Neutral Citation Number: [2019] EWHC 3352 (Admin)

Case No: CO/2300/2019

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

LEEDS DISTRICT REGISTRY

The Court House

1 Oxford Row

Leeds LS1 3BG

Date: 06/12/2019

Before :

MR JUSTICE FREEDMAN

- -

Between :

THE QUEEN (on the application of THE CHIEF CONSTABLE OF NORTHUMBRIA POLICE)	**Claimant**
- and –	
THE POLICE APPEALS TRIBUNAL	**Defendant**

-and-

KATIE BARRATT **Interested Party**

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Mr Fortt (instructed by **Northumbria Police Legal Services**) for the **Claimant**

Mr Beggs QC and Mr Berry (instructed by **Haighs Law**) for the **Interested Party**

Hearing dates: 21 November 2019

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Approved Judgment

Mr Justice Freedman :

I Introduction

1.This is a challenge to the determination of the Police Appeals Tribunal ("PAT") of 25 March 2019 reduced to writing on 11 April 2019 in which it upheld a finding of gross misconduct, but allowed an appeal against the outcome of dismissal. The appeal was against the outcome of a misconduct panel ("the Panel") that the Interested Party, PC Barratt, ("the IP") should be dismissed for gross misconduct. Having allowed the appeal against the outcome of the dismissal, the PAT directed that there should be a final written warning against the IP to stay on the file for 18 months and a further recommendation that she be given additional professional development on equality and diversity. The matter comes before this court on a claim for judicial review with the permission from HH Judge Saffman on 8 August 2019. The question is whether it is open to this court on a judicial review application to interfere with a decision of the PAT, and to reinstate the outcome of dismissal or to order afresh dismissal or to make some other order.

II Background

2.The background is to be found in the IP's detailed grounds for resisting (DGR) the claim at paragraphs 7-20 and in the Claimant's skeleton argument at paragraphs 5-7. They will be summarised in the following paragraphs.

3.The IP joined Northumbria Police on 12 December 2016 having been a Special Constable (volunteer) from the age of 18. At the time of the incident she was 21 years old, and still a probationer constable.

4.On 14 December 2017, while off duty, the IP went on a Christmas night out with police colleagues in Newcastle city centre. Like other officers present, she became intoxicated (consuming around 8 alcoholic drinks). At the end of the evening, at about 22:30, the IP went to a takeaway restaurant called the Spice of Punjab with two colleagues PC Downs (who was intoxicated) and PC Bradley (who was not). There were no other customers in the restaurant. The officers ordered food and waited for it sitting at a table. In conversation with the other two officers, and out of the hearing of the restaurant staff, the IP recalls using racially offensive language about the staff.

5.Whilst waiting for her pizza to arrive she made racially offensive comments to her colleagues about the staff who worked there (the staff did not hear the remarks). She called them 'fucking Pakis' and 'fucking niggers'. She referred to the staff as 'Pakis' on at least five occasions when talking to her colleagues, including stating 'I wish these Pakis would hurry up with me pizza'. She was reported to the police by one of her fellow police officers who had been out with her that evening.

6.The Claimant's professional standards department investigated the IP's conduct and served her with a notice of hearing pursuant to regulation 21 of the Police (Conduct) Regulations 2012 ("the PCR"). The allegations, which appear to have been pleaded in alternative, were as follows:

7.

Allegation 1- Discreditable Conduct

On Thursday 14 December 2017 at the Spice of Punjab takeaway in Newcastle city centre, you Officer Barratt, whilst off duty and intoxicated made racially offensive comments about members of the public, namely the staff working at Spice of Punjab, calling them “fucking niggers and fucking Pakis”.

By making these racially offensive comments you behaved in a manner which brought discredit to Northumbria Police and undermined the public’s confidence in the police service.”

Allegation 2- Discreditable Conduct

On Thursday 14 December 2017 at the Spice of Punjab takeaway in Newcastle city centre, you Officer Barratt, whilst off duty and intoxicated made racially offensive comments about members of the public, namely staff working at Spice of Punjab, calling them “Pakis” on at least 5 occasions, including saying “I wish these Pakis would hurry up with me pizza”.

By making these racially offensive comments you behaved in a manner which brought discredit to Northumbria Police and undermined the public’s confidence in the police service.”

8.The IP served a response to the allegations pursuant to regulation 22 of the PCR in which she:

i)denied allegation 1;

ii)admitted allegation 2 in part- admitting to using the word “Paki” twice (she did not admit that in fact it was five times), for which she apologised unreservedly;

iii)admitted that her behaviour amounted to misconduct (she did not admit that it was gross misconduct) recognising that her use of the word “Paki” was totally inappropriate, and that her conduct was capable of undermining public confidence in the police;

iv)stated:

“The officer bitterly regrets the use of the word, which was completely out of character, as confirmed by PC Gray …. Who describes her as “well mannered, considerate and respectful”, and by PC Vout… (“a respectful and courteous person”). PCs Harvey, Hall and Younas had never previously witnessed any inappropriate behaviour from the officer, or any causes for concern.”.

III The Panel’s decision

9.On 26-27 June 2018 the matter came before the panel which comprised Ms Rachel Mangenie, T/ Superintendent Dave Anderson and Dr Mohammed Farsi. The panel found allegations 1 and 2 both proved, and that the IP’s conduct amounted to gross misconduct.

10.The panel concluded in its determination dated 27 June 2018 that in addition to the use of the word “Paki” the IP also used other highly offensive language including referring to staff as ‘fucking niggers’ and ‘fucking Pakis’. The panel found that this seriously undermined the trust and confidence that the public has in the police service and jeopardised its reputation, such that dismissal was the only appropriate outcome. The panel’s conclusions as

to outcome included the following remarks:

"The Panel have considered the character references which are indeed impressive … The Panel have also considered other documents which compliment PC Barratt on her professional behaviour. PC Barratt is clearly a young enthusiastic and dedicated Police Officer ...

In making this decision the Panel have had regard to our purpose as set out in *Salter v Chief Constable of Dorset Police [2012] EWCA Civ 1047* : namely to protect the public and to maintain the high standards and good reputation of an honourable profession. We have also considered the recent case of *R (On the application of Williams) v Police Appeals Tribunal [2016] EWHC 2798* which reiterates the relative lack of weight that a Panel must give to personal mitigation' however impressive, when balanced against the public interest in maintaining public confidence in the police service ...

The Panel conclude that the appropriate sanction is Dismissal without notice …

… We have sympathy for PC Barratt and the situation she finds herself in …

The serious nature of the incident and public perception cannot be underestimated. Whilst no member of the public has been directly affected the issue is highly sensitive and the words used can cause great offence. Any member of the public hearing such comments from a serving Police Officer would no doubt be offended and their confidence in that Officer and the Police force would be diminished.

It is concerning to the panel and likely would be to the public, that a young officer in current times would use such language ***either consciously or unconsciously*** , particularly given that diversity training is detailed and central to a student's officer training and development.

When making the decision, we have had particular regard to the ethnic minority communities who resided in the Northumbria Policing Area and also to the scale of national concern of the issue of racism throughout the Police Service …

The Panel are persuaded that PC Barratt does not hold deep seated racist values. There has been no evidence presented which supports this assertion. We do not believe that PC Barratt is inherently racist and this was an out of character incident.

The deliberate or conscious use of discriminatory language will always undermine public confidence that the officer concerned cannot discharge their duties in accordance with the Code of Ethics.

Unconscious discrimination however, which the Panel deem this situation to be, can also have a significant impact on public confidence.

The Panel has considered whether this was a case where a lesser sanction may be available but regretfully concludes it is not. ***This type of behaviour undermines public confidence. A confidence that depends on Police Officers demonstrating the highest standards of personal and professional behaviour and safeguarding the public. We concluded that an outcome where PC Barratt was allowed to remain an***

Officer with Northumbria Police, would seriously undermine the trust and confidence the public have in the organisation and jeopardise the reputation of the Police Service." (emphasis added).

IV Appeal to the PAT

11.The IP appealed the panel's decision to the PAT on various grounds including that the panel's decision that she be dismissed was "unreasonable". Rule 4(4)(a) of the Police Appeals Tribunals Rules 2012 ("the PAT Rules") permits an officer to appeal the decision of a panel to the PAT on the ground *"that the finding or disciplinary action imposed was unreasonable".*

12.It is to be noted that the appeal was not by reference to the absence of reasons for the decision or by reason of the use of the words "unconscious discrimination". As regards to the appeal as to outcome it was on the basis that the panel's decision that the IP be dismissed was "unreasonable".

13.On 24 October 2019 the PAT Chair, Dorian Lovell-Pank QC, decided pursuant to r.11 of the PAT Rules that the IP's appeal as to disciplinary action (only) should proceed to a hearing before the PAT. As regards an intended appeal against the finding of gross misconduct Mr Lovell-Pank QC found that the decision was entirely reasonable. He had also found on the facts that the decision to prefer PC Down's evidence was entirely reasonable.

14.On 25 March 2019 the matter came before a full PAT, which comprised Dorian Lovell-Pank QC (Chair), Deputy Chief Constable Jo Farrell (since appointed Chief Constable of Durham Police) and Mr Stephen Smith. Both parties were represented by counsel. The PAT announced its decision, and a summary of its reasons (with written reasons to follow), that:

i)the appeal was allowed on the basis that the panel's finding as to outcome was unreasonable;

ii)the panel's decision that the IP be dismissed was substituted with a final written warning of 18 months' duration;

iii)the IP was to be reinstated and given back pay from the date of her dismissal (less earnings since her dismissal).

15.In its written decision dated 11 April 2019, the PAT set out the allegations, the facts, details of the hearing before the panel, the IP's grounds of appeal, the submissions made by counsel, its legal approach and its decision. The basis for PAT's decision, by reference to the PAT's written decision dated 11 April 2019**,** was as follows (emphasis added):

"7.16 We have looked carefully at the terms in which the panel has set out its reasons on outcome. We try not to indulge in over rigorous analysis nor emphasise semantic points.

7.17 The CoP (the college of policing Guidance on outcomes in police misconduct proceedings *(2017) at paragraphs 4.51 to 4*.54 reads:

"4.51 Discrimination towards person on the basis of [race] is never acceptable and really serious.

4.52 Discrimination… may be conscious or unconscious

4.53 Cases where discrimination is conscious or deliberate will be particularly serious. In these circumstances the public cannot have confidence that the officer will discharge their duties in accordance with the Code of Ethics

4.54 Unconscious discrimination can, however, also be serious and can also have significant impact on public confidence in policing."

7.18 The nub of this appeal revolves around the sanction of dismissal. In comparing to our decision on outcome, it is important to bear in mind that a PAT does not conduct a rehearing, it does not decide what it would have done had it been the panel itself, but rather it reviews the panel's thought processes and decision and consider if the panel has approached the case in the right way and applied itself particularly to authority and the guidelines.

Just as the panel did, we have found this a difficult case but for different reasons.

7.19 The panel sets out at some length its reasons for dismissing KB and they overlap with the reasons for its finding of gross misconduct.

7.20 The panel begins by announcing its decision to dismiss KB early on in its reasons. It then goes on to say that the discrimination was unconscious in what appears to us to be an afterthought or justification without explaining what it means or has in mind by the use of that term.

7.21 The CoP distinguishes between cases of conscious and deliberate discrimination which will be particularly serious and unconscious discrimination which *"can, however, also be serious"*.

7.22 The CoP does not define the term *"unconscious discrimination"*. Some may argue it does not need to be. Others may argue it should in some way be defined so as to be clear and understood by all concerned.

The panel itself has not chosen to explain what it means when it says that this was *"an incident of unconscious discrimination"*.

7.23 The Panel concludes that KB has not been dishonest nor sought to mislead the panel, that she was in drink, that she was not inherently racist and that what happened was an out of character incident

7.24 We try to avoid undue speculation as to what the panel had in mind. We think it unlikely that the panel meant that KB was unaware that her use of the abusive language was racist. She accepted that it was. Equally unlikely is that the panel meant that KB was so drunk that she was unaware of everything she was saying. She remembered using the word *"Paki"* twice.

We ask ourselves rhetorically whether using KB's language in one's sleep or under anaesthetic would be considered to be *"unconscious discrimination"* and make one liable to be sanctioned.

7.25 The panel's decision is in two parts and neither of which we consider to be properly explained. The panel has looked at the words and used and determined that they amount to gross misconduct and merit, nothing less than dismissal.

The panel has acknowledged that there is no evidence that KB holds any serious racist values, the non-deliberate and the out of character nature of the use of the words, the fact that it was not directed at the staff, nor indeed, heard by them and then determined that what had occurred was an incident of unconscious discrimination, without explaining what it had in mind by the use of that term.

The panel then goes on to say that it has considered whether any outcome short of dismissal is appropriate. It regrets not, but, again, it gives no or no proper reason.

7.26 We entirely endorse the principle that uppermost in the minds of a panel and a PAT will be the maintenance of confidence in and the reputation of the force and these interests must take precedence over those of the individual offer.

7.27 In giving reasons for its decision, a panel is not required to spell out its thought process in excessive detail. What is expected of it are reasons which are sufficiently clear to explain on what basis it has come to its conclusion so as to allow all interested parties to understand its thought process and to know why- taking this case in particular- the officer had lost her job.

7.28 We consider that this has not happened here. Whereas the panel has noted and quoted from established authority and guidelines, it has made an important finding (unconscious discrimination) and decision (dismissal) without proper explanation so that an informed reader of the panel's reasons is left in considerable doubt as to the basis of the outcome.

7.29 This makes the panel's decision on outcome unreasonable as that word is understood in the context of an appeal to a PAT, as is set out at some length at paragraph 6 above.

7.30 The reputation of and public confidence in the force are maintained not simply by the severity of outcomes. They are maintained equally by the force being seen to be an organisation which is not given to knee-jerk reactions to what at first blush might appear to merit dismissal. A force which is unnecessarily punitive of its own members will not maintain the reputation or the confidence of its own members or the public."

V The law

16.The law is agreed as per paragraph 6 of the IP's skeleton argument which reads as follows:

"6. As to the PAT's approach, drawing on the helpful distillation of the principles *in R (CC of Cleveland) v PAT & Rukin [2017] EWHC 1286 (Admin)* :

(a) An officer such as the IP who is dismissed by a misconduct panel has an appeal as of right to the PAT.

(b) One of the three prescribed grounds of appeal to the PAT is *"that the finding or disciplinary action imposed was unreasonable"*: r.4(4)(a) of the PAT Rules 2012

(c) The test for 'unreasonableness' under r.4(4)(a) is something less than the *Wednesbury* test: see in particular *Green* (cited by the PAT at [6.8] **160**) and *Woollard* (cited by the PAT at [6.11] **161**) and *Rukin* at [53(A)]"

17.The law is also agreed per paragraph 8 of the Claimant's skeleton argument, quoted in *Chief Constable of Cleveland Constabulary v PAT (Rukin) [2017] EWHC 1286 (Admin)* [53] which reads as follows:

"(A) When considering whether a finding by a panel is unreasonable the PAT is not required to find it Wednesbury unreasonable as a prerequisite for overturning the decision of the panel.

(B) The PAT is not entitled to substitute its own view for that of the panel unless and until it has already reached the view for example that the finding may by the panel was unreasonable or that there was another valid basis for appeal as provided by paragraphs 4(4)(b) and/or 4(4)(c) of the Rules.

(C) The PAT is entitled to substitute its own view for that of the panel once it has concluded either that the approach the panel took was unreasonable or the appeal from the panel's decision is justified under grounds 4(4)(b) or 4(4)(c)

(D) In other words, rule 4 (4) provides a gateway for an appeal. If the appellant gets through the gateway because the PAT find that the decision of the panel was for example, unreasonable or unfair then it is open to the PAT to substitute its own views for those of the panel. Thus, once the gateway is negotiated, the PAT can deal with this matter on a clean slate basis and can make an order dealing with the appellant in any way in which he could have been dealt with by the panel whose decision is appealed."

18.In *R(on the application of the Chief Constable of Durham) v Police Appeals Tribunal and Cooper [2012] EWHC 2733 (Admin)* the test of whether a decision of a Panel could be described as unreasonable was characterised in the following way by Burnett J (as then was) whose judgment was upheld by the Court of Appeal:

"It follows therefore, to my mind, that the test imposed by the rules is not the Wednesbury test but is something less. That does not mean that the appeal tribunal is entitled to substitute its own view for that of the misconduct hearing panel, unless and until it has already reached the view, for example, that the finding was unreasonable. Nor, I should emphasise, is the Police Appeals Tribunal entitled, unless it has already found that the previous decision was unreasonable, to substitute its own approach. It is commonplace to observe that different and opposing conclusions can each be reasonable. The different views as to approach and as to the weight to be given to facts may all of them be reasonable, and different views may be taken as to the relevance of different sets of facts, all of which may be reasonable. The Police Appeals Tribunal is only allowed and permitted to substitute its own views once it has concluded either that the approach was unreasonable, or that the conclusions of fact were unreasonable. None of what I say is revolutionary or new."

19.In R (on the application of *Williams) v Police Appeals Tribunal [2016] EWHC 2708 (Admin)* , Holroyde J (as he

then was) emphasised that gross misconduct poses a threat to the maintenance of public confidence in the police and at paragraph 66 stated as follows (emphasis added):

"In my judgement, 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 ..... Gross misconduct involving dishonesty or lack of integrity will by its very nature be a serious threat: save perhaps in wholly exceptional circumstances, the public could have no confidence in a police force which allowed a convicted fraudster to continue in service. Gross misconduct involving a lack of integrity will often also 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.**"

20.Further, as regards new evidence not before the PAT comprising the evidence of Detective Superintendent Patsalos, the primary submission of Mr Beggs QC for the IP is that the Court should disregard that evidence in its entirety because the Court should judge the decision of the PAT strictly by reference to the material that was before the PAT. Mr Fortt accepted that position. I have disregarded that evidence. The same must apply to the newspaper cutting of the spokesman for the takeaway restaurant who welcomed the decision of the PAT and understood that everybody makes mistakes. If I had taken it into account, it would carry little weight because it would show only the restraint of a particular establishment, which had been quite shocked. It appears at face value to be more by reference to the personal consequences to the police officer, which as the cases say, is a matter of personal mitigation carrying less weight in this context than in other contexts: see *Salter v Chief Constable of Dorset Police [2012] EWCA Civ 1047* (and referred to by the panel as above set out). It appears to be less by reference to the key matter, namely the trust and confidence of the public as a whole in the organisation and the reputation of the Police Service: see *R (on the application of Williams) v Police Appeal Tribunal [2016] EWHC 2708 (Admin)* , also referred to by the panel, and also in the paragraph immediately above.

VI Approach of administrative court of judicial review of PAT's decision

21.The correct approach to be taken by the Administrative Court on a claim for judicial review of a PAT's decision is that stated by Burnett J in R *(CC of Dorset) v PAT & Salter [2011] EWHC 3366 (Admin)* (emphasis added):

"[9] Proceedings in the Administrative Court seeking to challenge the decision of a Police Appeals Tribunal do not arise by way of appeal, but by way of a claim for judicial review. In those circumstances, a claimant in judicial review proceedings must establish a public law error before the decision of that Tribunal could be quashed."

"[25] Absent another error of law on the part of the Police Appeals Tribunal its decision on sanction could be interfered with only on classic *Wednesbury* grounds, in short that on the material before it no reasonable Tribunal could have reached the conclusion that it did."

The Administrative Court should guard against the misuse of its jurisdiction by Chief Constables seeking to mount what are effectively "undue leniency" appeals to decisions of misconduct panels or PATs.

VII Grounds 1 and 2

22.Ground 1 is as follows:

"The Claimant contends that the decision of the PAT was unlawful in that its conclusion that the Panel's decision as to outcome was unreasonable and was perverse and not a conclusion which was open to it. If that contention is accepted, the PAT had no lawful basis for replacing the Panel's decision as to outcome with its own."

23.This was broken down by the Claimant in to two questions, namely:

i)Was it open to the PAT to conclude that the panel's determination left "considerable doubt" as to why dismissal was the appropriate outcome?

ii)Was it open to the PAT to conclude that the panel's conclusion as to outcome was unreasonable in the sense that it had not imposed an outcome, which was within the range of reasonable outcomes available to it?

24.Ground 2 is as follows:

"Further, or alternatively, if the panel's decision was unreasonable for the reasons given by the PAT, then the PAT could not itself reasonably have concluded that dismissal was a knee jerk reaction and was unnecessarily punitive. The conduct in question in this case is such that no reasonable tribunal could conclude that anything other than dismissal is warranted."

25.Ground 2 operates in circumstances where the decision of the panel was so impaired that the PAT was entitled to impose its own sanction. In those circumstances the question is whether the decision to impose a final written warning was unreasonable in the sense that no PAT could properly reach the conclusion that such an outcome was appropriate, having regard to the central purpose of the disciplinary regime to maintain public confidence in the police service.

26.The IP submits that the application has been brought out of time because, although brought within the 3-month period, it has been not been brought promptly. The parties in writing and orally in submissions before this Court and in the skeleton arguments have addressed limitation at the end of the submissions. I shall follow this course in this judgment.

VIII Ground 1 – the submissions

1. **The IP's submission in respect of ground 1**

27.The IP contends that:

i)there was no misdirection;

ii)the PAT is entitled to 'deference';

iii)the PAT's decision was not irrational.

2. **No misdirection**

28.Although Ground 1 characterises the PAT's decision as "*unlawful*", it is in fact a pure rationality challenge. There is no allegation made that the PAT misdirected itself or erred in law. For the reasons set out in the DGR, it is clear that the PAT cited, understood and correctly directed itself as to the relevant law.

3. **Entitlement to deference**

29.The PAT's decision is entitled to 'deference' such that the court should be slow to interfere with it. The PAT is a specialist appellate tribunal, experienced and expert in assessing police misconduct, including the impact of an officer's misconduct on public confidence in and the reputation of the police. Although he deprecated the use of the term 'deference' in *Salter*, Burnett J (as he then was) said at [33]:

"…The reason why the court is slow to interfere with the decision of an expert tribunal is that the court does not share the expertise. It is not 'deference' but a proper recognition of the need for caution before disagreeing with someone making a judgment on a matter for which he is especially well qualified, when the court is not."

30.PAT is comprised of a legally qualified Chair, a senior serving police officer and a retired police officer. In the

IP's case, the Chair of the PAT was a highly experienced QC practising in the field of criminal law, and himself one of (if not the) most experienced Chair of the PAT. The senior police member of the PAT was Jo Farrell, the Deputy Chief Constable (and now Chief Constable) of Durham Police, the neighbouring force to Northumbria Police, who spent a substantial part of her police career, in ranks up to and including Assistant Chief Constable in Northumbria Police.

d. PAT decision not irrational

31.The IP's submission is that the PAT's conclusion that the panel's decision was unreasonable, because the panel failed to give proper reasons for the finding that the IP's actions amount to "unconscious discrimination". Insufficiency of reasons is said to be a proper basis for finding that a panel's decision is unreasonable. The IP submits that the finding of unconscious discrimination was important because of reliance on the section of the College of Policing guidance that it "should be considered especially serious". It was not discrimination within the meaning of the Equality Act 2010 section 13. It was not explained what was meant by unconscious discrimination.

5. **The response of the Claimant**

32.The Claimant contends that the finding that the reasons of the panel were insufficiently clear, such as the decision was unreasonable was not open to the PAT. It was clear that the language used rendered the conduct so serious that dismissal was the only available outcome.

"16. On the question of whether the reasons of the panel were insufficiently clear such that the outcome was unreasonable, the Claimant contends that such a finding was not open to the Defendant for the following reasons:

(1) The extracts of the panel's determination set out above readily demonstrate that it was the nature of the language used which rendered the conduct so serious that dismissal was the only available outcome. This was due to the impact on the trust, confidence and reputation of the police service. That is all the information that the IP needed to understand why the decision as to Outcome had been reached.

(2) In that context, description of the discrimination as being 'unconscious' (not being a conclusion which it is easy to understand) does not introduce any lack of clarity as to the reason for dismissal. The reason for dismissal could not have been clearer.

(3) The focus of the panel on the nature of the language used and the damage to the reputation of the police service was therefore the correct focus and constituted proper and clear reasons for dismissal.

(4) The Defendant's decision as to the alleged lack of clarity was for the above reasons flawed and was not a reason which permitted the IP to substitute its own view as to Outcome.

……

17(3) In fact the opposite is true: it is perverse to conclude in the face of the conduct of the officer in this case that it was harmful to the reputation of the police service to dismiss the officer and no reasonable PAT could have so found. Furthermore, no reasonable PAT on the facts of this case could properly conclude that anything other than dismissal was warranted."

IX Ground 2 – the submissions

33.The second ground is that if contrary to Ground 1, the PAT was entitled to substitute its own sanction, the PAT's decision to substitute a final written warning was irrational because the conduct in question in this case is such that no reasonable tribunal could conclude that anything other than dismissal is warranted.

a. Submission of the IP

34.In cases of gross misconduct, a final written warning is the next most severe sanction to dismissal. Its effect is draconian, meaning that any case (whether misconduct or gross misconduct) against the officer in the subsequent 18 months will result in their dismissal, save in "*exceptional circumstances*" where a final written warning may be extended once: regulation 35(7)(b) of the Police (Conduct) Regulations 2012.

35.The PAT in no sense downplayed the seriousness of the IP's conduct and the capacity it had to undermine public confidence and the reputation of the police. Indeed, the PAT found that the panel's decision that the IP's conduct amounted to gross misconduct was entirely reasonable. The PAT concluded with an "Epilogue" that emphasised in clear terms that the IP's language was not in any way acceptable and that it was "*to be roundly condemned".*

36.The PAT also properly had regard to the panel's findings that:

(a) PC Barratt was 21 years old, having previously been a special constable and joining Northumbria Police as a student constable on 12 December 2016;

(b) PC Barratt had not been dishonest nor sought to mislead the panel;

(c) PC Barratt was in drink at the material time;

(d) PC Barratt was not inherently racist;

(e) what happened was an out of character incident;

(f) there was no evidence that PC Barratt held any racist values (the panel had in fact gone further and found that "…*PC Barratt does not hold deep seated racist values. There has been no evidence presented which supports this assertion. We do not believe that PC Barratt is inherently racist and this was an out of character incident."*)

(g) the nature of her words was non-deliberate;

(h) her words were not directed at the staff;

(i) her words were not heard by the staff, or indeed by any members of the public.

b. Submission of the Claimant

37.No reasonable PAT on the facts of this case could properly conclude that anything other than dismissal was warranted. That was what the panel held. It considered whether this was a case were a lesser sanction may be available but then only concluded that it was not. The submission here goes beyond this. It is that no reasonable tribunal could conclude anything else. It is a conclusion of perversity.

38.Even noting the difficulty of reaching such a conclusion especially in respect of an eminent Tribunal, the Claimant urges upon the Court the difficulty of retaining such an officer within the police service. It is that it gives such a terrible message to the public who expect a higher standard of officers. It is especially bad as regards the confidence of ethnic minority communities in Northumbria.

X Discussion – Ground 1

39.In my judgment, as regards Ground 1, the decision of the PAT that "*the reasoning was so deficient that it has made an important finding (unconscious discrimination) and decision (dismissal) without proper explanation so that an informed reader of the panel's reasons is left in considerable doubt as to the basis of the outcome*" and that "*this makes the panel's decision on outcome unreasonable as that word is understood in the context of an appeal to a PAT*" is wrong. The reasoning was not so deficient as having been made without proper explanation nor did it leave the reader in considerable doubt as to the basis of the outcome nor was the decision thereby unreasonable.

40.This is because it is clear that the words used were the critical reason for the decision of the panel, and hence the references in the decision to:

i)the words used can cause great offence;

ii)a member of the public hearing that the police officer had used those words would be offended and their confidence in the officer and police force would be diminished;

iii)that concern would be exacerbated by the use of language by a young officer given detailed diversity training;

iv)it is exacerbated by the substantial ethnic minority communities in Northumbria and the scale of concern nationally about racism throughout the police service.

41.The suggestion is that the use of the words "unconscious discrimination" changed all of that because the words are said to be so unclear that they leave the reader in a state of considerable doubt as to the basis of the outcome. In my judgment, they do not have that effect because it is clear that it was the words used which were critical as stated in the paragraph immediately above.

42.Further, in context, the word "discrimination" does not refer to an act of discrimination in the sense that would offend the Equality Act 2010. It is not to prefer one person or class of persons over another. It is a reference to discriminatory language. Mr Beggs QC for the IP helpfully pointed out that there were four references to unconscious discrimination as follows:

i)to using "such language consciously or unconsciously";

ii)that this was an incident of unconscious discrimination;

iii)the deliberate or conscious use of discriminatory language will always undermine public confidence;

iv)unconscious discrimination can also have a significant impact on public confidence.

43.Seen in context, this could not sensibly be construed as discrimination in the sense of treating people more favourably than others. The juxtaposition of a) and b) above and of c) and d) above is such that the discrimination in b) and in d) is the use of discriminatory language. That accords with the facts of the case and with the words used seen in context.

44.It is in that context that the word "unconscious" is to be understood. Here it is a contrast between conscious and unconscious. Where there is conscious or deliberate use of discriminatory language, this will always

undermine public confidence. However, where it is unconscious, it can also have a significant effect on public confidence. What was it that led to the decision that the discriminatory language was unconscious? This cannot mean in context some form of automatism. It is about all or some of the features referred to in paragraph 35 above.

45.Nevertheless, the panel had to consider in this case on its own facts whether this was a case where a lesser sanction may be available. The panel considered that the conduct did undermine public confidence such that allowing the IP to remain in office would seriously undermine the trust and confidence the public have in the organisation and jeopardise the reputation of the police service.

46.It therefore follows that although the words must have been used consciously in one sense, they were characterised as unconscious because they were said in drink and/or the IP was not inherently racist and/ or it was out of character and/ or her words were not deliberate and/or they were not targeted at or heard by staff.

47.It is recognised that the language is not precise. The term “discriminatory language’ would have been preferable throughout to the term ‘discrimination’, but it does not matter because it is apparent that this is what the panel meant in context. Unconscious might in other contexts be confused with a person having no awareness, whereas in this case the IP must have had some reduced awareness. Nevertheless, it was in context used by reference to the matters set out above including under the influence of drink, without inherent racism and out of character.

48.In any event, there was no confusion about this. In the grounds of appeal from the panel, there was no ground to this effect that there was uncertainty as to what was meant. Nor was this Court pointed to any oral submission to the effect that there was an overriding uncertainty. The IP submitted that in view of the eminence of the PAT it would be in a particularly good position to notice the uncertainty. The Court has at all times had a proper recognition of the need for caution before disagreeing with a Tribunal making a judgment on a matter for which they are especially well qualified. Whether they reached their conclusion about uncertainty by themselves or as a result of submissions made to them, it was not well founded.

49.In any event, if, contrary to the foregoing, the expression about unconscious discrimination was uncertain, in my judgment, that did not affect the fact that the panel decided the outcome because of the language used. The panel made the point that the language used by the IP, which was not deliberate or conscious, still undermined the trust and confidence of the public in the organisation and jeopardised the reputation of the police service.

50.It was suggested by Mr Beggs QC that the concept of unconscious discrimination was to introduce a further charge without any notice about the same in advance. He pointed to a decision of Beatson J who had said that finding somebody guilty of a matter amounting to serious misconduct without having charged the same was bad practice: see *R (on the application of the Chief Constable of the Derbyshire Constabulary) v Police Appeals Tribunal [2012] EWHC 2280 at paragraph 38* and following. In my judgment, this point has no application to the instant case. For the reasons set out above, the reference to “unconscious discrimination” was not to some breach of the Equality Act 2010 or some other actionable wrong, but to discriminatory language. In any event, the appeal to the PAT was not on this basis, nor in my judgment did the PAT find this to be the case. In any event, the point is based on a misconception about the meaning of “unconscious discrimination” being to add a charge, which the PAT did not find to be the case: it simply was concerned about the uncertain meaning of the expression.

51.It was also submitted by Mr Beggs QC that the panel did not give proper reasons why a final written warning or some sanction less than dismissal was appropriate. It was necessary to consider the lesser sanction first and work upwards rather than just choose the most draconian sanction. In my judgment, the panel did consider the possibility of a lesser sanction. It stated that “the panel has considered whether this was a case where a lesser sanction may be available but regrettably concludes that it is not.” It went on to say that a conclusion where the IP was allowed to remain an officer would seriously undermine trust and confidence the public have in this organisation and jeopardise the reputation of the police service. In my judgment, that is a very clear reason for rejecting any penalty other than dismissal. This also is an answer to a submission which was made to the effect that the panel did not consider that dismissal is not a necessary corollary of a finding of misconduct. That is demonstrably not the case from the structure of the panel’s decision on misconduct followed by the section on mitigation and sanction and the express consideration of a lesser sanction than dismissal.

52.For all these reasons, the decision that the reasoning was too uncertain is not well made out. Despite the

proper caution before disagreeing with the PAT, in my judgment, it was unreasonable of the PAT to find that there was uncertainty. They had no reasonable ground to conclude this. Further, the PAT did not find that dismissal was outside the range of reasonable responses. Put another way, it did not find that only a final written warning was appropriate. There was therefore no basis for the PAT to substitute the penalty of a final written warning. In these circumstances, Ground 1 must succeed.

XI Discussion - Ground 2

53.If, contrary to ground 1, the PAT was entitled to substitute its own sanction on the facts of this case, in order to consider how rational was the approach of PAT, it is first necessary to consider the reason given by PAT for departing from the decision to dismiss of the panel. The parties were asked to address where such reasoning was in the decision of the PAT. Mr Beggs QC pointed to paragraphs 7.23 and 7.25 about the absence of serious racist values, the non-deliberate and out of character nature of the words used. However, this was not part of the reasoning for a lesser penalty than dismissal. It was a part of the summary of the matters which had been found by the panel. One therefore turns to paragraph 7.30. This is simply to say that a force which is unduly punitive of its own members will not retain public confidence. Even if this were true, it does not explain why it is unduly punitive in this case to dismiss.

54.In my judgment, the effect of the foregoing is that the PAT which had been critical of the absence of adequate reasoning in respect of its decision on outcome has replaced that decision without any reasons being given for a final written warning. This issue was a matter on which the assistance of the parties was sought. Mr Beggs QC and Mr Berry helpfully addressed this. Mr Beggs QC said that the Court should come to the view that it is not necessary to remit because it is clear that the conclusion of a written final warning is appropriate. It would involve unnecessary delay to remit to the PAT. He says that if the Court is against this, then it should remit to the PAT, and submits that it is not necessary to have a differently constituted tribunal. He recognises that it would be available to the Court to substitute its own judgment for that of the PAT. However, that was qualified by Mr Berry, Mr Beggs' junior who followed, referring to subsections 31(5) and 31(5A) of the Senior Courts Act 1981 which say as follows:

"(5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition –

(i.a.i.a)remit the matter to the court, tribunal or authority to which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or

(i.a.i.b)substitute its own decision for the decision in question."

(5A) But the power conferred by subsection (5)(b) is exercisable only if-

(i.a.i.b.i.a)the decision in question was made by a court or tribunal,

(i.a.i.b.i.b)the decision is quashed on the ground that there has been an error of law, and

(i.a.i.b.i.c)without the error, there would have been only one decision which the court or tribunal could have reached."

55.Thus, Mr Berry submitted that if this Court quashes the decision of the PAT on the ground of no reason for the difference in outcome, it may only substitute its own decision if that decision is the only which the PAT could have reached.

56.In my judgment, this is a case where the Court must quash the decision of the PAT on the ground that there has been an error of law. The error is that there were no reasons provided for the decision to change the outcome to a final written warning. If, contrary to the foregoing finding, there were any reasons, the reasons were not adequate. It is particularly unfortunate that the PAT should have failed to give any or any adequate reasons in circumstances where the ground on which they were exercising their discretion afresh was that the panel's

decision was on outcome unreasonable since it made a finding and a decision *"without proper explanation so that an informed reader of the panel's reasons is left in considerable doubt as to the basis of the outcome."* [7.28-7.29].

57.In my judgment, the only reasonable decision on the facts of this case was dismissal. This was due to the words used. It was not a word used inappositely or just an odd word that just slipped out: it was a whole volley of expressions, and it contained vile, offensive and racist language.

58.It was submitted for the IP that if the rules had intended that dismissal would be the only sanction for use of racist language, it would have said so. That is not a well-made submission. There are times when there is a slip of language e.g. by the use of an old-fashioned and now discredited expression with racist overtones. It was not a lapse of one word. The panel was evaluating the precise circumstances of this case, namely the repeated use of the terms "Paki", and the other deeply offensive language which was used.

59.The personal mitigation is significant, as are the consequences of dismissal on a person who appeared to have a promising career as a police officer. This accounts for the hesitancy of the panel, which is in contrast to the reference to a knee-jerk reaction at paragraph 7.30 of the PAT decision. However, in the end, it simply does not alter the stark reality which is that there was only one sanction for the particular findings of gross misconduct, namely dismissal.

60.It is appropriate to consider the impact of any other decision on right thinking and well-informed members of the public. It was suggested that the fact that the PAT with all of their experience and expertise would take the view that it is sufficient to have a final written warning should weigh so heavily as to encourage this Court not to depart from that. This Court is alive to the fact that some might wish the IP not to have to suffer more than she has done already. The restauranteur was apparently satisfied by the warning.

61.This Court has considered all of this including whether some sanction short of dismissal might fall within a range of reasonable responses. It has reminded itself that it is no function of the Court on a judicial review application, and particularly on a review of the PAT, to correct something simply because it regards it as "unduly lenient". Further, as noted above, the Court gives considerable weight to the PAT's decision on outcome notwithstanding the error of law identified above. However, I repeat a part of the language of the panel as follows:

"The serious nature of the incident and public perception cannot be underestimated. Whilst no member of the public has been directly affected the issue is highly sensitive and the words used can cause great offence. Any member of the public hearing such comments from a serving Police Officer would no doubt be offended and their confidence in that Officer and the Police force would be diminished.

….

The Panel has considered whether this was a case where a lesser sanction may be available but regretfully concludes it is not. This type of behaviour undermines public confidence. A confidence that depends on Police Officers demonstrating the highest standards of personal and professional behaviour and safeguarding the public. We concluded that an outcome where PC Barratt was allowed to remain an Officer with Northumbria Police, would seriously undermine the trust and confidence the public have in the organisation and jeopardise the reputation of the Police Service."

62.Mr Fortt, Counsel on behalf of the Claimant, pointed to the analogy of the Court's approach to dishonesty in respect of a professional person where Sir Thomas Bingham MR had said in *Bolton v The Law Society [1994] 2 All ER 486* that *"the reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."* This is not a dishonesty case, nor is it a case about a solicitor as in *Bolton*. Nevertheless, *Bolton v The Law Society* is a case which has been of wider application than limited to dishonesty or solicitors. It has a resonance in respect of a police constable using the language which the IP did in the precise way and extent which has been found by the panel and upheld by the

PAT. Even if it was an isolated occasion, the racist and offensive language as was used by the IP on the night in question cannot be tolerated within the police force. The panel was right to take the view that retaining the IP would seriously undermine the trust and confidence the public have in the organisation and jeopardise the reputation of the Police Service.

63.If, contrary to the foregoing, the reasoning of the PAT was evident from the decision, in my judgment, I reach the same conclusion on the basis contained in Ground 2. That is that the PAT's decision to substitute a final written warning was irrational because the conduct in question in this case is such that no reasonable tribunal could conclude that anything other than dismissal was warranted. In reaching that conclusion, the Court recognises that a finding of *Wednesbury* unreasonableness requires more than taking the view that the decision to have a final written warning was one which was unreasonable or one which this Court would not have made. The Court has given heavy weight to the vast experience and eminence of the members of the PAT and to their usual ability to evaluate what undermines trust and confidence in the police and to determine sanctions. Nevertheless, in the circumstances of this case and all the matters set out above about the gravity of the findings of the panel and the consequences as regards the undermining of public confidence in the police, the final written warning and the recommendation of diversity training were not available to the PAT, and fell well outside any band of reasonable responses. The conclusion of the panel was that "*an outcome where PC Barratt was allowed to remain an Officer with Northumbria Police, would seriously undermine the trust and confidence the public have in the organisation and jeopardise the reputation of the Police Service."* In my judgment, dismissal was the only reasonable response in the circumstances of this case. The decision made, falling short of dismissal, was one which was so unreasonable that no tribunal acting reasonably could have come to it. The allegation in Ground 2 is made out.

XII Time

64.The Claimant was required by CPR 54.5(1) to bring the claim promptly in any event not less than three months after the grounds to make the claim first arose. The PAT's decision was taken on 25 March 2019 and the claim form was filed on 13 June 2019. The IP says that relief should be refused because the Claimant did not act promptly. It is clear that it is no answer to delay that the matter was brought within three months, if it has not been brought promptly.

65.The gravamen of the complaint of delay is between 23 April 2019 when the written decision of PAT was received (it was given orally on 25 March 2019) and 13 June 2019 when the application was issued. It is to be borne in mind that in the period prior to 23 April 2019, the Claimant had issued a pre-action protocol and had stated an intention as at that time that it intended to challenge the PAT's decision by way of judicial review. The grounds in the pre-action protocol were similar to the grounds subsequently issued. Nevertheless, the IP was seeking to slow down matters in two senses. First, in the response to the pre-action protocol on 18 April 2019, it suggested that the Claimant should wait until receipt of the PAT's written decision before issuing its claim, which in the event was received on 23 April 2019. Further, whereas the Claimant spoke about expedition, in reply to the pre action protocol, the IP was concerned that insistence on expedition might affect the quality of preparation for the hearing.

66.The IP says that there was a delay of 7 weeks from then until the issue of the claim form on 13 June 2019. The IP is affected because of the back pay and reinstatement being withheld in the interim. The Claimant has served a witness statement of Hayley Hebb to the effect that it required a transcript of the hearing which was done on 29/30 April 2019 and was not approved until 3 June 2019. It has not been referred to in the hearing. It also had to prepare a statement in support of the application of DS 7756 Sav Patsalos. The IP says that the statement of Ms Hebb does not explain what was being done in the month of May 2019, other than proofreading the transcript.

67.Despite the detail in the statement of Ms Hebb, I am satisfied that this case did require very careful consideration before it was to be brought. I am satisfied that it was sensible to check the transcript of the proceedings in order to consider the oral submissions and any observations of the PAT during the hearing. Whilst it was not strictly necessary for this to be done, it was desirable. In considering whether the Claimant acted promptly, extra time should be allowed for this exercise. Whilst the proceedings could perhaps have been done within a shorter period, that does not mean that the proceedings were not issued sufficiently promptly.

68.If it was not sufficiently prompt, I am satisfied that the time should be extended for the following reasons, namely:

i)The period of lack of promptness would be very short: it is some part of the 7 weeks, but not all of it and, allowing at least 4 weeks from the receipt of the written reasons, no more than 3 weeks;

ii)There was no inactivity even if it were to be held that the claim was not issued sufficiently promptly;

iii)It would not have made an appreciable difference to the position of the IP, albeit that her position as a police officer hinged on the hearing of the application for judicial review;

iv)There is a point of public importance in relation to the question of whether a police officer who has acted in the way set out above could ever be retained as a police officer. That itself is a ground for the court exercising its discretion to extend time (SSHD v Ruddock *[1987] 1 WLR 1482*). It is true that the matters in *Ruddock* had a national importance which made the importance of that case greater than the instant case, but there was still a point of public importance in this case, namely about the proper response of such discriminatory language used by a serving police constable. Indeed, the ways in which this has been judged by a panel and the PAT and the considerations to which they give rise indicate a need for judicial scrutiny about the substantive merits. That is a matter which can be taken into account as a factor as to whether in the exercise of the Court's discretion, there should be an extension.

69.For all these reasons, in my judgment, there is no time bar. The case was brought promptly. If it was not, time should be extended so that it was brought in time.

XIII Disposal

70.For all the reasons set out above, I find that the decision of the PAT on outcome should be set aside and that it should be replaced with the same decision as that of the panel, namely one of dismissal. I find that there is no time bar, or that if there is, that time should be extended so that there is no time bar. I am grateful to all Counsel for their assistance both in writing and orally. I should be grateful if the parties could agree an order to reflect the matters dealt with in this judgment, and consequential matters such as back pay and the like. I shall deal with any other consequential matters such as costs in writing.