

POLICE APPEALS TRIBUNAL

**IN THE MATTER OF POLICE ACT 1996
AND IN THE MATTER OF POLICE APPEALS TRIBUNAL RULES 2020
AND IN THE MATTER OF EX PC DARRIAN FEARN**

Heard at Derbyshire Constabulary HQ, Butterley Hall, Ripley

On 3 August 2022

Before: Ms S Fenoughty (Chair), Deputy Chief Constable S Blatchly and Mrs S Malooq

Between

FORMER PC DARRIAN FEARN

Appellant

AND

CHIEF CONSTABLE OF DERBYSHIRE CONSTABULARY

Respondent

Representation

For the Appellant: Mr N Walker

For the Respondent: Ms C Sellars

DECISION AND REASONS

1. This is a determination made in accordance with The Police Appeals Tribunals Rules 2020 which provide for the hearing of appeals made by a police officer against a decision made under the Police (Conduct) Regulations 2020.
2. This decision is made in the appeal of former PC Fearn who appeals against the decision of 19 April 2021 that he be dismissed from Derbyshire Constabulary without notice.

BACKGROUND

3. The allegation before the misconduct hearing Panel ("the Panel"), which took place on 12, 14 and 19 February 2021, concerned the appellant's record of a domestic incident he had attended with a colleague on 20 May 2020, and an account he gave of the incident, which were alleged to be false. The facts of the allegations were not disputed, nor that the conduct amounted to gross misconduct, but the appellant did not accept that he had been dishonest. The appellant was represented by Mr Nicholas Walker, and the Respondent was represented by Ms Caroline Sellars.
4. The allegations were:

It is alleged that your on duty conduct breached the standards of professional behaviour required of a Police Officer in respect of your investigation of incident

1070 on the 20th May 2020, the particulars of which are as follows:

1. You failed to act expeditiously and diligently in your role as a Police Officer, namely:

- a. You were told by the female party H that she had been
 - i. assaulted by a male party, R, and/or
 - ii. threatened by R with the use of a knife

and you thereafter failed to record the allegations and/or obtain a witness statement from her and/or arrest R,

- b. You were told by R that he
 - i. grabbed hold of H and/or
 - ii. was threatened by H with a knife

and you thereafter failed to record the allegations and/or admission, and/or obtain a witness statement from him and/or arrest H.

2. On 20 May 2020 you provided false and/or misleading information to Sergeant Frearson in your update of the incident to the effect that:

- a. No offences had been disclosed by either party
- b. H had picked up the knife instinctively, she had not made any threats and dropped the knife immediately.

You knew this information was false and/or misleading for the following reasons:

- a. H had disclosed to you that she had been hit, held to the floor and kicked by R,
- b. R disclosed that he had grabbed H,
- c. Both parties disclosed to you that each had threatened the other with a knife.

Based on the information available at the time the conduct described above, if proven or admitted, has been assessed as amounting to Gross Misconduct.

The conduct if approved, whether individually or cumulatively, amounts to gross misconduct for the following reasons;

1. You were dishonest and/or deliberately misleading in your update of the incident.
2. By failing to accurately record details of the incident as described to you, proper and informed risk assessments could not be adequately conducted;
3. Your conduct is likely to undermine public confidence in the police service as a whole;
4. The conduct has a fundamental impact on the ability of the service to maintain trust and confidence in you as a police officer.

The Standards of professional behaviour engaged are:

- Honesty and integrity
- Duties and responsibilities

5. The Panel found that the proven allegations amounted to gross misconduct. It concluded that the appellant's conduct was dishonest, and that dismissal was the appropriate outcome.

APPEAL

6. On the appellant's behalf, Mr Walker has submitted a document dated 28 May 2021 outlining the grounds of appeal under Rules 4(4)(a) and (c) of the Police Appeals Tribunal Rules 2020. He made further written and oral submissions at the hearing. He indicated that, as the respondent had conceded that there were grounds for appeal under Rule 4(4)(c), and both parties were of the view that the matter should be remitted for a fresh hearing, he would not be pursuing appeal under Rule 4(4)(a).
7. In the first document, Mr Walker set out the background to the Panel's decision, and listed the reasons that the appellant did not accept that his actions had been dishonest.

Finding

8. Mr Walker referred to the Panel's reasons for finding that the respondent had proved that the appellant had a dishonest mindset, which were contained in just two sentences. He said this was a wholly inadequate basis upon which to find that a police officer deliberately lied to his Sergeant, it was impossible to see on what basis they made their finding, and they did not deal with any of the points raised on the appellant's behalf.
9. Mr Walker said it was incumbent upon the Panel to explain its decision, and he referred to case law in support of this proposition. He said that, once an officer's conduct had been found to amount to operational dishonesty, dismissal was likely to follow, so the Panel's reasons must be properly understood. He said the Panel had not explained what they had taken the test of dishonesty to be.
10. Mr Walker said the Panel engaged with some of the issues raised at the outcome stage. He took issue with the way in which the Panel assessed culpability, and the impact of the appellant's mental health. He submitted these matters should have been dealt with fully at Stage 1, and not simply as a way of dismissing a mitigating factor raised on the appellant's behalf.

Outcome

11. Mr Walker submitted that the decision to dismiss the appellant without notice followed its conclusion that the appellant's conduct amounted to operational dishonesty. He said the basis for that finding was flawed, and so was the outcome imposed.
12. Mr Walker said the appellant admitted that his errors amounted to gross misconduct, but the route to dismissal would have been much harder but for the finding of dishonesty, given the uncontested background of his ill-health and his performance concerns.
13. Mr Walker made the following submissions to the tribunal:
14. Both parties accepted that the written reasons of the panel failed to engage with the evidence in support of the appellant's denial of dishonesty, and failed to show what test it had applied to prove dishonesty, or how the evidence related to that test. In consequence, the appellant could not know why he lost the case. In the absence of a clear structured and concentrated approach, the tribunal could not gauge whether the decision had been fair, as the written reasons were wholly inadequate.

15. He summarised the law on the duty to give reasons, referring to the case of **English v Emery Reimbold & Strick [2002] 1 WLR 2409**. There is a general duty to give reasons, and whilst it is not necessary to deal with every point, the issues critical to the decision must be identified. At paragraph 19 the court said:

...This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained."

16. It was clear from **Phipps v General Medical Council [2006] EWCA Civ 397** (paras 85 - 86) that these principles apply in professional disciplinary proceedings.
17. In this case there were no factual disputes. The decision of the Panel was six pages long. The first page set out the evidence, standard of proof, and admissions. The Panel's "Finding of Facts" were set out over the next two pages. It was only in the last two paragraphs that the Panel stopped reciting what had been admitted.
18. In the last two paragraphs of its findings the Panel repeated the appellant's denial of dishonesty. There was no mention of the other factors that had been raised, including the fact that he had been de-skilled, he had been off work, there was a plan to ease him back into work but he had been sent out with a junior colleague, he was confused, there was no benefit to him, the stresses of his health conditions, the inconsistency of his behaviour with lying, and the testimonials regarding his good character. The Panel's conclusion offended against the principles in **English v Emery**.
19. The issue before the Panel was whether the officer was dishonest at the material time. He had responded to questions during the hearing, regarding what offences had been disclosed, and these responses were the reasons given for finding that he was dishonest. This ignored what the appellant said at the end of his responses, which was that he was not thinking straight at the time.
20. The Panel did not address the matter the AA had to prove, which was that the only explanation for the appellant's conduct was dishonesty. It found him dishonest solely on the basis that he was, a year later, able to identify potential offences from a transcript.
21. The Panel should have followed the approach set out in **Ivey v Genting Casinos (UK) Ltd (t/a Crockfords) [2017] UKSC 67**:

"74.... When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people."

22. The Panel did not look at the appellant's mind at the time, but asked him what offences were revealed on the body cam, when he watched it in 2021, and used that to say he must have known in May 2020 that offences had been committed. The Panel did not appear to consider his state of mind, or what might have affected it.

23. Under the heading “*Outcome*”, the Panel said the appellant “*knew or reasonably ought to have known (as he subsequently accepted in evidence) that the conduct of the parties clearly disclosed potential offences.*” That proposition is not supported by the Panel’s questioning, as it ignores the appellant’s evidence that he was not thinking straight.
24. The respondent’s case, and the Panel’s reasons, rely on there being no other explanation than dishonesty. Just because one gets things wrong does not make one dishonest. One can forget the detail of what happened at a scene and be inaccurate but not dishonest.
25. This was not a case where there was an absence of any other explanation than dishonesty. There was no medical evidence, but the appellant gave evidence of the effects of his medication, and he was not cross-examined on the basis that this was untrue. The appellant’s personal and medical difficulties were not in dispute, and the respondent accepts that this “*may have clouded his judgement*” at the time. If so, there is an explanation other than knowing dishonesty.
26. At the outcome stage, the Panel said that the officer appeared to be in charge. In the light of his evidence, this is a superficial approach to a complex issue.
27. The appellant’s character evidence was not mentioned at the first stage, and the Panel did not therefore engage with the question of propensity to act dishonestly. Whilst his character evidence was considered under the question of outcome, this does not remedy the deficiency at the first stage,
28. Mr Walker submitted that, if the grounds of appeal were successful, the matter should be remitted for a rehearing by a fresh panel. He did not invite the tribunal to determine the matter, and did not therefore make any further submissions on that point.

RESPONDENT’S SUBMISSIONS

29. In his response to the appeal, dated 14 July 2021, on behalf of the respondent, Mr David Ring resisted the appeal and submits that it is without merit, has no real prospect of success, and that there is no other compelling why should proceed.
30. Mr Ring set out the background to the case and the applicable statutory and regulatory framework. He said that the key issue, correctly identified by the Panel, was whether there had been a reasonable belief in the mind of the appellant that no offences had been disclosed at the time that he spoke to Sgt Frearson. He said the Panel’s rationale was not inadequate, and required no further elaboration. In the absence of some logical explanation, it was obvious that the appellant had lied.
31. Mr Ring said that, having found that the appellant had lied, and maintained the dishonesty in subsequent updates, it was reasonable to find that honesty and integrity had been breached. This would inevitably result in a finding of gross misconduct.
32. Mr Ring said the Panel was entitled to take into account the authority of **Salter v Chief Constable of Dorset** as to the weight that should be applied to personal mitigation.
33. Mr Ring said that, once the Panel had found that the appellant had been dishonest and had denied it before the Panel, there would have to have been exceptional circumstances which justified a decision not to dismiss the appellant.
34. In her submissions to the tribunal, Ms Sellars said Mr Walker had accurately summarised the case law relating to the requirement for reasons. She conceded that the Panel’s

reasoning was insufficient, and that the ground of appeal under Rule 4(4)(c) was made out. She added that no concession was made with regard to the ground of appeal under Rule 4(4)(a). She said that this ground of appeal was still opposed.

35. Ms Sellars submitted that, should the grounds of appeal be successful, the tribunal should remit the matter for a fresh hearing. She did not invite the tribunal to determine the matter. She said this was a case in which a tribunal should be cautious, not having heard the oral evidence of the appellant.

LAW

36. The Police Appeals Tribunals Rules 2020 came into force on 1 February 2020, and apply to this appeal against a decision made in accordance with the Police (Conduct) Regulations 2020.

The Police Appeals Tribunals Rules 2020

Circumstances in which a police officer may appeal to a tribunal

Rule 4 (4) The grounds of appeal under this rule are—

- (a) that the finding or decision to impose disciplinary action was unreasonable;
- (b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action, or
- (c) that there was a breach of the procedures set out in the Conduct Regulations, the Complaints and Misconduct Regulations or Part 2 of the 2002 Act or unfairness which could have materially affected the finding or decision on disciplinary action.

The Home Office Guidance (published 5 February 2020) applying to this case (post-February 2020) covers the Standards of Professional Behaviour for police officers and sets out the procedures for dealing with misconduct and for appeals to the Police Appeals Tribunal. The guidance refers to the Standards of Professional Behaviour set out in Schedule 2 of The Police (Conduct) Regulations 2020. The following standards are relevant in this case:

Honesty and Integrity

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

Duties and Responsibilities

Police officers are diligent in the exercise of their duties and responsibilities.

Police officers have a responsibility to give appropriate cooperation during investigations, inquiries and formal proceedings, participating openly and professionally in line with the expectations of a police officer when identified as a witness.

EVIDENCE

37. The tribunal has been provided with the documentation available at the hearing, including the body worn video, transcripts of the Panel hearing, the Finding and Outcome

document, appellant's grounds of appeal, and the Respondent's response to the appeal.

NOTIFICATION OF REASONS

38. The Panel found that the appellant "*knew or reasonably ought to have known (as he subsequently accepted in evidence) that the conduct of the parties clearly disclosed potential offences.*" This finding as to his state of mind is in the alternative, that either he knew, or he ought to have known. This does not follow the approach in ***lvey***, that the Panel "*must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts*". To prove dishonesty, the respondent was required to demonstrate the appellant's actual state of belief at the time. It would not be sufficient that he ought to have known, or was able to identify the offences after reviewing the video.
39. The tribunal accepted Mr Walker's submissions regarding the deficiencies of reasoning in the Panel's decision that the appellant had acted dishonestly. It found there to be no way of telling, from the Panel's decision, that it had fully considered the key factors in order to determine what was in the appellant's mind, or what was his actual state of knowledge or belief as to the facts at the times relevant to the allegation, namely when he attended the incident, and later that day when he gave an account to Sgt Frearson.
40. This is a case in which there is an allegation of operational dishonesty, a particularly serious matter. It required the Panel to consider the alternative explanation offered by the appellant, and to engage with the evidence supporting this explanation. The appellant had accepted that he handled the incident very badly, as a result of a number of factors which he said were relevant. He said that, as a result, he failed to identify the offences and take the correct action, such as taking statements or arresting one of the parties. His position is that these failures were the result of his ineptitude and his inadequate assessment of the situation, not deliberate dishonesty. The Panel did not consider whether this explanation was consistent with other evidence of the events, such as the written and verbal accounts of the colleague who attended the incident with him.
41. In its written findings, the Panel did not engage with the appellant's explanation, beyond noting that he disputed dishonesty, before concluding that he had been deliberately dishonest. It did not consider what his motivation might have been for deliberately telling his Sergeant a lie about the incident, knowing that the whole incident was recorded on his Body Worn Video. It made no observations on the credibility of the appellant's evidence, and gave no reasons for rejecting his account of his actions, other than inferring dishonesty from his ability, during the hearing, to identify the actions he should have taken at the time. Further, whilst it considered the character evidence in mitigation when it made its decision on disciplinary action, the Panel did not take it into account when considering his propensity to act dishonestly. The weight it gave all these factors would be a matter for the Panel, but in the absence of evidence of engagement with any, or all of these key points, the tribunal finds that the Panel's approach was unfair, and it therefore finds the grounds of appeal under Rule 4(4)(c) to have been made out.
42. Having found the appeal to be made out under Rule 4(4)(c), the tribunal had to decide whether to deal with the matter itself, or to remit the matter for rehearing. Its powers stem from the Police Act 1996, which states:

85.— *Appeals against dismissal etc.*

(2) A police appeals tribunal may, on the determination of an appeal under this section, make an order dealing with the appellant in any way in which he could have been dealt with by the person who made the decision appealed against.

43. Rule 26(2) of the Police Appeals Tribunals Rules 2020 permits the tribunal to remit the case for rehearing if the appeal succeeded under R4(4)(c). The power to remit was added in the 2012 Rules. The explanatory notes at the end of the 2012 Rules say:

"Rule 22(2) and (3) of these Rules make new provision in relation to the situation where a Tribunal determines that there is fresh evidence, or that there was a procedural default or other unfairness, that could have materially affected the decision appealed against. In this situation, under section 85(2) of the Police Act 1996 the Tribunal may deal with the appellant in any way that he could have been dealt with by the maker of the decision appealed against. But the Tribunal, which will not have heard all of the evidence, will not be well placed to determine how the matter should have been decided had the fresh evidence been available in the original proceedings or the procedural failure or other unfairness had not occurred. Rule 22(2) and (3) allows the Tribunal to remit the matter for re-hearing in these circumstances."

44. Rule 26 of the 2020 Rule mirrors Rule 22 of the 2012 Rules. In the context of the powers conferred by the Police Act, it is clear that this power to remit a case is an additional way for a tribunal to deal with case where an appeal is allowed under Rules 4(4)(b) or (c). It does not replace the powers under the Police Act.
45. The explanatory note confirms that the tribunal may deal with the appellant in any way they could have been dealt with by the original decision-maker. The additional power allows for rehearing in cases where the tribunal would not be well placed to determine how the matter should have been decided, had the new evidence been available.
46. As the grounds of appeal were made out, the tribunal had power to deal with the matter, or to remit the matter for determination by a fresh panel. Although the primary facts were not disputed, the critical issue that required to be addressed was whether the appellant's conduct had been dishonest. Remitting the matter would allow for the oral evidence of the appellant and any other witnesses whose evidence might assist the new panel. The tribunal took the view that it was not well-placed to hear all the evidence that would bear upon this important decision, and the subsequent decision on outcome.
47. Whilst the tribunal was mindful of the delays that have occurred in this case, and the desirability of bringing proceedings to a prompt conclusion, in the unusual circumstances of this case, it determined that the appropriate course of action would be to remit the case for a fresh hearing.

Conclusion

48. The tribunal found that there was unfairness which could have materially affected the Panel's finding of dishonesty and the resulting outcome of dismissal. The Panel's decision is, accordingly, set aside. The tribunal therefore remits the case, under Rule 26 of the Police Appeals Tribunals Rules 2020, to a fresh hearing to be decided again in accordance with the relevant provisions of the Conduct Regulations

Sara Fenoughty
Chair of the Police Appeals Tribunal
5 August 2022