Neutral Citation Number: [2022] EWHC 2424 (Admin)

Case No: CO/1310/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2022

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

THE KING **on the Application of** **DAVID HUMPHERSON**	**Claimant**
- and –	
THE POLICE APPEALS TRIBUNAL	**Defendant**
THE CHIEF CONSTABLE OF WEST MIDLANDS POLICE	**Interested Party**

- -
- -

Colin Banham (instructed by **JMW Solicitors**) for the **Claimant**
Olivia Checa-Dover (instructed by **Staffordshire and West Midlands Joint Legal Services**) for the **Interested Party**
The Defendant did not appear at was not represented

Hearing date: 8 July 2022
Draft judgment circulated to the parties: 26 September 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Henshaw:

(A) INTRODUCTION

1. By this claim for judicial review, Mr Humpherson ("***the Claimant***") challenges the decision of the Defendant Police Appeals Tribunal ("***the PAT***") dated 21 January 2021 dismissing his appeal against the decision of the Chief Constable of West Midlands Police ("***the Chief Constable***") to dismiss him. The Chief Constable is the Interested Party and opposes the Claimant's claim.

2. Because the facts were not in dispute, the Chief Constable's decision was taken following a hearing pursuant to the "*Special Case*" procedure. The Chief Constable read the evidence, heard full submissions and issued a detailed judgment.

3. The task of the PAT in this case was to determine whether the Chief Constable's finding, or the disciplinary action he imposed, were unreasonable.

4. The PAT considered the evidence and the Chief Constable's findings, and held a hearing at which it heard oral submissions from Sergeant David Hadley on the Claimant's behalf and counsel for the Chief Constable. It concluded that the Chief Constable had not acted unreasonably.

5. In this court, permission to proceed was granted (on the Claimant's renewed application) on only one ground, namely that the PAT acted irrationally in one or more specified respects. For the reasons set out below, I have reached the conclusion that it did not. The claim for judicial review must therefore be dismissed.

(B) UNDERLYING FACTS

6. As I have indicated, the facts were not in dispute. The following summary is based on that set out in the Claimant's Statement of Facts and Grounds.

7. The Claimant was an officer with the West Midlands police force. He had 22 years of service and had won a number of significant and prestigious awards.

8. On 2 September 2019, the Claimant met a woman *("**Ms A**")* at a garage (petrol station) on the A491. The meeting had been arranged by prior appointment using a dating app called Bumble. Bumble works differently from other dating apps, in that a woman must make the first move by sending a message to a man. It was accepted that the purpose of the meeting was to explore the possibility of having a sexual relationship and that it was entirely consensual in nature. Ms A had worked for the police in a senior staff role, and the Claimant says he believed her to be a mature, professional lady. The Claimant's profile on Bumble did not identify him as a police officer; he told Ms A his job only in response to a question she asked.

9. When the Claimant arrived for the meeting, he was in full police uniform and riding a liveried police motorcycle. The Claimant had exclusive use of the motorcycle and was able to park it close to his home and then journey into work. He had begun his commute earlier that day to have the meeting before his agreed tour of duty. The garage was situated on his journey to work. He would only ever claim payment from his arrival time. Although he was therefore 'on duty' on the basis that he was in uniform, he was not being paid at the time of the meeting. It was not disputed that the Claimant was entitled to commute to work in this way and there was no doubt that he would have been able to respond to any call of duty, if he had been required to do so.

10. There was no suggestion, nor any evidence, that the Claimant had deliberately engineered a situation so as to able to meet Ms A in uniform. The Claimant had already disclosed to her that he was a police officer during the previous correspondence, and only upon Ms A asking him what he did for a living. It was never contemplated that there would be any sexual activity or relationship while the Claimant was on duty.

11. The Claimant waited for a while at the garage forecourt until Ms A arrived. When she arrived, he went over to her car and got into it, holding his police blue notebook. When asked about this in interview, the Claimant said:

> "Q: Ok, she also informs us that you joked about the official blue book, for the purpose of the public and CCTV. Erm did you have a blue ...
>
> A: I had a book. Yeah.
>
> Q: Ok and did you take that in the car with you?
>
> A: I took it in the car with me cause basically, there I am in full uniform and she's sitting in the car and the public are going to be, going to be coming in and you know, I didn't want the public sitting there staring ...

> Q: Thinking what's going on?
>
> A: Thinking what's going, so I took my blue book because sometimes as we know, when we see police officers with a blue book, they're literally (inaudible) and talking and and that's it. There was no, and I I I jokingly when I got in the car (inaudible) got my little blue book, probably as an ice breaker really, but that was it."

12. Most of the conversation that took place in the car was relatively mundane. However, at one stage, the Claimant complimented Ms A on her legs, which led to her lifting her skirt, first exposing more of her legs and then exposing her black underwear. At this, the Claimant commented that he preferred white underwear. Ms A also removed her breast from her bra and played with her nipple. The Claimant did not touch Ms A or encourage her sexualised behaviour. After about 20 minutes, the Claimant left to go to his place of work.

13. At around 6pm on the day when the meeting had taken place, Ms A contacted the Claimant and invited him to communicate using WhatsApp. She had previously sent him pictures of her cleavage and legs, and of herself in a dress. As part of the exchanges, Ms A asked the officer how well-endowed he was and whether he was 'good at using it'. In response, the Claimant sent her an image of his erect penis. The Claimant said in his witness statement:-

> "I can't remember what time it was but at some point later when I was at the office, I received a WhatsApp message from Ms A saying something like "You're alright you are". We then exchanged messages back and forth and the conversation turned sexual again. At one point she made reference to my 'size' and my ability to 'use it'". At this point, I sent her the picture of my penis that I had taken earlier in the day. I can't remember what she said exactly but I recall that Ms A responded in a positive way to the picture."

Similarly, in his interview the Claimant said Ms A had complimented him on the image. Although the image was sent when the Claimant was on duty, it had been taken on an earlier occasion when he had been off duty.

14. The conversation continued for a short period but ultimately came to nothing. Shortly thereafter, Ms A made it clear that the fact that the Claimant was married with children was a problem for her. The exchange of messages ceased and there was no further contact between Ms A and the Claimant.

15. Ms A reported the Claimant's behaviour to the Professional Standards Department the following day but made it clear from the outset that she did not wish to make a formal complaint. Save for a brief telephone call with the Department, she had no further involvement in the matter.

16. The Claimant always accepted the factual background and accepted that his behaviour in sending the image to Ms A amounted to a breach of the Standards of Professional Behaviour so far as concerns "*discreditable conduct*". He denied that it amounted to

gross misconduct but accepted that it was misconduct. The Claimant denied that the meeting with Ms A breached the police Standards of Professional Behaviour.

(C) PROCEEDINGS BEFORE THE CHIEF CONSTABLE

17. On 18 May 2020, the Claimant appeared at a Special Case Hearing before the Chief Constable. Consistently with the usual procedure in such hearings, Ms A did not give evidence and was therefore not tested under cross-examination. In any event, nothing that she had said was inconsistent with the account given by the Claimant. The account given by the Claimant was not challenged by the Chief Constable and was accepted as a true account.

18. The Chief Constable found that the Claimant had breached the Standards of Professional Behaviour as regards "*duties and responsibilities*", as well as "*discreditable conduct*", and also that the Claimant's behaviour amounted to gross misconduct. After hearing mitigation, the Chief Constable dismissed the Claimant without notice.

(D) PROCEEDINGS BEFORE THE PAT

19. The Claimant brought an appeal pursuant to rule 4(4)(a) of the Police Appeals Tribunals Rules 2012, on the ground that the finding and/or outcome imposed was unreasonable. The Claimant's Grounds of Appeal noted the following observations made in the Chief Constable's decision, with which the Claimant agreed but to which, he submitted, the Chief Constable had given insufficient weight:

> "The morality of this relationship, the embarrassment caused by the language used in this case are not relevant"
>
> "Officers are entitled to a private life and whilst this has made uncomfortable reading for all concerned none of this had reached a level on its own that would justify dismissal"; and
>
> "Had this stayed a private matter we would not be examining the case".

20. The Claimant argued before the PAT that:-

    i) With reference to the College of Policing's "*Guidance on Outcomes*" ("***the Guidance***"), the Chief Constable had erred by assessing culpability as 'high' and the harm flowing from the misconduct as 'high', for the following reasons:

        a) although the Claimant's actions were 'intentional and deliberate' inasmuch as the meeting was pre-arranged, there was nothing from which it could properly be inferred that he set out intending knowingly to commit misconduct;

        b) Ms A could not properly be described as a 'target' (which would be an aggravating factor) in the sense envisaged by the language within the Guidance;

c) the Chief Constable had erred in his assessment of the extent to which the Claimant "*overtly brought the [police] force into the meeting*" and used "*overt leverage of [his] role to support a sexual relationship*". Ms A already knew him to be a police officer;

d) although the decision to send the image was that of the Claimant, the Chief Constable failed to have proper regard to the manner in which it was sent;

e) twice within the regulation 56 Notice [i.e. the Chief Constable's notification of his decision and the reasons for it], the Chief Constable erroneously referred to the explicit image of the Claimant being shared on 'social media'. WhatsApp is not a social media platform; it is a private messaging service. Its use was invited and instigated by Ms A, both by the images she had already sent him and by her comments about his genitals;

f) WhatsApp being a wholly private messaging platform, the Chief Constable failed to have any proper regard to the Claimant's reasonable expectation of privacy under Article 8, as set out in the Scottish authority *BC & Others v Chief Constable Police Service Of Scotland & Others* [2019] CSOH 48; and

g) the Chief Constable erred in stating that the image was unwanted by Ms A ("*The sharing of the image, whilst following the sexualised conversation was a significant escalation and was, not unreasonably so, unwanted by Miss A*"). There was no evidence presented for that assertion: in fact, the opposite was true.

ii) The Chief Constable was wrong to view any sexual impropriety as a matter of 'Harm'. Although the Guidance does indeed state that "*sexual impropriety undermines public trust in a policing and is serious*" (§ 4.39), this is a matter to be assessed within 'Culpability' rather than harm. Furthermore, no matter when it is assessed, the limit of the sexual impropriety here was to send an image that had been encouraged, while on duty, but in a wholly private forum, that caused no upset. No feature of Guidance § 4.40 (which deals with violence, intimidation or sexual impropriety) was present.

iii) The Chief Constable was wrong to view any potential vulnerability on Ms A's part as a matter of 'Harm': it too falls within 'Culpability' at Guidance §§ 4.46 to 4.50. More importantly, the Chief Constable was wrong to rely upon potential vulnerability, and certainly to the extent he clearly did. There was no evidence at all of any vulnerability, and the Chief Constable was wrong to speculate that Ms A could have been vulnerable, and even more to take that into account.

iv) The Chief Constable acknowledged that "*There is no evidence the other party is vulnerable in this case*", but speculated by adding *"…though I would point out the officer would have no idea of this. In assessing vulnerability [the Guidance] at 4.49 makes a number of points clear as to how a person can be vulnerable in any given situation. The rapid formation of this relationship is at*

best reckless to these points. The force has been extremely clear on this risk of forming relationships with the vulnerable. The rapid formation of this relationship is at best reckless to these points and this is critical when looking at what happened in a very short period of time". The Chief Constable thereby effectively introduced 'vulnerability' by the back door.

v) The only harm that can be properly identified is a modest degree of reputational harm.

vi) The error of the Chief Constable's reasoning and wrong emphasis is further exemplified by his summary conclusion: "*My summary view is that this is a case of gross misconduct. The public would not expect officers to use the overt leverage of their role to support a sexual relationship whilst on duty and to share highly intimate images when they should be working in the public interest*". The summary wrongly ignores the following important features:

a) Ms A already knew the Claimant to be a police officer before they met. The meeting was based on no real leverage;

b) the sexual relationship was not to be on duty, and the meeting took place before the officer's tour of duty, though admittedly in uniform;

c) the sharing of the intimate images was perceived to be by invitation, on a wholly private forum, and caused no offence; and

d) though the image was sent on duty, it was created off duty, and there has to be a sensible acknowledgment (as had already been made) that "*as an employer I also recognise that personal lives can sometimes intrude into the working day*".

21. The PAT dismissed the Claimant's appeal.

(E) THE CLAIMANT'S CHALLENGE TO THE PAT'S DECISION

22. The Claimant sought to challenge the PAT's decision on five grounds, but permission has been granted in this court, on the Claimant's renewed application (following refusal on the papers) on only one. That ground is that the PAT's approach and/or decisions in relation to the issues raised on appeal against finding and outcome were irrational on the fundamental questions of:

i) whether the Claimants' behaviour was "*targeted*";

ii) whether the Claimant used *"the overt leverage of [his] role to support a sexual relationship[]"*; and

iii) whether the image sent was *"unwanted"*.

23. I consider this ground of challenge in section (G) below.

(F) PRINCIPLES

(1) Appeals to the PAT

24. Rule 4(4) of the Police Appeals Tribunals Rules 2012 provides that a Panel decision (which would include the Chief Constable's decision here) can be appealed on the grounds that:

    i) the finding or disciplinary action imposed was unreasonable; or

    ii) 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

    iii) there was a breach of the procedures set out in the conduct regulations, the Police (Complaints and Misconduct) Regulations 2012 or Schedule 3 to the Police Reform Act 2002, or other unfairness which could have materially affected the finding or decision on disciplinary action.

25. The Claimant's appeal was brought on the first of these grounds.

26. The meaning of *"unreasonable"* in this context has been the subject of judicial consideration. In *R (Chief Constable of Wiltshire Police v The Police Appeals Tribunal* [2012] EWHC 3288 (Admin), Wyn Williams J stated at §§ 32 and 33 that the relevant question is:

> "whether the panel in question had made a finding or imposed a sanction which was within the range of reasonable findings or sanctions upon the material before it…
>
> It follows therefore, to my mind, that the test imposed by the rules is not the *Wednesbury* test but is something less. That does not mean that the Appeal Tribunal is entitled to substitute its own view for that of the misconduct hearing panel, unless and until it has already reached the view, for example, that the finding was unreasonable"

27. This test been held to apply when considering both the Panel's approach to the decision, and the decision itself: see *R (Chief Constable of Durham) v PAT & Cooper* [2012] EWHC 2733 (Admin); *R (Chief Constable of Cleveland) v PAT & Rukin* [2017] EWHC 1286 (Admin), and *R (the Chief Constable of Nottinghamshire Police) v PAT & Flint* [2021] EWHC 1248 (Admin).

28. One matter that the PAT must consider is whether the Panel has applied the structured approach set out in the Guidance, which is intended to be used as a mechanism for assessing *inter alia* whether misconduct is sufficiently serious to constitute gross misconduct, and provides indicative guidance on sanctions: see *R (Chief Constable of Greater Manchester Police) v Police Misconduct Panel* (High Court, 13.11.18) §§ 14, 16 and 18; and *R (Chief Constable of West Midlands Police) v Panel Chair and Panel Misconduct Panel* [2020] EWHC 1400 (Admin) §30.

29. Section 1 of the Guidance includes the following paragraphs:

> "1.2 The guidance is intended to assist persons appointed to conduct misconduct proceedings (misconduct hearings, misconduct meetings, and special case hearings) under Parts 4 and 5 of the Police (Conduct) Regulations 2012 (the Conduct Regulations). The guidance may also be used to inform assessments of conduct under Regulation 12 of the Conduct Regulations or paragraph 19B of Schedule 3 to the Police Reform Act 2002. The guidance is designed to ensure consistency and transparency in assessing conduct and imposing outcomes at the conclusion of police misconduct proceedings.
>
> 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." (footnotes omitted)

30. The Guidance deals in section 4 with assessing seriousness. The first five paragraphs state:

> "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 [in *Fuglers LLP v Solicitors Regulation Authority* [2014] EWHC 179 (Admin), referring to a similar guidance note regarding solicitors), 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.
>
> 4.3 Assessing the seriousness of the misconduct is the first of these three stages.

> 4.4 Assess the seriousness of the proven conduct by reference to:
>
> ■ the officer's culpability for the misconduct
>
> ■ the harm caused by the misconduct
>
> ■ the existence of any aggravating factors
>
> ■ the existence of any mitigating factors.
>
> 4.5 When considering outcome, first assess the seriousness of the misconduct, taking account of any aggravating or mitigating factors and the officer's record of service. The most important purpose of imposing disciplinary sanctions is to maintain public confidence in and the reputation of the policing profession as a whole. This dual objective must take precedence over the specific impact that the sanction has on the individual whose misconduct is being sanctioned." (footnotes omitted)

31. Section 4 of the Guidance goes on to consider culpability, harm, aggravating factors and mitigating factors in more detail.

32. It was held in *R (Chief Constable of Nottinghamshire Police v PAT & Flint* [2021] EWHC 1248 (Admin) § 75 that the PAT itself is required to adopt the same structured approach.

(2) Judicial review of PAT decisions

33. The High Court can set aside a decision of the PAT only if a public law error is established. Thus *Wednesbury* unreasonableness or some other error of law must be established. A degree of deference is due to the PAT as an expert body: see e.g. the comments of Burnett J in *R (Chief Constable of Dorset) v PAT & Salter* [2011] EWHC 3366 (Admin):

> "Proceedings in the Administrative Court seeking to challenge the decision of a Police Appeals Tribunal do not arise by way of appeal, but by way of a claim for judicial review. In those circumstances, a claimant in judicial review proceedings must establish a public law error before the decision of that Tribunal could be quashed …" (§ 19)
>
> "At each level in the disciplinary process, the decision maker or decision making body is expert in nature. It knows and understands how the police service works. It knows and understands the importance of maintaining integrity amongst police officers. It knows and understands the impact that serious misconduct can have on the force concerned and the police service in general. Parliament has provided that the Tribunal is the appellate body for these purposes. There is no further appeal to the High Court. The Tribunal is subject to the

> supervisory jurisdiction of this court. I have already observed that the approach of this court in judicial review is different from the approach adopted when sitting in an appellate capacity from the Solicitors Disciplinary Tribunal. Absent another error of law on the part of the Police Appeals Tribunal its decision on sanction could be interfered with only on classic Wednesbury grounds, in short that on the material before it no reasonable Tribunal could have reached the conclusion that it did" (§ 25)

34. The Chief Constable refers to the following general statements as indicating the narrow scope of *Wednesbury* unreasonableness:

> "If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming..." (per Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (HL))

> "By "*irrationality*" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it," (*Council of Service Unions -v- Minister for the Civil Service* [1985] AC 374 per Lord Diplock at 410).

35. As the Claimant points out, public law errors are not confined to *Wednesbury* unreasonableness but include, in addition to procedural unfairness, cases where a decision-maker has taken into account matters which it ought not to have taken into account, or conversely, refused to take into account or neglected to take into account matters which it ought to have taken into account (see, e.g., *R (DSD and NBV) v The Parole Board* [2018] EWHC 694 (Admin).

36. It is common ground that the need for deference to the PAT as an expert body is reduced were the issue is one of law (as opposed to fact or evaluation): see *R (Wilby-Newton) v PAT & Chief Constable of South Yorkshire Police* [2021] EWHC 550 (Admin) § 86. The same will apply, as the Claimant submits, if the PAT's reasoning indicates fundamental misunderstandings of the facts and/or the principles to be applied.

37. Further, the Claimant submitted that this was not a case where deference was due in respect of the PAT's findings of fact (cf *Arunkalalvanan v General Medical Council* [2014] EWHC 873 (Admin), cited by the Claimant, in the context of appeals from GMC decisions). In the present case, the facts were agreed, so the exercise for the PAT was an evaluative one. I agree, though, that a degree of deference is nonetheless due to the PAT's evaluation of the facts, for the reasons indicated in the *Chief Constable of Dorset* case quoted above.

38. Since the PAT decision, which the court is asked to review, itself relates to the Chief Constable's prior decision, the court naturally has to look at the Chief Constable's decision as well as that of the PAT. This court said in *R (Williams) v Police Appeals Tribunal* [2016] EWHC 2708: "*It is common ground that in this claim for judicial review I must, in effect, carry out a review of a review and must therefore consider not just the decision of the PAT but also the decision of the panel."* (§ 28) The Claimant accordingly submits that where the original decision was 'plainly wrong', the court should be able more readily to quash the PAT's decision to dismiss the appeal. That may be correct, depending on what is meant by 'plainly wrong', but any attempt further to define that term would merely result in restating the tests I have set out earlier which the PAT and the court, respectively, must apply. The court has to consider the Chief Constable's decision, because it has to decide whether the PAT's approach to it involved any error of law. However, the decision which the court reviews is that of the PAT, applying the public law error standard.

(G) ANALYSIS

39. I now consider the three respects in which (under his extant ground of challenge) the Claimant submits the PAT's decision was wrong in law by reason of irrationality and/or taking into account an irrelevant consideration and/or failure to take account of a relevant consideration.

(1) "Targeted" behaviour

40. In the context of culpability, the Guidance states at § 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."

41. The Chief Constable said, as part of the reasons for his decision:

> "In assessing seriousness:
>
> The [Claimant] has high culpability in this case. The activities are "intentional, deliberate, targeted and planned" (4.11). The meeting is arranged so the [Claimant] is on duty and in uniform which directly and overtly brings the force into the meeting. The decision to send the intimate image is his."

42. In response to the Claimant's challenge on this point, the PAT said:

> "57. We see nothing wrong with the Respondent's finding. The COP Guidance provides no clarification or gloss on the use of the word 'targeted'.
>
> 58. This was a deliberate plan to meet Ms A, in a public place, in uniform, whilst on duty in circumstances which the Appellant knew to be wrong (or was recklessly indifferent to the same) and where he took steps to conceal from the public what was going on."

43. The Claimant submits that that conclusion was flawed. Ms A could not properly be said to have been targeted. The ordinary meaning of 'target' is to select someone as an object of attention or attack. The Guidance does not define 'targeted', though in the context of aggravating factors it states one factor indicating a higher level of culpability or harm to be "*premeditation, planning, targeting or taking deliberate or predatory steps*". Ms A was not selected by the Claimant as an object of attention or attack – on the contrary, she took the first step towards their making contact – and there was no predatory conduct. Insofar as the Chief Constable in his last sentence quoted above treats the image as having been unwanted, that was incorrect for the reasons discussed under heading (3) below.

44. In considering this issue it is necessary to have regard to the context in which the word 'targeted' is used in the Guidance, and the context of the Chief Constable's findings as a whole.

45. As to the former, § 4.11 of the Guidance refers to conduct that is "*intentional, deliberate, targeted or planned*" in contradistinction from conduct with unintended consequences. The essential focus is thus on distinguishing deliberate actions and results from accidental actions or harm. In this context, 'targeted' conduct does not have to involve a predatory or unwanted element. That point is reinforced, to a degree, by the fact that the Guidance has separate provisions (in the context of aggravating factors) dealing with predatory conduct, abuse of trust and vulnerable victims.

46. Moreover, the Chief Constable elsewhere in his decision expressly found that there was no evidence that Ms A was in fact vulnerable, or suffered harm. He found there to be mutuality in the nature of the conversations between the Claimant and Ms A, and no evidence that the Claimant was seeking anything other than a consensual relationship. It is unlikely in these circumstances that the Chief Constable was using the word 'targeted' in any sense connoting predatory or similar conduct, as opposed to the sense in which the PAT understood it as quoted above.

47. It is important to note also the disjunctive "*or*": any of the four listed characteristics puts conduct into the first, non-accidental, category. There is no doubt that each of the Claimant's actions was intentional and deliberate, and his meeting with Ms A was planned. Moreover, even though the Claimant will not have intended to damage the reputation of the police force, the risk of doing so was obvious, and indeed the Claimants' evidence that he took his notebook into Ms A's car when he met her (in case bystanders wondered what was going on) suggests that he was aware of the risk. Thus on any view the Claimant's conduct fell within the description "*intentional, deliberate, targeted or planned*".

48. In all these circumstances, I do not consider that the PAT's rejection of the Claimant's challenge on this ground was irrational or involved any other public law error. The PAT was entitled to conclude that the Chief Constable's conclusion that the conduct fell within Guidance § 4.11 was within the range of reasonable responses to the facts.

(2) Leverage

49. In weighing up the seriousness of the Claimant's conduct overall, the Chief Constable said:

> "My summary view is that this is a case of gross misconduct. The public would not expect officers to use the overt leverage of their role to support a sexual relationships whilst on duty and to share highly intimate images when they should be working in the public interest.'

Earlier in his decision, the Chief Constable had said *"[the meeting is arranged so the officer is on duty and in uniform which directly and overtly brings the force into the meeting"* and "*[p]olicing was introduced deliberately by attending the first meeting in uniform in furtherance of sexual gain"*.

50. When considering sanction, the Chief Constable went on to say:

> "In a matter of a few hours the officer had arranged to meet someone on duty, in uniform with a police vehicle and the relationship had escalated to showing a highly intimate image whilst he was working on duty. To this extent it was not incidental he was a police officer. The meeting drew this fact directly and deliberately into the formation of the relationship."

51. In response to the Claimant's challenge to the Chief Constable's reasoning on this topic, the PAT said:

> "52. In one view, it may seem somewhat harsh to say that the Appellant used "*the overt leverage of [his] role to support a sexual relationships*". However, the Appellant certainly did use one of his police 'tools' (namely his blue notebook) to conceal what he was doing from the public.
>
> 53. In any event, we see nothing wrong in the finding that Appellant's wearing his uniform "directly and overtly brings the force into the meeting [with Ms A]." He did so by attending the meeting in full uniform on a liveried police motorcycle.
>
> 54. In the circumstances, his bringing the force into the meeting could not have been more obvious and, as explained above, the Appellant's use of his blue notebook demonstrated that he knew what he was doing was improper. That has to be judged against the fact, as counsel for the Respondent stated, it would have been a trivial matter to have arranged a meeting when the Appellant was not on duty and whilst wearing civilian clothes."

52. The Claimant objects to that reasoning, submitting that:

i) there was no evidence that the Claimant deliberately engineered a meeting at a time when he would be in police uniform. The meeting was set up at a time when he was on his way to work, so it was incidental that he was in uniform. The use of his blue book was to ensure that attention was not drawn to the fact that he was in uniform;

ii) he was not using his role as 'leverage' to support a sexual relationship. The opposite is true. He would have been less conspicuous had he been in civilian attire. Had he not been on duty and in uniform, his evidence was that it was more likely for there to have been consensual sexual acts at the meeting itself; and

iii) he was not engaged in a sexual relationship, nor did he know whether the meeting would conclude in any sexual relationship. There was certainly no intent to engage in sexual activity at the meeting and no sexual relationship arose from his contact with Ms A.

53. However, the PAT substantially accepted that the Claimant did not use his status or leverage as a means of seeking to achieve a sexual relationship. It did not suggest that the Claimant abused his position or status as a police officer in any way, and there is no evidence of that. The PAT's core conclusion was that by having an encounter of a sexual nature in Ms A's car, while in full uniform and having arrived on a police liveried motorbike, the Claimant had, in the Chief Constable's words, *"directly and overtly [brought] the force into the meeting"*. That was surely correct, as an evaluation of the agreed facts, and, at the very least, was not an irrational conclusion for the PAT to reach. Any bystander would have perceived these events as involving a uniformed officer engaging in sexual activity while on duty. That is what gave rise to the serious risk of harm to the reputation of the police force, which was central to the conclusions reached by both the Chief Constable and the PAT.

54. Further, the PAT's main concern about the blue notebook was that it was used as a means of disguising from any observer what was occurring, and indicated that the Claimant knew what he was doing was wrong. It also brought an item of the Claimant's police equipment into the encounter with Ms A. That was a rational view of the evidence, including the Claimant's own evidence.

55. Insofar as the PAT may have needed to reassess the case as a whole in light of its conclusion that the Chief Constable's "*leverage*" comment may have been unduly harsh, the PAT did so. At §§ 114 and 115 of its decision, the PAT said:

> "114. It follows from above, that we do not find anything unreasonable about the manner in which the Respondent assessed seriousness and therefore reached a finding of gross misconduct.
>
> 115. In any event, we are satisfied that however viewed the misconduct was sufficiently serious such that a finding of gross misconduct was within the range of reasonable findings. In particular we note that:
>
> a) the Appellant brought the police force into his initial meeting with Ms A because he was wearing his uniform, arrived on a police liveried vehicle and displayed his blue notebook;
>
> b) the use of the blue notebook was intended to deceive other members of the public;

> c) he remained in Ms A's car, in his uniform whilst Ms A revealed her underwear and nipple;
>
> d) the Appellant knew or recklessly disregarded the fact that his behaviour amounted to misconduct;
>
> e) he continued to engage in a sexualised message exchange whilst he was unequivocally on duty (and when Ms A would have realised the same);
>
> f) as part of that exchange, he sent a compromising image to Ms A; and
>
> g) as Ms A was a complete stranger he could not possibly know how Ms A would respond to the image or what she might subsequently do with it."

56. That reasoning is cogent, and certainly not irrational. Nor does it take account of any irrelevant consideration or fail to take account of relevant considerations.

57. Accordingly I see no merit in this limb of the ground of challenge.

(3) Unwanted image

58. When considering sanction, the Chief Constable said:

> "… The sharing of the image, whilst following the sexualized conversation was a significant escalation and was, not unreasonably so, unwanted by Miss A. Combined together this is very serious behaviour."

59. This was challenged by the Claimant on appeal on the basis that the evidence did not support it. The PAT's reasoning on this point was as follows:

> "80. Setting aside our bafflement as to why anyone would think that sending a picture of a disembodied penis would be a good idea or would likely be view as desirable, we do accept that there was some, albeit limited, evidence that may have led the Appellant to think that the image was wanted.
>
> 81. However, that evidence was limited to an apparently positive comment (the detail of which the Appellant could not recall) after the picture was sent. What the Appellant did not know, before he had sent it, was how Ms A would respond to the image.
>
> 82. This is just another factor that reflects the reckless nature of the Appellant's behaviour. We do not accept that the poorly recalled flirtatious comments made immediately prior to the sending of the image amounted to an invitation to send it, particularly, when, as explained, Ms A was effectively a stranger to the Appellant.

> 83. We also doubt, even with the apparently positive comments about the image, that the Respondent could have been confident that Ms A was untroubled by the image. The next event in the chronology advanced by the Appellant was that Ms A brought the communications to an end (albeit on the basis that the Appellant was married with children). Thereafter, Ms A was troubled enough to report the mater to PSD.
>
> 84. We accept that the evidence probably doesn't support an express finding that the image was unwanted. …
>
> 85. The removal of the finding that the image was unwanted does little to reduce the seriousness of the Appellant's conduct in our view. It was the decision to send it, with little if any insight as to how it would be viewed by Ms A which was the most serious aspect of this part of the incident. We entirely agree that this was, given that Ms A was effectively a stranger, "a significant escalation"."

60. The Claimant submits that removal of the finding that the image was unwanted did indeed significantly reduce the seriousness of the matter: there is a significant and substantial difference between sending an unwanted image of this nature and one that is encouraged or wanted. Further, the PAT rightly concluded that the Chief Constable was obliged to treat the content of the Claimant's statement and interview responses as true. On his account, Ms A was 'positive' after the image was sent. The Chief Constable's conclusion that the image was unwanted was based on no evidence. On the contrary, the Claimant's account was that Ms A made flirtatious comments before the image was sent, including referring to the Claimant's 'size' and his ability to 'use it'; and (the Claimant had said) *"I can't remember what she said exactly but I recall that Ms A responded in a positive way to the picture"*. Ms A had also sent intimate images (cleavage and bare legs) to the Claimant prior to their meeting in Ms A's car. It was impermissible and irrational for the PAT to speculate that Ms A's behaviour after the image was sent was linked to that act, rather than the more obvious factors that were properly in evidence (e.g. her concern about entering into a relationship with someone who was married with children).

61. The gist of the PAT's conclusion on this issue, though, was not based on the image having in fact been unwanted. Rather, the PAT regarded the Claimant's actions as reckless, since (even accepting his account of Ms A's comments before he sent the image) he had no solid grounds for believing that she wished him actually to send her a photograph of his penis. It was not irrational (or otherwise a public law error) for the PAT to agree with the Chief Constable that the sending of the image was a significant escalation, and to find that it was reckless for the Claimant to have sent it to someone who was still a virtual stranger. The evidence of Ms A having sent pictures of her cleavage and bare legs was before the PAT, but there was a qualitative difference between images of that kind and an image of the Claimants' erect penis. The Claimant could not be sure how she would respond to that image, or what she would do with it. Again, the Claimant's actions put the police force's reputation at risk.

62. Insofar as the PAT needed to reassess the matter in the light of its acceptance that the image could not positively be stated to have been unwanted, it did so: see § 55. above.

63. I therefore do not consider the PAT to have made any public law error in this context.

(4) Outcome

64. The Claimant submits that the PAT's decision is also flawed as none of the specific issues discussed above was separately considered in relation to the appeal against outcome, i.e. the Chief Constable's decision that the Claimant should be dismissed for gross misconduct. When giving its reasons in relation to the appeal against outcome, the PAT did not make any reference to these matters. Considerations relating to findings are separate from outcome, not least because the two stages should not be conflated and are dealt with separately at all misconduct hearings.

65. As the PAT recorded, the Claimant appealed, *inter alia*, against the decision summarily to dismiss him, notwithstanding the Chief Constable's finding of gross misconduct. The Ground for which the Claimant was granted permission to proceed on the present application was that the PAT's *"approach or decisions in relation to the issues raised on the appeal against finding and outcome"* (emphasis added) were irrational on the three specific questions discussed under headings (1) to (3) above.

66. However, I have concluded that the PAT's reasoning in relation to those three issues, in upholding the Chief Constable's conclusion that gross misconduct occurred, did not involve any public law error. The same must apply in relation to outcome: to the extent that the PAT had regard to the three matters when upholding the Chief Constable's decision on outcome, i.e. summary dismissal, it cannot be shown that the PAT's reasoning was flawed by reason of any public law error.

(H) CONCLUSIONS

67. It follows that the Claimant has not made out his ground of challenge. The claim for judicial review must therefore be dismissed.

68. I am grateful to both parties' counsel for their helpful written and oral submissions.