 Conduct which is intentional, deliberate, targeted or planned will generally be more culpable than conduct which has unintended consequences, although the consequences of an officer's actions will be relevant to the harm caused.

.....

4.13 Culpability will also be increased if the officer was holding a position of trust or responsibility at the relevant time. All police officers are in a position of trust, but an officer's level of responsibility may be affected by specific circumstantial factors such as rank, their particular role and their relationship with any persons affected by the misconduct.

4.14 It is not possible to categorise all types of case where dismissal will be appropriate because the circumstances of the individual case must be considered. Many acts have the potential to damage public confidence in the police service.

4.15 The following types of misconduct, however, should be considered especially serious.

....

### Violence, intimidation or sexual impropriety

4.39 Misconduct involving violence, intimidation or sexual impropriety undermines public trust in the profession and is therefore serious.

4.40 This includes cases involving bullying or harassment, either in the police service or towards members of the public. Give attention to the degree of persistence, the vulnerability of the other party, the number of people subjected to the behaviour and whether the officer was in a specific position of authority or trust. More serious action is likely to be appropriate where the officer has demonstrated predatory behaviour motivated by a desire to establish a sexual or inappropriate emotional relationship with a colleague or member of the public.

4.41 The presence of any of these factors is likely to increase the seriousness of the misconduct, although the treatment of a single individual can be sufficiently serious to amount to gross misconduct.

#### Breach of position of trust or authority

4.42 The nature of the Office of Constable means that all police officers are in a position of trust and authority in relation to members of the public. An officer's misconduct will be more culpable where it involves an abuse of this position. Where an officer has used their position to pursue a sexual or improper emotional relationship with a member of the public, this should be regarded as an abuse of authority for sexual gain. Such conduct can cause substantial damage to public trust and confidence in the police and is particularly serious where the subject of the officer's behaviour is a vulnerable person.

....

4.45 The misconduct may involve members of the public, victims of crime, offenders or witnesses during the course of an officer's duties or as part of an investigation.

#### Misconduct involving a vulnerable person

4.46 Many people come into contact with the police when they are at a particularly difficult or distressing point in their lives, and they are entitled to be treated professionally.

4.47 Officers must not, under any circumstances, use their professional position to initiate or pursue a sexual or improper emotional relationship with a vulnerable person.

...

4.49 Factors which may give rise to vulnerability include:

- age, and any other protected characteristic

....

- experience of crime, including harassment or domestic abuse

.....

#### Harm

4.57 The harm caused by an officer's actions can be considered in various ways including:

Type of harm The types of harm caused or risked by different types of police misconduct are diverse. Victims may suffer:

...

- psychological distress

....

#### Persons affected

Misconduct may affect particular individuals, in which case the harm caused may depend on the victim's personal characteristics and circumstances. Misconduct can also harm the wider community. Such harm may involve economic loss, harm to public health or interference with the administration of justice.

#### Effect on the police service and/or public confidence

Harm will likely undermine public confidence in policing. Harm does not need to be suffered by a defined individual or group to undermine public confidence. Where an officer commits an act which would harm public confidence if the circumstances were known to the public, take this into account. Always take seriously misconduct which undermines discipline and good order within the police service, even if it does not result in harm to individual victims.

4.58 Assess the impact of the officer's conduct, having regard to these factors and the victim's particular characteristics.

....

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



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 or harm include:

- premeditation, planning, targeting or taking deliberate or predatory steps

...

- abuse of trust, position, powers or authority

...

- continuing the behaviour after the officer realised or should have realised that it was improper

....

- vulnerability of the victim

....

- multiple proven allegations and/or breaches of the Standards of Professional Behaviour.

4.69 On occasions, two or more of the factors listed will describe the same feature of the misconduct – take care to avoid ‘double counting’.

Mitigating factors

4.70 Mitigating factors are those tending to reduce the seriousness of the misconduct. Some factors may indicate that an officer's culpability is lower, or that the harm caused by the misconduct is less serious than it might otherwise have been.

4.71 Factors indicating a lower level of culpability or harm include:

...

- open admissions at an early stage

...

- evidence of genuine remorse, insight and/or accepting responsibility for one's actions.

4.72 In cases where the misconduct occurred several years prior to the meeting or hearing, consider the outcome by reference to the standards of the time rather than current attitudes and

standards. Give due account to the officer's conduct in the intervening years, for example, whether they performed their duties to a high standard.

...

## 6 Personal mitigation

6.1 As Lord Justice Maurice Kay confirmed in the Court of Appeal decision in Salter:

'As to personal mitigation, just as an unexpectedly errant solicitor can usually refer to an unblemished past and the esteem of his colleagues, so will a police officer often be able so to do. However, because of the importance of public confidence, the potential of such mitigation is necessarily limited.'

6.2 Purely personal mitigation is not relevant to the seriousness of the misconduct. Tributes and testimonials should not be confused with the mitigating factors relating to the misconduct itself, as outlined above. Consider any personal mitigation after forming an assessment of the seriousness of the misconduct.

6.3 Consider any personal mitigation advanced by the officer when deciding on the appropriate outcome.<sup>78</sup> Such mitigation may include whether the officer has shown remorse, acted out of character or made a significant contribution to the police service.

6.4 Due to the nature and purpose of disciplinary proceedings, however, the weight of personal mitigation will necessarily be limited, particularly where serious misconduct has been proven.

...

6.5 As Lord Bingham stated in Bolton v Law Society, of disciplinary proceedings:

'Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to reestablish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any

solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. ... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.'

6.6 The primary consideration for the panel or chairperson is the seriousness of the misconduct found proven. If the misconduct is so serious that nothing less than dismissal would be sufficient to maintain public confidence, personal mitigation will not justify a lesser sanction.

....

## 7 Conclusion

7.1 This guidance should be used to inform the approach taken by panels and chairpersons to determining outcomes in police misconduct proceedings. It sets out an approach for assessing the seriousness of conduct, which can be applied to assessments of conduct under Regulation 12 of the Conduct Regulations or paragraph 19B of Schedule 3 to the Police Reform Act 2002.

7.2 There are three stages to determining outcome:

- assess the seriousness of the misconduct
- keep in mind the threefold purpose for imposing outcomes in police misconduct proceedings
- choose the outcome which most appropriately fulfils that purpose, given the seriousness of the conduct in question.

7.3 Assessing the seriousness of the conduct is the first of these three stages. In assessing the seriousness of the conduct, have regard to the four categories outlined: culpability, harm, aggravating and mitigating factors.

7.4 Consider less severe outcomes before more severe outcomes. The more serious the conduct found proven against an officer, the more likely it is that dismissal will be justified.

7.5 Always take personal mitigation into account. Due to the purpose of disciplinary proceedings, its impact will necessarily be limited. Less weight can be attached to personal mitigation where serious misconduct has been proven.

7.6 The reasons for imposing a particular outcome should be recorded and usually read out in public. Refer to this guidance and explain any departures from it."