

# IN THE MATTER OF THE POLICE (CONDUCT) REGULATIONS 2020

## SUSSEX POLICE

### PS DAVID TRITTON

#### **SUMMARY BACKGROUND OF THE ALLEGATIONS**

1. This Misconduct hearing relates to the conduct of Police Sergeant David Tritton (referred to as the 'officer' in this determination) in January 2022.

1.2. In brief outline, the AA alleges that on 19 January 2022, the officer lied to his line manager, Inspector Simon Burroughs ('SB') and the Duties and Resourcing Team Leader, Laurence Grant ('LG') when he sent them an email at 05.18hrs stating that no one had informed him that he had been stood down for a policing operation due to take place that day.

1.3. At all material times, the officer was an experienced supervising sergeant for the East Sussex Tactical Enforcement Unit ('TEU') with approximately 21 years of service. The TEU comprised about seven officers (excluding the officer) and included PC Kelvin Lowes ('KL') and PC Emma Henry ('EH').

1.4. The AA alleges that the officer's conduct, if proved, breached the Standards of Professional Behaviour (SPBs) relating to Honesty and Integrity and amounts to gross misconduct that is so serious as to justify dismissal.

1.5. The Panel observes that the officer has filed a Regulation 31 response. In summary, the officer denied the allegation in its entirety and stated that he did not read the messages from KL or EH informing him that he had been stood down. The response further stated '*The WhatsApp message platform can indicate that a message has been read in circumstances where the message has not been read. PS Tritton did not read the messages cancelling the operation and was unaware it had been cancelled until reading his email upon arrival at work.*'

1.6. At the conclusion of the AA's case, the defence made a submission of 'No case to answer' in accordance with the decision of R v Galbraith [1981] 1 WLR 1039. Based on the Panel's understanding of the Defence's application, it is brought under 'Limb 2' of Galbraith (see below).

1.7. The defence submit that the entire case against the officer should be stopped from proceeding because taken at its highest, the Panel properly directed by its LQC cannot properly and/or safely make a finding to the appropriate standard of proof that the officer committed the single allegation of misconduct set out in the regulation 30 notice relating to Honesty and Integrity. The AA reject these assertions and invite the Panel to continue the case against the officer.

1.8. The defence's no-case submission was considered by the Panel and the first part of this written determination to paragraph 1.41. sets out the Panel's decision. The Panel's further consideration and findings at stage 1 (facts, breach and severity assessment) are to be found from paragraph 1.42. onwards.

1.9. The Panel is grateful for the submissions and valuable assistance provided by Ms Briony Ballard on behalf of the AA and Mr Mark Aldred on behalf of the officer.

### **Legal Principles**

1.10. The overarching principles behind conducting misconduct proceedings are based on fairness and natural justice (see Home Office Guidance 2020 at paragraph 1.4). In this respect, the power of a Panel to dismiss a charge at this stage of the hearing is not in dispute and is based on precedent in case law, namely R v Galbraith [1981]. Furthermore, regulation 41(7)(a)(iv) of the 2020 Regulations permits a person representing the subject officer (PS Tritton) concerned to make representations concerning any aspect of proceedings under the 2020 Regulations. The Panel accepts that this includes making representations as to whether the officer has a case to answer. This position has been confirmed by the GMC case of Sharaf v GMC [2013] EWHC 3332.

1.11. The decision in the case of SRA v Sheikh [2020] EWHC 3062 is also instructive to the Panel as it states that it is not whether 'a reasonable jury' could refuse to find the charge proven, but whether 'no reasonable jury' could find it proven on the evidence.

1.12. The 'Galbraith' test anticipates the stopping of proceedings in two circumstances:

(a) where there is no evidence to prove the charge (Limb 1), or

(b) where there is some evidence, but it is of a *tenuous character*, for example, because of *inherent weakness or vagueness or because it is inconsistent with other evidence* and, taking the AA's case at its highest, a properly directed Panel could not conclude that the SPBs have been breached. In such circumstances, it is the duty of a Panel to stop the case (Limb 2).

1.13. The Panel is also mindful that the standard of proof is the balance of probabilities. Paragraphs 9.10 and 9.11 of the Home Office Guidance 2020 provides that the balance of probabilities is a single unvarying standard (i.e. there is no sliding scale). Conduct will be proved on the balance of probabilities if the persons conducting the hearing are satisfied by the evidence that it is more likely than not that the conduct occurred. The seriousness of the allegation of misconduct and/or the seriousness of the consequences for the officer do not require a different standard of proof, merely appropriately careful consideration by the Panel before it is satisfied of the matter which has to be established.

1.14. The Panel is also aware that it should not dismiss an allegation where there is evidence of a breach of the SPBs which could amount to 'simple misconduct'. The

Panel does not need to conclude that it could be a breach that would justify dismissal (gross misconduct).

1.15. Both the AA and the defence agree on the applicable legal principles.

### **The Allegations**

1.16. The AA brings a single allegation of misconduct against the officer in the regulation 30 notice. This states as follows:

*In breach of the Standard of Professional Behaviour of Honesty and Integrity (Dishonesty) in your email to Mr Grant and Inspector Burroughs of 05.18 on 19 January 2022 you stated 'As no one advised me that this was no longer happening....' which was untrue because you had been advised by PC Lowes in a WhatsApp message at 13:16 on 18 January 2022 which you read at 13:22hrs [sic] on 18 January 2022 that Operation Furzehill had been cancelled and that you were to revert to normal duty times. Your said conduct amounts to gross misconduct.*

### **The Evidence**

#### **Motive**

1.17. Both parties accept that the rest day work provisions allowed the officer, if he wished, to work the overtime that he had been scheduled to do before Op Furzehill was cancelled irrespective of the fact that the operation had been stood down. This is because he received less than the required 8 days cancellation notice. Accordingly, based on the relevant provisions, both parties accept that in reality the officer had no financial incentive or gain to work the overtime.

1.18. Notwithstanding this being the true position, the AA asserts that the officer told a lie for financial gain due to his unclear understanding around the rest day working provisions. This is based on his regulation 17 response when he stated he was only 'fairly sure' about the rest day working provisions. The Panel has reviewed his Regulation 17 response. He stated '*I am fairly sure that regulations would have allowed me to still have worked 4 hours as there was less than 5 days' notice ....*'.

1.19. The Panel has considered the AA's evidence and while feeling 'fairly sure' is not 100%, it nonetheless shows a sufficient understanding and awareness of the rest day working provisions. The officer had also served as a Federation Representative which would have provided him with some familiarity with the rest day provisions. In the circumstances, the Panel does not see any misunderstanding on the officer's part regarding his overtime financial entitlements that would give rise to a financial motive to lie.

1.20. The AA advanced another motive, namely, that the officer having described himself as a 'technophobe' did not appreciate that his WhatsApp messages had a read receipt which could be viewed by someone else with the risk of it being demonstrated

that he had read the WhatsApp. The Panel has considered the argument and while it is accepted that he has described himself in this way, finds it is wholly speculative. As such the AA's argument is weak and tenuous.

1.21. Finally, on the issue of motive, the AA has suggested that the officer was in some way seeking to adopt a position of 'principle' because he took the view that being communicated with via WhatsApp to cancel the operation was inappropriate and was not the way of standing anyone down at short notice. The Panel has considered this assertion and views the officer's position as simply expressing a routine 'moan' about the manner by which he was contacted as is common amongst officers. Importantly, his expression of dissatisfaction does not support the AA's case one way or another regarding the specific allegation that he lied about not reading the WhatsApp message.

1.22. Overall, concerning the issue of motive, the Panel considers for the reasons mentioned that while there is some evidence of motive advanced by the AA, it is of a *tenuous character*, for example, because of *inherent weakness or vagueness*. However, in reaching this view, the Panel is aware that while it would be helpful to the AA to establish a possible motive on the part of the officer, it is not an essential requirement to prove the Regulation 30 allegation.

### **'Blue Ticks'**

1.23. In general, both parties accept that the central issue in this case is the extent to which the read receipts can be relied upon to provide reliable evidence that a message has in fact been read.

1.24. It is also right to say that the AA's case does rest substantially, albeit not exclusively, on the inferences that can be properly drawn from the presence of the two blue ticks at 13:33hrs and the words 'read' alongside them.

1.25. The Panel received expert evidence from DC Armstrong (instructed by PSD) and Mr Hunniford (instructed by the defence). The Panel has reviewed the document listing the agreed propositions by both experts.

1.26. The AA submits that the sum total of those propositions is that it is possible that a WhatsApp message can be inadvertently marked 'read' despite the recipient not having in fact read the message. In other words, the two blue ticks are not infallible. This much is also accepted by the defence who agree that the assertion that a blue tick unequivocally means 'read' is inaccurate.

### **The Wider Circumstances of the Case**

1.27. The AA submit that the Panel should also have regard to the all the circumstances in the case in reaching its decision on the application. The Panel agrees with this submission.

1.28. In respect of the propositions advanced by the expert's testing, the Panel notes that one aspect that is consistent across all the tests in which the WhatsApp messages can be inadvertently read, is that the officer would have had to soft close from the TEU Admin Group chat. This is not disputed.

1.29. As observed by the AA, this means that would have been the last group the officer would have been in and is consistent with him using and accessing the TEU Admin group chat on his rest day. Again, this was not disputed.

1.30. The AA also made reference to the evidence of SB (Inspector Burroughs) who stated in his witness statement dated 15/06/2022 that the officer '*usually monitored his work telephone and emails even when not on duty*'. The Defence argue that the Inspector's 'impression' is mere speculation in the absence of any evidence. The Panel considers that the officer's own evidence is consistent with the Inspector's impression, namely that the officer admitted to checking his work emails on his rest day on 18 January 2022. In his Regulation 17 response, the officer stated '*I was out most of the day on the 18<sup>th</sup> assisting a friend who was moving house, I recall checking my work phone around 1030hrs before I left home and seeing an email from Kendal Wells the Inspector for the operation the following day....*'

1.31. The AA also relies on the context of the industrial action and the fact that the situation could have changed at the last moment, coupled with the officer's supervisory position to conclude that it would have been natural for him to keep tabs on what was happening with the operation on the following day by checking his emails and WhatsApp TEU Admin Group chat.

1.32. The defence argue this is mere speculation while the AA submits it is entirely appropriate for decision-makers to bring their own experiences of people's natural behaviours when making decisions. The Panel has considered the submission and agrees with the AA that as a professional Panel comprising a senior police officer, it is not only appropriate but expected that the senior police officer will share their knowledge of policing operations and the expected behaviours of supervisory officers as part of the Panel's deliberations.

1.33. Turning now to the issue of adverse inferences. The AA submits that the officer declined to provide the investigation with the make or model or operating system for his phone either in his Regulation 18 response or his interview. He further declined to provide the investigation with an explanation, until much later in video form as to how it can be said that the 'read' receipts (blue ticks) were wrong.

1.34. Specifically, on 10 February 2022, the officer was served a Regulation 17 notice which included a caution that stated words to the effect '*Whilst you do not have to say anything, it may harm your case if you do not mention when interviewed or when providing any information...something which you later rely on in any misconduct proceedings...*'

1.35. In his Regulation 18 response, he said 'It is not uncommon for me to receive a notification of a message on WhatsApp and simply swipe it away especially on my few days off, this may mean that the message is shown as read, but it does not mean that I have actually opened and read it'.

1.36. At his interview held on 25 March 2022, the officer was read the caution and was asked to provide details of the phone he used (Apple or Android) and if WhatsApp was on his personal or work phone. He was also asked about if he knew that if you swipe away notifications of messages from the screen they still remained in the group chat as unread. He declined to answer all these questions, amongst others.

1.37. On 23 May 2023, the officer served his Regulation 31 response and for the first time he suggested that a WhatsApp message platform can indicate that a message has been read in circumstances where the message has not been read.

1.38. In his live evidence on 7 May 2024, DC Armstrong confirmed that the failure of the officer to disclose the details of the phone he used had hampered the investigation. He said during the preparation of his first report dated 13 June 2022 he did not know what phone the officer was using and if he had that information, it would have helped 'massively'. The Panel is also aware that on 7 May 2024 the possibility was also raised for the first time about a missed phone call and additional expert tests were conducted on this basis.

1.39. The Panel has considered the sequence of events and the officer's evolving response and finds there is clear and consistent evidence pointing to the officer withholding information about his phone and location of WhatsApp which has hampered the investigation and which can reasonably lead to the drawing of an adverse inference.

1.40. Having reviewed the evidence in the 'round', the Panel finds for the reasons indicated that the defence have failed on the balance of probabilities to show that taking the evidence at its highest a reasonable Panel could not conclude that the officer lied. In reaching this decision, the Panel has focused on the main evidential issues of consequence to its decision. While other matters have been raised by the defence, the Panel does not consider them material or relevant to address regarding its decision.

1.41. Accordingly, the defence application is dismissed with a direction for the Misconduct Hearing to proceed to consider the allegation.

### **Stage 1 - The Panel's Findings on the Factual Allegation**

1.42. Having determined that the case against the officer should proceed to a full hearing, the Panel went on to consider the evidence concerning the single allegation.

## **The Panel's Approach**

1.43. The Panel approached its fact-finding role in the following manner:

- To ascertain the facts (whether as admitted or found proven).
- To ascertain whether the facts as determined by the Panel, constitute a breach of the SPBs, as alleged;  
and,
- Whether the breach of the SPBs amount to Misconduct or Gross Misconduct or neither?
- What Disciplinary Action (sanction) is appropriate?

1.44. In deciding matters of fact, the Panel is fully cognisant that the AA brings the case and the burden of proving the allegations rests with the AA. The standard of proof in misconduct proceedings is the civil standard of the balance of probabilities and the test is a simple unvarying balance of probabilities; what is more likely than not. The seriousness of the allegation of misconduct and/or the seriousness of the consequences for the officer do not require a different standard of proof, merely appropriately careful consideration by the Panel before it is satisfied of the matter which has to be established.

1.45. The inherent probability or improbability of the conduct occurring is itself a matter to be taken into account when deciding whether, on the balance of probabilities, the conduct occurred. In making a decision whether the alleged conduct is proven or not, the persons conducting, or chairing will need to exercise reasonable judgment and give appropriate careful consideration to the evidence **(See Paragraphs 9.10/9.11. of the Home Office Guidance 2020)**.

## **The Allegations and Related Evidence**

1.46. The Panel notes that the key factual issue for its determination is:

- (a) Did PS Tritton read the WhatsApp messages as alleged?

## **Agreed Chronology**

1.47. There are several chronological facts which are not in dispute in this case. These are set out below:

- In January 2022 there was an industrial dispute in the Eastbourne area by the refuse collectors. Sussex Police organised a planned response to the industrial action called Operation Furzehill ('Op Furzehill') which was planned to take place between 17 to 21 January 2022.

- To address the planned unrest, SB stood up public order units for 19 January 2022 which included the officer's TEU.
- On 18 January 2022 whilst on his rest day the officer read an email from Inspector Kendal Wells (KW) who was to be the PSU Commander for the operation for OP Furzehill. The email informed him that he his team were to book on at 05:00hrs at Bexhill Police Station and then be ready for a briefing at Eastbourne Police Station at 06:00hrs. The officer then informed his team not to 'rush to get in really early as often they are in 30-45 minutes early'.
- At 12:46hrs on 18 January 2022, SB heard from Inspector Barrow that the industrial action was off as agreement had been reached between the refuse driver and the Borough Council.
- At 12:50hrs on 18 January, SB informed LG of the stand down.
- Prior to 13:16hrs on 18 January, KL who was the only TEU officer working as the rest of the team were on rest days, received an email from LG informing him that Op Furzehill which was scheduled for the next day (19/1) had been cancelled and that the teams should revert to normal duties which for TEU meant booking on for 07.00hrs.
- At 13.16hrs on 18 January, KL then sent a WhatsApp message to TEU colleagues on the TEU Admin group stating '*OP Furzehill now cancelled, Revert back to normal duties*'. He immediately followed this up with a further message stating '*All been resolved*'.
- At 13:32hrs on 18 January, EH sent a WhatsApp message to the group indicating 'Excellent 7 am start it is [with a thumbs up emoji]'.
- At 14:43hrs on 18 January, KL received a message from the Force Duties Planner, Margaret Ayres, asking if the team were aware that Op Furzehill had been stood down. KL checked if his messages and saw that everyone (other than Dave Seal who was on sick leave) appeared from his device to have read the message. KL informed Margaret Ayres that he had told the team indicating it would be a 07:00hrs start.
- At 15:05hrs on 18 January, LG emailed the officer and 24 other recipients informing everyone that the dispute had been resolved and Op Furzehill had been stood down and that normal start times and duties would now apply.
- At 05:08hrs on 19 January 2022, the officer entered Bexhill Police Station by the rear door.
- At 05:18hrs on 19 January 2022, the officer sent an email to LG and SB in reply to LG's email of 18 January which stated: '*Morning, As no one*



*advised me that this was no longer happening I'm still in at Bexhill at 05:00hrs. Please can this be reflected in my SAP'.*

- At 07:44hrs on 19 January 2022, the officer accessed Room 7 on the second floor of the Police Station.
- On 10 February 2022, the officer was served with the Regulation 17 Notice with a caution. On 24 February 2022, the officer responded to the Regulation 17 notice stating that he first saw the WhatsApp message on the 'TEU Admin Group' chat on the morning of 19 January 2022 after he had attended Bexhill Police Station and as a 'technophobe' he had no interest in social media. He further stated that on his rest days if he is busy he does not always read his WhatsApp messages and it is not uncommon for him to swipe away WhatsApp notifications.

1.48. In his regulation 31 response, the officer denied the allegation in its entirety and stated that he did not read the messages from KL or EH informing him that he had been stood down. The response further stated *'The WhatsApp message platform can indicate that a message has been read in circumstances where the message has not been read. PS Tritton did not read the messages cancelling the operation and was unaware it had been cancelled until reading his email upon arrival at work.'*

1.49. The Panel heard evidence from the respective experts, Mr Hunniford (for the officer) and DC Armstrong (for the AA). They produced a document listing eight agreed propositions when 'blue ticks' might appear against a message on the WhatsApp platform. The propositions arose from the experts' testing of the WhatsApp messaging process using both Android and Apple devices.

1.50. The AA submitted that the sum total of the propositions is that it is possible for a WhatsApp message to be inadvertently marked 'read' despite the recipient not having in fact read the message. In other words, the two 'blue ticks' were not infallible. The defence also agreed that the assertion of a 'blue tick;' unequivocally meant 'read' was inaccurate.

1.51. In respect of the propositions advanced by the experts, the Panel noted one aspect that was consistent across all the tests in which the WhatsApp messages can be inadvertently read, is that the officer would have had to soft close from the TEU Admin Group chat. As observed by the AA, this meant that it would have been the last group the officer would have been in and was consistent with him using and accessing the TEU Admin group chat on his rest day.

1.52. Although the officer did not give oral evidence, there is no dispute that the 18 January 2022 was a rest day for him when he checked his email and saw the message from Kendal Wells (KW) about Op Furzehill the next day. KW's email was sent only to sergeants. The Panel finds that the officer's conduct in checking his emails ahead of the operation is consistent with the evidence of SB who stated that the officer *'usually*

*monitored his work telephone and emails even when not on duty*'. The officer's behaviour is also consistent with being a supervisor involved in a significant operation the next day and naturally wanting to keep up with any evolving developments to pass on to his team. That is why it would appear that the email was only sent to sergeants.

1.53. In light of that finding and recalling the expert's agreed propositions, the Panel finds on the balance of probabilities that the officer more likely than not accessed the WhatsApp TEU group chat after 13:16hrs when KL sent a WhatsApp message to TEU colleagues on the TEU Admin group stating '*OP Furzehill now cancelled, Revert back to normal duties*' in order for the 'blue ticks' to appear against his name at 13:33hrs. KL immediately followed this up with a further message stating '*All been resolved*'. Again 'blue ticks' appeared against the officer's name at 13:33.

1.54. Given these factual findings, the question that arises is whether the officer would have read KL's message, which he has denied. In this regard, the Panel has paid close attention to the character evidence provided on his behalf.

1.55. At this stage of the proceedings, the officer's positive good character is admissible in evidence and is relevant to the Panel's assessment of his credibility and propensity to behave in the manner alleged. The Panel confirms that it has considered the officer's positive good character in its assessment of the evidence leading to its factual findings that follow.

1.56. The Panel has carefully weighed the factors that support or diminish the weight to be placed on the good character evidence. In his favour, the Panel notes the officer had no financial motive to act in the manner alleged and there was no formal obligation on him to have checked his email and messages on a rest day.

1.57. However, there are several other facts which point the other way which suggest that he did read the 13:16 message; in this respect the officer did check KW's email consistent with his usual practice when not on duty; it is evident from the expert's testing that he must have accessed WhatsApp for the 'blue ticks' to have appeared against his name. The timings of when the 'blue ticks' appeared at 13:33hrs is consistent with the officer reading KL's two messages sent at 13:16 and PC Henry's message at 13:32. It is also notable that the timing of the 'blue ticks' marked against other colleagues' names in respect of KL's two messages were just minutes apart from the officer, being either earlier or a little after his recorded blue ticks at 13:33. The officer's blue ticks are therefore consistent with the wider group receiving and reading KL's and PC Henry's respective messages. The Panel does not consider the timing to be simply coincidental.

1.58. Finally, the Panel has considered the issue concerning drawing an adverse inference regarding the officer's response to the investigation. In this respect, the AA submitted that the officer had declined to provide the investigation with the make, model or operating system for his phone either in his Regulation 18 response or at interview. He further declined to provide the investigation with an explanation, until much later in video form as to how it can be said that the 'read' receipts (blue ticks) were wrong.

1.59. Specifically, on 10 February 2022, the officer was served a regulation 17 notice which included a caution that stated words to the effect '*Whilst you do not have to say anything, it may harm your case if you do not mention when interviewed or when providing any information...something which you later rely on in any misconduct proceedings...*'

1.60. In his regulation 18 response of 24 February 2022, the officer said '*It is not uncommon for me to receive a notification of a message on WhatsApp and simply swipe it away especially on my few days off, this may mean that the message is shown as read, but it does not mean that I have actually opened and read it*'.

1.61. At his interview held on 25 March 2022, the officer was read the caution and was asked to provide details of the phone he used (Apple or Android) and if WhatsApp was on his personal or work phone. He was also asked whether he knew that if you swipe away notifications of messages from the screen they still remained in the group chat as unread. He declined to answer all these questions, amongst others.

1.62. On 7 August 2022, the officer served a report from Mr Hunniford. In order to instruct Mr Hunniford, the officer shared with him his make and model of iPhone and three videos (1-3) with tests using his iPhone and other phones of different makes and models used by his family.

1.63. On 23 May 2023, the officer served his regulation 31 response and for the first time he suggested that a WhatsApp message platform can indicate that a message has been read in circumstances where the message has not been read.

1.64. In his live evidence on 7 May 2024, DC Armstrong confirmed that the failure of the officer to disclose the details of the phone he used had hampered the investigation. He said during the preparation of his first report dated 13 June 2022, he did not know what phone the officer was using and if he had that information, it would have helped 'massively'. The Panel is also aware that on 7 May 2024 the possibility was also raised for the first time about a missed phone call and additional expert tests were conducted on this basis.

1.65. The Panel has considered the sequence of events and the officer's evolving response, and finds there is clear and consistent evidence pointing to the officer withholding information about the type of phone he used which has hampered the investigation. He knew the make and model of his phone and the operating system before DC Armstrong's first report dated 13 June 2022. This is evident from the videos he shared with Mr Hunniford. The officer should have revealed the information about the make and model of his mobile phone to the investigator and failed to do so. Accordingly, the Panel are content to draw an adverse inference.

1.66. In summary for the reasons set out above, the Panel finds on the balance of probabilities that the officer (PS Tritton), did read the WhatsApp messages sent by KL at 13:16hrs on 18 January 2022 and the message also sent by PC Henry. The Panel further draws an adverse finding in respect of the officer's conduct in hampering the

investigation by refusing to disclose at interview on 25 March 2022, the make and model of his iphone. He obviously knew this information as he was able to provide it to his expert, Mr Hunniford for the preparation of his report dated 7 August 2022. In light of the Panel's findings, it has attached little weight to his good character evidence.

### **To Ascertain Whether the Facts as Determined by the Panel Constitute a Breach of the Standards of Professional Behaviour**

2. The Panel has considered the proven facts and is mindful that in considering this question, it must exercise reasonable judgement and give appropriate and careful consideration to the evidence. The Panel is also aware that when applying the SPBs in any decision or misconduct hearing they shall be applied in a reasonable, transparent, objective, proportionate and fair manner and, due regard shall be paid to the nature and circumstances of a police officer's conduct, including whether his or her actions or omissions were reasonable at the time of the conduct under scrutiny. The Panel takes notes that all police officers are in a position of trust and responsibility whether on or off duty.

2.1. Turning to the alleged breaches of the SPBs set out in the regulation 30 notice in relation to the proven conduct these are: Honesty and Integrity.

#### **Honesty and Integrity**

2.2. According to this SPB, an officer will be honest and act with integrity at all times and will not compromise or abuse their position. Specifically, an officer must not make any false, misleading or inaccurate oral or written statements in any professional context.

2.3. In reaching its findings on the issue of 'dishonesty' the Panel has addressed its mind to the test set out in the reported decision of **Ivey v Genting Casinos [2017] UKSC 67**. This requires the Panel to ask itself whether the officer's conduct was, in the circumstances as he perceived them to be dishonest by the objective standards of ordinary decent people.

2.4. In relation to the officer's email sent to SB and LG on 19 January 2022 at 05:18hrs, the Panel finds based on the Ivey test, the officer's conduct in all the circumstances as he perceived them, would be viewed as dishonest by the objective standards of ordinary decent people. Accordingly this SPB is found proven.

### **WHETHER THE BREACH OF THE STANDARDS OF PROFESSIONAL BEHAVIOUR CONSTITUTES MISCONDUCT OR GROSS MISCONDUCT?**

3. Having found breaches of the SPBs relating to Honesty and Integrity, the Panel went on to consider whether the proven conduct amounts to 'Misconduct' 'Gross Misconduct' or 'Neither'. The Panel is mindful that under the Police (Conduct) Regulations 2020 'Misconduct' is defined as a breach of the standards that is so serious as to justify disciplinary action and 'Gross Misconduct' is defined as a breach of the standards that is so serious as to justify dismissal.

3.1. In considering the issue of seriousness of the proven conduct, the Panel is aware that this is to be determined by reference an officer's culpability for the misconduct; the harm caused by their misconduct and the existence of any aggravating and mitigating factors relevant to the conduct. In undertaking this task, the Panel is acutely aware that the proven conduct of the officer is to be judged according to the circumstances prevailing at the time it occurred. It is a contemporaneous assessment.

3.2. In terms of culpability, this denotes an officer's blameworthiness or responsibility for their actions. In this regard, the Panel finds the officer is responsible for his own actions by lying to SB and LG in the email sent on 19 January 2022 at 05:18hrs.

3.3. Honesty and Integrity are fundamental requirements for any police officer and any evidence of dishonesty and/or a lack of integrity must be treated seriously, especially where it was on duty.

3.4. In relation to any harm caused, the College of Policing Guidance provides that where an officer commits an act that would harm public confidence if the circumstances were known, this should be taken into account. In this regard, the Panel finds that harm would most certainly be caused to the reputation of Sussex Police because as stated in the decision of Salter v CC of Dorset [2012] ECWA Civ 1047, '*...the dishonesty or impropriety of a single officer tarnishes the reputation of his Force and undermines public confidence in it*'.

3.5. The Panel has also considered the presence of any aggravating factors relevant to the officer's conduct. The Panel finds the scale and depth of national concern regarding professional standards of behaviour by the police, an expectation by the public and other policing colleagues that the officer would lead by example given his seniority as a sergeant, and deliberate steps all amount to aggravating factors.

3.6. Turning to the presence of mitigating factors which indicate a lower level of culpability, these are as follows: the misconduct being confined to a single episode of brief duration and the absence of any financial or personal gain all amount to mitigating factors.

3.7. The Panel has carefully considered the relevant factors that bear on the issue of seriousness and finds that viewed in its proper context, the officer's overall culpability is at the higher end of the range, and the severity assessment of his proven conduct amounts to gross misconduct.

## **Panel Finding on Outcome**

4. The Panel heard submissions regarding outcome in light of its gross misconduct finding.

4.1. In approaching its decision-making regarding an appropriate and proportionate outcome the Panel has considered the submissions, together with the officer's record of police service in accordance with the 2020 Regulations. The Panel has also paid close attention to the 2023 College of Policing Guidance (the 'guidance').

4.2. Of particular importance, are the following paragraphs in the guidance:

At paragraph 2.3: the guidance sets out the purpose of the misconduct regime which is threefold:

- *Maintaining public confidence in and the reputation of the police service*
- *Upholding high standards in policing and deterring misconduct*
- *Protecting the public*

4.3. In the context of the purpose of professional disciplinary proceedings, the Panel is aware this is drawn from established case-law:

In Bolton v Law Society [1994] 1 WLR 512

Sir Thomas Bingham MR (as he then was) stated "A *profession's most valuable asset is its collective reputation and the confidence which that inspires.*"

In R (Green) v Police Complaints Authority [2004] UKHL 6

Lord Carswell stated in relation to the police service:

*"Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded".*

4.4. In distilling these important principles to reach an appropriate and proportionate outcome for the officer, the Panel is aware of the importance of following the three-stage structured approach explained by Popplewell J. in the decision of Fuglers LLP v SRA [2014].

4.5. The three stages are to assess the seriousness of the misconduct; to keep in mind the purpose of imposing sanctions; and, to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.

4.6. Turning first to the issue of seriousness of the proven conduct, the Panel has already conducted an assessment of 'seriousness' and formally adopts its earlier reasoning here regarding outcome.

4.7. The Panel recalls it has already found the officer's culpability to be at the higher end of the range of seriousness.

4.8. Turning to the records of police service, the officer joined Sussex Police on 29 August 2000. At the time of the proven conduct he had approximately 21 years' service and was serving in the rank of Sergeant, which is regarded as a leadership role. The officer's training record is up to date. It is also significant that the officer served as a Federation Representative. In this regard, the Panel notes that his wife stated in her character statement '*David is an extremely intelligent man and well versed in misconduct and discipline matters*'. She further observed '*He has seen numerous discipline matters and knows what the ramifications are for an officer accused of dishonesty*'.

4.9. The Panel has also taken into account the other multiple character testimonials provided on behalf of the officer. The testimonials show him to be an enthusiastic, approachable and committed officer. In considering the appropriate weight to place on personal mitigation, the Panel has been guided by the decision of Holroyde J in the case of Williams v The Police Appeals Tribunal [2016] EWHC 2708. The judgment makes it clear that the weight to be attached to personal mitigation in any particular case is necessarily limited owing to the importance of maintaining public confidence and respect in the policing service.

4.10. Accordingly, personal mitigation is relevant and the Panel has taken account of it, but attached limited weight on the basis as noted by the learned judge that gross misconduct involving dishonesty or lack of integrity will by its very nature be a serious threat to the public's confidence in and respect for the police.

4.11. The Panel next turned to consider the purpose of imposing sanctions. In this regard, the Panel is aware that an important purpose of imposing disciplinary sanctions is to maintain public confidence in and the reputation of the policing profession as a whole. This dual objective must take precedence over the specific impact that the sanction has on the individual whose misconduct is being sanctioned. The guidance also provides that misconduct proceedings are not designed to punish police officers, although the outcome imposed can have a punitive effect which should be no more than is necessary to satisfy the purpose of proceedings.

4.12. In terms of maintaining public confidence, the Panel recalls it found the officer was dishonest and that he hampered and/or hindered the investigation into his own conduct by refusing to disclose at interview on 25 March 2022, the details of his iPhone which he clearly knew at that time as he was able to later provide them to his own expert Mr Hunniford.

4.13. The guidance provides that Honesty and integrity are fundamental requirements for any police officer and a Panel is advised to treat any evidence of dishonesty or lack integrity seriously.

4.14. In the Panel's view, the AA has properly conceded that this is not a case of operational dishonesty, which is dishonesty in connection with a police operation or the evidential chain. It is common ground that operational dishonesty is at the more serious end of the 'dishonesty' spectrum which has the effect of significantly limiting the discretion of a Panel to retain an officer, except in exceptional circumstances. The guidance reflects this type of scenario by expressly recognising at paragraph 4.30 that there may be cases where an officer has behaved dishonestly but the dishonesty is unconnected to a police operation or investigation and could be regarded as minor or trivial. That being said, the guidance continues to reiterate that '*Cases involving any form of dishonesty on duty will always be serious because of the importance of maintaining public trust and confidence in the police service*'.

4.15. In light of the guidance it is clear to the Panel that whilst the nature of the officer's proven conduct does not amount to 'operational dishonesty' and it was not motivated by financial gain, it is nonetheless dishonesty committed whilst on duty by a senior officer which was deliberate and intentional.

4.16. The officer has shown no insight or contrition regarding his conduct. The Panel finds the public would be rightly concerned about whether the officer's proven conduct if left unchecked, might pose a wider risk to their protection given the serious implications flowing from any form of dishonesty while on duty. Such concerns would no doubt be heightened by the officer's behaviour in hampering and/or impeding the investigation into his own conduct by refusing to promptly provide details of his iPhone which led to the Panel drawing an adverse inference.

4.17. In the circumstances, the Panel finds it has no confidence that the officer has learnt from these proceedings or that he would adhere to the standards of professional behaviour expected from him if retained in service. He has offered no reassurance to the Panel that he understands the implications of his conduct in terms of maintaining public confidence in and the reputation of the police or there would be no recurrence of his conduct in the future. Trust lies at the heart of maintaining public confidence in policing and he has breached that trust.

4.18. Turning to the outcome which most appropriately and proportionately fulfils the purpose for the seriousness of the conduct in question, the Panel is mindful that these proceedings look forward and are designed to protect the public, deter future misconduct and maintain the reputation of the profession.

4.19. The Panel has considered the range of outcomes available under the 2020 Regulations starting from the least severe (Final Written Warning) and moving to the



most severe (Dismissal Without Notice). The Panel has considered the imposition of a Final Written Warning but has concluded that in the absence of the officer demonstrating any proper insight regarding his behaviour, it can have little confidence or reassurance that there will be no recurrent misconduct in the future. To impose a Final Written Warning (even if extended), in such circumstances would send the wrong message to the policing profession and put the protection of the public at risk. It would not serve as a deterrence nor uphold the high standards of behaviour expected from police officers.

4.20. The Panel has also considered reduction in rank, but after having had regard to paragraphs 11.133 to 11.143 of the Home Office Guidance 2020 (HoG), it has concluded this course would be inappropriate. The HoG specifically provides that reduction in rank should not be used as a 'softer option' or simply where there is 'sympathy' for the officer. It is available where there are questions of poor leadership related to the specific responsibilities of senior ranks in the police force where there may be different expectations of behaviour. It is evident from the nature of the proven conduct in this case that it does not fall within the ambit of reduction in rank.

4.21. Accordingly, the Panel's decision is that the only appropriate and proportionate outcome in this case is dismissal without notice in order to meet the requirements of the misconduct regime. The imposition of this outcome should send a clear message that members of the public are entitled to expect that those who serve them at any rank are persons of unquestionable integrity, probity and trustworthiness.

4.22. The Panel recommends that the officer is placed on the barred list.

**Signed on behalf of the Panel:**

**Mr Akbar Khan, LQC**

**31 July 2024**