Neutral Citation Number: [2021] CA (Bda) 12 Civ

Case No: Civ/2021/005

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2020: No. 402

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

8 July 2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL GEOFFREY BELL

- -

Between:

OSWIN PEREIRA **Appellant**

- and -

COMMISSIONER OF POLICE **First Respondent**

THE PUBLIC SERVICE COMMISSSION **Second Respondent**

Ms Victoria Greening of Resolution Chambers for the Appellant

Mr. Kevin Taylor of Walkers (Bermuda) Ltd. for the First Respondent

Date of Hearing: 24 June 2021

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JUDGMENT

BELL JA:

Introduction

1. At all material times, the Appellant was a police constable serving in the Bermuda Police Service. On Saturday 13 May 2017, then PC 2360 Pereira (I will refer to him as such even though he is no longer a serving police officer) was on duty with PC 2445 Boden on their police motorcycles when they had cause to pursue Talundae Azariah Grant, who was riding a motorcycle with a pillion passenger. The pursuit started at Barnes Corner in Southampton, involved driving at high speeds, and concluded at the junction of East Dale Lane and South Shore Road in Southampton, where both Mr Grant and the pillion passenger abandoned the motorcycle and took off on foot. Mr Grant was chased and caught by PC Pereira, and PC Boden arrived a short time later. PC Pereira twice used his Taser with a view to subduing Mr Grant, and what happened during the struggle between them led to a complaint being made against both officers, which was heard by a panel appointed under the Police (Conduct) Orders 2016 ("the PCO"), comprising Alan Dunch as chair, Douglas Soares and Acting Assistant Commissioner Sean Field-Lament ("the Panel").

2. It will no doubt be helpful at this point to detail the complaints made against PC Pereira, which were set out in the decision of the Panel, and are in the following terms:

> *(i) On or about 1200 hours on Saturday 13th May 2017 you were on duty in uniform riding a police motorcycle in pursuit of 17-year old Mr. Grant who failed to stop for police. It is alleged that after subsequently pursuing him on foot into an area of dense vegetation, you used your police-issued Taser on two occasions to neutralize a perceived threat from Mr. Grant. While Mr. Grant was on the ground, Police Constable 2445 Joshua Boden attempted to control the movements of Mr. Grant by placing hand-cuffs on his wrists. According to footage captured from your police-issued body camera, PC Boden continued to control the complainant by holding his arms behind his back while you used your left hand to hold the right side of Mr. Grant's head against a large stone. The camera images then appear to show you use your right hand to strike Mr. Grant's head twice in rapid succession while gripping your police-issued ASP baton in your clenched right fist. Immediately prior to striking Mr. Grant you are heard to say: "camera's off" before you are then shown to deactivate the body camera.*
>
> *(ii) You were subsequently prosecuted in Hamilton Magistrates Court for the offence of unlawfully wounding Mr. Grant contrary to section 306(b) of the Criminal Code Act 1907, and at the conclusion of the trial on 20th July 2018, you were found not guilty of that charge.*

(iii) Having reviewed your audio/video interview, written statement and your testimony to Magistrate Archibald Warner your account of the incident appears to be wholly inconsistent with the body camera footage.

(iv) Your account of the incident is that striking Mr. Grant with your ASP baton was purely accidental. You stated that your ASP only extended: ***"as I braced for my fall, the movement caused my police issued baton to extend forward. Mr. Grant was in the direct trajectory of my fall and therefore I am aware and accept that my baton extended and struck Mr. Grant in the area of his head or*** *face" (Interview 23.11.17 page 5 lines 35-38).*

(v) You also stated that ***"I did not strike Mr. Grant on multiple occasions again as he alleges"*** *(interview 23.11.17 page 6 line 8). The body camera footage at 4:53 – 4:54 minutes shows you striking Mr. Grant twice and it is only on the second blow that your ASP baton extended. Your account appears to be at odds with the evidence and the force used against Mr. Grant appears to be excessive.*

(vi) You also stated that "I ***then said to PC Boden 'Your camera is off' as I wanted PC Boden to record the rest from a different vantage point"*** *(interview 23.11.17 page 5 lines 24-26). However your own body camera footage shows you holding down Mr. Grant with you left hand while you used your right hand to deactivate your camera while saying* ***"camera's off".*** *Your actions in this regard occurred immediately before the assault on Mr. Grant – in fact at 4:52 minutes – just one second before you delivered the first of two strikes.*

(vii) As a result of these allegations you may have fallen below the acceptable Standards of Professional Behaviour, which is expected of members of the Bermuda Police Service.

3. The Panel gave its decision in January 2020, and made the following findings of fact as against PC Pereira:

(i) The Panel dismisses Pc Pereira's overall account as implausible.

(ii) The Panel's determination is that after a pursuit of Mr Grant, Pc Pereira lawfully deployed his TASER which eventually momentarily incapacitated Mr Grant, allowing Pc Boden to commence further restraint (handcuffing).

(iii) During the hand cuffing of Mr Grant, Pc Pereira wilfully and intentionally turned off his BWC and then unnecessarily struck Mr Grant twice in the head area using his ASP. The turning off of the BWC indicates a level of

premeditation in regards to "covering up" (not recording) an unjustifiable assault on a prisoner being restrained.

(iv) This action constitutes gross misconduct.

4. Having found that PC Pereira's actions during the arrest of Grant amounted to gross misconduct, the Panel moved on to consider the appropriate disciplinary action and concluded that he should be dismissed without notice.

5. PC Pereira appealed the Panel's decision to the Public Service Commission ("the PSC"), as provided for by section 37 of the PCO, and the PSC rendered its decision on 17 August 2020. In it the PSC dealt with some 11 grounds of appeal. They dismissed grounds 1 through 5. They dealt with grounds 6,7,8 and 9 together, which grounds concerned the admission of the statement made by Mr Grant, who had died in an unrelated traffic accident by then, and the Panel's refusal to review Mr Grant's testimony in the Magistrates' Court proceedings. The PSC allowed that ground of complaint, saying that PC Pereira should not have been denied the opportunity to put Mr Grant's cross-examination into evidence, and that the Panel's refusal to admit it was unfair to PC Pereira. They refused ground 10, and in relation to ground 11, a contention that the Panel had acted unreasonably in finding that PC Pereira's action amounted to gross misconduct, the PSC found (paragraph 47) that the Panel's conclusion that PC Pereira unjustifiably assaulted Mr Grant by striking him twice in the head was unreasonable, and reversed that finding. In relation to the complaint that PC Pereira had turned off his body camera, and had given an implausible account of his actions in that regard, the PSC first found that it could not say that the Panel's finding that PC Pereira had wilfully turned off his body camera was unreasonable. In relation to the second finding by the Panel, that PC Pereira had given an implausible account of the material events, the PSC held that that they were unable to say that this finding was unreasonable. The PSC did not immediately say in terms that PC Pereira's turning off his camera amounted to gross misconduct, but did say that giving an inaccurate or implausible account of events in order to shield himself from criticism and potential misconduct charges was in the PSC's opinion gross misconduct. However, when considering the appropriate sanction, the PSC held that PC Pereira had been "clearly culpable" in denying that he had requested PC Boden to turn his body camera off. They found the real aggravating factor in the case to have been PC Pereira's implausible account of what had transpired, and continued by finding that in the absence of finding any evidence to support the Panel's finding that PC Pereira had assaulted Mr Grant, the sanction of dismissal without notice was unreasonable. They did regard PC Pereira's conduct as serious, varied the Panel's decision to dismiss without notice and substituted a final written warning.

6. However, that was not the end of matters because both PC Pereira and the first Respondent ("the Commissioner") took judicial review proceedings, in the case of PC Pereira to set aside the decision which had by then been made by the Commissioner to dismiss PC Pereira prior to the final determination of the decision of the PSC, and by the Commissioner seeking to quash the PSC's decision. The two sets of proceedings were consolidated, and judgment on those proceedings was given by Subair Williams J on 15 February 2021.

The Supreme Court Judgment

7. Having reviewed the decision of the Panel, the learned judge turned to the appeal to the PSC. She noted that the PSC had reversed the Panel's factual finding that PC Pereira had assaulted Mr Grant by striking him twice in the head, but had not disturbed the Panel's factual finding that PC Pereira had wilfully turned off his body camera, and had further found that the implausible account given by PC Pereira of how the camera came to be turned off was another act of gross misconduct. She then referred to the PSC's final determination on the appropriate disciplinary action, where it had set aside the Panel's decision to dismiss PC Pereira without notice on the basis that it was unreasonable. The judge found that decision to be at the core of the dispute in the case, and set out the material parts of the PSC's decision.

8. The learned judge then set out the relevant law (contained in the PCO) relating to the investigation of allegations of misconduct made against a police officer, including the burden of proof (the balance of probabilities) and the factors to be taken into account when considering the question of disciplinary action. Next, she turned to the basis upon which a police officer was entitled to appeal to the PSC contained in Order 38 of the PCO, namely "*(a) the finding or disciplinary action imposed was unreasonable; (b) there is evidence that could not reasonably have been considered at the misconduct proceeding which could have materially affected the finding or the decision on disciplinary action; or (c) there was a serious breach of the procedures set out in these Orders or other unfairness which could have materially affected the finding or decision on disciplinary action"*

9. The judge continued by reviewing the constitutional role of the PSC. In doing so, she referenced the case of *Police Constable GA v The DPP* et al [2021] SC (Bda) 1 Civ (5 January 2021), where the Supreme Court was exercising its jurisdiction in judicial review proceedings. The judge then moved on to consider the legal principles applicable to gross misconduct by a police officer, and did so with reference, first, to the case of *Salter v Chief Constable of Dorset* [2001] EWHC 3366. The judge reviewed the case with great thoroughness. It is necessary to set out some of the background to the case.

10. The starting point was an accident in which a police constable was killed. Then Sergeant Salter was appointed as investigating officer, and it soon became apparent that the deceased officer, who had a long-term partner, was also involved with a member of another force, with whom he had spent the night before his death. His partner was unaware of the relationship. When it became known to Mr Salter that the deceased's mobile phone contained text messages which evidenced the relationship, Mr Salter instructed a junior officer to go to the vehicle recovery centre, find the phone and destroy it. The junior officer reported the matter to senior colleagues, and a misconduct panel (with functions similar to those of the Panel) was appointed. Mr Salter admitted that his conduct did not meet the appropriate standard and that he had not behaved with honesty and integrity in relation to the investigation. The misconduct panel required that Mr Salter resign from the force forthwith. The initial appeal was to the Chief Constable, who rightly apprehended that his function was one of review, and that he could not simply substitute his own decision for that of the panel. He concluded that the sanction imposed by the panel was both justified and appropriate. The next step was an appeal by Mr

Salter to the Police Appeals Tribunal ("the PAT"). That tribunal took the view that Mr Salter's actions constituted a one-off aberration in an otherwise unblemished career, allowed Mr Salter's appeal and directed that he be reinstated in the demoted rank of police constable. The Chief Constable then filed an application for judicial review, which was heard before Burnett J, as he then was.

11. Burnett J summarised the correct approach as follows:

> "*…the correct approach for a decision maker is to recognise that a sanction which results in the officer concerned leaving the force would be the almost inevitable outcome in cases involving operational dishonesty. That terminology itself recognises that there may be exceptions. In concluding that the case is exceptional, the decision maker must identify the features of the circumstances of the misconduct which support a different conclusion, recognising that the number of such cases would be very small. The decision maker would take account of personal mitigation, but must recognise its limited impact in this area. It would not overlook any article 8 arguments in play*."

He then quashed the tribunal's decision not to dismiss Mr Salter in the following terms:

> *"32. The language of the Tribunal suggests that it did not approach its decision making on the basis that a finding of operational dishonesty normally called for dismissal or a requirement to resign from the force. Furthermore, it is clear from the way in which it discussed the question of mitigation that it gave very great weight to personal mitigation in circumstances where it was not appropriate to do so, for the reasons given by Sir Thomas Bingham in Bolton. The strength of the personal mitigation available to Mr Salter was regarded by the Tribunal as of great significance… It follows that in my judgment the Tribunal misdirected itself in law in both these respects.*
> *…*
>
> *38. There is no doubt that the Tribunal's approach to the question of personal mitigation resulted in its attaching more weight to it than justified. Having accorded more weight to that mitigation than the proper legal approach justified, the Tribunal concluded in its epilogue that the appeal before it was 'a finely balanced case'. It follows as a result of irresistible logic that it would have dismissed the appeal had it followed the correct legal approach, both as to mitigation and the starting point being dismissal or requirement to resign for operational dishonesty. When taking account of those factors this was not a finely balanced case. The misconduct was very serious, for the reasons given by the Panel and Chief Constable. Those reasons were accepted by the Tribunal. It is true that the mitigation advanced by Mr. Salter concerning the misconduct itself shows that the destruction of evidence can arise in circumstances that are worse. But his personal mitigation could not, in my judgment, tip the scales against a sanction that resulted in his leaving the Police Force."*

12. Burnett J also addressed the point initially raised by the Chief Constable, namely that in any future deployment, Mr Salter would pose a danger to any prosecution with which he might be evidentially involved, insofar as he would be bound to disclose his disciplinary record, about which Burnett J said this:

> "…*In my judgment, it is a factor in cases involving dishonesty which must be considered for the purposes of sanction. It engages a facet of public confidence in the police service. The need for what may appear to be harsh sanctions in cases of this nature arises from the requirement to maintain public confidence in the police service. That is why almost invariably an officer found to have behaved dishonestly in the conduct of an investigation will be dismissed or required to resign. Whilst, exceptionally, an officer may be retained, public confidence is likely to be adversely affected if such an officer were disqualified by his own misconduct from performing a substantial part of his ordinary duties and, if it were the case, be given a non-job or provided with a role which otherwise might be available to an officer injured on duty or otherwise disabled in some way*."

13. Burnett J's judgment was then appealed to the Court of Appeal, where Kay, LJ gave the judgment of the court upholding the first instance judgment.

14. The judge then moved on to consider the judicial review application before her, noting that the court's jurisdiction required the applicant to establish that the public body concerned either materially erred in law or exercised its discretion in such a way that its decision was subject to reversal on classic *Wednesbury* grounds, that is to say on the basis that no reasonable tribunal could have reached the conclusion that it did based on the evidence and material before it. She pointed out that the application for judicial review rested squarely on the sanction decided by the PSC, and that an appeal from the Panel to the PSC could only succeed if it were to be found that the disciplinary action imposed by the Panel was unreasonable. This in turn required the facts of the case to demonstrate the unreasonableness of the Panel's decision, and in this regard the judge held that what was necessary in considering the reasoning shown by the Panel was whether its approach had been consistent with the correct legal approach. That took the judge to consideration of the issues of honesty and integrity under the *Salter* principles.

15. The judge noted at the outset of this consideration that the facts of this case did involve gross misconduct of a dishonest nature, insofar as PC Pereira's dishonesty was not only self-serving but continual. The PSC had not disturbed the Panel's finding that PC Pereira's conduct in turning off his body camera was wilful and intentional, or that his conduct in giving an implausible account of events some two years later constituted gross misconduct. She rejected counsel's submission that this was not a case of operational dishonesty. She held that applying the reasoning in *Salter*, the Panel ought to have proceeded on the basis that, absent exceptional circumstances relating to the misconduct itself, dismissal without notice was inevitable, commenting that Burnett J in *Salter* had noted that cases of suppression of evidence were to be considered the most serious breaches of professional conduct which would "almost invariably" result in dismissal or a requirement to resign. In particular, the judge accepted the submission of counsel that the language used by the PSC in their decision did not indicate

that they understood the correct approach to be applied to determine the appropriate sanction. Had the PSC applied the correct approach, they would have acknowledged that the starting point in the case before them was dismissal or a requirement to resign. The judge concluded that the PSC had misdirected itself in law by failing to apply the correct approach as set out in *Salter*, and that had the PSC been properly guided by the statutory "unreasonable" test in reviewing the Panel's decision on sanction, it could not have overturned the Panel's decision to dismiss PC Pereira. Accordingly, she found in favour of the Commissioner's application, refused PC Pereira's application, and restored the Panel's decision to dismiss PC Pereira.

The Applications before this Court

16. The Notice of Appeal was filed on 25 March 2021, and set out five grounds of appeal, as follows:

    (i) The Learned Judge erred in law when she intervened with the PSC's decision, which is final and shall not be subject to the direction and control of any other person or authority unless the decision can be considered perverse or there has been an obvious error of law.

    (ii) The Learned Judge erred in law when she misconstrued the test laid out in the cases of R (on the application of the Chief Constable of Dorset) v Police Appeals Tribunal v Mr. Neil Salter [2011] EWHC 3366 (Admin) and The Queen on the application of Darren Williams v Police Appeals Tribunal of Police of the Metropolis [2016] EWHC 2709 (Admin).

    (iii) The Learned Judge erred in law when she suggested at paragraph 76 of the judgment that *"the PSC reversed the Panel's factual findings that PC Pereira unnecessarily struck Mr. Grant twice. However, the PSC's acceptance that PC Pereira wilfully and dishonestly turned off his body cam was implicit that they accepted that he did so to prevent access to any evidence of video footage of the events which transpired after he turned off the body cam".* To the contrary, the evidence shows the body camera footage capturing the time that PC Pereira is alleged to have assaulted Mr. Grant, which was rejected by the PSC, and not challenged.

    (iv) The Learned Judge erred in law when she misapplied the statutory test of "unreasonableness", as set out in Section 28(1)(d) of the Public Service Commission Regulations 2001.

    (v) The PSC failed to instruct independent counsel for the judicial review which led to the PSC's position at the judicial review not being fully heard".

17. Then on 8 April 2021, PC Pereira swore an affidavit in support of an application for an order to be made under Order 2 rule 33 of the Rules of the Court of Appeal for Bermuda, seeking to prosecute his appeal as a poor person, which, if successful, would mean no more than that he would be relieved of the obligation to pay court fees and to provide security for costs. That application was heard in the first instance by the President sitting as a single judge, and on 3 May 2021 he declined to grant PC Pereira the leave he had sought, because he was not persuaded that PC Pereira had a reasonable

probability of success (the test mandated by the relevant rule), dealing with each of the grounds of appeal in turn. It is no doubt helpful to set out the learned President's reasons in full, as follows:

> *"1. The performance by the Public Service Commission ("PSC") of its functions is not subject to the direction or control of any other person or authority. But that does not mean that it is not open to review on the usual grounds for judicial review.*
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> *2. It is not apparent that the judge misconstrued the test laid out in the two cases mentioned (Salter and Darren Williams). These cases lay down that the almost invariable sanction in a case of operational dishonesty (with limited exceptions, of which personal mitigation is rarely to be one) is dismissal. As the judge rightly held that was not the starting point adopted by the PSC. The PSC had, in effect, been guilty of the same sort of error as led to a successful judicial review in those cases, as decided on by Burnett J (as he then was) and the English Court of Appeal.*
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> *3. The fact that the evidence showed the body camera footage capturing the time that the appellant is alleged to have assaulted Mr Grant does not mean that what the Panel found to be the wilful and dishonest turning off of the appellant's body camera was not done in order to prevent any record of anything that transpired after he turned it off, or thought that he had – there is a delay of some 3 or 4 seconds between turning the camera off and it actually turning off, of which delay, the Panel found, Mr Pereira was either unaware or failed to take into account. It is practically impossible to see what other purpose there could have been for such an instruction.*
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> *4. The judge did not err in her application of the statutory test of "unreasonableness". On the contrary she rightly held that, if the PSC had properly approached the statutory "unreasonable" test in reviewing the Panel's decision on sanction, it could not have overturned the Panel's decision to dismiss the appellant on the grounds of unreasonableness. If the PSC had begun from the right starting point it could not have found that the decision of the Panel to dismiss was unreasonable, having regard to the appellant's dishonesty in (a) wilfully turning off his body camera; and (b) giving dishonest evidence to the Panel that he had in fact sought to ensure that PC Boden's camera was on.*
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> *5. The fact that the PSC failed to instruct independent counsel is no ground for allowing the appeal. The parties were all represented by competent counsel. It would be odd for the PSC, the tribunal appealed from, to be represented as well."*

18. That application was subsequently renewed to the full court. The renewal application was supported by a second affidavit sworn by PC Pereira, in which he descended into considerable further detail in respect of the argument for each of the five grounds of appeal.

The Argument on the Appeal

19. The Court proceeded on the basis of a rolled up hearing. In relation to the first ground of appeal, Ms Greening emphasised that the test to be applied in relation to the PSC's decision was whether that decision could be considered perverse or where there had been an obvious error of law, and went through that part of the PSC's decision dealing with the allegation of assault against PC Pereira. In one sense this was an academic exercise because that part of the PSC's decision is not now being challenged, but the Court did note that the PSC decision had said that Mr Dunch had indicated that the Panel had not seen, on the video, Mr Grant being struck by PC Pereira's baton (the PSC decision refers to the Appellant, being struck by the baton, but clearly that must be a reference to the assault on Mr Grant), whereas the Panel's decision sets out in considerable detail what it had seen in the last five seconds before the video's termination. This included the portion of the video where PC Pereira is heard to say "Camera's Off", something which PC Pereira admitted having said, but which he explained to the Panel was in fact a request made of PC Boden to ascertain whether his camera was off. The Panel struggled with PC Pereira's explanation, given that the incident involved a very fluid dynamic, and questioned why, if he had wanted PC Boden to turn his camera on, he did not say words to this effect. The Panel continued to find in terms that PC Pereira had administered two rapid blows to Mr Grant's head region. That conflict between the decision of the Panel and that of the PSC is not an issue for this Court, but we note that the Panel did set out its findings on the video in detail. Ms Greening accepted that the decision of the PSC was reviewable in judicial review proceedings, and went through the relevant provisions of the PSC Regulations 2001.

20. Ms Greening then moved to the second ground of appeal which argued that the judge had misconstrued the test laid out in *Salter* and the subsequent case of *R (on the application of Williams) v Police Appeals Tribunal* [2016] EWHC 2709 (Admin). In that later case Holroyde J had applied what he had referred to as the *Salter* principle. Counsel for the police officer in that case had sought to draw a distinction between cases where the *Salter* principle had been applied, which all involved dishonesty or lack of integrity, and where, it was accepted, reduced weight ought to be given to personal mitigation. Nevertheless, the judge had declined to limit the *Salter* principle in the manner argued for by counsel and found that the disciplinary panel and the PAT (the equivalent of the PSC) were correct in law in declining to confine the *Salter* principle to cases of dishonesty or lack of integrity.

21. In this regard, Ms Greening referred the Court to the case of *R (on the application of the Chief Constable of Cleveland Constabulary v Police Appeals Tribunal v Rukin* [2017] EWHC 1286 (Admin). That case concerned a serious assault by the husband of a female police sergeant with whom the subject police officer was having an affair. The officer sustained multiple fractures of his facial bones which caused him to be hospitalised. The misconduct alleged in the disciplinary proceedings arose from the fact that the officer had lied to police colleagues about the circumstances giving rise to his injuries. The disciplinary panel found the officer guilty of breaching the requisite standard of honesty and integrity, and held that the officer's actions amounted to gross misconduct. The PAT found the panel's finding that the officer's conduct amounted to gross misconduct was unreasonable, and found that the panel had yet further misdirected itself in applying the *Salter* approach when this was not a case of operational dishonesty. HHJ Saffman held that the PAT had been entitled to take the

view that the panel had misdirected itself and dismissed the application, with the result that the decision of the PAT stood.

22. Mr Taylor was quick to point out that *Rukin* was distinguishable because it was not a case of gross misconduct, and it is important to note that the judge in *Rukin* was very much alive to this point, and to the application of the *Salter* principle in cases involving operational dishonesty. He quoted Kay LJ in the Court of Appeal in *Salter* and Holroyde J in *Williams,* and said in terms that an analysis of *Salter*, *Williams* and the earlier case of *Bolton v Law Society* [1994] 1 WLR 512 showed that dismissal was "almost inevitable" where the dishonesty is such as to undermine trust and confidence in the profession concerned, whether that dishonesty arose on an operational basis or on some other basis. So it is clear that *Rukin* can be distinguished on its facts, dealing as it did with a case of misconduct as opposed to gross misconduct, and, more significantly, not concerning operational dishonesty.

23. The third ground of appeal first referred to the PSC's reversal of the Panel's finding that there had been an assault, and the subsequent section of the judge's judgment at paragraph 76, where she went on to say that the PSC's acceptance that PC Pereira had wilfully and dishonestly turned off his body cam indicated that they accepted that he had done so with a view to preventing his subsequent acts being recorded. This ground of appeal seeks to suggest that this conclusion was wrong because the body camera did capture some of the events relating to the alleged assault. It is true that the PSC took a different view of what was shown by the body camera video, and that they too reviewed the video evidence in depth. But the PSC's finding that the body camera did not show the alleged assault does not speak to the issue of the turning off of the body camera, or the reason for so doing. The judge's finding seems to us to accord with common sense. The obvious answer to the question as to why PC Pereira turned off the body camera would be to avoid subsequent events being recorded, and counsel was understandably unable to provide any alternative answer which made sense when that question was put to her in argument. And, as the President put it, the next question for which there was not a satisfactory answer was why did PC Pereira lie about the matter thereafter. Ms Greening accepted the PSC's findings that both acts constituted gross misconduct, but maintained that the *Salter* principle was not absolute. And the fact that the body camera footage may not have fully recorded the alleged assault does not seem to us to be relevant when considering the other two complaints of gross misconduct.

24. The fourth ground of appeal was that the judge erred in law by misapplying the statutory test of unreasonableness as set out in section 28(1)(d) of the PSC Regulations 2001. Ms Greening argued that the PSC was required to determine whether the sanction of termination without notice was unreasonable. In doing so she maintained that once the PSC had determined that there was insufficient evidence of an assault, the sanction of termination without notice became unreasonable, because, she maintained, a finding regarding PC Pereira's conduct in respect of the other two complaints could not stand if there was insufficient evidence of the alleged assault. But the fact is that the PSC had found that the remaining two complaints, turning off the body camera and lying about the reason for so doing, did constitute gross misconduct. In our view they were right to do so, and the only question then remaining was the appropriate sanction.

25. Ms Greening did not pursue the fifth ground of appeal, in relation to the failure by the PSC to be legally represented. She asked that we review the cases of *R on the application of the Chief Constable of the Nottinghamshire Police, the Police Appeals Tribunal and PS Flint* [2021] EWHC 1248 (Admin) and *Fugler LLP v Solicitors Regulation Authority* [2014] EWHC 179 (Admin). The first of these cases involved a finding by the disciplinary panel, its being overturned by the PAT, and an application for judicial review by the Chief Constable. But it was common ground in that case that the panel had erred, and the judge took the view that the PAT's decision had not addressed the seriousness of PS Flint's conduct. Accordingly, she remitted the matter to the panel for reconsideration of the appropriate sanction. The second case concerned the disciplinary process against a firm of solicitors, where the Solicitors Disciplinary Tribunal had found charges of misconduct proved and had imposed fines on the firm and its two equity partners. The finding of misconduct was not challenged, so that the appeal was concerned only with the level of penalty. There was nothing in either case which could assist the Court in its consideration of this matter.

Decision

26. In relation to the separate grounds of appeal put forward in support of the appeal, I can do no better than reiterate the reasons set out in the President's ruling of 3 May 2021, set out in paragraph 17 above, and I do not repeat them.

27. The key factor in this case is the application of the *Salter* principle, and once the principles applied in that case are accepted, this case becomes straightforward. As well as accepting that the conduct complained of and found by both the Panel and the PSC to have occurred was gross misconduct, Ms Greening accepted (and in our view was right to do so) that the conduct complained of did constitute operational dishonesty. The application of the *Salter* principle then inevitably leads to dismissal as the starting point. As Burnett J explained in *Salter*, the need for the imposition of what may appear to be a harsh sanction arises from the requirement to maintain public confidence in the police service. And he also pointed out that while, exceptionally, a police officer might be retained, public confidence is likely to be adversely affected if such an officer were disqualified by his own misconduct from performing a substantial part of his ordinary duties. And as Kay LJ pointed out in the Court of Appeal in *Salter*, because of the importance of public confidence, the potential of mitigation is necessarily limited. Lastly, one must not lose sight of the point made by Burnett J referred to in paragraph 12 above, which demonstrates the potential difficulty in continuing to employ an officer found to have committed operational dishonesty. It is unfortunate that the PSC was not apparently referred to the relevant authorities when considering the appropriate sanction. Indeed, neither, does it seem, was the Panel. Had they been referred to the authorities, no doubt the PSC would have appreciated that operational dishonesty calls for dismissal save in exceptional circumstances.

28. In the circumstances, we did not call on Mr Taylor, though he did helpfully put the case of *Rukin* in context. It follows from all that is set out above that I would dismiss the appeal.

KAY JA:

29. I agree.

CLARKE P:

30. I also agree. Accordingly, the appeal is dismissed. The appellant's renewal application under Order 2 Rule 33 is hereby refused. Unless the parties wished to be heard on costs, the submissions of which should be filed sequentially within 14 days of the other, the Commissioner shall have his costs in the appeal and in the court below.