[2023] EWHC 2119 (Admin)

Case No: CO/2142/2022

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 18/08/2023

Before:

MR JUSTICE EYRE

- -

Between:

THE KING **on the application of** **ALICE VICTOR**	**Claimant**
- and -	
CHIEF CONSTABLE OF WEST MERCIA POLICE	**Defendant**

- -
- -

Kevin Baumber and Ciju Puthuppally (instructed by **Straw & Pearce Solicitors**) for the **Claimant**
John Beggs KC and Aaron Rathmell (instructed by **West Mercia Police Legal Services**) for the **Defendant**

Hearing date: 10th May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 18th August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr Justice Eyre:

Introduction.

1. The Claimant was formerly a student probationer police constable with West Mercia Police. On 16th March 2022 the Defendant discharged the Claimant under regulation 13 of the Police Regulations 2003 ("the Police Regulations"). The discharge followed and was a consequence of the removal of the Claimant's Recruitment Vetting clearance as a result of a decision by the West Mercia force's Vetting Appeal Panel on 8th December 2021 ("the Vetting Decision"). The removal of the Claimant's vetting clearance was because of an incident in which the Claimant had been involved on 29th May 2021. The Claimant's behaviour in that incident had already been subject to proceedings under the Police (Conduct) Regulations 2020 ("the Conduct Regulations"). Those proceedings had resulted in a finding of misconduct and in the Claimant receiving a final written warning.

2. The Claimant seeks judicial review of the decision to discharge her ("the Discharge Decision") and of the Vetting Decision on which it was based pursuant to permission given by Steyn J. The primary ground is that the Vetting Decision was unlawful because it amounted to using the vetting procedure to subvert the conclusion reached in the misconduct proceedings and the protections provided to the Claimant by the Conduct Regulations. It is said that the Vetting Decision had that effect because it caused the Claimant to be dismissed from the West Mercia Police for precisely the same behaviour which had been found not to merit dismissal under the Conduct Regulations. That was supplemented by the contention that in the light of the outcome of the misconduct proceedings it was not rationally open to the Vetting Appeal Panel or the Defendant to remove the Claimant's vetting clearance or to discharge her under regulation 13 respectively. The Defendant says that there was no unlawful subversion of the Conduct Regulations nor any irrationality in the decisions reached. Instead, the decision under the Conduct Regulations; the Vetting Decision; and the Discharge Decision were reached in separate, sequential, and independent processes with distinct, rational, and lawful decisions being reached at the different stages under each process.

3. Permission was only given on the grounds alleging irrationality to the extent that they overlapped with the primary ground of unlawfulness. The central issue was, therefore, whether it was lawful for the Claimant's vetting clearance to be removed and for her discharge to follow as a consequence in circumstances where the conduct on which the Vetting Decision was based had been addressed in misconduct proceedings and where it had resulted there in a final written warning rather than dismissal. For the Claimant Mr Baumber accepted this in his oral submissions where he said that the question was that of the lawfulness rather than the rationality of the decisions.

The Factual Background.

4. The Claimant joined West Mercia Police on 26th April 2021 as a student probationary officer and enrolled on the Police Constable Degree Apprenticeship.

5. On 29th May 2021 at about 2.00am while off-duty the Claimant was involved in an incident in a public house in Worcester. The Claimant had been drinking since about 6.00pm the preceding evening and the incident occurred when she confronted a man whom she believed had been sleeping with her twin sister's boyfriend. There was an

altercation in which the Claimant shouted abuse at that man. The Claimant left the public house at the instigation of the door supervisor but then continued shouting abuse in the street.

6. The incident led to misconduct proceedings under the Conduct Regulations. In those proceedings the Claimant admitted that she had called the man a "gay prick" but denied having called him a "gay cunt". She accepted that while in the public house and under the influence of alcohol she had shouted abuse and had continued to do so in the street. She did not admit that she had been required to leave the public house but did accept that the door supervisor had taken her outside to defuse the situation and so the difference on that point was immaterial. The Claimant said that she would not have acted in the way she had but for the combination of her anger at what she believed to have been the betrayal of her sister and the amount of alcohol she had consumed.

7. Initially the allegation against the Claimant was that she had breached the Standards of Professional Behaviour in relation to authority, respect, and courtesy; discreditable conduct; and equality and diversity such that her conduct amounted to gross misconduct. In the course of the misconduct proceedings the allegation that there had been a breach of the standards in relation to equality and diversity was dropped and the view was taken that the conduct amounted to misconduct rather than to gross misconduct. As a consequence the Claimant attended at a misconduct meeting chaired by Chief Inspector Gibbs. He found that the Claimant's behaviour had been deliberate and directed at a particular individual and that the Claimant had used discriminatory terminology based on the abused man's sexual orientation. CI Gibbs said that the Claimant's intoxication did not provide a defence and characterized her behaviour as "an ill-tempered emotional response" showing immaturity. Having found that the Claimant's actions constituted misconduct CI Gibbs imposed a final written warning to persist for two years.

8. The Claimant's vetting clearance was then reviewed. The initial decision was to withdraw the Claimant's recruitment vetting clearance because her behaviour on 29th May 2021 had shown that she was not fit to hold vetting clearance. That was a consequence of "the impact on public confidence" of allowing the Claimant to retain her clearance and because of "the lack of integrity … demonstrated by [her] behaviour". The starting point of that analysis had been the principle derived from the Vetting Code of Practice that "it is essential that the public is confident that police vetting processes are effective in identifying those who are unsuitable for working within the police service."

9. The Claimant appealed that decision but her appeal was refused and the Vetting Decision was made on 8th December 2021. The Vetting Appeal Panel noted the Claimant's behaviour on 29th May 2021 and concluded that for her to retain vetting clearance despite such behaviour "would have a derogatory effect on [the public's] trust and confidence in West Mercia Police".

10. The Defendant made the Discharge Decision on 16th March 2022 after a meeting pursuant to regulation 13. In essence, the Defendant's reasoning was that the withdrawal of the Claimant's recruitment vetting clearance meant that the Claimant would not be able to continue with the Police Constable Degree Apprenticeship and so would not be able to become an efficient or well-conducted officer.

The Grounds and the Procedural History.

11. The Claimant advanced five grounds of challenge to the Vetting Decision and to the Discharge Decision. Permission was refused by HH Judge Mithani KC but Steyn J granted permission on grounds 1(b), 2, 3, and 5. However, in granting that permission Steyn J explained that ground 2 was the primary ground and that permission was only granted on grounds 3 and 5 insofar as they overlapped with ground 2.

12. The Claimant has abandoned ground 1(b) which was an assertion that the Claimant had not been given adequate notice or disclosure in relation to the Vetting Decision.

13. In ground 2 the Claimant asserted that the Vetting Decision was "infected with illegality in that the Vetting Appeal Panel misdirected itself in respect of the proper approach to the police misconduct regime and the police misconduct outcome in Miss Victor's case". Ground 3 asserted that the Vetting Decision was irrational in failing to take into account the substantial mitigating factors; in being "fundamentally inconsistent" with the outcome of the misconduct proceedings; and in being outside the range of conclusions open to a reasonable decision maker. Ground 5 addressed the Discharge Decision under regulation 13 saying that this decision was not rationally open to the Defendant in light of the outcome of the misconduct proceedings and was made on the basis of "a manifestly flawed vetting decision". The parties' respective cases on these points as they developed before me and the issues to be addressed are summarised at [2] and [3] above.

The Core Decision.

14. The central decision was that of the Vetting Appeal Panel to withdraw the Claimant's vetting clearance rather than the subsequent Discharge Decision. This is because the Discharge Decision was dependent on the Vetting Decision. If the earlier decision was unlawful then that illegality will necessarily have tainted the later decision. This was recognised by the fact that it was the Vetting Decision which was the subject of ground 2 which Steyn J identified as the primary ground. It is, however, to be noted that the Defendant in asserting the lawfulness of both decisions made the point that they and the decision in the misconduct proceedings were separate decisions taken at different stages under different processes. I will consider the force and relevance of that argument further below. However, the Defendant did not contend that the Discharge Decision could stand if the Vetting Decision was unlawful. For her part, although ground 5 asserted that the Discharge Decision was irrational the Claimant did not seek to advance a separate challenge to that decision and did not argue that if the Vetting Decision was lawful and rational it was not open to the Defendant to make the Discharge Decision.

The Legislative and Regulatory Framework.

15. By section 2(1) and (3) of the Police Reform and Social Responsibility Act 2011 each police force is to have a chief constable and is to be "under the direction and control" of that officer. By paragraph 7(1) of schedule 2 to that Act a chief constable is empowered to "do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of the functions of chief constable". It is, however, relevant to note that in discharging the Claimant the Defendant did not purport to exercise that power but instead used the power given by regulation 13 of the Police Regulations.

16. By section 39A(1) of the Police Act 1996 the College of Policing is empowered, with the approval of the Secretary of State, to issue codes of practice "relating to the discharge of their functions by chief officers of police". Such officers are required by section 39A(7) to have regard to such codes when discharging any function to which a code relates.

17. Section 50 of that Act empowers the Secretary of State to make regulations as to the "government, administration and conditions of service of police forces". By section 87(1) and (1B) the Secretary of State and the College of Policing are empowered to issue guidance as to the discharge by chief officers among others of their disciplinary functions in relation to members of police forces. By subsection (3) each such person is to have regard to that guidance in discharging those functions. Section 87A(1) and (3) make equivalent provision for guidance "as to matters of conduct, efficiency, and effectiveness".

18. By regulation 2(1) the Conduct Regulations define "gross misconduct" and "misconduct" thus:

> "gross misconduct means a breach of the Standards of Professional Behaviour that is so serious as to justify dismissal;
>
> "misconduct, other than in regulation 23(2)(a) and the first reference to "misconduct" in regulation 23(2)(b), means a breach of the Standards of Professional Behaviour that is so serious as to justify disciplinary action;"

19. It will be seen immediately that the dividing line between gross misconduct and misconduct is drawn by reference to whether dismissal would be justified for the conduct in question.

20. By regulation 4(1) those regulations apply whenever:

> "an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct, gross misconduct or practice requiring improvement."

21. The Conduct Regulations provide in detail for the procedure to be followed in addressing a complaint of misconduct. These include provision for legal representation (regulation 8), notices (regulations 9 and 17), and for investigation leading to the preparation of a report based on the investigation (regulations 16 – 21 including, at 18, provision for representations to the investigator). Regulations 14 and 23 provide for assessments of the gravity of the matter to be made both before and after the investigation. The assessment required by regulation 23 is to take place after the investigation and is to determine whether proceedings should be brought and if so what form they should take. By regulation 23(10) if there is a case to answer in respect of gross misconduct the matter must proceed to a misconduct hearing. If there is a case to answer only in respect of misconduct then the matter is to proceed to a misconduct meeting (subject to the provisions of 23(10)(b) and (c) which do not apply here).

22. The Conduct Regulations then provide for the procedures which are to be followed leading up to and at a misconduct hearing and at a misconduct meeting.

23. Regulation 42 provides, at subsections (2) and (3), for the disciplinary action available at a misconduct meeting and a misconduct hearing respectively as follows:

> (2) The disciplinary action available at a misconduct meeting is—
>
> (a) a written warning;
>
> (b) a final written warning.
>
> (3) The disciplinary action available at a misconduct hearing is—
>
> (a) where the person conducting or chairing the misconduct proceedings decides the conduct of the officer concerned amounts to misconduct, in accordance with regulation 41(15)—
>
> (i) a written warning;
>
> (ii) a final written warning;
>
> (iii) reduction in rank, where paragraph (5) or (6) applies;
>
> (iv) dismissal without notice, where paragraph (5) or (6) applies;
>
> (b) where the person conducting or chairing the misconduct proceedings decides the conduct of the officer concerned amounts to gross misconduct, in accordance with regulation 41(15)—
>
> (i) a final written warning;
>
> (ii) reduction in rank;
>
> (iii) dismissal without notice.

24. As a consequence the most severe sanction which can be imposed at a misconduct meeting is that of a final written warning.

25. The Standards of Professional Behaviour, a breach of which is to constitute misconduct or gross misconduct, are set out at schedule 2 of the Conduct Regulations. Pursuant to section 39A of the 1996 Act the College of Policing has issued a Code of Ethics relating to the operation of those standards.

26. The College of Policing has also, pursuant to section 87 of the 1996 Act, issued Guidance on Outcomes in Police Misconduct Proceedings. At paragraph 2.3 that Guidance describes the purpose of the misconduct regime as follows:

> "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."

27. It is also relevant to note the guidance which is given at paragraphs 2.10 and 2.11 in these terms:

> "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. If an

outcome is necessary to satisfy the purpose of the proceedings, impose it even where this would lead to difficulties for the individual officer."

28. The Vetting Code of Practice has been issued by the College of Policing under section 39A of the 1996 Act. At the outset this Code states:

> "1.1 Everyone in the police service, and leaders in particular, must maintain high ethical and professional standards and act with the utmost integrity. This is crucial in ensuring public confidence in the service is maintained.
>
> 1.2 It is essential that the public is confident that police vetting processes are effective in identifying those who pose a potential risk to others or who are otherwise unsuitable for working within the police service.
>
> 1.3 Vetting is an integral part of a police force's framework of ethics and professional standards. It assists with identifying individuals who are unsuitable to work within the police service, or to have access to police assets. This includes people who are unsuitable through criminal activity or association, those who have a demonstrable lack of honesty or whose previous behaviour has been inconsistent with the Code of Ethics, and those who are financially vulnerable."

29. At 3.4 the Code explains that it will be supported by the Authorised Professional Practice (APP) on Vetting which "will describe the technical processes and detail needed to implement vetting".

30. The principles which "should underpin all decision-making within vetting" are set out at section 5 of the Code under the heading "Transparency and Accountability". The following are of relevance here:

> "**Principle 1**
>
> In applying vetting, practitioners will comply with the requirements of this Code and the Code of Ethics. Each case must be treated on its own merits.
>
> **Principle 2**
>
> Everyone working in a police environment will be vetted to the requisite level. This includes those who: have unrestricted or unsupervised access to police information, assets or estates have access to force or national police systems, be that directly or remotely act as a representative of the police service have the power to make or significantly influence strategic decisions in the police service, and includes members of partner agencies.
>
> ...
>
> **Principle 4**
>
> Police vetting should comply with the standards laid out in APP on Vetting.
>
> ...
>
> **Principle 6**
>
> Decision-making in respect of vetting clearance should be separate from, and independent of, recruitment and other human resources processes. There should be an effective working relationship between vetting and professional standards departments.
>
> ..."

31. At section 1.1 the APP provides further guidance on the purpose of vetting saying:

> "Everyone within, working alongside or delivering service on behalf of the police service must maintain high ethical and professional standards, and must act with the utmost integrity. They must also be seen to maintain and promote such standards. A thorough and effective vetting regime is a key component in assessing an individual's integrity. It helps to reassure the public that appropriate checks are conducted on individuals in positions of trust. Vetting also identifies areas of vulnerability that could damage public confidence in a force or the wider police service."

32. At section 3 the APP explains why vetting is necessary saying, at 3.1 and 3.2:

> "3.1 Vetting is conducted in the police service to help identify, assess and manage risk relating to areas including, but not limited to: protection of police assets; national security; public safety; public confidence; protection of organisational assets; operational safety; leadership; corruption and coercion; integrity"
>
> "3.2 Vetting clearances must be granted before an individual is appointed, employed or otherwise authorised to access police premises or information that is not in the public domain. This is because the vetting process can uncover information that shows the individual is unsuitable to be appointed, employed or otherwise given unsupervised access to police assets."

33. At section 5.1 the APP explains the existence of the two vetting regimes in the police service and their different objectives:

> "There are two vetting regimes in the police service:
>
> force vetting – designed to protect police assets
>
> national security vetting (NSV) – designed to protect government assets"

34. At section 6.1 the different force vetting levels are described thus:

> "6.1.1 There are three levels of force vetting applicable to the police service: non-police personnel vetting; recruitment vetting; management vetting;
>
> 6.1.2 Force vetting levels are applied to all individuals who require unsupervised access to police assets (including information, systems or premises). Some of these individuals also require access to GSC information. Where this is the case, the appropriate level of NSV is applied.
>
> 6.1.3 Individuals who are not required to have unsupervised access to police information, systems or premises do not require force vetting clearance.
>
> ..."

35. Recruitment vetting clearance is the minimum level of vetting and the APP says at section 7.11.2:

> "RV is the minimum level of check acceptable for police personnel to be allowed unsupervised access to police assets, estates and information...."

36. The effect of recruitment vetting clearance is explained at section 7.11.5 thus:

> "RV clearance, preceded by authentication, allows regular access to police assets up to OFFICIAL-SENSITIVE and occasional access to SECRET. The RV process should be completed after the applicant has passed all other assessment criteria, such as assessment centres and interviews. In all cases, clearance must be processed and a decision must be reached as soon as reasonably practicable."

37. The material to be considered in the vetting process is explained at sections 7.19 – 7.22. The nature and purpose of the checking of an applicant's social media posts is explained in these terms at section 7.22.25:

> "Forces should check content on publicly available social media sites for the purposes of service reputational reassurance, and to ensure that the applicant's online behaviour is compatible with the Code of Ethics or Standards of Professional Behaviour.
>
> - The applicant must use social media responsibly and safely.
>
> - The applicant must not have published anything that could reasonably be perceived by the public or by policing colleagues to be discriminatory, abusive, oppressive, harassing, bullying, victimising, offensive or otherwise incompatible with policing principles.
>
> - The applicant must not have published, or offered to publish, any material that might undermine their reputation or that of the policing profession, or might run the risk of damaging public confidence in the police service."

38. At section 8.3 the approach to be taken to previous convictions and cautions is explained.

39. It is to be noted that the APP provides for vetting decisions to be based on police intelligence, information obtained from open source checks, and other material giving grounds for suspicion or concern as well as established facts. In *R(A) v Chief Constable of C Constabulary* [2014] EWHC 216 (Admin), [2014] 1 WLR 2776 Coulson J explained that a vetting decision could be made on the basis of material giving reasonable grounds for suspicion provided that the decision maker then went on to consider whether it was appropriate having regard to all the circumstances to refuse vetting clearance. At section 7.37.4 the APP set out the following two-stage test giving effect to the approach approved by Coulson J:

> "In assessing information and intelligence revealed as part of the vetting process, forces should apply a two-stage test.
>
> 1. Are there reasonable grounds for suspecting that the applicant, a family member or other relevant associate: is or has been involved in criminal activity; has financial vulnerabilities (applicant only); is, or has been, subjected to any adverse information
>
> 2. If so, is it appropriate, in all the circumstances, to refuse vetting clearance?"

40. At section 8.46 the APP addressed the withdrawal of vetting clearance or a refusal to renew the clearance at the end of its period of validity saying:

> "8.46.1 Vetting clearances can be refused or withdrawn at any level.
>
> 8.46.2 Where RV clearance is withdrawn, consideration must be given to whether the identified risk(s) can be mitigated by placing conditions on clearance and/or using close supervision. When an MV is withdrawn, consideration must be given to alternative deployment to a role where the withdrawn clearance level is not required. In such circumstances, assessment must also be made in respect of the subject's continued suitability to hold RV clearance.
>
> …"

41. The APP expressly contemplates that the withdrawal of vetting clearance can be the trigger for steps to be taken under the Police (Performance) Regulations 2020. Thus, under the heading "Employment Rights Act 1996 and Police (Performance) Regulations 2020", section 8.47 says:

> "8.47.1 Where vetting clearance is withdrawn or refused on renewal for existing personnel, a different process will need to be followed for police officers and police staff. If vetting clearance is refused at RV, unsupervised access to police assets, including premises, information and systems, cannot be granted. IF MV clearance is withdrawn, consideration must be given to whether RV clearance can be granted.
>
> …
>
> 8.47.3 The ERA does not apply to police officers or special constables. Therefore, when clearance is withdrawn and suitable alternative employment cannot be identified, and/or the risk cannot be reasonably managed, the force should consider proceedings under the Police (Performance) Regulations 2020.
>
> 8.47.4 When a police officer's or special constable's RV clearance is withdrawn, they will be unable to access police information and systems. Unsupervised access to police premises will also not be permitted. As a result, the police officer will be unable to perform their role to a satisfactory level. This could, therefore, amount to gross incompetence and a third-stage meeting should be considered.
>
> 8.47.5 In cases where RV clearance is withdrawn and the risk cannot be managed, the matter should be referred to HR for progression."

42. The effect of sections 8.46 and 8.47 seen together is that where recruitment vetting clearance is withdrawn consideration is to be given to seeing if there are mitigating measures which will enable the officer to remain in the service. However, the APP expressly contemplates that where the risk cannot be reasonably managed steps to remove the officer may have to be put in train.

43. At section 8.50.1 the APP provided as follows for there to be a review of vetting clearance following misconduct proceedings which resulted in a written warning or a final written warning:

> "Following the conclusion of a misconduct hearing or meeting where the officer, special constable or member of staff is not dismissed but has been issued with a written warning or a final written warning, a review of vetting clearance should be carried out. The review includes a consideration of the applicant's suitability to maintain the level of clearance held and to continue in the post they occupy."

44. The Police (Performance) Regulations 2020 apply where there has been "unsatisfactory performance or attendance" by a police officer. They provide a route through which constables can be removed from office without misconduct. Those regulations do not, however, apply to probationers.

45. Regulations 12 and 13 of the Police Regulations do apply to probationers and regulation 13(1) addresses the discharge of a probationer thus:

> "Subject to the provisions of this regulation, during his period of probation in the force [the services of a constable, [DE inspector, DE superintendent or rejoiner member]] may be dispensed with at any time if the chief officer considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or [well conducted constable, [DE inspector, DE superintendent or rejoiner member]]."

46. As will be seen below in *R v Chief Constable of British Transport Police ex p Farmer* (July 1999) Henry LJ explained that "the probationary period is there to discover and deal with fundamental unsuitability of outlook or temperament". It is also to be remembered that, as explained by Silber J in *R(Verity) v Chief Constable of North*

Yorkshire Police [2009] EWHC 1879 (Admin) at [23] –[24], "the ability to discharge under regulation 13 depends not on whether on an objective basis the probationer would not become an efficient police constable but on whether the Chief Constable *considers* that he does" (original emphasis). This means that a challenge to such a decision on factual grounds can only succeed if irrationality is established in which regard "the Chief Constable must be allowed a substantial degree of deference".

47. On behalf of the Secretary of State and pursuant to sections 87 and 87A of the 1996 Act the Home Office has issued guidance in respect of Conduct, Efficiency, and Effectiveness. This addresses the position of probationers at paragraphs 4.82 – 4.92 and paragraphs 4.87 – 4.90 explain the approach to be taken to disciplinary proceedings in these terms:

> "4.87 Probationary officers are subject to the procedures concerning investigations and disciplinary proceedings. The chief officer has discretion whether to use the disciplinary procedures or the procedures set out at Regulation 13 of the Police Regulations 2003 (Discharge of probationer) as the most appropriate means of dealing with a misconduct matter.
>
> 4.88 Particular consideration should be given to allegations of gross misconduct which ordinarily should be subject to disciplinary proceedings rather than the Regulation 13 route.
>
> 4.89 However, where allegations of misconduct (rather than gross misconduct) are made, the chief officer may instead consider whether the circumstances of the matter merit consideration under Regulation 13 rather than under misconduct procedures. In exercising this discretion due regard should be given to whether the student police officer admits to the conduct or not. Where the misconduct in question is not admitted by the student police officer then, in most if not all cases, the matter will fall to be determined under the misconduct procedures.
>
> 4.90 Whilst an officer who had passed probation may have been subject to a misconduct meeting in such circumstances and would unlikely face dismissal (unless they are facing multiple counts or had existing warnings in force) the chief officer may determine that a potential breach amounting to misconduct during a probationary period would demonstrate that the officer is not fitted to become an efficient or well conducted constable, inspector or superintendent."

The Lawfulness of the Vetting Decision: the applicable Principles.

48. Expressed in general terms the applicable principles were not contentious and can be stated shortly. The dispute between the parties turned on the question of how the principles were to be applied to the particular circumstances of the Claimant and of the decisions taken in relation to her.

49. Where a person or body has a power expressed in wide or general terms then that power cannot be used to defeat the intention of other provisions directed to the particular circumstances and giving protections or imposing restrictions intended to apply in those circumstances. Lord Bingham expressed the principle thus in *R v Liverpool CC ex p Baby Products Association* (November 1999): "a power conferred in very general terms plainly cannot be relied on to defeat the intention of clear and particular statutory provisions". Similarly, the majority in *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 explained, at [51], that wide-ranging prerogative powers could not be used to "frustrate the purpose of a statute or a statutory provision, for example, by emptying it of content or preventing its effectual operation".

50. In the context of the interrelation between the Conduct Regulations and the discharge of a constable under other procedures it is necessary to consider the decisions in *Farmer* (above), *R(Monger) v Chief Constable of Cumbria* [2013] EWHC 455 (Admin), and *C v Chief Constable, Strathclyde Police* [2013] CSOH 65, [2013] SLT 699.

51. In *Farmer* the claimant and another probationer constable had been caught cheating in examinations. Each of them admitted having done so. The claimant's services were dispensed with under order 3.2 of the British Transport Police Standing Orders. This provision was akin to regulation 13 of the Police Regulations and empowered a Chief Constable who "considers that [the probationer] is not fitted to perform the duties of his or her office" to dispense with that probationer's services. The claimant challenged this decision saying that where a disciplinary offence might have been committed it was not appropriate to circumvent the disciplinary process by using the order 3.2 power to dispense with a probationer's services.

52. At first instance Lightman J upheld that challenge. He did so on the basis that the cheating had been a disciplinary offence and that removal for such a matter could only be through the disciplinary procedure governing dismissal for misconduct. Lightman J said that removal under the procedure for dispensing with a probationer's services was only appropriate where the reason for so dispensing did not relate to misconduct. In reaching that conclusion Lightman J had been influenced by the wording of condition 7 of the claimant's contractual terms of service. This had set out the procedure which would be followed when the Chief Constable was considering using the power to dispense with a probationer's services and had concluded by saying that "this procedure would not apply where a disciplinary offence is involved".

53. The Court of Appeal disagreed with Lightman J and found that the claimant's discharge had been lawful. Henry LJ (with whom Potter and Mummery LJJ agreed) set out the reasons for that conclusion as follows:

> "At the end of the day, the last sentence of Condition 7 will, in my judgment not bear the weight which the judge attached to it. First, if there was force in the point, one would expect to find the embargo on probationer's dismissal spelt out in the Standing Orders or General Conditions. Second, this is reinforced by the wording "This procedure would not apply …" — accurate to describe the situation of separate procedures — rather than words of prescription such as "This procedure must not be used." Third, where the offence is admitted, there will be many cases where it would be contrary to good administration to go by the disciplinary route. The probationary period is there to discover and deal with fundamental unsuitability of outlook or temperament or behaviour. Each of these might manifest themselves in misconduct, but would in most cases be more appropriately resolved under the probationer's dismissal procedure, concerned as it is, not so much with individual charges, as with fundamental questions about whether the probationary police constable is fitted to perform the testing duties required of the police. Fourthly, the cases of *Evans* and *Carroll* each show that, in what I might call mainstream policing, where the Police Regulations apply, it has never been suggested that there is no discretion to proceed by the probationary dismissal procedures where misconduct such as might be prosecuted under the disciplinary process is charged. It would be a curiosity if such a rule did not apply to those more formalised probationary dismissal procedures, but did apply to the BTPF procedure on the strength of the plainly ambiguous last sentence of Condition 7."
>
> "In conclusion, there are two separate dismissal procedures which govern probationers. The decision which to use is a decision for the employing force. Where the facts founding the complaint are not admitted, in most if not all cases the decision is likely to be that the

> question whether the charge is proved or not proved be decided under the disciplinary procedures."

54. In *Monger* the claimant's services as special constable had been dispensed with by way of management action under regulations empowering a chief constable to require a special constable to retire. That decision had been taken because of a number of allegations of misconduct which the claimant had denied. The procedure provided by the applicable conduct regulations had not been invoked. Supperstone J said, at [7,] that:

> "In my judgment, Parliament cannot have intended that in a case of misconduct which, as in a case such as the present, led to a dismissal, a police force can choose to bypass the 2008 Regulations, specifically issued to lay down appropriate procedures and safeguards for police officers, including Special Constables, in cases of misconduct."

55. Supperstone J then concluded that the claimant's dismissal was unlawful. The dismissal was in reality for the misconduct which was disputed. That meant that the procedure laid down in the applicable conduct regulations should have been followed that being the route provided by Parliament for such a dismissal.

56. The decision in the *Strathclyde Police* case is not binding on me. It is, however, of substantial persuasive weight as a decision addressing the Scottish equivalent of the provisions with which I am concerned. There the probationer police constable had been accused of rape and of making unwanted sexual advances. Initially the matter was approached through the misconduct process. In the course of that process the police force concluded that misconduct could not be proved (essentially because of the non-cooperation of the complainants). The petitioner was given a formal Advice and Direction report and told that there would be no misconduct proceedings. However, the respondent then discharged the petitioner using powers given by regulation 13 of the Police (Scotland) Regulations 2004 which was in equivalent terms to regulation 13 of the Police Regulations. That decision was taken because of the petitioner's conduct in plying young women with alcohol in his flat. The petitioner challenged that decision saying that it was irrational and unfair to dispense with his services using the regulation 13 power in relation to matters which could and should have been dealt with under the conduct procedure.

57. Lord Drummond Young rejected the petitioner's contention. At [21] he pointed out that the procedures for making a finding of misconduct and for utilising regulation 13 were different and involved different decision makers. Then, at [22], he said:

> "Furthermore, the two procedures are concerned with different issues. The misconduct procedure is concerned with allegations that an officer has been guilty of misconduct as defined in Sch.1 to the Conduct Regulations. The reg.13 procedure, by contrast, is concerned with the question whether a probationary constable is not fitted to perform the duties of office of constable or ''is not likely to become an efficient or well conducted constable''. Those questions, especially the latter, are capable of raising much wider issues than misconduct. Nevertheless, it would be quite extraordinary if actual misconduct could not be taken into account in making a reg.13 assessment when other, lesser, matters could be. Nor does it matter that misconduct proceedings were considered and then dropped because the issues involved in the two types of proceeding are essentially different. In these circumstances, I am of the opinion that the decision of the chief constable as to whether to proceed under reg.13 cannot be constrained by any decision not to proceed to a misconduct hearing. In summary, two different decisions are involved, which are made for different

> purposes by different individuals and which may involve consideration of different material. On that basis, the decision to proceed by way of the reg.13 procedure cannot be challenged."

58. It is to be noted that the petitioner's case was put before Lord Drummond Young on the basis of rationality and fairness rather than lawfulness and, although as will be seen the judge considered some of the English authorities, he was not referred to the decision in *Monger* which had been decided only a couple of months before. It was in that context that the judge characterized the crucial question as being whether the regulation 13 determination should have been reached without a formal hearing and the testing of the evidence saying, at [23]:

> "… Specifically, the crucial question would appear to be whether in the specific circumstances of the case the respondent was entitled to reach a determination under reg.13 that the petitioner should be discharged from his appointment as a probationary constable without giving the petitioner the opportunity of a formal hearing involving the right to legal representation, the leading of evidence as to the allegations against the petitioner, cross examination of the witnesses giving such evidence, and the right to lead evidence on the petitioner's behalf.…"

59. Having considered a number of the English authorities and quoting Henry LJ's conclusion in *Farmer* Lord Drummond Young said, at [27]:

> "… I agree that in cases where there is a dispute of primary fact the misconduct procedure is likely to be the norm. In some cases, however, there may be sufficient uncontroversial factual material that a decision under the reg.13 procedure can properly be made even though other matters remain in dispute. That is I think clearly implicit in the tests adopted by Elias J in *Khan* and Silber J in *Kay*. On the basis of those tests, with which I respectfully agree, the critical question becomes whether the conflict over the primary facts is sufficiently great to make it unfair for the chief constable to make use of the standard reg.13 procedure rather than giving the probationary constable the protection available under the Conduct Regulations. In all cases, however, it is essential to determine precisely what the material is that is to be relied on for the purposes of the reg.13 procedure, and to ensure that there is no dispute of fact in that material that could render the standard reg.13 procedure unfair."

60. It was against that background that the judge concluded that use of the regulation 13 procedure had not been unfair in the particular case because the critical facts on which the decision had been based were not in dispute. Those were that young women in a state of intoxication had accompanied the petitioner to his flat where he had given them further alcohol and made sexual advances to them.

61. Lord Drummond Young's focus on the issue of fairness followed from the way in which the case was put before him. It meant that the lawfulness of the approach taken by the respondent was not addressed directly but it is apparent that the judge accepted that the approach taken was potentially lawful.

62. My understanding of the effect of the general principles set out above and of those decisions concerning constables is that where there is an issue as to whether particular conduct took place the protections provided by the Conduct Regulations should not be circumvented. In such cases the procedures laid down by those regulations should normally be followed. A failure to do so is likely to mean that a dismissal based on the misconduct is unlawful as in *Monger*. However, where the conduct (or at least the relevant acts) amounting to misconduct is admitted or otherwise not in dispute then it is not necessarily the position that the use of other procedures instead of or in addition

to those of the Conduct Regulations is precluded. It is clear from *Farmer* and the *Strathclyde Police* case that it can be lawful to dispense with a probationer's services other than through the misconduct route even when the basis for taking that course is behaviour which could amount to misconduct. The critical question in such a case will be whether the effect of the course adopted is (a) to undermine or subvert the protections provided for a constable accused of misconduct or (b) amounts instead to the legitimate use of a different power for its intended purpose. The lawfulness of the action will depend on both the particular circumstances and the particular procedures which are being used. In relation to the former the presence or absence of a factual dispute will be of great significance and is normally likely to be determinative. As to the latter there will need to be close analysis of the nature and purpose of the powers being used.

The Lawfulness of the Vetting Decision: Discussion.

63. The Vetting Decision did not amount to a subversion of the kind which Supperstone J found to be unlawful in *Monger*. Here there was no material dispute as to the facts. The minor points of difference in respect of the actual terms of the abuse spoken by the Claimant and whether she was required to leave the public house did not go the substance of her conduct namely that in public and when in drink she had shouted abuse at another and had continued to do so in the street. The Defendant was not using the vetting procedure to circumvent the need for a disputed allegation of misconduct to be established through the route provided by the Conduct Regulations with the protections which those provide to constables against whom such an allegation is made.

64. The unlawfulness asserted here by the Claimant takes a different form. The contention is that the Vetting Decision had the effect of ending the Claimant's service by reference to behaviour which amounted to misconduct. It is said that was an unlawful and impermissible subverting of the Conduct Regulations because precisely the same behaviour had been addressed in proceedings under those regulations and there not only had the sanction of dismissal not been imposed but that sanction could not have been imposed. The Claimant's point is that the Vetting Decision in effect brought about her dismissal for misconduct in circumstances where such dismissal was not permissible under the Conduct Regulations and where a different sanction had already been imposed under those regulations. The Claimant's position was that the imposition of the final written warning through the Conduct Regulations procedure should have been an end of the matter. The unlawfulness derives, the Claimant says, from the application of a different process leading to her discharge when the conduct on which the discharge was based had already been considered under the Conduct Regulations and a sanction less than dismissal imposed.

65. It follows that the circumstances here are different from those considered in *Farmer, Monger,* and in the *Strathclyde Police* case. In none of those had there been a finding of misconduct under the Conduct Regulations (or their equivalent) and still less a sanction imposed under them.

66. The position here is not in truth one where the vetting clearance process is being used to subvert or sidestep the protections given to a constable by the Conduct Regulations. Instead, the position is one of the operation of different processes both being used to address the same behaviour and resulting in different outcomes. The lawfulness or otherwise of that depends on an assessment of the proper interrelation between the

different processes and that will turn on an analysis of the structure and purpose of the different provisions.

67. Before turning to that analysis and to the competing factors here I note that the circumstances with which I am concerned are markedly different from those of the vetting decisions considered by Coulson J in *R(A) v Chief Constable of C Constabulary* (above). It is relevant that Coulson J had regard to the sensitivity of the vetting process and to the important public interest in ensuring that only suitable persons obtained security clearance. Those are considerations which also apply to the vetting of constables for the purpose of clearance and account is to be taken of them here. Beyond that the difference in circumstances is such that Coulson J's decision does not assist with the issues I have to address. In that case a commercial operator was being vetted with a view to being given clearance to provide vehicle recovery and breakdown services to two constabularies. Coulson J's assessment of the limited weight to be given to the interests of the person being vetted is to be seen in that context. Coulson J was not addressing the circumstances of a person in the office of constable (where, as I will explain below, there is a public interest in the preservation of that person's independence) and still less was he considering the interplay between the vetting process and the procedures to address misconduct.

Factors supporting the Claimant's Analysis.

68. There are a number of factors which support the Claimant's contention that it was not lawful for the vetting clearance process to be used so as to bring about a different result from the outcome of the misconduct proceedings.

69. The first is the public interest in the independence of police officers. Each constable is an office holder and not an employee. Each holds the powers of a constable and is individually answerable for the way in which he or she exercises those powers. There is a public interest in maintaining that independence and in protecting constables from being at risk of sanction for a refusal to comply with potentially unlawful commands or even with commands which, although not unlawful, require action to be taken which does not accord with the constable's independent exercise of his or her judgement. It is for that reason that a constable has protection going beyond that of other office holders. The argument for the Claimant is that if a vetting review can remove a constable's vetting clearance after misconduct proceedings which did not lead to a dismissal then that can have the consequence of a constable being removed from office for misconduct which has been found not to merit removal under the procedures set up to determine that very point. This is a factor of weight but it has to be remembered that the public interest in the independence of a constable is not the only relevant public interest. There is also a potent public interest in ensuring the highest standards of integrity, professionalism, and performance by police officers and in limiting access to the material to which police officers are privy to those who are fit to have such access (a point to which I will return below). It is also very relevant to note the regulation 13 procedure and the provision there for a probationer to be removed in a way which is not permissible in the case of an established officer. In this regard the purpose of the probationary period, as explained by Henry LJ in *Farmer*, and the breadth of the regulation 13 power, as explained by Silber J in *Verity,* are significant factors. It follows that the balance of interests is different in the case of a probationer from that of an established officer with the protection of the interests of the former being designedly less than that given to the interests of the latter.

70. It is relevant that the behaviour of the Claimant which was under consideration was misconduct. It was admitted to be such and was initially addressed through the Conduct Regulations. An assessment was made in the misconduct process that the behaviour was not such as to warrant the Claimant's dismissal and so that it was misconduct and not gross misconduct. That had the consequence that, in her circumstances, the Claimant could not be dismissed under the Conduct Regulations and that no greater sanction than a final written warning could be imposed. Moreover, the conduct proceedings were then continued to their conclusion at a misconduct meeting at which a final written warning was imposed.

71. The objectives of the Conduct Regulations and of the Vetting Code of Practice are the same namely the maintenance of public confidence in the police service, the upholding of high standards, and the protection of the public. The purpose of the police misconduct regime is expressed in those terms at paragraph 2.3 of the Guidance on Outcomes. The introduction to the Vetting Code of Practice uses very similar language to explain the purpose of the vetting regime. It is of note in this regard that the Guidance on Outcomes expressly explains, at paragraphs 2.9 and 2.10, that misconduct proceedings are not designed to punish officers but rather to protect the reputation and standing of the police service.

72. It follows that although misconduct proceedings and steps to review an officer's vetting clearance involve different processes and different personnel they have the same objectives and, in the case of the Claimant, were addressing the same behaviour. The Conduct Regulations contained express restrictions on the penalty which could be imposed for that behaviour. There is force in the point that a different process having the same objective and considering the same behaviour as the misconduct proceedings should not result in an outcome which would be impermissible in those proceedings.

73. For the Claimant it was said that the purpose of the vetting regime was the protection of police assets in the sense of the confidential and sensitive information to which those with clearance had access. In the case of the Claimant the Vetting Decision was being made by reference to behaviour which was unrelated to such access. However, in this regard the Claimant came close to seeking to have matters both ways. On her behalf it was being said that the misconduct regime and the vetting regime had the same objectives and that as a result there should not be different outcomes in respect of the same behaviour. However, then the Claimant sought to say that the focus of the vetting regime should be seen as the protection of assets.

74. In my judgement it is not correct to say that the purpose of the vetting regime should be seen as being solely the protection of police assets. That is an important part of the regime's function but the Vetting Code of Practice and the APP make it clear that the function of the regime is wider than that and that it is concerned also with the preservation of public confidence in the police service. Inevitably those with vetting clearance will have access to sensitive, private, and confidential information about members of the public. There is a public interest not just in avoiding the wrongful use or improper disclosure of such information but also in the character, maturity, and integrity of those who are given access to that information. Those whose personal and confidential information is available to police officers have an interest in being confident that such officers not only are persons of integrity but also that they have an appropriate measure of maturity and self-control. The Defendant is right to say that public confidence in the police service would be diminished if those who are immature

or who have shown an ability to lose their self-control when affected by drink or when in anger have access to confidential information. It follows that part of the purpose of the vetting regime is to ensure that those lacking the necessary maturity and self-control do not receive clearance even if they are persons whose integrity is not in question. This is illustrated by the fact that the checks of an applicant's social media postings mandated by section 7.22.25 of the APP are with a view to assessing the tone and nature of those postings rather than being to check whether the applicant has disclosed private information. That said, there remains force in the Claimant's point that the primary focus of the misconduct regime is on the effect of behaviour on the standing of the police service whereas the vetting regime has a wider focus including but not limited to the security of assets. In light of that the contention that as the central concern in respect of the Claimant's behaviour was the effect of that behaviour on public confidence in the police service then primacy should be given to the outcome reached in the misconduct proceedings which had such matters as their primary focus has real force.

75. Although the Vetting Decision was formally only a decision to remove the Claimant's recruitment vetting clearance it was inevitable that the Claimant would be discharged under regulation 13 as a consequence. This was because at least that degree of clearance was necessary for the Claimant to be able to take part in her training as a probationer. To complete that training she needed to be able to access material and information which she would be prevented from accessing if she did not have recruitment vetting clearance. In the light of those matters once the clearance had been removed the Defendant would have no choice but to discharge the Claimant. This means that there is real force in the contention that it would be artificial to see the Vetting Decision as being other than in reality a decision ending the Claimant's service as a constable. As already noted, it was doing so for behaviour which had been considered in the misconduct proceedings and which could not have led to dismissal in those proceedings. For the Defendant Mr Beggs KC sought to emphasise the differences between a regulation 13 discharge and a dismissal under the Conduct Regulations. In particular he pointed to the fact that a regulation 13 discharge would not bar the Claimant from future service as a police officer whether with the West Mercia force or a different force whereas a dismissal for misconduct would have this effect. It is true that there is that difference in the consequences and the decisions are formally different. However, this point has only very limited weight. The reality is that the Vetting Decision brought the Claimant's service with the West Mercia force to an end in circumstances where the result of the misconduct proceedings had been that she continued in post albeit subject to a final written warning.

76. Mr Baumber placed considerable weight on the argument that acceptance of the Defendant's approach would allow a wholesale sidestepping of the Conduct Regulations and of the procedures which they contain for determining both the existence of misconduct and the appropriate sanction. Mr Baumber said that if the Vetting Decision was lawful this would mean that police forces could routinely use the vetting process to achieve the same result as could be achieved when misconduct was established under the Conduct Regulations. However, they would be able to do so without following the procedures laid down in those regulations and without being subject to the restrictions which they contained for the protection of constables. In my judgement that was very much an overstatement of the position. It is right to note that the vetting process permits decisions to be made on the basis of suspicion. There may

be scope for debate where the conduct in question is disputed and the misconduct procedure does not find it established but a subsequent vetting clearance decision is then made by reference to suspicion in relation to the very conduct in issue. However, such circumstances are very far from those of the current case and it is the lawfulness of the decisions taken in the current circumstances with which I am concerned. Here the Claimant did not dispute the substance of the conduct in question. The issue here is not whether there can be a removal of vetting clearance in respect of a disputed misconduct allegation. Rather it is whether the conclusion in misconduct proceedings that the appropriate and only permissible sanction is that of a final written warning rather than dismissal is necessarily the end of the process and precludes a removal of vetting clearance under the vetting procedures. A conclusion that such removal was lawful in the circumstances of this case would not mean that the removal of vetting clearance would be lawful on the basis of a disputed allegation of misconduct where the procedure under the Conduct Regulations had not been followed. In assessing the lawfulness of such action it would be necessary to consider the interrelation between the principle enunciated by Supperstone J in *Monger* and the point that vetting clearance decisions do not have to be based on facts which have been established in a formal process with opportunity for challenge. The position here is that the Claimant admitted the substance of the conduct and, moreover, the procedure under the Conduct Regulations was invoked. In the light of that I do not accept that if I were to conclude that the Vetting Decision was lawful that would sweep the Conduct Regulations away nor that it would permit those regulations to be sidestepped as a matter of course.

77. Mr Baumber acknowledged that section 8.50.1 of the APP said that there should be a review of vetting clearance after a finding of misconduct in misconduct proceedings. He contended, however, that such a review was intended to address cases where the officer against whom a finding of misconduct had been made held an enhanced level of vetting clearance such as management vetting clearance. The purpose of the review was to be seen as being to determine whether that enhanced clearance should be removed. In support of this argument Mr Baumber said that it was significant that this section said that the review was to include "consideration of the applicant's suitability to maintain the level and clearance held and to continue in the post they occupy". It would have been possible, he submitted, for that section to say that the purpose of the vetting clearance review after a finding of misconduct was to consider the officer's continued suitability to remain in the office of constable. That was not done and instead reference was made to the applicant continuing in the "post" he or she occupied. I do not accept that the review envisaged by section 8.50.1 is to be so narrowly confined. There are two reasons for this. First, Mr Baumber's argument placed undue stress on a single word in the APP which although a formal document is drafted and expressed as guidance and to be read as such rather than as a statute. Second, the interpretation advanced on behalf of the Claimant would mean that the review to which section 8.50.1 refers would only be relevant in a limited number of cases. However, when that section is read naturally it clearly contemplates a review of vetting clearance after every finding of misconduct. Even on a narrow reading of the language used it is apparent that consideration of the officer's continued suitability for a particular post is to be only one aspect of that review as indicated by the fact that the section says that the review "includes" such consideration.

78. By way of an alternative argument as to the effect of section 8.50.1 Mr Baumber submitted that the review of vetting clearance envisaged there was to be confined to a

consideration of those of the purposes of the vetting regime which had not already been addressed in the misconduct proceedings. The contention was that both the misconduct regime and the vetting regime had the maintenance of standards and the ensuring of public confidence as objectives but that the vetting regime had the additional purpose of protecting police assets. The objectives of maintaining standards and ensuring public confidence should be treated as having been adequately addressed by the misconduct proceedings and so did not need to be taken into account in the review for the purposes of the vetting regime. Putting it slightly differently the vetting review should proceed on the footing that the measures imposed in the misconduct proceedings were adequate for the purpose of achieving those objectives and so should be confined to the question of the protection of assets. In support of this interpretation reference was again made to the second sentence of section 8.50.1 and to the reference there to the level of clearance and the holding of a post.

79. This is a variant of the argument which I have addressed at [71] - [74] above and has a similar degree of force in that regard. However, to the extent that it is an argument that the review mandated by section 8.50.1 is to be confined to questions of the security of assets it is not persuasive. The second sentence of that section does draw attention to matters which are to be a particular focus of that review and to issues which may well not have been addressed in the misconduct proceedings. The section makes it clear that those matters are to be considered but I do not read it as confining the review to that consideration. If that had been intended one would have expected the APP to say in terms that the post-misconduct vetting clearance review should address that issue only.

Factors supporting the Lawfulness of the Vetting Decision.

80. The starting point is that the misconduct proceedings and the review of the Claimant's vetting clearance were different processes carried out by different officers applying different rules. The objectives of those processes were closely related but they were not identical. It is, accordingly, not surprising that the processes had different outcomes. This, although a factor of significance, is not of itself conclusive where the question is whether one process (that of vetting clearance) is being used unlawfully to subvert the outcome of the other (that of the misconduct proceedings).

81. More significant is the fact that section 8.50.1 of the APP expressly says that there should be a review of an officer's vetting clearance where that officer has been issued with a final written warning in misconduct proceedings. As explained above that review is not to have the limited focus for which the Claimant contended. Rather it is to be a full review of the officer in question's vetting clearance. Such a review is to take account of the considerations generally applicable to the grant or removal of vetting clearance. The APP does not state that the review cannot result in the removal of vetting clearance, indeed, the requirement for a review indicates that might be the outcome. There would be little point in a review if it could not result in the removal of an officer's vetting clearance even if that was otherwise warranted.

82. A related point is that the APP envisages that the withdrawal of recruitment vetting clearance can lead to the termination of an officer's service. Section 8.47 expressly addresses the fact that where such clearance is withdrawn an officer may not be able to perform their role and that proceedings under the Performance Regulations are likely to follow (subject to the mitigating measures referred to in section 8.46). The APP contemplates this as a possible outcome in the case of an established officer who has

the protection of the Performance Regulations and still more must the point be applicable to a probationer. It follows that the APP is to be read as contemplating that the review of vetting clearance which section 8.50.1 requires after a finding of misconduct could lead to the withdrawal of recruitment vetting clearance and to a consequent ending of service.

83. As Steyn J explained in *R(J) v Chief Constable of West Mercia & another* [2022] EWHC 26(Admin) at [86] "the APP Guidance is guidance, not legislation, but there would need to be a good reason not to follow it". In that case there was found to have been an error of law because the APP had not been followed where there was no good reason for that failure. There will be circumstances in which it can be an error of law to follow statutory guidance. Those circumstances will be uncommon but will arise if there is a good reason for not following the guidance in question. It is possible to envisage circumstances in which the effect on a separate lawful decision of following particular guidance would be a good reason for not following such guidance. Such circumstances are likely to be rare but might arise if the guidance did not contemplate the fact of the separate decision in question. That is not the position here. Here, at section 8.50.1, the APP expressly contemplates the issuing of a final written warning in misconduct proceedings and provides for what is to happen in the vetting regime in those circumstances. It also, as I have just explained, contemplates the prospect that the removal of vetting clearance could lead to the termination of the officer's service. It follows that the APP contemplates such termination in circumstances where the outcome of the misconduct proceedings had been a written warning and continued service. In those circumstances the fact that review of the Claimant's vetting clearance could lead to an outcome different from that which could have taken place in the misconduct proceedings cannot be a good reason for not undertaking the review. It would, therefore, have been an error of law for the Defendant to fail to undertake the review which led to the Vetting Decision.

84. I have already explained that the different consequences of dismissal for misconduct and discharge under regulation 13 in respect of barring and re-engagement have very limited weight. Similarly, although the decisions under the misconduct proceedings and the vetting clearance review are different in their terms (one being the imposition of a final written warning and the other being the removal of vetting clearance) this also has little weight in circumstances where discharge of the Claimant was the inevitable consequence of the removal of vetting clearance.

85. In their skeleton argument at [10] Mr Baumber and Mr Puthuppally said:

> "The statutory regime cannot be taken to envisage that, if a police force is dissatisfied with the outcome of a misconduct procedure, it can try its luck through an alternative avenue"

86. There were other points in the skeleton argument and in the Statement of Facts and Grounds where the language used came close to questioning the good faith of the Defendant or of those engaged in these processes on her behalf. I do not accept that either those reviewing the Claimant's vetting clearance or the Defendant herself were acting in bad faith or were deliberately seeking to subvert the outcome of the misconduct proceedings. This is not a case where the Vetting Decision was the result of the force taking a "second bite of the cherry" having been thwarted in an attempt to remove the Claimant through the misconduct proceedings. The review of the Claimant's vetting clearance was mandated by the guidance at section 8.50.1 of the

APP. It was not open to the Defendant not to undertake the review in the absence of a good reason for departing from the guidance. I have already explained my rejection of the contention that the mandated review was to be in some way an attenuated one (while noting that the argument that primacy should be given to the assessment of the measures needed for maintenance of standards reached in the misconduct proceedings cannot be discounted). The position might have been different if the Defendant had sought to contend in the misconduct proceedings that the Claimant's conduct amounted to gross misconduct meriting dismissal but the panel at a misconduct hearing had rejected that argument and had characterized it as misconduct not meriting dismissal. Different considerations from the current case might apply if in such circumstances there was then a vetting review leading ultimately to removal of the officer and premised on the view that the conduct required the officer's service to be ended. However, that is not this case and I address the question of lawfulness on the basis that each stage in the process was conducted in good faith; in accordance with the rules applicable to the process being undertaken; and without a conscious ulterior motive of circumventing the restrictions imposed by the Conduct Regulations.

87. Both Mr Beggs and Mr Baumber referred to the fact that there can be cases of misconduct which have no relevance to vetting clearance and also instances of matters relevant to vetting clearance which are wholly unrelated to conduct. Thus sloppiness in uniform or persistent poor attendance could in certain circumstances amount to misconduct but are unlikely to be relevant to vetting clearance. Conversely, the criminal activities of an officer's family or associates might be highly relevant to vetting clearance but not in any way misconduct. Although it was Mr Beggs who placed most stress on this point it might properly be seen as supporting the Claimant's contentions. That is because it could be seen as pointing to the focus of the vetting provisions being the security of police assets and information. I have already explained that in my judgement the vetting process is not solely concerned with the protection of assets. The fact that there are considerations which are relevant to vetting but immaterial in the context of misconduct proceedings and vice versa does provide some support for the Defendant's approach by indicating that vetting clearance and misconduct proceedings are different processes to which, despite their common objectives, different considerations can be relevant. However, that is rather beside the point in the circumstances of this case. Here it was the Claimant's behaviour on 29th May 2021 which led to the final written warning in the misconduct proceedings and it was the same behaviour which resulted in the removal of her vetting clearance.

88. It is significant that the removal of the Claimant's recruitment vetting clearance was not of itself the end of her service as a constable. A further step was needed. In the case of the Claimant as a probationer that was the Discharge Decision taken under regulation 13 by the Defendant rather than by the Vetting Appeal Panel. If the Claimant had been an established officer proceedings under the Police (Performance) Regulations would have been necessary. In that regard it is relevant that although the APP contemplated, at section 8.47, that the withdrawal of clearance could lead to proceedings under those regulations it also provided, at section 8.46.2, for consideration to be given to mitigating the effects of such withdrawal. The vetting regime was one element in an inter-connected system involving different processes and stages and the withdrawal of vetting clearance did not bring an officer's service to an end. In the circumstances of the Claimant (and probably those of any other probationer) the removal of her recruitment vetting clearance led inevitably to her discharge under regulation 13.

Accordingly, as explained above it is rather artificial to see the Vetting Decision as being anything other than a decision ending the Claimant's service with the West Mercia force. Even so the fact that the final discharge was made by a separate decision maker under different powers cannot be ignored and is a factor in favour of lawfulness.

89. The Claimant's argument amounts to saying that where there have been misconduct proceedings resulting in a particular outcome that must be the end of the matter and the behaviour leading to that outcome cannot be addressed under any other process. Although not expressed in these terms that contention came close to being an assertion that behaviour which is potentially misconduct can only be addressed through the procedure of the Conduct Regulations. That approach accords with the reasoning which caused Lightman J to uphold the challenge at first instance in *Farmer* but which was rejected by the Court of Appeal in that case. Such an approach is, moreover, inconsistent with decision in the *Strathclyde Police* case where the position was arguably stronger because there the misconduct proceedings had been abandoned and the petitioner had been told that they would not be pursued. In addition the decision of Supperstone J in *Monger* does not require acceptance of the Claimant's argument in this regard. In that case the facts were disputed and there had been no misconduct proceedings. The unlawfulness there derived from the subversion of the protection which the misconduct proceedings provided in respect of findings of misconduct. The position here is very different.

Conclusion on Lawfulness.

90. The factors supporting the view that the Vetting Decision was lawful are compelling. It is to be remembered that this is not a case where the allegation against the Claimant was dismissed in the misconduct proceedings or where an assertion of gross misconduct had been made and rejected by a panel with a subsequent vetting decision being based on disputed facts. Here there was no material dispute of fact.

91. No one factor is determinative by itself but looking at matters in the round the position is that the misconduct proceedings and the review of the Claimant's vetting clearance were different processes in which different, but related, criteria were applied. Moreover, and significantly the Vetting Code of Practice and the APP to which the Defendant was required to have regard called for the review to be undertaken in these circumstances. For such a review to be undertaken properly it could not simply mirror the outcome in the misconduct proceedings but had to be a genuine review of the vetting clearance having regard to all the considerations relevant to such a review. Although there is force in the Claimant's point that primacy should be accorded to the conclusion reached in the misconduct proceedings as to the measures necessary to maintain professional standards and public confidence it cannot outweigh the factors in favour of lawfulness. In particular it cannot prevail against the fact that the requirement that there was to be a review of the Claimant's vetting clearance is strongly indicative that this was to be a full and not an attenuated review. The Claimant did not go as far as to say that there should not be a review but her case amounts to saying that the only lawful outcome of such a review in these circumstances would be for her recruitment vetting clearance to remain in place. That would render the review a pointless exercise in circumstances such as those of the Claimant and, indeed, in most cases where the constable in question does not have an enhanced vetting clearance. The APP requires the review to be undertaken whenever misconduct proceedings result in a written warning or a final written warning. If the Claimant's position is correct that means the APP requires an

exercise to be undertaken in all such cases even though in very many of them that exercise will be pointless. The unlikelihood of the APP being intended to have that effect strongly indicates that the review called for by section 8.50.1 was to be a full review not constrained by the outcome of the misconduct proceedings.

92. The ultimate outcome of the misconduct, vetting, and regulation 13 processes was that the Claimant was discharged in circumstances where her conduct had not resulted in dismissal under the Conduct Regulations. That, however, was not because the vetting or regulation 13 processes unlawfully subverted the outcome of the misconduct proceedings but instead because those processes were applied properly and by reference to the criteria applicable and relevant to them in the particular circumstances. It follows that the Vetting Decision was not unlawful even though it led to the discharge of the Claimant.

Rationality

93. Permission was only given for the grounds asserting irrationality in so far as they overlapped with the primary lawfulness challenge. The Claimant accepted that the issue was one of the lawfulness of the Vetting Decision rather than the rationality of that decision or of the Discharge Decision. I can, however, address the point very shortly. If, as I have concluded, the Vetting Decision was to be taken by reference to the criteria relevant to vetting generally and unconstrained by the outcome of the misconduct proceedings then the conclusion that the Claimant's behaviour required the withdrawal of her recruitment vetting clearance was well within the range of permissible decisions. In the light of the Vetting Decision the Discharge Decision was clearly rational. Indeed, the Claimant accepted that it was in reality inevitable once she had been deprived of the vetting clearance which was necessary for her to operate as a police officer at even the most basic level or to participate in the necessary training.

The Applicability of Section 31(2A) of the Senior Courts Act 1981.

94. In light of the conclusion I have reached it is not necessary to consider the Defendant's argument that even if the Vetting Decision was unlawful relief should be refused pursuant to section 31(2A) of the Senior Courts Act. I will briefly explain why, if I had found the Vetting Decision to be unlawful, I would not have refused relief on this basis. The counter-factual to be addressed here would be that the Claimant's recruitment vetting clearance had not been withdrawn but that she remained subject to a final written warning because of her misconduct. The Discharge Decision was in fact entirely based on the consequences of the withdrawal of the vetting clearance. Neither the decision nor the report to the regulation 13 meeting made any reference to the Claimant's conduct other than as leading to the misconduct meeting and the consequent vetting review. The focus of both was on the fact that without the vetting clearance the Claimant would not be able to undertake her training or to complete the Police Constable Degree Apprenticeship. In those circumstances I am not able to conclude that it is highly likely that there would have been a regulation 13 discharge in the absence of the Vetting Decision.

Conclusion.

95. The Claim is, therefore, dismissed.