Decision of the Police Appeals Tribunal

IN THE MATTER OF THE POLICE ACT 1996

AND IN THE MATTER OF THE POLICE APPEALS TRIBUNALS RULES 2020

Heard in person

BETWEEN

FORMER POLICE CONSTABLE CALUM POWELL (APPELLANT)

AND

GWENT POLICE (RESPONDENT)

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DECISION AND REASONS OF THE POLICE APPEALS TRIBUNAL
PREPARED BY THE CHAIR PURSUANT TO RULE 26(5)

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Before:

Ms Justine M Davidge, PAT Chair
Assistant Chief Constable Jenny Gilmer
Mr Stephen Davies, Lay Panel Member

Representation:

Mr Perry for the Appellant

Ms Kane for the Respondent

1. This is a decision made in accordance with The Police Appeals Tribunals Rules 2020 (the "Rules"), which provide for the hearing of appeals brought by a police officer against a decision made under the Police (Conduct) Regulations 2020 (the "Regulations").
2. This decision is made in relation to former Police Constable Calum Powell (the "Appellant") who appeals against decisions, made during a misconduct hearing that culminated on 9 November 2023, that he committed gross misconduct and should be dismissed from Gwent Police (the "Respondent") without notice.
3. The Tribunal heard his appeal and made its decision on 16 October 2024. The Appellant's hearing was held in public in accordance with Rule 22 of the Rules. At the end of the hearing the Chair summarised, orally, the Tribunal's decision and indicated that written notice of the decision, as well as a written statement of the Tribunal's determination of the appeal and the reasons for its decision, would be provided within the time frame provided for by Rule 26.

**Background to the appeal**

4. On 30 October to 1 November and 9 November 2023, the Appellant appeared before a misconduct hearing panel (the "Panel") chaired by Mr Christopher McKay (the "Legally Qualified Chair" or "LQC"). The Appellant was represented by counsel and supported by a representative from the Police Federation.
5. The Appellant faced an allegation of gross misconduct based on a number of breaches of the police standards of professional behaviour (the "standards of conduct" or "standards"). The allegation, as set out in the Regulation 30 notice, was:

> *On 1 July 2021 you assaulted a detainee, Mr Moshen, in the holding cell in the Newport Central custody unit in that you:*
>
> *a. Pulled his left arm upwards whilst he was handcuffed to the rear; and/or*
>
> *b. Struck him to his upper chest area with your knee.*
>
> *Such use of force was unnecessary, disproportionate and unreasonable. You acted without self-control and in a manner that would discredit the police service or undermine public confidence in it. As such you are in breach of the Standards of Professional Behaviour in relation to 'Use of Force', 'Authority, Respect and Courtesy' and 'Discreditable Conduct'. Such conduct amounts to gross misconduct as it is so serious as to justify your dismissal.*

<u>Days 1-3 of the misconduct hearing</u>

6. There were no preliminary matters to be dealt with at the start of the hearing. The allegation was put to Appellant, who denied breaching any standards of conduct.
7. The Respondent presented its case, playing CCTV from Newport police station custody suite showing the alleged incident and some of the lead up to it, and calling live evidence from: the Appellant's colleague who had been in the holding cell with him and Mr Moshen at the relevant time, PC Marshall; and the Custody Sergeant on duty at the time, PS Vincent.
8. PC Marshall's evidence broadly corresponded with what he had originally said in his witness statement dated 2 July 2021, although he stated that he did not see the knee strikes themselves due to his exact position at the time. He stated that in his view the force used on Mr Moshen was reasonable.
9. PS Vincent's evidence meanwhile likewise corresponded with her witness statement, dated 26 August 2021. Whilst on duty she became aware of a male (Mr Moshen) apparently having a seizure or 'fit' after being restrained by the Appellant and PC Marshall. She took details of what led to the restraint and was alerted by a custody staff member to

CCTV of the events in the cell. She described seeing the Appellant deliver three knee strikes to Mr Moshen, who was handcuffed to the rear, and thereafter informing the Inspector on duty at the time that this appeared excessive force in the circumstances.

10. The remainder of the evidence relied upon by the Respondent was submitted to the Panel on the papers, it being agreed by the Appellant. This included evidence of a PS Jones, who was present in the custody suite during the incident that led to the allegations being brought, had provided the Appellant with the spit guard that was placed on Mr Moshen's head and had advised the officers to keep a closer eye on him prior to him being restrained.

11. At the close of the Respondents' case, the Appellant made a submission of no case to answer and the Panel adjourned for the day.

12. The next day the Panel ruled that there was a case to answer. Thereafter the Appellant gave evidence, followed by the defence expert, Mr Carvalho.

13. The Appellant's case, in summary, was as per his interview under caution that took place on 2 September 2021 and his Regulation 31 response, namely:

*[T]here is no dispute that PC Powell did raise Mr Moshen's arm and that he delivered the three knee strikes to the upper body in the manner which can be seen in the cell CCTV footage. What is not accepted is that his use of force in these regards was unnecessary, disproportionate or unreasonable. …*
*In the background to Mr Moshen's detention there were a range of factors, of which PC Powell was or became aware, which indicated his high risk of volatility and violence. …*
*Mr Moshen's actual conduct towards and in the presence of PC Powell further indicated that he posed a threat of volatility and violence …*
*A threat of particular note was that Mr Moshen would spit at officers. …*
*The risk associated with spitting was heightened significantly by the prevalence of Covid and, in the case of PC Powell, heightened further on account of the particular vulnerability of his wife and child for the reasons set out in interview. At all material times PC Powell was entitled to defend himself against this and other forms of potential assault, including by preemptive means. …*
*after Mr Moshen, claimed to have difficulty breathing on account of claustrophobia associated with being in a small cell which he had rendered insanitary by urinating on the floor it would have been contrary to that duty of care simply to leave him locked in there unattended …*
*The application of a spit hood was plainly a necessary and appropriate precaution and it is noted that there is no suggestion to the contrary in the Appropriate Authority's case …*
*It being appropriate and necessary to apply the spit hood, it followed that it was appropriate and necessary to ensure that Mr Moshen kept it on. He was clearly intent on removing it and succeeded on doing so repeatedly …*
*PC Powell used tactical communication to seek to persuade Mr Moshen to keep the spit hood on. He told him that he needed him to keep the spit hood on. His hair made it difficult but in any event he was resistant to the re application of the hood …*
*The situation escalated when Mr Moshen reacted angrily saying "get your fucking hands of me". PC Powell assessed that the situation was escalating and might get out of hand and so it was necessary to bring Mr Moshen under control. Mr Moshen pushed himself into the corner PC Powell again said that he needed him to comply and to keep the hood on but Mr Moshen maintained resistance. …*
*PC Powell lifted Mr Moshen's arm in order that they could gain control of him and take him to the ground…*
*In order to seek to overcome Mr Moshen's active resistance PC Powell delivered a knee strike. This is a taught technique in operational safety training and was consistent with the principle of "nearest weapon, nearest target". …*
*The force used in the knee strike was neither unnecessary nor excessive. It is notable that the first knee strike was not successful in bringing Mr Moshen under control …*

*there was enough time after the first for PC Powell to assess that Mr Moshen was not yet under control and to decide to deliver a second strike. …*
*it can be seen that Mr Moshen was not yet under control. He was brought under control following the third strike. The third strike was the last because it was successful in bringing him under control …*

14. In addition to his oral evidence, the Appellant submitted a large number of character references and testimonials to his good work and service, to be considered by the Panel.

15. The evidence of Mr Carvalho reiterated the conclusions in his report, namely that:

    a. generally, the techniques that were used had been taught to the Appellant; and
    b. it was for the Appellant to give a good account of whether his actions were proportionate and necessary given all the pertinent circumstances.

16. On the third day of the hearing the Appellant was recalled to deal with some matters that had arisen during Mr Carvalho's evidence, as a result of questions put to the expert by the LQC i.e., as to whether there were options open other than placing a spit guard on Mr Moshen. Thereafter the Panel heard submissions from each party before retiring to consider their findings as to fact, breaches of standards and either misconduct or gross misconduct.

17. As the Panel were unable to reach a decision later that same day the matter was adjourned part heard until 9 November.

<u>The decisions appealed against</u>

18. On day four of the hearing the Panel delivered its findings that the allegations had been proven, that as a result the Appellant had breached the police standards of conduct and that these breaches amounted to gross misconduct.

19. In summary, the Panel was satisfied that:

    a. It was unnecessary for PC Powell to fit a spit guard on Mr Moshen's head and that he could have been left in a locked cell provided he was closely monitored by PC Powell and PC Marshall.

    b. Once PC Powell had decided to place the spit guard on Mr Moshen's head and Mr Moshen had removed it on 3 occasions, PC Powell lost his temper with Mr Moshen after he said to him, "get your fucking hands off me". PC Powell then pushed his head down forcibly and pushed him to the corner of the cell. He then ignored Mr Moshen's verbal offer to comply and assaulted him as alleged in the Regulation 30 Notice.

    c. When PC Powell pushed Mr Moshen's left arm upwards it was done aggressively and in temper. It was unnecessary, disproportionate and unlawful.

    d. When PC Powell struck Mr Moshen in the torso with his right knee it was done aggressively and in temper. It was unnecessary, disproportionate and unlawful.

    e. PC Powell failed to correctly apply the control, restraint and searches policy published by the College of Policing. In particular, he failed to discuss possible options with the detainee such as locking him in the cell rather than putting the spit guard on. He also failed to apply the National Decision-making Model ("NDM").

    f. The level of threat posed by the detainee did not justify the use of force by PC Powell.

20. Other key parts of Panel's assessment of the factual evidence were as follows:

a. PC Marshall was in difficult situation where he probably felt that he owed loyalty to his colleague, PC Powell. The Panel did not place any significant weight on his assertion that he believed they had dealt with Mr Moshen reasonably. It would have been against his own interests and those of PC Powell to say otherwise.

b. The Panel was impressed with DS Vincent as a witness and considered that her opinion about the lack of necessity for the strikes was important evidence.

c. There was no medical evidence to confirm that Mr Moshen did suffer from claustrophobia.

d. At the time of applying force to Mr Moshen, he posed no threat to the Appellant or PC Marshall. The Appellant did not allege that he was spat at or headbutted in the second cell, although Mr Moshen appeared to have had the opportunity to do this if he had wished.

e. Mr Carvalho accepted, when questioned by the Panel, that locking Mr Moshen in the cell and monitoring him was a potential option.

f. The written evidence of PS Jones suggested that the Appellant and PC Marshall did leave Mr Moshen in the second cell without any spit guard in place for a period of time. However, they did not closely monitor him.

21. Consequently the Panel found breaches of the standards of conduct as alleged.

a. The Appellant was in clear breach of the standard relating to use of force.

b. PC Powell failed to treat Mr Moshen with respect and courtesy. His response to Mr Moshen's uncooperative attitude was disproportionate. He was unnecessarily aggressive towards him.

c. PC Powell's behaviour towards Mr Moshen was not appropriate. He lost his temper with him and assaulted him. A member of the public would be shocked to learn of the way PC Powell behaved towards Mr Moshen. It thereby amounted to discreditable conduct.

22. In respect of the finding of gross misconduct, the Panel concluded that:

a. it was in no doubt that the misconduct threshold was crossed by the behaviour of the Appellant towards Mr Moshen; and
b. the use of force, which is unnecessary, disproportionate and unreasonable was clearly gross misconduct. The CCTV evidence showed the Appellant to have lost his temper and inflict violence on Mr Moshen which was not justified by any threat posed by him.

23. Thereafter the Panel heard submissions on outcome and the Appellant's mitigation and received a copy of the Appellant's service record. The Panel then retired to consider its decision on outcome.

24. The Panel concluded that the appropriate disciplinary action was for the Appellant to be dismissed without notice. It gave reasons for its decision, which sought to follow the Guidance on Outcomes in Police Conduct Proceedings[1] (the "Outcomes Guidance") and relevant case law principles, summarised as follows:

a. Culpability: [*the Appellant] acted intentionally when he assaulted Mr Moshen. He was in a position of responsibility as one of two arresting officers*.

b. Harm: *this was significant. Mr Moshen suffered harm from the actions of PC Powell assaulting him. He had his right arm forcibly bent upwards and backwards was then kneed 3 times in the chest. Following this excessive use of force by PC Powell, Mr Moshen appears to have suffered a fit. An ambulance was called to take him to*

[1] Published by the College of Policing, updated 17 August 2022.

*hospital. However, there is no medical evidence to link the fit with the assault by PC Powell. The actions of PC Powell would also be liable to cause reputational harm to the Gwent Police if members of the public became aware of what had happened to Mr Moshen. There is significant public concern about persons in custody coming to harm when they should be treated with respect and courtesy*.

c. Aggravating features included: the Appellant's deliberate actions; the Appellant's abuse of his position of power; the significant impact of those actions on Mr Moshen; and mistreatment of persons in custody being a matter of public concern.

d. Mitigating features included: that it was a single incident and took place over a short period; the Appellant's good record and character references; and Mr Moshen behaving in a very difficult and unco-operative manner.

e. It was submitted that the Panel should take the fact that there had been a delay of 2 years in bringing this case to a conclusion as constituting mitigation. During this period, the Appellant had been working in a non-public facing role. He had not been suspended. Whilst the Panel noted this, it did not consider it to be properly termed mitigation.

f. It was also suggested that there was little risk of repetition in this case, but this had not been tested due to the office nature of his role since these events.

g. The Panel considered the potential outcomes in ascending order of severity:

*A final written warning does not sufficiently mark the seriousness of the misconduct in this case. Three Standards of professional Behaviour have been breached in this case. The excessive use of force by PC Powell in this case was a substantial departure from what was appropriate. …*

*In the judgement of the Panel a final written warning is not sufficient deterrent to other officers who might find themselves in a similar situation. It must be made clear to them that the most serious consequences will result if they are proved to have treated detainees with violence which cannot be justified. The Panel has taken into account PC Powell's record of service and the 27 testimonials but the impact of personal mitigation is limited in police misconduct cases …*

*The primary consideration for the Panel is the seriousness of the misconduct found proven. If the misconduct is so serious that nothing less than dismissal would be sufficient to maintain public confidence, personal mitigation will not justify a lesser sanction. The interests of the police service and the protection of the public are more important than the interests of PC Powell.*

*In conclusion, the only outcome which is appropriate in this case is that PC Powell is dismissed without notice.*

**The approach of the Police Appeals Tribunal[2]**

25. Under Rule 4(1) of the Police Appeals Tribunal Rules 2020 the Appellant may appeal against either:

a. the finding referred to in paragraph (2)(a), (b) or (c) [a finding of misconduct or gross misconduct] made under the Conduct Regulations;

b. any decision to impose disciplinary action under the Conduct Regulations in consequence of that finding.

[2] The following section was provided to the parties appearing before the Police Appeals Tribunal prior to the Tribunal hearing commencing. The Tribunal invited the parties to make submissions on any of the matters set out and both parties agreed that the approach as outlined was uncontroversial and correct.

26. He may only appeal against either or both of those decisions on the grounds set out under Rule 4(4):[3]

    a. that the finding or decision to impose disciplinary action imposed 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.

27. An appeal to the Police Appeals Tribunal is not an appeal by way of re-hearing. Under Rule 26(1) of the Rules the Tribunal is required to determine whether the ground or grounds of appeal on which the Appellant relies have been made out.

28. When determining whether a decision was "unreasonable" under Rule 4(4)(a) the Tribunal should be guided by a number of principles, as set out below.

    a. In reaching a decision on appeal the duty of the Tribunal is to consider all relevant matters and to reach its own conclusions. The Tribunal will have regard to the decisions appealed but is not bound by them where it is persuaded that they were wrong in the context of valid grounds of appeal under the provisions of the Rules. In those circumstances the Tribunal's duty is to ensure the correct result.[4]

    b. The term "unreasonable" does not mean Wednesbury unreasonableness, but something less.[5]

    c. The Tribunal must ask itself whether this finding was one that was within or outside of the range of reasonable findings that the relevant decision-maker could have made.[6]

    d. The Tribunal should keep in mind that the rule 4(4)(a) test is not met simply by showing a deficiency in the decision-maker's reasoning, or a failure to consider a particular piece of evidence or similar error, if the finding of misconduct / gross misconduct was nonetheless one that the decision-maker could reasonably have arrived at. The question is whether that finding is unreasonable.[7]

    e. Whether the Tribunal agrees or disagrees with the decision-maker and whether it thinks it would/would not have found the allegations proven if it had been hearing the disciplinary proceedings is not in point, as this in itself does not indicate that the decision maker's finding was "unreasonable". Different and opposing conclusions can each be reasonable.[8]

    f. Where the appeal is brought under Rule 4(4)(a), and where the decision appealed against was within the range of reasonable decisions which could have been made, an appeal will nonetheless fail even if the Tribunal concludes it would have reached a different decision to that reached.[9]

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[3] Subject to Rule 4(3): "A police officer may not appeal to a tribunal against the finding referred to in paragraph (2)(a), (b) or (c) where that finding was made following acceptance by the officer that his conduct amounted to misconduct or gross misconduct (as the case may be)".

[4] R (Chief Constable of Somerset v Avon) v Police Appeals Tribunal [2004] EWHC 220 (Admin).

[5] Per Lord Justice Moses in CC Durham v Police Appeals Tribunal & Cooper [2012] EWHC 2733 (Admin).

[6] Per note 4 and R (Chief Constable of the Derbyshire Constabulary) v Police Appeals Tribunal [2012] EWHC 280 (Admin).

[7] R v PAT (Michel and Charnock) [2022] EWHC 2711.

[8] Per note 6 above.

[9] R (Comm of Police for the Metropolis) v Police Appeals Tribunal & Naulls [2013] EWHC 1684.

g. The grounds under 4(4)(a) and (c) may overlap. Unfairness may lead to an unreasonable conclusion.[10]

29. In respect of all appeals, insofar as there are any matters of fact to be determined, the standard of proof is on the balance of probabilities.

30. The purpose of police professional misconduct proceedings is threefold: to maintain public confidence in and the reputation of the police service, to uphold high standards in policing and deter misconduct and to protect the public.

31. The Tribunal should take account of, but will not be bound by, the Policing Code of Ethics, Home Office Guidance provided in relation to the professional standards of policing and the Guidance on Outcomes in Police Conduct Proceedings.

32. Where the Tribunal decides that a finding or outcome was unreasonable under Rule 4(4)(a) then it can either simply quash the finding or go onto substitute its own decision for that of the previous decision-maker.

33. The Tribunal, when re-determining any disciplinary action taken, may impose any outcome that the original panel/person could have imposed. In this matter, which was determined at a Misconduct Hearing and resulted in a finding of gross misconduct, this would involve:

    a. A final written warning.
    b. Reduction in rank.
    c. Dismissal, without notice.[11]

**Evidence and other documentation**

34. The evidence and other documentation before the Tribunal, as agreed between the parties, was as follows:

    a. Paginated PAT Bundle (898 pages).
    b. Case Law Bundle (392 pages).
    c. Appellant's SA dated 8 October 2024 (5 pages).
    d. Respondent's SA dated 9 October 2024 (15 pages)
    e. Three separate videos of CCTV footage from Newport Custody Suite.
    f. Video evidence of Mr Moshen's ABE interview.
    g. Video evidence of the Appellant's PACE interview held on 2 September 2021.

**The Appeal**

35. The Appellant's original grounds of appeal, dated 17 January 2024, sought leave to appeal both the Panel's finding that his actions amounted to gross misconduct and the outcome it imposed, under the grounds of appeal set out in Rule 4(4)(a), namely that the Panel's finding of gross misconduct, or alternatively its decision on outcome, were unreasonable. These grounds were later reiterated in the Appellant's response to the provisional ruling that was provided by the Chair to the PAT pursuant to Rule 15, on 14 April 2024.

36. Four grounds of appeal were advanced in relation to the Panel's factual findings/findings of breaches of standards, together with a ground of appeal relating to the Panel's finding of gross misconduct (as opposed to misconduct only) and one relating to the outcome imposed. The latter two grounds of appeal were relied on only in the scenario that those preceding them failed.

37. The submissions made were as follows.

[10] CC of Durham v Police Appeals Tribunal [2013] ACD 20 at para 5.

[11] Regulation 42(3)(b), Police (Conduct) Regulations 2020.

a. The Panel's finding that PC Powell should have shut the door of the second holding cell on Mr Moshen and left him inside without needing to put a spit guard on him was an unreasonable finding which led to an unreasonable conclusion as to breach of standards. There was no proper evidential basis for concluding that it was unnecessary for the officers to have been in the cell with Mr Moshen or, consequently, that it was unnecessary to have required him to wear a spit guard. The evidence of the need to be in the cell was clear and the suggestion that it had not been necessary was also not part of the allegation of undue force as reflected by the charges in the regulation 30 notice. The Panel failed to take account of relevant evidence, namely that Mr Moshen had been saying that he couldn't breathe when in the second cell.

b. The Panel was unreasonable in its finding that PC Marshall's opinion was one to which they attached little weight given that he "probably felt he owed loyalty" to PC Powell and that it would have been against his own interests and PC Powell's to say that anything other than they behaved reasonably. Nothing in the answers he gave supported that notion and that he might be trying to protect his own interests was not borne out by the evidence. His evidence was clear, methodical, reasoned and balanced and no part of it failed to hang together or could be said to be incredible or doubtful. To have reached such an adverse conclusion as to a witness' evidence in such circumstances was unreasonable. There was a lack of tenable reasoning for the conclusion.

c. The Panel's finding that Sergent Vincent's opinion as to the lack of necessity of the strikes was "important" (by implication, more important than any other witness in the case) was unreasonable. At the hearing, her view of what was shown in the CCTV was permitted to take on effective expert status with undue and unreasonable weight attached to it, with the Panel apparently relying on her opinion to the exclusion of that of the officers who had been physically present, and a recognised expert, Mr Carvalho. Opinion evidence from witnesses without direct knowledge is not admissible other than from an expert source. PS Vincent gave what was indisputably opinion evidence and it was unreasonable to have permitted it. It was wrong for the Respondent to have not called their own "expert" but then try to circumvent the absence of such by adducing an opinion on the central issue in the case from a non-expert source.

d. The Panel was unreasonable in its dismissal of Mr Carvalho's opinion and was further unreasonable in failing to give reasons for doing so. The Panel did little more than to say that ultimately it was their opinion that mattered and that they were entitled to reject his opinion, which they did in favour of their own. Where a tribunal of fact is presented with expert opinion then there must be a rational and reasonable basis for doing so. There was no such basis in this case and the Panel gave no reasons as to why it rejected his opinion.

e. The Panel was unreasonable in its conclusion that the breach of standards amounted to gross misconduct. While excessive and unreasonable use of force will often amount to gross misconduct, it need not necessarily do so. To reach a factual conclusion that the Appellant's actions resulted from a loss of temper was unreasonable in light of the CCTV that showed his demeanour in the lead up to those actions and evidence that the Appellant had a genuinely held belief that he needed to be in the cell with Mr Moshen. The Panel erred and was unreasonable in excluding the interpretation of this as an excessive use of force case based on "culpable misjudgement" of a situation in the heat of the moment as opposed to a gratuitous act in order to win a "battle of wills".

f. The Panel was unreasonable in concluding that immediate dismissal was the only appropriate course. Immediate dismissal may be a likely course in the event of a

finding of gross misconduct. However, that need not necessarily be the conclusion and a Panel must exercise its discretion in this regard reasonably. This was a case of unusual facts and in the light of the extensive mitigation that existed, the passage of time and the ongoing availability of the non-public facing role he was performing as at the date of the hearing, this was not a case in which it was reasonable to have excluded a final written warning.

38. A skeleton argument (plus appendices) was subsequently received from the Appellant, dated 8 October 2024, summarising his grounds of appeal and the submissions that would be advanced before the Tribunal.

39. On the morning of 16 October 2024, the Police Appeals Tribunal heard submissions from counsel Mr Perry appearing on behalf of the Appellant, on all six grounds of appeal, which reiterated and expanded upon the points made in the written grounds of appeal and the Appellant's skeleton argument (see further below).

**The Response**

40. Meanwhile, the Respondent submitted a response to the original grounds of appeal dated 27 February 2024, which, in summary argued that the Appellant's grounds of appeal had no reasonable prospects of success and therefore the appeal should be dismissed. This was because "*the Appellant is unable to demonstrate that, in relation to each of the Grounds of Appeal … advanced, that the Panel's decision was unreasonable … [and] that the decisions of the Panel were within the range of reasonable findings or outcomes to which the Panel could have arrived, and that the decision of the Panel was not unreasonable*".

41. In respect of the six particularised grounds of appeal advanced by the Appellant:

    a. The Panel's finding that PC Powell should have shut the door of the second holding cell on Mr Moshen and left him inside without needing to put a spit guard on him was not unreasonable as:

        i. it was a factual finding on a relevant matter that they were entitled to make based on the evidence;
        ii. the evidence of the need to be in the cell with the detainee was not (as the Appellant contended) clear;
        iii. the Panel did not fail to take account of or fail to identify that the detainee had said that he could not breathe when in the second cell;
        iv. the Panel was not required to set out in its decision every aspect of the evidence it considered; and
        v. the Panel drew a clear distinction between the breaches it found proven and other matters on which it made factual findings.

    b. The Panel was not unreasonable in its finding that PC Marshall's opinion was one to which they attached little weight. The assessment of the evidence was for the Panel and it was within the Panel's remit to make this finding having heard live evidence from the witness about his role and that of the Appellant.

    c. The Panel's finding that PS Vincent's opinion as to the lack of necessity of the strikes was "important" was not unreasonable. It was not suggested at any point that the witness was an expert and it is inaccurate to say that the Respondent attempted to use her evidence as expert evidence. In any event, the Appellant did not raise an admissibility challenge in relation to the witness' evidence in the hearing. In the circumstances the Panel was entitled to find the witness impressive and that her evidence was important.

d. The opinion of Mr Carvalho was not dismissed and his expert status was recognised but a Panel cannot be compelled to accept an expert's conclusions and, in any event, the Panel did not reject them in this case. The Panel clearly considered Mr Carvalho's evidence and assessed the Appellant's actions in light of it before concluding that he had not carried out an assessment of impact of each individual knee strike, which Mr Carvalho stated was necessary.

e. The finding of gross misconduct was reasonable in all the circumstances. It was open to the Panel to conclude that the conduct of an officer who it determined had assaulted a person who was handcuffed to the rear in a police cell amounted to gross misconduct, even if the case were to be viewed as "culpable misjudgement" (which would not be consistent with the Panel's findings).

f. Dismissal was an outcome which was open to the Panel. The Panel approached its task in the correct order as required by the Outcomes Guidance and assessed whether a final written warning could be imposed. It correctly noted that the impact of personal mitigation is limited in the disciplinary context. The decision of the Panel was reasoned and reasonable in the circumstances

42. Both the Respondent's representations on the provisional Rule 15 ruling made by the Chair to the PAT on 14 April 2024 and its skeleton argument, dated 9 October 2024, reiterated the above arguments.

43. During the Tribunal hearing, once Mr Perry had made his submissions, counsel for the Respondent, Ms Kane, likewise expanded upon the points made in the response to the grounds of appeal and the Respondent's skeleton argument (see further below).

**The Tribunal hearing**

44. The Tribunal hearing began with the Chair raising a preliminary matter, in order to clarify exactly which of the decisions made by the Panel were the subject of the different grounds of appeal available under Rule 4(4) and how the PAT Rules applied to each decision.

45. The Chair clarified with the parties that the findings and decisions made by the Panel that are being challenged under Rule 4(4)(a) were:

a. The factual finding as to whether there were options other than to apply the spit guard (ground 1).

b. The assessment that PC Marshall's evidence was of limited weight (ground 2).

c. The assessment that PC Vincent's evidence was important (ground 3).

d. The assessment that the Appellant's actions were in excessive of what was required, in light of the evidence given by Mr Cavello (ground 4).

e. Overall, the Appellant's conduct being found proven to be a breach of the standards alleged following as a result of the afore mentioned (grounds 1 to 4).

f. Alternatively, the finding that the Appellant's conduct was serious enough as to amount to gross misconduct, primarily as a result of the Panel having found him to have engaged in a battle of wills and lost his temper, as opposed to considering another rationale for his actions (e.g. culpable misjudgement) and that his conduct amounted to misconduct only. This finding being linked back to the factual finding as to whether there were options other than to apply the spit guard (ground 5).

g. Alternatively, the decision of the Panel to dismiss the Appellant without notice (ground 6).

46. The Chair then also clarified that, under the Rules, neither a single factual finding, assessment of a witness' evidence or decision as to breach of a particular standard could strictly be the subject of a ground of appeal under Rule 4(4)(a). Rather any appeal being brought ought to be in relation to the ultimate finding of gross misconduct (or the decision as to outcome). However, an argument that a Panel made irrational or unreasonable factual findings and findings as to breaches of standards, for example unsupported by evidence, could demonstrate that the Panel adopted an unreasonable approach that in turn led to their finding of gross misconduct being unreasonable.

47. The Chair noted the distinction was unlikely to make any difference in practice to the way in which the parties put their submissions, as set out in the skeleton arguments provided. However, as that was the appropriate way to consider the arguments, in her view, then that would be the approach that the Tribunal would adopt. Counsel indicated that they had no objection to this.

48. Thereafter, the Tribunal dealt with matters of housekeeping and the conduct of the hearing, including noting that if it was unable to reach a decision the same day it would be able to take steps to reconvene 'part-heard' on another date.

49. The Tribunal then indicated that it had read all of the documentation provided and so it could be assumed that each Tribunal member was generally familiar with the contents of the same, before hearing submissions from both parties.

50. In addition to the arguments contained within his written submissions, as summarised above, Mr Perry addressed the following matters (both in his initial address to the Tribunal and then in reply to the Respondent's submissions), amongst others.

    a. The basis for ground 1 was the unreasonable finding by the Panel that the Appellant was engaged in a "battle of wills" with Mr Moshen that led to him losing his temper, which was tied into the notion of whether it was appropriate for the officers to be in the cell at all.

    b. Although the Respondent says that even if there was some reason to challenge that that finding, it can be uncoupled from the findings of breaches of standards, however the Appellant's position was that they were all interlinked and to uncouple them would be artificial.

    c. The Appellant's position was that there was no evidence on which the Panel could reach the decision that they did on the use of the spit guard. The questions on this only arose at the very end of the evidence, from the LQC.

    d. The Chair seemed excised at this point as he thought that this was the first time that Mr Moshen's behaviour, and claims of claustrophobia in the second cell (cell 3) had been mentioned. However, this had clearly been covered in evidence given by both the Appellant and PC Marshall, although the LQC did not seem to realise it.

    e. The Respondent at no point suggested that the use of the spit guard was unnecessary. The officers going in and out of the cell was ancillary to its use and If the Respondents' case had been that the officers were only using the spit guard and going in/out of the cell to show dominance over the detainee or overbear his will, then that would have been part of his case.

    f. It was important to recognise that the Panel did not refer at all to Mr Moshen's breathing difficulties (or claimed difficulties) in the second cell at all. Rather than accepting the Respondent's argument that just because it didn't put this in its written decision, it didn't mean they hadn't taken it into account, the better way of considering it was that it was ignored by the Panel as nothing in the decision explained why it still said that he should have been left alone in the cell.

g. Whilst a Panel may form its own view on something, the question of whether it was appropriate to leave the detainee alone was a matter of policing practice and not one a lay Panel could decide and, whilst the Panel was not a wholly lay Panel in this case, there was also no evidence called at all as to whether the use of the spit hood was appropriate. PC Marshall meanwhile also genuinely believed that they could not leave Mr Moshen in the cell alone and there was further evidence from Mr Jones as to providing the spit guard and the need to observe the detainee.

h. The positive finding made by the Panel that Mr Moshen should have been left in the cell alone, that it was wrong for the officers to have stayed in there with him and there was battle of wills that led the Appellant to lose his temper, was used by the Panel to form the basis of its finding of gross misconduct. However, its findings did not fit with the rest of the evidence as to the Appellant's conduct towards the detainee .i.e. there was a long period of patience and tolerance from the Appellant prior to force being used and there was nothing on the video to suggest that the Appellant was trying to "show him who was boss".

i. In respect of grounds 2-4 they, like ground 1 supported the submission that the Panel made an unreasonable finding as to excessive force.

j. In respect of ground 2 and PC Marshall's evidence, whilst a Panel can of course form a view on a witness' evidence this was not a case where it became clear that PC Marshall was not telling the truth at any stage, it was not correct to say that he had been inaccurate and he was not defensive or evasive when giving evidence. Therefore the Panel's assessment that his evidence could be given less weight as he felt 'a degree of loyalty' to the Appellant was unreasonable.

k. Whilst it could be considered that the Panel's comment only related to the opinion PC Marshall expressed as to whether the force used was reasonable, he was entitled to give that opinion based on what he saw at the time and was in the best position to give that opinion.

l. The Panel's conclusion was effectively that PC Marshall wasn't being complete and accurate in his evidence. However the basis for this wasn't made out given that PC Marshall did not deliver the knee strikes to Mr Moshen and wasn't going to be in any trouble. He had no interest to protect in the circumstances.

m. PC Marshall spoke of being between a rock and a hard place. Essentially the Appellant could have been more forceful and PC Marshall was best placed to see what was reasonable and there was no proper or reasonable basis to discount his view.

n. Regarding ground 3, whilst there was nothing wrong in DS Vincent being called to give evidence, in reality, as she had not been in the cell (or having watched the CCTV in real time) she was in no better place to opine on the reasonableness of the force shown on the video than any other rank and file officer.

o. It was therefore unreasonable to attach weight to her evidence effectively as if she were an expert, when she wasn't one. There were better placed witnesses than her to opine, e.g. PC Marshall. The Panel nonetheless attached undue weight to her opinion and allowed it to bear heavily on the decisions they made.

p. Regarding ground 4, the expert Mr Carvalho was in contrast highly qualified and his evidence was reasoned and clear. He explained that the use of knee strikes is a taught technique and that when a decision is made to use force in such circumstances, it must be dynamic and quick.

q. It could be noted from the video that whilst the knee strikes appear close together, time was taken in between (the need to evaluate the impact of each strike being a matter covered in Mr Carvalho's evidence and relied on by the Panel).

r. Whilst a Panel can of course reject an expert's opinion, in this case it barely acknowledged Mr Carvalho's evidence. The Panel instead referred to an isolated aspect of his evidence (the aspect relating to pausing between knee strikes) that happened to fit with the battle of wills narrative that it had constructed.

s. That the Panel did not give proper consideration to the expert evidence is shown by the fact that the most potent parts are conspicuous by their absence from the decision.

t. Grounds 1-4 all arise from the fact that the idea that there was a "battle of wills" and this flowed through the findings, all of which were all arrived at in a way that supported this narrative. However the "battle of wills" finding was unreasonable as it was based on the question of whether the use of the spit guard was appropriate and ignored the other evidence that went contrary to it.

u. In respect of ground 5, the Appellant's position was that the Appellant's conduct did not amount to gross misconduct, even if there was some culpability i.e. on the basis that the knee strikes and arm raise alone were excessive force.

v. The Panel's conclusion as to a "battle of wills" was unreasonable in the face of CCTV evidence that showed that the Appellant was in fact patient and diligent in dealing with Mr Moshen and noting that the Appellant would have known that his actions were captured on CCTV.

w. If the level of force applied was a misjudgement by the Appellant then it was submitted that it was unreasonable to find that this amounted to gross misconduct, as opposed to misconduct only.

x. In respect of ground 6, the Appellant's position was even if his actions were to amount to gross misconduct, dismissal was not the automatic outcome and it was unreasonable to conclude it was the only appropriate one. This submission is not just based on the Appellant's personal mitigation but also on all of the circumstances pertaining at the times at the time, the passage of time since the incident and the fact that the Appellant had been working in a non-customer facing role for that period.

51. In response, Ms Kane added the following points, amongst others, to her written submissions, with reference to relevant legal authorities where appropriate, as set out in those same written submissions.

a. The Respondent's position was that the grounds of appeal had not been made out to the requisite standard. Whilst it may have been open to the Panel to find something different, this is not the test to be applied. The test is whether the decision was unreasonable in that it was outwith the range of reasonable decisions that the Panel could have made. Although the Tribunal were effectively being invited to consider whether the Panel should have reached a different decision, this is not the decision that the Tribunal should be making.

b. In respect of ground 1, the Appellant's position was that it was open to the Panel to make the factual finding it did as to the appropriateness or otherwise of the spit guard's use and it is not clear how it is being argued how the conclusion led to a breach of the standard of conduct. The Panel in fact clearly separated out its factual findings from its findings of breaches of standards.

c. It was not the case that there was any clear evidence of the need to be in the cell with the detainee. There was wider evidence, beyond that of the Appellant's and PC Marshall's, including that of PS Jones, who indicated that Mr Moshen had been left unattended for a period of time.

d. It was also not the case that the Panel didn't recognise that Mr Moshen said he couldn't breathe in the second cell, as it stated in the written decision that "he said he couldn't breathe on several occasions".

e. This was not a case where there was no evidence on the question of whether the spit guard was inappropriate (with the Tribunal's attention being drawn to relevant paragraphs of the hearing transcript) and the Panel were not obliged to accept the Appellant's evidence on the matter.

f. It was also not correct to say that this was a matter not raised prior to the end of the case, given that it was raised on multiple occasions by and with the Appellant and the expert, Mr Carvalho as well as PC Marshall. It was also raised by the Appellant in his response to the Regulation 30 Notice.

g. There is constraint on appellate courts and tribunals overturning findings of facts made by lower courts and tribunals unless there is no evidence to support it.

h. The finding that the Panel made was one of fact and important to the context of the allegations. The "battle of wills" was the context for the conclusions the Panel arrived at but not the only thing the conclusions were based on. The Panel's factual findings were that: the Appellant pushed the detainee's head down aggressively and then into the corner; Mr Moshen was no threat at that time; the Appellant was not spat at or headbutted in the second cell although Mr Moshen had opportunity to do this; the Appellant also pushed the detainee's arm up and struck him three times. The Panel's decision makes reference to all of the matters that were taking place at the time.

i. In respect of ground 2, the Panel was entitled to make the assessment of PC Marshall's evidence that it did, noting that PC Marshall himself gave evidence that he could not see the strikes, and it was not an assessment that no reasonable Panel would have made.

j. It is right to say that the Panel's comment as to what weight should be applied to his evidence was particularly directed to his opinion, rather than all of his evidence. There was no criticism made of PC Marshall and the Panel's assessment did not refer to him being deliberately misleading and there was no suggestion that he did anything inappropriate.

k. It is the case that findings of primary fact, including assessments of witness credibility made by lower courts and Tribunals are virtually unassailable.

l. In respect of ground 3, there is no implication that DS Vincent was treated as a more significant witness than anyone else by the Panel. The admissibility of her opinion evidence was not challenged at the time and her evidence was not relied on to the exclusion of other witnesses. In the circumstances it was not unreasonable to describe a witness' evidence as important.

m. Her evidence was given in the context that she clearly wasn't an expert and was not aware of the surrounding circumstances of Mr Moshen's detention, but was based on the CCTV footage that showed use of force on a detainee handcuffed to the rear.

n. In respect of ground 4, the Panel did not dismiss Mr Carvalho's opinion and therefore did not fail to give reasons for doing so. It was clear that the Panel had read his report and had listened to his evidence from its decision. There was no basis for assuming that the Panel did not take the whole of his evidence into consideration.

o. The Panel was in particular entitled to find that there was no pause between the Appellant's knee strikes and it was notable that they were delivered after Mr Moshen said he would comply with the officers and he was not given an opportunity to so comply.

p. As Mr Carvalho stated in his report, it was the Appellant who needed to give the account as to whether his actions were proportionate and/or necessary at the time and the Panel rejected his account without rejecting the expert's opinion. They rather used that opinion themselves to reach a reasonable conclusion.

q. Regarding ground 5, the Panel's finding of gross misconduct was reasonable in all the circumstances i.e. a person handcuffed to the rear being subject to the level of force applied by the Appellant. That contextual point of the battle of wills and the Appellant losing his temper was also important. It was not the Panel's finding that there was culpable misjudgement by the Appellant.

r. Excessive and unreasonable force on one individual can amount to gross misconduct, in accordance with the published Outcomes Guidance and was it clearly not unreasonable for the Panel to find this in the circumstances.

s. The Panel's decision did set out clearly the reasons for its assessment of the seriousness of the Appellant's conduct – not under the heading of "FINDINGS ON MISCONDUCT AND GROSS MISCONDUCT" but before the decision made as to Outcome (under heading "OUTCOME") – with reference to the relevant factors in the Outcomes Guidance, and therefore it did so appropriately.

t. Regarding ground 6, dismissal was always an outcome open to the Panel in this case. The Panel went through the correct stages and set out its reasoning in appropriate detail. The decision to dismiss was clearly within the range of reasonable decisions open to the Panel.

52. At the conclusion of the Respondent's submissions, the CCTV footage covering the allegations (covering cell 3) was played for the Tribunal. Thereafter, following discussion between the Chair and counsel, sections of the CCTV footage covering cell 2 and the custody holding area were also played.

53. The Tribunal also clarified the following matters with the parties in the course of submissions and whilst the CCTV was played.

a. No specific point was being taken by the Appellant about the fact that the Panel did not go through the criteria within the Outcomes Guidance when assessing the severity of the Appellant's conduct i.e. whether it amounted to misconduct or gross misconduct. However, the Appellant submitted that if the Panel had done this it may have enabled them to approach their decision in a reasonable way.

b. There was no dispute that the decision to use the spit guard was not pleaded in the allegation and not part of the Respondent's case to support the breaches of standards and gross misconduct alleged.

c. It was accepted, nonetheless, that if there was sufficient evidence to support the factual finding that the spit guard was not the only option available, the Panel could have used it to support a conclusion that the force was excessive and/or the assessment of gross misconduct.

d. It was accepted that both the Appellant and PC Marshall had referred in evidence to their own understanding as to why it was necessary to use the spit guard and neither of them had been challenged on this. The Appellant was later recalled to deal with this point after the LQC's questioning of Mr Carvalho on the matter. PC Marshall was not challenged on it at all.

e. It was accepted that the Panel, in addition to finding that the spit guard was not the only option available, made its own assessment of the Appellant's state of mind at the time of engaging with Mr Moshen in order to keep the spit guard on him and when applying force to him i.e. that he was involved in a "battle of wills" with the detainee and this led to him losing his temper.

f. It was accepted that the Panel used its factual findings as to the spit guard not being the only option available and the Appellant's state of mind at the relevant time when making its assessment that his conduct amounted to gross misconduct, even if it was submitted by the Respondent that the Panel's factual findings in this regard (which it submitted were permissible as it went to establish important context) were separate from the decisions it made as to whether different standards of conduct had been breached.

g. The point at which PS Jones appeared to provide the Appellant with the spit guard, with reference to the CCTV from cell 2, and the fact that the CCTV of the custody holding area showed when the Appellant had been talking to PS Jones rather than observing Mr Moshen closely.

h. Where in the evidence reference had been made to the Appellant's use, or otherwise, of the National Decision Model (NDM).

54. Once submissions from both parties had concluded, the Tribunal clarified with counsel the questions that it needed to address in its decision, namely:

a. Was the decision to find gross misconduct unreasonable/irrational as a result of an unreasonable approach being adopted by the Panel, as demonstrated by one or more of the following irrational/unreasonable findings of fact:

i. The decision re alternatives to the use of the spit guard;
ii. The assessment of PC Marshall's evidence;
iii. The assessment of DS Vincent's evidence; and
iv. The inappropriateness of the force used, in light of Mr Cavallo's evidence:

which had in turn led the Panel to unreasonably conclude that the force used by the Appellant was excessive?

b. Alternatively, was the decision to find the Appellant's use of excessive force so serious so as to amount to gross misconduct unreasonable, in terms of it being based on the Panel irrationally and/or unreasonably concluding that there was a "battle of wills", after which Appellant lost his temper, as opposed to an alternative interpretation of the Appellant's state of mind?

c. If the decision to find that the Appellant's conduct amounted to gross misconduct was assessed to be unreasonable, then the Tribunal would need to assess: whether that decision should simply be quashed, on the basis that could have neither amounted to misconduct or gross misconduct in the circumstances; or, if it could otherwise be satisfied that it did amount to either misconduct or gross misconduct, if it should substitute its own view for the misconduct Panel (under s.85(2) Police Act 1996) and go on to also make its own assessment of the appropriate outcome to be imposed.

d. Alternatively, was the outcome imposed by the Panel unreasonable in all the circumstances?

e. Again, if the outcome was found to be unreasonable then the Tribunal would need to go onto consider what the appropriate outcome should be.

55. The Tribunal then retired to consider its decision as to whether any of the grounds of appeal advanced under Rule 4(4)(a) should be upheld and, if so, whether the Tribunal should substitute its own decision in place of the original Panel's decision, as it would be entitled to do, pursuant to section 85(2) of the Police Act 1996.

**Decision and Reasons**

56. The Tribunal began by noting that the submissions from the parties highlighted the centrality to the appeal of the Panel's findings as to: the appropriateness of the use of the spit guard vis a vis any other available options open to the Appellant when dealing with Mr Moshen once he was located in cell 3; as well as the Appellant's state of mind when engaging with Mr Moshen at that point. The findings were, as clarified with counsel, important to all the submissions made in respect of grounds of appeal 1 to 5 in particular.

57. The Tribunal reminded itself that under Rule 4(4)(a) it was required to assess whether the Panel's decision was unreasonable in all the circumstances, in terms of whether it was a decision that no reasonable Panel presented with the same information would have made.

Ground 1

58. The Tribunal considered whether the Panel's findings as to the Appellant's use of excessive force and that it amounted to gross misconduct, had been rendered unreasonable as a result of it reaching an irrational or unreasonable conclusion as to:

    a. whether there were other options reasonably available to the Appellant and PC Marshall to protect themselves from a perceived threat from Mr Moshen other than the use of a spit guard, which meant that its use (and the officers' presence in the cell to ensure that it remained in place) was unnecessary; and/or

    b. that the level of force used by the Appellant arose from his state of mind being one whereby he was engaged in a "battle of wills" and then lost his temper.

59. As a preliminary point, the Tribunal noted that although counsel's submissions did not articulate the two findings as distinctly as they are set out above, the Tribunal considered that they were distinct as it was not the case that there could not be one finding without the other i.e. it would have been possible for the Panel to find the use of the spit guard unnecessary without also finding that its use led to a "battle of wills" and a loss of temper. Likewise it was possible for the Panel to find that the use of the spit guard was necessary, or at least a reasonable, but also that the Appellant went onto lose his temper with Mr Moshen because he repeatedly removed the hood and swore at him.

60. The Panel also considered that whilst ground 1, as set out in the Appellant's grounds of appeal, focused on the finding as to the necessity for the spit guard, leaving the primary discussion of the Appellant's state of mind to ground 5, in practice the grounds of appeal as developed in subsequent documents (including the Respondents' responses) and in oral submissions had made it clear that the two findings were strongly interlinked. Therefore the reasonableness of both findings fell to be assessed as part of ground 1.

61. The Tribunal thereafter considered the following matters relevant to its assessment of the Panel's findings.

62. Firstly, the reasons for the use of the spit guard had been raised on a number of occasions throughout the hearing, including during the course of questioning both the Appellant and PC Marshall, prior to the questioning of Mr Carvalho by the LQC. However where they were raised this was by way of explaining the background to the Appellant's decision to use force on Mr Moshen and at no point, prior to the LQC raising the matter, had it been suggested to any witness that the use of the spit guard was inappropriate.

63. The Tribunal also acknowledged that the reasons for the use of the spit guard had been raised by the Appellant in his Regulation 31 response and by counsel in various submissions earlier in the hearing, but considered that this was of no additional assistance, given that the stance of the parties on the question of the appropriateness or otherwise of using the spit guard was either positive or neutral. Specifically, no particular view was expressed on it by the Respondent, in line with the way that the allegation against the Appellant had been particularised.

64. It was apparent that the questioning from the LQC on this issue had taken the parties, as well as Mr Carvalho, unawares and that the answer the expert gave, that "*Maybe that would have been the right thing to do, you know I don't know, sorry*" indicated that he had not formulated a clear opinion on that matter (see the transcript, page 724 of the paginated bundle). Thereafter the Appellant was recalled and gave further evidence about the necessity of the spit guard, upon which he was not cross-examined (an intervention from the LQC leading instead to a discussion between himself and counsel as per the next paragraph).

65. Secondly, that it was unclear whether the Panel had in fact recalled that the fact that Mr Moshen had been behaving in a particular way and/or complaining of an inability to breathe in the second cell had been referred to in evidence prior to the exchange with Mr Carvalho. It appears that the LQC was quite determined that the question of whether Mr Moshen had been behaving "badly" in the second cell had not been raised (see the transcript, page 734 of the paginated bundle, where it shows that the LQC said "*Well I don't think checking notes will help because I don't think anything's been said about it but, there we are*"). Thereafter, counsel confirmed from their notes that PC Marshall had described Mr Moshen spitting of the floor in the second cell and the LQC indicated that the Panel would move to hearing submissions.

66. Whilst the focus of this exchange between the LQC and counsel was on Mr Moshen's behaviour in the second cell rather than his difficulty breathing specifically, it is right to say that both matters were in fact covered by the Appellant and PC Marshall in their evidence before the Tribunal, and formed part of the reasons why the witnesses said decision was made to apply the spit guard and keep the cell door open.

67. Thereafter, as the Appellant pointed out, the Panel's written decision was not clear in terms of whether it took the evidence that Mr Moshen complained of breathing difficulties in the second cell into account when it made its finding of facts, including on the issue of whether the use of the spit guard and the officer's presence in the cell was necessary. The decision states that:

    *On several occasions Mr Moshen claimed that he couldn't breathe according to PC Marshall. Both officers moved Mr Moshen to a clean cell. PC Marshall confirms that Mr Moshen began to spit on the floor of the new cell, which was of similar size and design to the first holding cell used*

    which appears to indicate instead that Mr Moshen's complained of breathing difficulties were only an issue in the first cell.

68. Thirdly, that the officers' decision to apply a spit guard to Mr Mohsen and leave the cell door open appears to have been prompted by PS Jones' comment to them, made in the custody holding area, that they should keep him under observation. As observed on the CCTV, prior to this Mr Mohsen seems to have been left in the second cell with the door closed, but something that he was doing in that cell prompted the officers at this point to change their approach. It can be inferred from the CCTV and the evidence of the Appellant that he obtained a spit guard from PS Jones at that point in time, although PS Jones' statement was less clear as to the sequence of events.

69. Fourthly, there was no available direct evidence, presented by the Respondent or otherwise, as to what the Appellant's state of mind was at the time he applied force to Mr Moshen (beginning with the point at which the Appellant pushed Mr Mohsen's head down in front of him). The only point at which the question of a loss of temper was raised during the course of the evidence was when the Appellant was cross-examined and he denied that this was what happened (see the transcript, page 598 of the paginated bundled).

    *Counsel: I mean you state that there's a real and immediate threat here, but the reality is that you lost your temper, isn't that right.*

*Appellant: No.*

At no point was the Appellant, or any other witness, asked if there had been any "battle of wills" with Mr Moshen (that phrase being used for the first time in the Panel's decision).

70. Fifthly, in relation to whether there was any indirect evidence as to the Appellant's state of mind, through which reasonable inferences might be drawn, this included the following.

    a. The evidence of PC Marshall and the other officers involved in the incident, who described the Appellant's demeanour. None of the witness made any assertion that the Appellant presented in a way at the relevant time that might suggest that he had in fact been aggravated by Mr Moshen's behaviour and/or in fact lost his temper.

    b. A number of comments as to the type of inferences that could be drawn from the Appellant's evidence and his demeanour on the CCTV made by Mr Carvalho when he was cross-examined. There was no suggestion from the expert that anything he had understood or seen indicated to him that the Appellant was engaged in any sort of "battle of wills" or had lost his temper.

    c. The CCTV itself, which was available to the Panel and viewed by them more than once. The CCTV, as viewed by the Tribunal, did not give any clear indication of the Appellant's state of mind, noting specifically that it had no sound. It showed that:

        a. When in the custody holding area, prior to going to observe Mr Moshen more closely, and deciding to apply a spit guard, the Appellant could be seen talking, without any agitation, to PS Jones.

        b. Initially in his interactions with Mr Moshen in cell 3, the Appellant appeared to be firm, but not aggravated, and his actions when re-placing the spit guard on Mr Moshen in particular could be seen to be patient and careful.

        c. The Appellant then suddenly pushed Mr Moshen's head forward down in front of him and pushed him forcefully into the corner of the cell. This would seem to accord, in terms of timing, with the other evidence, including that from the Appellant, that refers to Mr Moshen saying, "get your fucking hands off me".

        d. Thereafter, the Appellant is seen speaking to Mr Moshen. This again, accords to other evidence, specifically that given by the Appellant, that at this point the detainee verbally stated he would comply with the officers.

        e. The Appellant then took the actions of lifting Mr Moshen's arm up and, subsequently, applying three knee strikes to his torso. These strikes were apparently carried out in an attempt to get Mr Moshen to the floor.

71. Taking all of the above into account, the Tribunal concluded that:

    a. There was insufficient evidence available to make a positive determination that it was unnecessary for the Appellant to use the spit guard on Mr Mohsen whilst he was held in cell 3. There were clearly other options that could have been explored without the application of the spit hood but without any available, objective evidence on the issue, it was not possible to say, on the balance of probabilities that the use of the spit guard was improper. The officers' decision to leave the cell door open and use the spit guard appeared to have been directly influenced by the intervention of PS Jones and as a result of Mr Moshen's actions in the cell at the time.

    b. However, in any event, the question of whether or not the use of a spit guard, and the officer's presence in the cell as a result, was necessary was not one that could be determinative as to whether or not the subsequent force applied was excessive. That question could only be answered with reference to the immediate circumstances surrounding the use of force, in what was described as a "dynamic" situation, noting

the use of the spit guard was not part of the allegation of excessive force as contained in the Respondent's Regulation 30 Notice.

c. There was no available evidence on which the Panel could have reached the conclusion that it did about the Appellant's state of mind prior to and at the time of his use of force i.e. that he was engaged in a "battle of wills" and lost his temper.

d. This finding related to the immediate circumstances surrounding the use of force and, therefore the Panel's decision on whether the Appellant's use of force was excessive, as articulated in the section of its written decision headed "Conclusions on the facts", was unreasonable as it was based on an irrational or unreasonable premise, namely that the force was applied in temper following a "battle of wills" between the Appellant and Mr Moshen (see page 313 of the paginated bundle).

e. That this finding of fact formed part of the Panel's decision as to whether the use of force was "necessary, proportionate and reasonable in the circumstances" was clear when the Panel's written decision was read as a whole. The Tribunal found the Respondent's attempt to separate out some of the Panel's finding of facts from the breaches of standards, as set out in its written response to the grounds of appeal skeleton argument, artificial.

f. Consequently, the subsequent findings of breaches of other standards and of gross misconduct that the finding of excessive force led to, were reached as a result of an unreasonable approach being adopted by the Panel, and were rendered unreasonable in turn.

g. Overall, it was apparent that the Panel's view of the Appellant's state of mind, described by counsel for the Appellant as the "battle of wills narrative", heavily influenced its assessment of the evidence in the case, including that relating to whether or not the original decision to apply a spit guard to Mr Moshen was reasonable or not. The Panel essentially appear to have fallen into the trap of interpreting the evidence in the case in a way that was consistent with its preferred, but evidentially unsupported, view on a specific issue, rather than assessing the different strands of evidence objectively before reaching a final, balanced conclusion.

72. The Tribunal also noted that, even if the distinction the Respondent sought to make between the Panel's finding of facts and its decision that the standard as to use of force was breached, was correctly drawn, it would matter not, given the acceptance by both parties that the Panel's finding that the Appellant's conduct was serious enough to amount to gross misconduct relied on the "important" context to the breaches of those standards i.e. the surrounding the use of the spit guard and the Appellant's state of mind at the time. Ultimately the appeal brought before the Tribunal was one in relation to the finding of gross misconduct, not individual findings of fact or breaches of standards, as noted at paragraph 46 above.

73. Finally, the Tribunal noted it was unfortunate that the Panel did not go through the process of applying the "seriousness" factors contained within the Outcomes Guidance at the point that they were assessing whether the Appellant's conduct amounted to misconduct or gross misconduct. It also noted that the advantage of doing so was not raised by counsel during the course of the hearing.

74. That the Panel did not go through this process at the point of making their decision as to whether the Appellant's conduct amounted to misconduct or gross misconduct is apparent from the hearing transcript. Although the Respondent submitted (with reference to the Panel's written decisions and the different headings used) that the Panel did go through this process before, not only at, the stage of imposing an appropriate outcome, the transcript makes it clear that the decision on gross misconduct was delivered prior to their adjourning to consider outcome (as is appropriate) (see the transcript, page 787 of the paginated bundle). The seriousness factors were only gone through in detail subsequently,

as part of the outcome assessment (see the transcript, page 802 onwards) and the heading that this reasoning appears at in the Panel's written decision reads as follows:

"***FINDINGS ON OUTCOME*** *INCLUDING ANY AGGRAVATING OR MITIGATING FACTORS AFFECTING THE SERIOUSNESS OF THE FAILURES IN STANDARDS*" (emphasis added).

75. It is commonly accepted good practice that misconduct hearing panels (and other relevant decision-makers such as Chief Constables) making a severity assessment should do so with reference to clear and objective factors, and the use of the Outcomes Guidance to assist with this, it containing comprehensive guidance on such factors, is to be encouraged. The importance of undertaking, and providing as part of a written decision, a fully reasoned assessment as to why breaches of standards cross the threshold of either misconduct or gross misconduct should not be underestimated.

Grounds 2-4

76. As a result of the decision made to uphold ground 1 of the appeal, it was strictly unnecessary for the Tribunal to consider these additional grounds of appeal.

77. However, the Tribunal noted that these grounds were significantly intertwined with ground 1, as emphasised in counsel's submissions. In the Tribunal's view it was likely that each of the Panel's assessments of the different witnesses evidence would have been, to a greater or lesser degree, affected by its assessment of the Appellant's state of mind and its overall interpretation of the evidence in a way that was consistent with the "battle of wills narrative".

78. It was not necessarily the case that each of the Panel's assessments of the different witness' evidence was irrational or unreasonable in of itself, but certain indicators were present to suggest that its assessments were arrived at to fit the "battle of the wills narrative". For example:

    a. The notable weight the Panel gave to DS Vincent's evidence although, given: her position as a non-expert; the fact that she had only watched the CCTV footage once; and that the purpose of her giving her view as to the reasonableness or otherwise of the force used was only to explain how the matter came to be reported: her opinion could only be given limited weight, however impressive a witness she was (noting the fact that she appeared entirely objective and theoretically had no interest in the outcome compared to PC Marshall).

    b. The fact that the Panel's decision highlighted a specific aspect of Mr Carvalho's evidence that allowed them to use it to the Appellant's detriment, i.e. the need to pause between knee strikes to assess their impact, without going through an exercise of weighing it against other aspects of Mr Carvalho's report supportive of the Appellant's case.

Grounds 5 and 6

79. As a result of the decision made to uphold the appeal on ground 1, it was also unnecessary for the Tribunal to consider these additional grounds of appeal, although again it noted the interlinked nature of grounds 1 and 5, specifically in respect of the Panel's finding as to the Appellant's state of mind at the relevant time.

The Tribunal's decision as to whether to substitute its own decision in place of that of the original Panel

80. Having concluded that it should uphold the appeal, the Tribunal noted that the effect of its decision was to quash the Panel's original finding of gross misconduct (and the decision as to outcome that followed). Therefore, pursuant to Section 85(2) of the Police Act 1996

the Tribunal went onto to consider whether it should substitute its own finding of in its place, i.e. as to whether the Appellant's conduct amounted to either misconduct or gross misconduct as a result of a breach of the standards of police conduct being proven on the balance of probabilities. The Tribunal reminded itself that if it did consider it appropriate to impose its own finding of either misconduct or gross misconduct, then it would also need to go onto consider what the appropriate disciplinary action should be in all the circumstances.

81. At all times, the Tribunal bore in mind that it was not obliged to decide each and every factual issue presented by the evidence, only those that were necessary in order for it to answer the relevant questions posed by the misconduct process i.e., whether:

    a. the Appellant had committed the acts alleged in the Regulation 3 Notice;
    b. if so, whether those acts amounted to breaches of the standards as alleged;
    c. again, if so, whether those breaches of standards amounted to either misconduct or gross misconduct on the Appellant's part; and
    d. finally, if misconduct or gross misconduct was established, what the appropriate outcome was.

82. In respect of considering whether any breaches of standards had been established on the balance of probabilities, the Tribunal considered that the facts leading up to the point shortly before the Appellant pushed Mr Moshen's head forward in front on him, as captured on the CCTV from cell 3, were as presented to the Panel: on the written evidence; through PC Marshall's and the Appellant's; evidence at the hearing and by way of the CCTV footage from cells 2, 3 and from the wider custody holding area.

83. Part of this evidence was, as demonstrated by the CCTV and the evidence of both the Appellant and PC Marshall, that Mr Moshen appeared to be agitated by PC Marshall's presence in the cell and by the use of the spit guard, which he removed with his knees. However, Mr Moshen made no attempt to either headbutt the Appellant or spit at him (as opposed to on the floor) during the course of the Appellant making attempts to put the spit guard back on his head after he had removed it.

84. In respect of the question of whether it was necessary to apply a spit guard to Mr Moshen in the first place, as opposed to it being an available option that the Appellant and PC Marshall chose to employ in the circumstances in order to protect themselves whilst keeping Mr Moshen under close observation, the Tribunal considered that it did not need to make a decision on this specific matter in order to assess whether the force that was subsequently applied to Mr Moshen, as specifically alleged in the Regulation 30 Notice, was excessive or not. The Tribunal noted that the decision to use the spit guard seemed to be prompted by an intervention from PS Jones and Mr Moshen acting in a particular way in his cell and it was more likely than not that the Appellant had a genuine belief that the use of a spit guard was appropriate.

85. In terms of the use of force itself and the trigger for this, the Panel found the following on the balance of the probabilities, considering in particular the evidence of the Appellant and the CCTV footage.

    a. The first application of force (the pushing of Mr Moshen's head down in front of him) occurred at or around the same time that Mr Moshen said "get your fucking hands off me" to the Appellant. At that time Mr Moshen was sat on the cell bench, with his hands handcuffed behind him, with his head at around the height of the Appellant's midriff. Mr Moshen had just had the spit hood reapplied to his head by the Appellant but it was removed again in the motion of his head being pushed forwards. PC Marshall watched the Appellant's actions from the cell doorway and then reached out to place his hand on Mr Moshen's left shoulder.

    b. That application of force was continued by the Appellant pushing Mr Moshen forcefully into the corner, so that his head could no longer be seen above his bent

forward shoulders and neck. There appeared to be a significant amount of force being used on Mr Moshen at this point.

c. There was then a verbal exchange between Mr Moshen and the Appellant, which on the Appellant's own account led to Mr Moshen agreeing to "comply". At this stage PC Marshall was positioned to the Appellant's left, looking down at Mr Moshen, with his hand on, or close to the back of, Mr Moshen's head. Mr Moshen was held in the corner for a number of seconds.

d. At this stage the Appellant, on his own evidence, had an intention to take Mr Moshen to the floor in order to place the spit guard on him in a prone position. The Appellant did not however, based on the evidence provided by PC Marshall, discuss that intention with PC Marshall in the presence of Mr Moshen. The Tribunal considered that what had most likely been understood by Mr Moshen was that he was being required to comply with the application of the spit guard, not being taken to the floor.

e. As far as it is relevant, the Tribunal concurred with the original Panel's conclusion that the Appellant did not properly apply the NDM in terms of considering and discussing the available options with PC Marshall, although there was time available to do this.

f. The Tribunal considered that at this point in time Mr Moshen presented no specific threat to the officers, of either headbutting or spitting or otherwise. Given Mr Moshen's indication that he would "comply" the next logical step would appear to have been for the Appellant and PC Marshall to try and sit Mr Moshen up (likely facing the corner) to apply the spit guard. No attempt was however made to do this and instead the Appellant raised Mr Moshen's arm up over his shoulder blades, using significant force, and attempted to move him off the cell bench and take him to the floor. PC Marshall also placed his hand on Mr Moshen's upraised arm.

g. Mr Moshen was more likely than not at this point was reluctant to go to the floor and the Appellant no doubt felt that reluctance through his body. Mr Moshen can be seen to straighten his left leg between the Appellant's own on the CCTV, which could be interpreted as either resistance or an attempt to try and stabilise himself, in the bent over position he was in.

h. The Appellant then delivered two knee strikes to Mr Moshen's left hand side in quick succession. Another attempt was made to move Mr Moshen to the floor, which may have in part have proved difficult noting the small size of the cell, and the Appellant then applied a further knee strike to the same area after a brief pause. During the application of the knee strikes, PC Marshall had his hand on Mr Mohsen's right arm and was looking directly down at the back of his head and with a potential view towards the Appellant's legs, albeit somewhat obscured by Mr Mohsen's torso.

i. Overall, there was no apparent need, based on likely threat or otherwise, for the Appellant to take Mr Moshen to the floor at the stage that he tried to do so and consequently the Appellant's actions in raising Mr Moshen's arm forcefully and delivering three knee strikes in quick succession were not necessary in the circumstances. The Tribunal also did not consider that the Appellant had a reasonable basis for believing that they were necessary, even taking into account all that he had said in evidence as to his particular concerns around the threat of spitting as the Covid-19 pandemic was still ongoing at that time (it being around 15 months since the first lockdown) given his personal circumstances, including his vaccination status and the health concerns he held for his family.

86. In terms of whether the force used was proportionate or reasonable, the Tribunal again focussed primarily on the Appellant's account of the matter and the CCTV and considered that the force used was very significant. In particular, given the fact that Mr Moshen was handcuffed to the rear at the time and the difference in size between him and the officers,

the force appeared neither proportionate nor reasonable, contrary to the Appellant's own opinion.

87. In terms of PC Marshall and DS Vincent's opinions on the reasonableness or otherwise of the force used, the Tribunal found that neither witness' opinion was of particular assistance in terms of making that assessment. Specifically:

    a. Whilst there was no direct evidence, e.g. based on a friendship or close working relationship, to support a suggestion that PC Marshall was simply aligning his assessment of the situation to support the Appellant's, a reasonable inference could be drawn that he would be unlikely to be openly state that he thought his colleague's actions were unnecessary, disproportionate and/or unreasonable, being aware as he would have been that he did nothing to try and reduce the impact of the Appellant's reaction towards Mr Moshen once the Appellant had pushed his head forward.

    b. Although DS Vincent was an independent and objective witness, her status as a non-expert and her position as someone who only say the CCTV once meant that her opinion on this issue could only be given limited weight.

88. In respect of the evidence provided by Mr Carvalho, whilst the Tribunal accepted all of the evidence he gave about the techniques used by the Appellant being approved, taught techniques and the importance of considering the use of these in the context of a dynamic and fluid situation, his evidence could not be determinative on the question of whether the force used was in fact necessary, proportionate and reasonable, as he recognised. For example, the following exchange took place between Mr Carvalho and counsel for Respondent during the course of his evidence. stating (see the transcript at page 390 of the paginated bundle):

*K Carvalho:* *In the circumstances well yeah. I mean to be honest with you its not up to me to say whether they're proportionate or not. What I can say is that they are taught, what I can say is that they were delivered and they were delivered because of a, the officer actually feeling that there was a threat there, it was.*

*J Kane:* *On his evidence.*

*K Carvalho:* *Yeah.*

89. The Tribunal, therefore considered the CCTV and the Appellant's own assessment of whether the force used was excessive alongside Mr Carvalho evidence, both as to the appropriateness of the techniques used and his view of what the CCTV showed in terms of the 'dynamic' situation, whilst bearing in mind that the evaluation of what the evidence showed and whether the Appellant's evidence on the matters should be accepted was a matter for the Tribunal.

90. The Tribunal also, in evaluating the evidence, took into account the character references presented on the Appellant's behalf, his good character being of course relevant to both the question of whether he would have a propensity to act contrary to the standards of conduct as alleged and also to his credibility.

91. Taking all of these matters into consideration the Tribunal's conclusion was that the Appellant's actions when applying force to Mr Moshen as alleged in the Regulation 30 Notice were, on the balance of probabilities, neither necessary, proportionate nor reasonable.

92. In terms of the Appellant's state of mind at the time he used force on Mr Moshen, the Tribunal concluded that there was insufficient available evidence to make a positive finding as to what motivated the Appellant to act in the way he did. The CCTV showed the

Appellant reapplying the spit guard to Mr Moshen calmly and with care on more than one occasion and treating him firmly, but reasonably, right up until the moment that caused him to push Mr Mohsen's head forwards and then into the corner. Whether his reaction at that point was as a result of a loss of temper resulting from Mr Mohsen swearing at him or as a result of him deciding that he needed to take positive, decisive action at that stage in order to control the situation, was not clear. However, the Tribunal did not consider it necessary, in order for it to make a finding as to whether the Appellant breached the standards of behaviour and committed misconduct or gross misconduct, to reach a specific decision on what the Appellant's state of mind in fact was.

93. On the basis of the facts, either accepted or found proven as set out above, the Tribunal found that the standard of conduct in relation to the use of force had been breached by the Appellant on 21 July 2021. This was by way of the force he applied to Mr Moshen in cell 3, from the point when Mr Moshen was pushed into the corner and indicated verbally that he would "comply" with the Appellant.

94. In addition, the Tribunal found the following other standards of police conduct breached, as alleged in the original Rule 30 Notice.

    a. The standard of authority, respect and courtesy. Specifically, the Appellant's actions in using excessive force did not reflect the use of tolerance, or treatment of Mr Moshen with respect and courtesy. His actions also did not represent a lawful and proportionate use of the Appellant's power and authority, respecting the rights of individuals.

    b. The standard of not acting in a way that would cause discredit to the police service. Specifically, by using excessive force the Appellant acted in a way that was capable of undermining public confidence in policing. A member of the public would be extremely concerned to see how the Appellant treated Mr Moshen.

95. In consequence of the above mentioned findings, the Tribunal proceeded to consider whether the breaches of standards found proven amounted to either misconduct or gross misconduct, reminding itself of the definition of each, as contained within Regulation 41(15(b)).

96. For the following reasons, the Tribunal concluded, after carrying out a severity assessment with reference to the factors contained within the Outcomes Guidance, that the breaches of standards found proven, both individually and collectively, amounted to gross misconduct.

97. The Tribunal first considered the question of the Appellant's culpability.

    a. The Tribunal noted that the Outcomes Guidance specified, in respect of violent conduct, that this is conduct that can significantly undermine public trust in the profession and is (by its nature) serious. In addition, it highlighted that the treatment of a single individual can be sufficiently serious to amount to gross misconduct. The Tribunal also however bore in mind the fact that not every instance of a breach of the standards (including that on use of force) necessarily amounts to gross misconduct.

    b. The Tribunal did not find that the Appellant's application of excessive force was intentional, targeted or planned. The force was used in reaction to a developing situation with a detainee over a few minutes and there was insufficient evidence before the Tribunal for it to conclude that the Appellant applied disproportionate force in a calculated manner, as a result of a "battle of wills" or otherwise.

    c. The Tribunal did find that the Appellant's conduct was deliberate, in that he purposely applied force to Mr Moshen in an attempt to get him to comply with his wishes. The level of force applied by the Appellant, which was assessed as disproportionate, was

likewise deliberate, chosen by the Appellant at the time as the means he considered appropriate in order to achieve his purpose.

d. The Tribunal concluded that it did not have sufficient evidence before it to determine what the Appellant's state of mind was immediately before and at the time of applying excessive force e.g. whether the Appellant momentarily lost his temper as a result of Mr Moshen swearing at him or acted disproportionately with a "cool head". However, the Tribunal also concluded that, in terms of culpability, there was little difference between a disproportionate reaction resulting from a momentary loss of control or alternatively from a desire, and/or misjudgement as to the need, to control the situation through a particular course of action. Neither was acceptable in the circumstances.

e. The Tribunal found that the Appellant did not have any intention to cause Mr Moshen to experience a fitting episode as a result of applying excessive force and that there was no causal link between the two matters. However, the Appellant's actions were reckless in terms of injuries that could have been caused, in particular by the knee strikes.

f. It could not be disputed that, as one of the officers' who had care of Mr Moshen in custody that day, the Appellant was in a position of trust, much as any officer who subsequently had control over an arrested person would be. As noted at paragraph 4.44 in the guidance, "the nature of the Office of Constable means that all police officers are in a position of trust and authority in relation to members of the public".

g. The Tribunal noted that Mr Moshen was also a vulnerable individual, by virtue of the same factors that the officers considered may also make him an unpredictable and "high-risk" detainee i.e. his history of drug use and associated mental health issues, and the Appellant should have been aware of this. The Appellant's actions breached his duty of care to Mr Mohsen personally and the trust placed in officers generally when dealing with members of the public.

h. The Tribunal did not however find that the Appellant had abused his position of trust or authority in this case, for the purpose of personal gain.

i. Overall the Tribunal considered that the Appellant's culpability could be assessed as medium to high in all the circumstances of this case.

98. The Tribunal next considered the question of the harm caused.

a. Physical harm was caused to Mr Moshen as a result of the Appellant's actions, consisting of pain and discomfort, although fortunately (and contrary to what was believed at the time) no longer term injuries were sustained by him.

b. The Tribunal also noted that Mr Moshen related to officers that his mental health had been affected by the incident and that his trust in police had been undermined, leaving him "paranoid" when dealing with the police.

c. The most significant harm was however caused in respect of undermining confidence in policing. This was particularly the case in the context of (ongoing) widespread public concern about the use of excessive force by police officers. The Tribunal considered that, taking into account: the fact that the Appellant's actions took place in the police custody suite, under the observation of CCTV; the harm caused to Mr Moshen and his potential vulnerability; as well as the risk of further injury to him: the Appellant's actions were capable of having a very significant impact on public confidence in policing.

d. The Tribunal noted that whether or not the Appellant's conduct was known by the public at the time was of no relevance to the assessment of the impact it could have on public confidence.

e. Overall, the Tribunal considered that the level of harm caused by the Appellant's conduct should be assessed as high, albeit that it was not the most severe harm that could have resulted in the circumstances.

99. The Tribunal then went onto consider whether there were any aggravating factors that tended to worsen the circumstances of the case, either in relation to the Appellant's culpability or the harm caused, taking care not to double count any matters already taken into account as part of the assessment of the seriousness of the conduct already carried out. The Tribunal concluded that there were no aggravating features in this case that had not already been taken into account.

100. The Tribunal then went onto consider whether there were mitigating factors that tended to reduce the seriousness of the misconduct, discounting any personal mitigation as this was not relevant to the severity assessment. The Tribunal concluded that the following mitigatory factors were present in this case:

a. The Appellant had no previous matters on his service record.

b. The misconduct was confined to a single episode of brief duration.

c. There was a notable background to the incident in cell 3, which involved an element of "provocation, threat or disturbance" that may have affected the Appellant's judgement. Specifically, Mr Moshen had behaved in a wholly unacceptable and unco-operative manner following his arrest and during his detention in cell 2. He then, in cell 3, continued to spit on the cell floor and resisted the use of the spit guard. However, at the time of the force being applied to Mr Moshen, as explained in earlier paragraphs, he in fact posed no specific threat to the officers.

d. Evidence had been given by the Appellant as to the effect on him and his family of the ongoing Covid-19 pandemic at the time and of his wife's health issues following the birth of their child. The Tribunal acknowledged that this would have been a stressful time for him.

101. Overall, the Tribunal considered that it had, for the most part, already taken these factors into account when making its assessment of the seriousness of the Appellant's conduct. Therefore, even after taking into account the potential effect of stress and Mr Moshen's behaviour on the Appellant at the time, it concluded that his culpability was of at least medium seriousness and the harm caused by his actions remained high.

102. The Tribunal's determination was that the breaches of standards found proven had, without doubt, crossed the threshold for misconduct as they clearly justified the taking of disciplinary action. In addition, those breaches, both individually and cumulatively, were serious enough to justify dismissal and amounted to gross misconduct.

103. Finally, the Tribunal carefully considered the question of what the appropriate outcome should be, again taking into account the contents of the Outcomes Guidance. It adopted for the purposes of deciding the appropriate outcome, the severity assessment that it had carried out when assessing the Appellant's conduct as gross misconduct and reminded itself of the need to consider the least severe outcome first, followed by the more severe.

104. The Tribunal also kept at the front of its mind the importance of upholding the three purposes of the police disciplinary regime, which is not designed to punish but to maintain public confidence in policing, uphold high standards in policing and deter misconduct and protect the public. It noted that paragraph 2.8 of the Outcomes Guidance highlighted that a decision-maker should:

*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.*

105. The Tribunal considered the Appellant's personal mitigation as well as his service record and extensive character testimonials. It found that the some of the matters presented overlapped.

106. The Tribunal accepted that the Appellant was an officer with an exemplary record, as attested to by numerous character references. It kept in mind to the principles in the cases of *Giele*[12] and *Bijl*[13], that there may be a public interest in retaining officers who have demonstrated or developed particular skills and experience and whose misconduct does not impact on their ability to perform their duties to the required standard.

107. However, it noted that this was not a case where the Appellant's misconduct could be said to have no effect on his ability to perform the duties of a police constable to the requisite standard, it being based on a finding that he used excessive force in the ordinary course of his duties as an arresting officer. The Tribunal noted what had been said on his behalf about the Appellant having been in a non-public facing role whilst awaiting the misconduct hearing, and that this was still available to him, but (like the Panel) did not consider that this could be properly considered mitigation, Nor could it provide support for an assertion that he could in the future perform all of the duties of his rank and position without any potential impact.

108. The Tribunal considered that a key matter of concern in this case was public protection, as well as the maintenance public confidence in police and the deterrence of similar misconduct in the future (from the Appellant or other officers). Any assertion made that there was little risk of repetition by the Appellant was not supported by any evidence given the limited role he had been in since July 2021. The Tribunal also noted that the Appellant had not, during the proceedings (which were fully contested), provided any substantive insight into his behaviour or undertaken any remediation.

109. Finally, whilst the misconduct proceedings had taken considerable time to resolve, there was nothing exceptional in that delay and it could not of itself be mitigation.

110. The Tribunal also had regard to the principles laid down in the case of *Williams*[14] in which Holyrode J said (at paras 66 and 67):

> *In my judgment, the importance of maintaining public confidence in and respect for the police service is constant, regardless of the nature of the gross misconduct under consideration.*
> *What may vary will be the extent to which the particular gross misconduct threatens the preservation of such confidence and respect. The more it does so, the less weight can be given to personal mitigation. Gross misconduct involving dishonesty or lack of integrity will by its very nature be a serious threat …*
> *But other forms of gross misconduct may also pose a serious threat, and breach of any of the Standards may be capable of causing great harm to the public's confidence in and respect for the police.*
> *This does not mean, of course, that personal mitigation is to be ignored. Nothing in the Salter principle suggests it must be ignored. On the contrary, it must always be taken into account. I therefore reject the submission that the effect of the Salter principle is that dismissal will invariably be the sanction whenever gross misconduct is proved. But where the gross misconduct threatens the maintenance of public confidence and respect in the police – as gross misconduct often will - the weight which can be given to personal mitigation will be less than would be the case if there were no such threat, and if the disciplinary body were a court imposing a punishment. Whether the circumstances are such that the sanction of dismissal is necessary will be a fact-specific decision …*

[12] [2005] EWHC 2143 (Admin).
[13] [2001] UKPC 42.
[14] [2016] EWHC 2708.

*where the facts show that one of the other Standards has been breached, the appropriate outcome will depend on an assessment of all the circumstances, with proper emphasis being given to the strong public interest in the maintenance of respect and confidence.*

111. Overall, the Tribunal was of the view that a severe sanction was necessary, to mark the seriousness with which the use of excessive force, by a police officer against a potentially vulnerable individual within the confines of a custody suite, would be viewed by the public, as well as to mark the importance of public protection and upholding high standards in policing.

112. The only outcomes available to the Tribunal in the circumstances (as noted in paragraph 33 above) were either a final written warning or dismissal without notice.

    a. The Tribunal first considered whether a final written warning would be sufficient to mark the seriousness of the Appellant's gross misconduct but determined that the purposes of police disciplinary proceedings, specifically that of public protection and of upholding public confidence in policing, would not be met by way of such a sanction.

    b. In the Tribunal's view, a member of the public who was aware of all the surrounding matters would be extremely concerned by the Appellant's action and would consider the misconduct to be of such a serious nature that nothing less than dismissal of the Appellant would suffice. The Tribunal therefore concluded that public confidence in policing could only be maintained through the imposition of dismissal without notice.

**Conclusion**

113. In conclusion, the Tribunal upheld the Appellant's appeal under Rule 4(4)(a).

114. In light of that decision, the Panel's original decision was overturned and the Tribunal went on to make its own decision as to whether the Appellant's conduct as alleged amounted to a breach of the standards and as either misconduct or gross misconduct.

115. The Tribunal concluded that:

    a. Based on the facts established by the evidence, the Appellant's conduct amounted to a breach of the standards as to use of force, authority, respect and courtesy and discreditable conduct.
    b. The breaches of standards found proved amounted to gross misconduct.
    c. The only appropriate outcome to be imposed in the circumstances was one of dismissal without notice.

3 November 2024

J M Davidge, PAT Chair