



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 102

P513/24

OPINION OF LORD FAIRLEY

In the Petition of

XY

Petitioner

for

Judicial Review

of

a decision to dispense with the services of the petitioner as a constable in terms of regulation 9 of the Police Service of Scotland Regulations 2013

Petitioner: Duncan KC, Young; Morton Fraser MacRoberts LLP

Respondent: Crawford KC; Clyde & Co (Scotland) LLP

13 November 2024

[1] The petitioner seeks reduction of a decision by the respondent to dispense with his services as a probationary police constable in terms of regulation 9 of the Police Service of Scotland Regulations, 2013 SSI 2013/35. The decision was intimated to the petitioner in a letter from the respondent dated 27 March 2024.

The 2013 regulations

[2] Subject to certain exceptions, police constables must complete a 2 year period of probation (regulation 8). Regulation 9 states:

“Discharge of probationer

9.—(1) Subject to the provisions of this regulation, during a constable’s period of probation the services of that constable may be dispensed with at any time by written notice given by the chief constable if the chief constable considers that that constable is not fitted, physically or mentally, to perform the duties of the office of constable, or that that constable is not likely to become an efficient or well conducted constable.

(2) A constable whose services are dispensed with under this regulation is to be—

- (a) informed in writing of the provisions of paragraph (3); and
- (b) entitled to receive a month’s notice or a month’s pay in lieu thereof.

(3) A constable’s services are not dispensed with in accordance with this regulation and any notice given for the purposes thereof ceases to have effect if that constable gives written notice to the Authority of that constable’s intention to retire and retires in pursuance of the said notice on or before the date on which that constable’s services would otherwise be dispensed with; and such a notice taking effect on that date must be accepted by the Authority notwithstanding that less than a month’s notice is given.”

Facts

[3] On 25 July 2022, the petitioner was appointed as a police constable. In terms of regulation 8, he was subject to a probationary period. During the probationary period, he was expected to complete a training programme consisting of five modules:

- Module One - Initial course, Scottish Police College
- Module Two - Post Initial Course, Local Training
- Module Three - Operational Phase
- Module Four - Assessment Milestones
- Module Five - Operational / Confirmation Stage

[4] On 26 October 2022 an allegation of historical sexual offending was made against the petitioner by a family member. The allegation related to a period between 2007 and 2015 when the petitioner was aged between 9 and 15. At all times since the allegation was made, the petitioner has denied it.

[5] On 28 October 2022, as a direct consequence of the allegation, the petitioner was suspended from his duties as a police constable. At the date of his suspension, he had completed only Module One of the probationer training modules.

[6] Between October 2022 and August 2023, the petitioner was the subject of a criminal investigation. He was interviewed under caution. He did not admit the allegation and was not charged. A report was then submitted to Crown Office. Crown counsel concluded that there was no corroboration of the allegation and directed that no criminal proceedings should be brought. That decision was subject to a qualification that the case would remain open in case corroborative evidence came to light at some point in the future.

Regulation 9 notice and summary of evidence

[7] On 9 February 2024, the petitioner's chief superintendent signed a notice intimating that consideration was being given to discharging the petitioner under and in terms of regulation 9 of the 2013 regulations. The notice was provided to the petitioner on 12 February 2024 together with a related document called a "Summary of Evidence for the Consideration of Discharge" which had been prepared by a police inspector.

[8] The Summary of Evidence document made reference *inter alia* to the provisions of the Police Scotland Vetting Manual as they apply to a situation where "Adverse

Information” about a probationary constable comes to light after appointment. The manual states:

“6.6.3 Adverse Information relating to a probationary constable can be revealed after their appointment. Where this relates to conduct or associations from the period before their appointment, this can be assessed by the [Force Vetting Unit / Professional Standards Department or Anti-corruption Unit] as appropriate. This will include an assessment of the honesty of the probationary constable in completing their vetting application.

6.6.4 Where a risk assessment of this information indicates that a probationary constable is unlikely to become an efficient or well conducted officer and that a Regulation 9 Discharge might be appropriate, the FVU/PSD or ACU shall report the circumstances to the probationary constable’s Chief Superintendent. It shall be the decision of the Chief Superintendent whether a formal regulation 9 procedure is required.”

[9] The Summary of Evidence document went on to note that the Force Vetting Unit had commented that if they had been aware of the allegation prior to the petitioner’s appointment, he would have been refused Recruit Vetting. The FVU stated:

“The information would have been such that the risk he would pose to the operational activity and reputation of Police Scotland was potentially damaging and until the matter had been resolved the decision would have been to refuse the application.”

[10] The Summary of Evidence document made a recommendation that the petitioner be discharged and concluded with the following observations:

“The fact, and nature, of the allegations against [the petitioner] are considered Adverse Information and have serious implications with regards to the risk to public confidence and potential risk and associated operational implications of deploying an officer against whom serious sexual allegations have been made. Due to this [the petitioner] is considered not likely to become an efficient or well conducted constable.”

Regulation 9 hearing

[11] A hearing was arranged and took place on 27 February 2024. The purpose of the hearing was to allow the petitioner to make representations to his chief superintendent as to

why a recommendation should not be made to the respondent that the petitioner be discharged under regulation 9. The petitioner attended the hearing with his Police Federation representative. At the meeting, the petitioner made representations to the chief superintendent in which he continued to deny the allegation.

[12] The official minute of the meeting is lengthy. Amongst other matters, it records the following exchange between the chief superintendent and the petitioner:

“[The petitioner] was asked for his personal insight into how he felt these events would impact on him continuing in his role and specifically how he would deal with incidents where he was required to deal with reports of sexual offending by victims. [The petitioner] replied that he would look to treat victims in such circumstances with empathy as he would wish to be treated.”

The regulation 9 report

[13] Following the hearing, the chief superintendent prepared a report to the respondent dated 13 March 2024. Although a copy of the report was not provided to the petitioner until around 20 June 2024, its conclusions broadly reflected those of the Summary of Evidence document. It noted the seriousness of the allegation and that, whilst it was uncorroborated, the criminal investigation “did not disprove or discount [it]...as malicious or vexatious.”

The report stated *inter alia*:

“6.3 ... I am not assessing [the petitioner's] guilt or innocence, rather my assessment is confined to whether the present fact of the allegation having been made and the nature of the allegation are likely to impact upon [the petitioner's] ability to become an efficient and/or well-conducted officer ... I do assess those factors as yielding that likelihood. I could not, in all conscience, deploy [the petitioner] in an operational capacity in the office of constable in the circumstances which obtain presently. I express no view as to whether the substance of the allegations is, or might be, true.

6.4 In making that assessment I have been guided by our organisational values of fairness, integrity and respect, and a commitment to upholding human rights, and I have sought at all times to ensure this process and the formulation of my recommendation is both fair and guided by the principles of natural justice.

6.5 [The petitioner] has been suspended from work for 17 months and by his own admission this process has had a significant mental toll on him.

6.7 Given the impact of this experience at such an early stage in [the petitioner's] career I am naturally concerned that this will also impact his ability to carry out his role in an operational environment. As a police officer he will be required to support and protect young girls and women reporting crimes of a sexual nature, and to do so in a fair, impartial, and empathetic manner.

6.8 When asked specifically about this [the petitioner] was unable to offer a reasonable insight or perspective as to the impact these events might have on him in the carrying out of his duties as a police officer or how he hopes to deal with this.

6.9 [His representative] expressed concern about acting on unproven allegations resulting in the end of an officer's career. I have great sympathy for that position. However, the fact that an allegation of this nature has been made against a serving police officer (irrespective of its veracity yet being established or not) has the potential, in and of itself, to have an impact on public confidence in the police service.

6.10 Notwithstanding the allegations remain unproven, I believe it would be necessary to put in place what I consider to be both disproportionate and impracticable safeguards in order to sufficiently address these concerns and test [the petitioner's] response to reports of sexual offences. Such safeguards would include but are not limited to extremely close supervision which are neither commensurate or in keeping with a victim focused and trauma informed approach to such matters.

6.11 In addition to this, if such supervision was considered appropriate, it would require a level of planning and oversight which is not practicable to deliver given the often-spontaneous nature of policing demand. Matters of this nature might arise unexpectedly during [the petitioner's] day-to-day activities without the opportunity to ensure the necessary supervision was in place and I consider this to be a significant operational risk to public safety and to wider confidence in policing.

6.12 The nature of this work means that it is more generally undertaken by officers with more service and experience however given that the relevancy of [the petitioner's] alleged conduct to the core role of a police constable, I believe it would be necessary and justified to fully test his ability to deal with such matters in order to safeguard both the public and [the petitioner] himself. It is not however practicable to put such safeguards in place during an officer's probation to do this.

6.13 In conclusion, I believe it will not be possible to properly test and assess [the petitioner] in some of the core competencies of the role and for those reasons, I believe he is not likely to become an efficient and or well conducted constable.

6.14 I respectfully recommend that [the petitioner] is considered for discharge from Police Scotland under the provisions of Regulation 9 of the Police Service of Scotland Regulations 2013.”

[14] Paragraph 6.8 of the report appears to relate to the exchange between the chief superintendent and the petitioner quoted at paragraph [12] above.

[15] The report was sent to the respondent. On 27 March 2024, she issued a letter to the petitioner intimating her decision to discharge him as a probationary constable with immediate effect. She gave reasons for that decision in the following terms:

“The recommendation that you be discharged arises in consequence of adverse information that has become known following your appointment to the office of police constable, namely, that an allegation of serious sexual offending has been made against you.

I note that the allegation is unproven at this time. I further note, from the submission made by your Federation representative on your behalf at the [hearing before the chief superintendent], that you refute the allegation. I do not understand the fact that the allegation has been made to be in dispute, nor do I understand it to be in dispute that the allegation was adjudged of sufficient credibility (in its own terms) to have warranted a criminal investigation, including you being interviewed under caution as the only identified suspect.

As [the chief superintendent] highlights within his report, sexual offending against women and girls is a priority for both the organisation and society at large. Extant allegations of such offending on the part of those who serve as police officers (and who, therefore, may be called upon to investigate such allegations) and the impact of all of that upon trust and confidence in the police are no less of a priority.

[The] chief superintendent ... as a police officer of relatively senior rank and long years' experience, has assessed that certain safeguards, such as extremely close supervision, would require to be put in place to address the concerns arising from the fact, and nature, of the allegation that has been made against you. He has further assessed that the necessary safeguards that would require to be put in place would be disproportionate and impracticable. More particularly, supervision of the nature required would not be in keeping with a victim focused and trauma informed approach to reports of sexual offences and would require a level of planning and oversight which is not practicable to deliver given the often-spontaneous nature of policing demand.

I wholly agree with that assessment.

In reaching my own view of the matter, in common with [the] chief superintendent... I make no assessment as to the substance of the allegation.

However, it is my view that the fact, and nature, of the allegation in and of itself poses a significant risk to public confidence in the police and in turn the core functions of the police, such as public safety and the prevention and detection of crime. The risks are such that I, in my capacity as chief constable with responsibility for policing in Scotland, am not prepared to permit you to be deployed in an operational capacity as a police constable in the present circumstances.

Consequently, I do not consider that it is possible to properly test and assess you in some of the core competencies of the role of police constable during your probationary period.

I have fully considered all of the information presented including the representations made by you, and on your behalf, and the terms of references provided in support of you. However, for the reasons set out above I am not satisfied that you are likely to become an efficient and/or well conducted Constable. It is therefore my decision that you will be discharged from the Police Service of Scotland, in terms of Regulation 9 of the Police Service of Scotland Regulations, 2013 with immediate effect.”

[16] The letter of 27 March 2024 made no mention at all of regulation 9(3).

Petitioner's submissions

[17] Certain grounds of challenge set out in the petition and the petitioner's note of argument were not ultimately insisted upon. In particular, senior counsel did not advance an argument that the respondent had fettered her discretion by the blanket application of an undisclosed policy, nor did he ultimately seek to advance any argument under Article 6(2) ECHR (the presumption of innocence) as a free-standing ground of challenge. The averments about Article 6(2) were relied upon only as aspects of the petitioner's submissions on fairness and natural justice at common law. The following summary is therefore only of the arguments that were ultimately relied upon before me.

[18] Senior counsel submitted that the respondent had (i) erred in law in failing properly to apply regulation 9(1); (ii) used a procedure that was inappropriate and unfair where

material facts in relation to an allegation of criminal conduct were disputed; (iii) reached a conclusion in the absence of a proper evidential basis and which was irrational; (iv) failed to give adequate and intelligible reasons for her decision; and (v) failed to comply at all with regulation 9(2). Point (v) was conceded by the respondent.

Regulation 9(1) - scope

[19] Before a discretion to discharge under regulation 9(1) arose for consideration, the respondent required to consider that the petitioner was “not likely to become an efficient or well conducted constable”. That test required assessment of evidence leading to a rational conclusion. Instead of applying that test, however, the respondent had erroneously applied a different test which had the practical effect of placing a burden of proof on the petitioner. This was clear from the final paragraph of the letter of 27 March 2024 in the respondent’s use of the expression “**I am not satisfied that** you are likely to become an efficient and / or well conducted constable” (emphasis added). The question to which the respondent had apparently directed her mind had placed a burden of proof upon the petitioner.

[20] It was also clear that the respondent had taken into account irrelevant considerations about public confidence in the police service when the only relevant regulation 9 factors apparently relied upon related to matters personal to the petitioner - specifically his efficiency or his future conduct. The purpose of the probationary period was “to discover and deal with fundamental unsuitability of outlook or temperament or behaviour” (*R v Chief Constable of British Transport Police ex parte Farmer* - unreported 30 July 1999, per Henry LJ). That was also the clear purpose of regulation 9.

Regulation 9 – appropriateness of procedure

[21] Previous authorities on regulation 9 (including *C v Chief Constable of Strathclyde Police* 2013 SLT 65; and *R (on the application of Kay) v Chief Constable of Northumbria* [2010] ICR 962) had established that the informality of regulation 9 procedure was not appropriate or fair where material facts were in dispute. That was particularly so where an allegation of criminal conduct was made. Here, a material disputed fact was whether there was any substance at all to the allegation made against the petitioner.

[22] Although the petitioner could not competently have been made subject to the procedures in either the Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) or the Police Service of Scotland (Performance) Regulations 2014 (SSI 2014/67), the informality of regulation 9 procedure should not be used to subvert or undermine the protections appropriate to the situation of a constable accused of criminal conduct (*R (Victor) v Chief Constable of West Mercia Police* [2024] ICR 109). Common law fairness and the rules of natural justice require that some assessment be made of the allegation within a procedure that allowed the petitioner to challenge it. It was clear from the report and the decision letter that no such procedure had been followed in this case.

Rationality

[23] It was also irrational to conclude that an allegation was, of itself, a matter that could be used to assess efficiency or conduct without some evidence-based assessment of the credibility of the allegation and of how it would be affect the petitioner. If no such assessment had been made, the conclusions reached were not fact-based.

Reasons

[24] Having regard to the mis-statement of the statutory test and the absence of clarity as to the extent to which (if at all) the credibility of the allegation had been assessed, the reasons given by the respondent were neither adequate nor intelligible to the informed reader.

Regulation 9(2)

[25] The respondent has accepted that she had failed to comply with the provisions of regulation 9(2). That failure was material and was to the prejudice of the petitioner.

Respondent's submissions

[26] Senior counsel for the respondent submitted that the purpose of the regulation 8 probationary period is to allow an assessment to be made of the fitness of a probationary constable and *inter alia* the likelihood of the probationer becoming an efficient and well conducted officer (*Farmer*). The probationary period serves the public interest and secures public confidence that only suitable individuals will become police officers. Assessment of the regulation 9 criteria is pre-eminently one for the respondent's discretion in the exercise of her professional judgement, knowledge and experience of Police Scotland and its operational requirements. The respondent's assessment of the criteria may, therefore, be subjective in that it may be based – as it was here – upon her understanding of Police Scotland and its operational requirements. Such assessment can only be challenged on familiar public law grounds.

[27] Regulation 9 proceedings are capable of raising much wider issues than conduct. An assessment under regulation 9 is not restricted to the personal characteristics of the probationer and may properly take account of external issues such as operational and deployment matters. The ordinary meaning should be given to the expression “efficient” as denoting an ability to work productively with minimum wasted effort or expense (*Farmer*).

[28] No specific procedure requires to be followed under regulation 9. The task for the chief constable is not to determine whether or not allegations were true but rather to ascertain whether the probationer would become “an efficient constable” or “a well conducted constable”. Regulation 9 procedure may therefore be less formal than under the conduct regulations provided that it is still fair in the whole circumstances.

[29] Protection of the interests of probationer constables is decidedly less than that given to the interests of established officers (*R (Victor) v Chief Constable of West Mercia Police* [2024] ICR 161). It is accepted by the respondent that the use of the regulation 9 process cannot be used to subvert the need for misconduct proceedings where that would be required - if, for example, there are disputed facts where fairness may require the type of protections seen in the conduct regulations. Here, however, the relevant facts were not in dispute.

[30] A regulation 9 decision does not carry any obligation to provide reasons, but where reasons are given - as they were here - they must be intelligible and adequate. Decision letters should be read as a whole without undue textual analysis such as would be apt for a statute or contract. The relevant test is “does the constable know why he was discharged?”. In assessing the intelligibility and adequacy of the reasons the context is important. Here that context included the subjective assessment of the chief constable using her professional knowledge and experience of operational requirements. Evidence of reasons for the

decision which are external to the decision may be permissible in cases where there was no obligation to give reasons at all (*Chief Constable of Lothian and Borders Police v Lothian & Borders Police Board* 2005 SLT 315 at paragraph 30).

[31] Any failure by the respondent to comply with regulation 9(2) should not result in the decision being reduced; reduction is a discretionary remedy.

[32] Applying those propositions to the facts of this case, the decision taken by the respondent had been properly and fairly taken. The reasons for it were clear. The admitted failure to comply with regulation 9(2) should not vitiate the decision taken. In particular, the respondent had properly concluded that where a serious allegation of sexual offending had been made, she could not permit the petitioner to be deployed on operational duties. If he could not be deployed on operational duties, he could not complete his probation and thus could never become an efficient and / or well conducted constable.

Analysis and decision

[33] A decision under regulation 9 to discharge a probationary constable is a matter for the discretion of the chief constable. As such, it is subject to challenge only on the recognised principles applicable to the court's supervisory jurisdiction. Those principles were summarised by Lord President Emslie in *Wordie Property Co. Ltd v. Secretary of State for Scotland* 1984 SLT 345 at page 347. They include a situation where there has been a material error of law going to the root of the question for determination, where the decision maker has taken into account irrelevant considerations or ignored relevant ones, where the decision was one for which a factual basis was required but was absent, or where the decision was irrational in the sense that it was one that no reasonable decision maker could have reached.

Was there a material error of law?

[34] The petitioner is correct that, in the decision letter of 27 March 2024, the respondent mis-stated the statutory test under regulation 9. There is an important difference between “I am not satisfied that you are likely to become ...” and “I consider that you are not likely to become”. The former is a conclusion capable of being reached merely from an absence of evidence. The latter is a conclusion that requires to be evidence-based.

[35] A decision-maker’s mis-statement of a statutory test does not, however, inevitably lead to the conclusion that they have made a material error of law. Someone who uses loose or inaccurate language to describe their thought processes may nevertheless be seen, when the whole circumstances are examined, to have applied the correct statutory test. What this issue highlights, however, is the need to consider with care whether the respondent took into account all relevant factors, excluded irrelevant ones, and reached conclusions that were evidence-based and rational.

Relevant factors

[36] Proper consideration of the elements of regulation 9 with which this decision was concerned required, as a first step, consideration of the available and relevant evidence. Thereafter, rational conclusions required to be drawn by the respondent, based upon such evidence, about whether or not the petitioner was likely to become either an efficient constable or a well conducted one. Finally, and on the basis of the conclusions reached at those previous two stages, the respondent then had to decide whether or not to exercise the discretion to discharge him. The issue of public confidence in the police service may arise

indirectly as a consideration, but only where one of the elements of regulation 9 has been engaged on the basis of evidence about the particular constable who is under consideration.

[37] A conclusion that an officer against whom a credible allegation of sexual offending has been made should not be deployed operationally would be entirely logical and sensible. That seems to have been the basis for the decision in *R (on the application of Verity) v Chief Constable of North Yorkshire Police* [2009] EWHC 1879 (Admin). A conclusion, however, that any allegation - irrespective of its credibility - should necessarily have the same effect is problematic.

[38] A feature of the application of regulation 9 to an allegation of criminal conduct, therefore, is that an assessment requires to be made by the chief constable of the credibility of the allegation and of any level of risk which it creates. Evidence to instruct that assessment might come from a number of different sources. One of those could potentially be the risk assessment referred to in paragraph 6.6.4 of the Vetting Manual. The assessments of credibility and of risk must, however, be based on more than the mere fact of the allegation having been made and investigated.

[39] It is also legitimate, in considering the issue of efficiency, for the chief constable to consider the effect that the allegation is likely to have upon the performance and efficiency of the particular officer whose duties may involve receiving reports of similar allegations. There could, for example, be evidence in a particular case that the making of an unfounded allegation against an officer had caused that officer to be influenced by conscious or unconscious bias against complainants in similar cases. Similarly, an assessment might require to be made of any officer who had made a complaint of being a victim of criminal conduct to examine the issue of possible prejudice against suspects. In each scenario,

however, the assessment would require to be evidence-based. It could not be reached simply upon the basis of speculation or assumption. It could also not be reached simply by placing a burden upon the constable to prove the absence of the negative effect in question.

The reasons for the respondent's decision

[40] It is clear that the respondent considered and agreed with conclusions reached by her chief superintendent. His advice was that an officer against whom an allegation of sexual offending had been made could not be deployed operationally without the need for disproportionate levels of supervision and could thus not become either efficient or well conducted.

[41] The reasons given in respondent's letter of 27 March 2024 are confusing and inconsistent as to what, if any, assessment was made of the allegation against the petitioner. Towards the end of the letter the respondent stated that she made "no assessment" of the substance of the allegation. Earlier in the letter, however, in a passage lifted directly from the chief superintendent's report, she stated that "the allegation was adjudged of sufficient credibility (in its own terms) to have warranted a criminal investigation" including an interview of the petitioner under caution. Neither approach was appropriate. The credibility of the allegation was a material factor in the factual inquiry required by regulation 9 where what was in issue was a criminal allegation. Any assessment of the credibility of that allegation made only by reference to the bare fact that it was made and investigated was illogical.

[42] The report by the chief superintendent does not advance matters. He too was at pains to stress that he did not consider that the role of a regulation 9 process was to consider

the veracity of the allegation, stating: “I express no view as to whether the substance of the allegations is, **or might be**, true” (emphasis added). He also expressed the view, however, that the allegation had “sufficient credibility” to justify a criminal investigation which had not discounted it as either malicious or vexatious.

[43] There was no evidence that the petitioner was (or might be) negatively influenced in the performance of his duties by an allegation having been made against him which he regarded as unfounded. On the contrary, the view expressed by the petitioner about that issue during his meeting with the chief superintendent was that he would try to treat victims with empathy as he would wish to be treated. Surprisingly, that response was characterised by the chief superintendent as showing that the petitioner was “unable to offer a reasonable insight or perspective” into the effect that the allegation might have upon him in his duties as a police officer.

[44] On the information that the respondent had, it would not have been possible for her to reach an evidence-based conclusion that, without impracticable levels of supervision, the petitioner could not be deployed operationally during his probationary period. The conclusion reached on that issue was entirely speculative and lacked any proper evidential foundation. There is an obvious circularity in the conclusion that a constable should be prevented from completing a probationary period because of an absence of evidence as to how they might perform or react in an operational environment. On careful examination, however, that was a key part of the respondent’s reasoning in this case.

[45] Similar problems are seen in the respondent’s conclusion on the issue of the likelihood of the petitioner becoming a “well-conducted” constable. That is a separate

ground for potential discharge under regulation 9 (*Barnes v Chief Constable of Thames Valley Police* [2024] ICR 161 at paragraph 54) and required to be considered separately.

[46] In considering this question, an assessment requires to be made of the probationer's likely future conduct. Inevitably, that exercise will involve the drawing of inferences from other facts. Usually - though not necessarily - those facts will consist of proven or admitted past behaviour. There must, however, be some evidential foundation for the conclusion reached.

[47] On this issue, the respondent's reasoning in her letter of 27 March 2024 is again flawed. The only basis for her inference that the petitioner would not become a "well conducted constable" was that a disputed and untested allegation had been made against him, the credibility of which she said she had either made "no assessment" or had assessed as credible simply because it was investigated. On no view of matters could the making of such an allegation, either of itself or in combination with the fact that it was investigated, form a proper evidential foundation for an assessment of likely future conduct.

Regulation 9(2)

[48] It is conceded that the respondent did not comply to any extent with regulation 9(2). Regulations 9(2) and 9(3) constitute, in combination, an important procedural step which is clearly intended to provide probationer constables who face the possibility of discharge under regulation 9(1) with a possible alternative disposal. In this case, however, the regulation 9(2) procedure was completely ignored.

Summary of conclusions

[49] The respondent reached the conclusions which caused her to discharge the petitioner without considering, on a proper evidential basis, material issues about the credibility of the allegation, its effect upon the petitioner and the level of supervision of him that might be required of him. The reasons given in the respondent's decision letter of 27 March 2024 were confused and inadequate. It is conceded that the respondent failed to comply with regulation 9(2). Individually and cumulatively, these are material errors of law which meet the required standard for intervention by this court in the exercise of its supervisory jurisdiction. I will therefore repel the first to fourth pleas-in-law for the respondent, sustain the petitioner's second, third and fourth pleas, reduce the respondent's decision of 27 March 2024, and reserve all questions of expenses arising from the petition.

Effect of reduction upon further procedure

[50] For completeness, I reiterate that it is no part of my role to determine the underlying merits of the issue that was before the respondent. It follows, therefore, that reduction of the decision of 27 March 2024 does not prevent the respondent from revisiting, on a proper factual basis, the question of whether or not the petitioner ought to be discharged in accordance with regulation 9. Given that possibility, it is necessary for me to make some general concluding remarks about procedural fairness.

[51] The apparent informality of regulation 9 procedure cannot be relied upon to circumvent the requirements of fairness and natural justice at common law (*R (Victor) v Chief Constable of West Mercia Police*; *C v Chief Constable of Strathclyde Police*; *R (on the application of Kay) v Chief Constable of Northumbria*). That is particularly so where the issue under

consideration is a disputed allegation of criminal conduct. A person does not lose those protections merely because they are training for their chosen profession (*cf Kulkarni v Milton Keynes Hospitals NHS Trust* [2010] ICR 101). The case of *R (Victor) v Chief Constable of West Mercia Police* does not suggest otherwise.

[52] What is required for a “fair” process will vary from case to case. The gravity of the allegation and the consequences for the person accused will be material factors. An allegation against a probationer constable of having committed a serious sexual offence plainly has the potential to deprive that constable of the ability to pursue their chosen career. In that situation, before any regulation 9 decision is reached, the constable must be given a fair opportunity to make representations upon and to challenge any material factors which are relevant to the engagement of the regulation and the exercise of the chief constable’s discretion.