**POLICE APPEALS TRIBUNAL**

**IN THE MATTER OF POLICE ACT 1996**

**AND IN THE MATTER OF POLICE APPEALS TRIBUNAL RULES 2020**

**AND IN THE MATTER OF FORMER INSPECTOR JAMES OLIVER**

|  |
| --- |
| **Heard at:Nottinghamshire Joint Headquarters, Sherwood Lodge, Arnold, Nottingham, NG5 8PP** |
| **On 17 November 2022** |
| **Before: Chief Constable Debbie Tedds, Mr I Crawford and Ms S Fenoughty (Chair)** |

**Between**

**FORMER INSPECTOR JAMES OLIVER**

 **Appellant**

 **AND**

**THE CHIEF CONSTABLE OF NOTTINGHAMSHIRE POLICE**

**Respondent**

**Representation**

For the Appellant: Mr H Davies KC

For the Respondent: Mr D Basu KC

**DECISION AND REASONS**

1. This is a determination made in accordance with The Police Appeals Tribunals Rules 2020 which provide for the hearing of appeals made by a police officer against a decision made under the Police (Conduct) Regulations 2020.
2. This decision is made in the appeal of former of former Inspector Oliver who appeals against the decision made on 27 April 2022 that he be dismissed from Nottinghamshire Police without notice.

**BACKGROUND**
3. The allegation before the misconduct hearing Panel (“the Panel”) on 25 – 27 April 2022 concerned an incident in September 2021 when the appellant had been assisting a colleague with her application for promotion to sergeant. Prior to her interview, she had illicitly obtained the interview questions and sent them to the appellant. When this was raised with her as an issue of cheating, on 22 September, she told the appellant she was in trouble and he advised her to seek support from her Federation Representative. On the same day, the appellant deleted exchanges between himself and his colleague. There was a dispute as to when and why he deleted these messages.
4. The appellant was present at the hearing. Both parties were represented; the appellant was represented by Mr Hugh Davies KC, the respondent was represented by Mr Dijen Basu KC.
5. The appellant faced an allegation that he had been aware, before 22 September, that PC Morris had obtained the actual interview questions, and he had used them on 15 September in a mock interview with her. These particulars of the allegation were not found to have been proved.
6. The paragraphs of the allegation against the appellant which were found proved were identified in the Panel’s decision:

*18. Immediately after finishing that conversation with Inspector Ball, at 09:41:58h, PC Morris sent you a text message saying, "Call me back please”. This message was extracted from the mobile telephone provided to you by Nottinghamshire Police, being recovered as a deleted item. You did call her back and she told you that she was ‘in the shit’ and that Inspector Ball had given her 24 hours in which to report herself. As a result of what PC Morris told you, at 0959h, you deleted the text messages and email threads between yourself and PC Morris. You had had the text messages containing the questions on your phone since 9th September without deleting them.*

*19. You deleted the messages after the text message and/or the telephone conversation in order to destroy evidence of PC Morris’ wrongdoing. Even taken in isolation, this conduct amounts to a breach of the Standards of Professional Behaviour, in relation to Honesty and Integrity and Discreditable Conduct, that is so serious that dismissal would be justified.*

*20. Insofar as you were not aware, either that PC Morris had obtained the actual interview questions, and must have done so illicitly, or that there was at least a real possibility that she had done so, you now knew of PC Morris’ gross misconduct. You failed to report or challenge it. Even taken in isolation, this conduct amounts to a breach of the Standards of Professional Behaviour, in relation to Challenging and Reporting Improper Conduct, that is so serious that dismissal would be justified.*

1. The allegation at paragraph 20 of the Panel’s decision was proved in respect of the failure to report (not the failure to challenge) the misconduct.
2. The appellant had disputed all the particulars of the allegation, and disputed that his behaviour amounted to misconduct or gross misconduct. The Panel found that the allegations found proved, taken individually and together, amounted to gross misconduct.
3. The Panel heard evidence from the appellant, and from two witnesses regarding the forensic download of his work mobile phone. It did not hear from former PC Morris. It considered all the documentary evidence of the investigation and the submissions of the parties’ representatives. It concluded that the appellant’s behaviour amounted to gross misconduct, and the breaches of the Standards of Professional Behaviour were so serious that dismissal without notice was the appropriate outcome.

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

## Circumstances in which a police officer may appeal to a tribunal

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

(a) that the finding or decision to impose disciplinary action was unreasonable;

(b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action, or

(c) that there was a breach of the procedures set out in the Conduct Regulations, the

Complaints and Misconduct Regulations or Part 2 of the 2002 Act or unfairness which could have materially affected the finding or decision on disciplinary action.

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

 *Honesty and Integrity*

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

*Discreditable Conduct*

*Police officers behave in a manner which does not discredit the police service or undermine public confidence, whether on or off duty.*

 *Challenging and Reporting Improper Conduct*

 *Police officers report, challenge or take action against the conduct of colleagues which has fallen below the Standards of Professional Behaviour.*

**APPEAL**

1. On behalf of the appellant, Mr Davies submitted his grounds of appeal, dated 16 June 2022. The grounds were:
	1. It was unreasonable for the Panel to find that the appellant had spoken to PC Morris (JM) between 9.41 and 9.59am on 22 September 2021.
	2. Contrary to the Regulations, Home Office Guidance and case law regarding disputed evidence, the Panel relied on JM’s interview transcript, when her evidence was disputed. She had not provided a witness statement, and was not called as a witness to permit challenge to her evidence.
	3. The Panel relied on JM’s evidence without giving the parties the opportunity to make representations as to whether she should be called as a witness in person, the admissibility and/status of her evidence. or the weight that should be attached to her evidence.
	4. The grounds in 2 and 3 amounted to a breach of the procedures in the Regulations or unfairness which could have materially affected the finding or decision on disciplinary action.
	5. If the honesty and integrity findings are not maintained, it would not have been reasonable to dismiss for the failure to report improper conduct.

Ground 1 - Unreasonable finding as to dialogue between 9.41 and 9.59am

1. The evidence shows that JM texted to the appellant *“call me please”* at 9.41am and at 10.10am she emailed him: *“ring me please”*. The appellant deleted the 9.41am exchange with JM at 9.59am. He believed that other messages from her had been deleted previously.
2. In its analysis of allegations 18 and 19, the Panel listed a series of factors, including the evidence in JM’s interview, the timing of the deletion of the message containing the questions, the timing of contact from JM and the plausibility of JM telling the appellant the details of the problem immediately after her conversation with Inspector Ball where this had been the focus of the conversation.
3. The appellant said he did not speak to JM until later in the day, at which point she was highly distressed and said she was *“in the shit”*. The email of 10.10am demonstrated that there was no telephone call prior to that, and any deletion of texts at 9.59am was routine, and in ignorance of why JM wanted the appellant to call her.
4. The Panel recognised the divergence between the accounts of JM and the appellant, but resolved this factual dispute without requiring her to give evidence to have her account examined and subject to cross-examination.
5. The Panel has been selective in interpreting JM’s interview. She had said the conversation with the appellant took place *“in the morning sometime”.* She had said *“Georgie rang me - and then I spoke with Jim later on…”* This does not reflect the suggestion that she spoke to the appellant directly after speaking to Inspector Ball.

Grounds 2 – 4 Reliance on the written evidence of JM

1. The Panel did not communicate to the parties the significance it intended to attach to JM’s interview account. Once this was clear to the Panel, it did not invite submissions as to the necessity of calling this potential witness. This is a significant procedural failure.
2. There are several cases dealing with the principles of calling witness evidence in cases where there is a factual dispute. Without exploring the inconsistencies in their accounts, the Panel would be unable rationally to decide to prefer the untested account of JM over the account provided by the appellant.
3. Case law deals with situations where it is not possible for a witness to give evidence. Fairness, or the interests of justice may require a panel to exclude the hearsay evidence. If such evidence is admitted, it should be subjected to adequate scrutiny.

Ground 5 - outcome

1. If the honesty and integrity findings are upheld, there is no appeal against the outcome.
2. Mr Davies made oral submissions to the tribunal, as set out below.
3. The start point for the appellant and Inspector Ball had been different at the outset of proceedings, when it was alleged that they were both complicit in JM’s corruption of the promotions process.
4. The timeline showed that the appellant had deleted a conversation thread at 9.59am on 22 September 2021, there was an email at 10.10am from JM saying *“ring me please”*, and at 10.10am Mr Lee had been served with notice of misconduct. There was no evidence that Mr Lee and JM had been in contact. JM had gone to work, and at 2.30pm misconduct papers were served on her. According to her interview, at 4pm, Inspector Ball was told that JM had been served with papers, and the appellant was a welfare officer. At 4.06pm, JM emailed Tom Hill, the Federation Representative.
5. JM’s interview evidence was confusing and inconsistent, as could be seen from her evidence at pages 384 - 387 of the hearing bundle. She had said she had emailed Tom Hill, the Federation Representative, before the papers were served.
6. As to Rule 4(4)(a), it was a significant hurdle to demonstrate that the Panel’s finding was unreasonable, but it could be met if the Panel had substituted speculation and suspicion for real evidence. This was not a case about the credibility of a witness, but about whether something had been proved. Without JM’s interview, there was nowhere near enough evidence to justify the conclusion that a call had taken place.
7. As to Rule 4(4)(c), there had been a breach of procedure in the conduct regulations, or unfairness which could have affected the finding, in that the consequences could have been different. The Panel had placed reliance on evidence without calling her as a witness, so there was no chance to test her evidence.
8. There had been no suggestion in JM’s evidence that there were two telephone calls, and the natural reading of her email at 10.10am was that they had not spoken earlier, so she emailed, having failed to contact him by telephone or text.
9. The Panel had recognised there was a divergence in the accounts of JM and the appellant, and it considered her evidence, knowing it was disputed. Even if she had the call with the appellant, telling him she was *“in the shit”*, there is insufficient to fix this call prior to 9.59am. There is no evidence that this call happened before 9.59am, and it is not a reasonable interpretation of what JM said.
10. If the Panel was intending to rely on JM’s interview, it should have said so. There was no witness statement from her, and the appellant had challenged her account.
11. The Panel could not have preferred JM’s account without hearing from her. The existence of a telephone call before 9.59am was an important point of primary fact, which was disputed, and could not be tested. If important findings of fact may end a person’s career, then fairness demands the witness be called.
12. If it is not proved that the conversation took place before 9.59am, there is a question over what the appellant was supposed to report. He had been asked to act as JM’s welfare officer, which is not a role in which he would have been given details of the case against her. It would be bizarre to agree to act as welfare officer, if he had deleted material to separate himself from the investigation into JM, when she accepted her wrongdoing.
13. If the failure to report JM’s misconduct is the only remaining matter, it would not be justified to impose a sanction more severe than reduction in rank.
14. As to the points raised in the response to the appeal, a number of cases were cited, indicating that it was rare to interfere with findings of primary facts where a panel has seen the witness. However, in this case, the Panel did not see JM, whose evidence was hotly disputed.
15. It is not “pernickety” to take issue with the Panel’s failure to address something important and central. The Panel failed to address the 10.10am email, and misinterpreted what JM said.
16. The case law regarding the fallibility of memory relates to commercial litigation; these proceedings are different. If the Panel had indicated its intention to act on JM’s evidence, it seems that the respondent would say she was unreliable. It did not do so at the hearing. If little reliance could be placed on her evidence, then that should apply to her witness statement. Nevertheless, witnesses of disputed fact should be called.
17. The respondent says that JM’s evidence formed only part of the Panel’s reasoning. However, the respondent has taken an evidence-free and speculative approach to the proceedings. JM’s evidence was integral to the Panel’s reasoning, and if it were taken out, all that remains would be the text, the deletion time, the email, and service of the papers on JM at 2.30pm.
18. The respondent said the allegations may not have been proved to the criminal standard, but were proved on the balance of probabilities. This demonstrates that one component can switch the balance; whilst this is a different standard of proof, there was still a burden of proof on the respondent, and JM’s evidence was the central fact at issue. Only she and the appellant could address the issue of if and when the call took place, and the content of the call. JM’s evidence could have assisted the Panel, and the Panel was not entitled to rely on her interview evidence without testing it.
19. It would not matter that delay were caused if JM had been called to give evidence at the hearing; the purpose of proceedings is to produce a fair outcome. The appellant would have urged her to be called, and it was irrelevant that he could not be confident of what she might say. Her evidence would have been challenged as an intrinsically confused account. The evidence points to the timing of her conversations after 2.30pm. The respondent says she is not reliable, but she was relied on.
20. Mr Davies was asked if consideration had been given by the appellant to seeking JM’s attendance at the hearing to give evidence. He submitted that, if the Panel had said that JM’s evidence were to be relied on, he would have called her, but there was no indication of that. Depending on how one reads it, he said her account was contrary, and inconsistent with the appellant’s position.
21. Mr Davies was asked if consideration had been given to making an application to exclude JM’s evidence, following the principles he had identified at paragraph 37 of the grounds of appeal, where he submitted:

*“In such cases, fairness or the interests of justice may require a Panel to exclude the hearsay evidence:* ***Ogbonna* v *NMC [2010] EWCA Civ 1216****”*

He said the evidence was served in accordance with the misconduct procedures, and no application was made to exclude JM’s evidence because it was not part of the respondent’s opening to characterise her dishonesty. If they had known she was to be treated as someone upon whom reliance could be placed they would have applied to exclude her evidence. The characterisation of JM before the tribunal was wholly different than that before the Panel. There was no suggestion in the investigator’s report that JM was intrinsically unreliable, and no beginning of the justification to exclude her evidence. This is different from saying that the Panel should not have relied on her evidence without calling her. The appeal should be allowed, and the matter should be remitted for rehearing before a new Panel.

 **RESPONDENT’S SUBMISSIONS**

1. In response to the appeal, submitted on 19 July 2022, the respondent’s representative, Mr Basu, resisted the appeal, submitting that the Panel made findings of fact that were open to them and are not open to challenge on appeal.
2. Mr Basu set out the Panel’s findings of fact by reference to paragraph numbers in its decision, then he set out the applicable legal principles (his paragraphs 8 – 21). He responded to the grounds of the appeal as follows:

Ground 1: finding of fact

1. The appellant received a text message asking him to *“Call me please”* and he plainly wished to call back promptly in response.
2. The appellant complains there was no log of the call between him and PC Morris. This is a bad point. There are phone applications permitting a person to call someone without the call being logged, and a number of phones that can be used to make such calls.
3. The appellant says the email at 10.10am, which read *“Ring me please”* directly contradicts the suggestion that they had spoken by telephone before 9.59am. It is plausible that PC Morris wanted to speak to the appellant again following their initial phone call. It is plausible that he cut their call short so he could undertake the deletion which the Panel found he had performed. It is also common that emails are not always dispatched or received immediately, and it is plausible that she sent the email at around the same time as the *“Call me please”* text. It is possible that she sent the email at 10.10am because she wanted to speak to the appellant again, as Mr Lee had been served with gross misconduct papers. Her email does not say they have not spoken.
4. The Panel is not required to explain every piece of evidence, it is only required to find those facts which enable them to decide which charges are proven. The evidence in PC Morris’s account supports there being two conversations with the appellant, one in the morning and one in the afternoon. The “pernickety critique” of the decision is wide of the mark. PC Morris’s evidence was merely part of the support for the Panel’s finding. It referred to the plausibility of her telling the appellant that she had obtained the questions illicitly, immediately after her conversation with former Inspector Ball.

Grounds 2 – 4: procedural challenges

1. Neither party sought to call Ms Morris. The appellant knew that the timing of the conversation was important, and could have asked for her to be called as a witness. This was not a case where the only evidence on a disputed point could be given by two opposing protagonists. Rather than relying on witnesses’ recollections, the best approach is to base factual findings on inferences drawn from the documentary evidence and known or probable facts.
2. The Chair was right not to call Ms Morris to give evidence, and if asked, she would have been entitled to refuse, given the limited value of her evidence. Even if she had agreed with the suggestion that the call must have been after the 10.10am email, the Panel would have been justified in finding that the conversation took place before 9.59am.
3. Even if a breach of procedures or unfairness can be shown, it must have been such that it could have materially affected the finding or decision on disciplinary action. This threshold cannot be met in this case.

Ground 5

1. This ground is only maintained if the appeal partly succeeds, leaving allegation 20 intact. The appellant does not say why its reasonableness is challenged. It is a grave finding that an inspector failed to report his knowledge of circumstances surrounding the misconduct of which PC Morris was accused. The appellant cannot show, by his challenge, that the finding did not fall within the range of reasonable findings or outcomes to which the Panel could have arrived.
2. Mr Basu made oral submissions to the tribunal as set out below.
3. JM’s evidence was one of six factors relied on by the Panel in making its key finding about the call that took place on the morning of 22 September 2021. The Panel’s finding was not dependent on the reliability of her evidence. Whilst there may have been some doubt about the timing of the call, the Panel had to make a decision on the balance of probabilities. It also did this in deciding, on balance, that the appellant did not know, before 22 September, that JM had illicitly obtained the interview questions. It also found that, in deleting the messages from JM, he was not seeking to conceal his own wrongdoing. It had reminded itself of the standard of proof, and correctly applied it.
4. In his Regulation 31 response, the appellant said the call took place late morning or early afternoon, he was not clear. He became clearer when he gave his oral evidence.
5. It was clear that some reliance would be placed on JM’s evidence. At the hearing, the appellant’s representative had checked that the Panel members had read the interviews of some of the parties, and it was clear that reference would be made to the witness statement.
6. The 10.10am email is not evidence that JM and the appellant had not spoken a few minutes earlier. All it says is *“ring me please”*. The evidence that they had spoken before 9.59am is inferential evidence. The best evidence is the plausibility of JM speaking to the appellant straight after her call with Inspector Ball, having sent him a text seconds later saying *“call me please”.* There is some evidence of a call in JM’s evidence, but it was not strongly relied on at the hearing.
7. By the time of the hearing, JM had resigned, and had faced proceedings which found that, had she not resigned, she would have been dismissed. She had been found to be dishonest and prepared to cheat. Her evidence was confusing, inconsistent and unreliable, and unlikely to help either party.
8. JM had said there were two phone calls with the appellant, one of which was in the morning. The appellant could have asked the chair to call JM as a witness.
9. Where a finding of fact has been made after hearing the appellant at length, and considering the totality of the evidence, it is a high hurdle to overturn such a finding. The Panel had to evaluate the extent to which the oral evidence was consistent; the appellant was the main witness of fact, and the Panel formed a view about his reliability and credibility. The evidence of JM was not that important, as there were other aspects, such as the implausibility of being told that she was *“in the shit”* and not asking her more questions, as he maintained. Putting JM’s evidence in context, in its proper place among the other factors, the appellant comes nowhere near surmounting the high hurdle of displacing the findings of the Panel.
10. As to the procedural challenge, this is not a situation in which the only available evidence of a disputed fact is the account given by two conflicting witnesses. As to the timing of the call, it was known that the appellant had deleted the texts at 9.59am, and the Panel found on balance that he knew of the appellant’s wrongdoing before he deleted the texts.
11. JM’s evidence was confusing, inconsistent and unreliable, and she had been found to be dishonest. The Panel was right not to consider it necessary to hear from her. It would not have been necessary, as her evidence was not determinative, and not treated as such by the Panel. If it had been determinative, the Panel would have said so.
12. Even if JM had been called to give evidence, and even if the Panel had rejected all her evidence, there is no prospect that this would undermine the rest of its reasoning. There is no prospect that there could have been any material impact on the outcome as a consequence of not calling JM to give oral evidence.
13. The content of a hearing bundle is often a matter of dispute, and it would have been possible for the appellant to apply for parts of the report to be redacted.
14. The Panel was entitled to make a clear inference from the plausibility that JM would have told the appellant about the conversation she had just had with Inspector Ball. There was an urgency to the matter.

 **EVIDENCE**

1. The Tribunal was provided with the documentation and other material available to the Panel, together with transcripts of the hearing, the written decision on the findings and the outcome, the appellant’s grounds of appeal and the respondent’s response to the appeal.

**DECISION**

1. The appellant appeals under Rules 4(4)(a) and 4(4)(c).

**Rule 4(4)(a)**

1. The representatives agreed that that the meaning of *“unreasonable”* in this context was a matter of settled case law, and the Tribunal’s approach to Rule 4(4)(a) should be that set out in the response to the appeal:

Meaning of “unreasonable” in Rule 4(4)(a)
In order to show that a finding or a decision to impose disciplinary action was unreasonable, the appellant must show that it did not fall *“within the range of reasonable findings or outcomes to which the panel could have arrived”* (see **Chief Constable of the Derbyshire Constabulary v Police Appeals Tribunal [2012] EWHC 2280 (Admin)** at §36.
 *“.. an appeal will not succeed simply because the appeals tribunal concludes it would have reached a different decision… Where the decision reached by the panel was within the range of reasonable decisions to which the panel could have come, and appeal will nevertheless fail, even if the appeal tribunal would have reached a different decision to that reached by the panel.”* (See **R (Durham) v Police Appeals Tribunal [2012] EWHC 2733 (or Admin)** at §10”

1. The tribunal also took note of the decision in **Commissioner of Police of the Metropolis, R. (On the Application Of) v Michel & Anor [2022] EWHC 2711 (Admin)** in which the court set out the applicable principles, then added:

*57. Accordingly, consistent with this case law and the consequences of upholding a rule 4(4)(a) appeal, in determining whether a Panel’s finding of misconduct / gross misconduct was “unreasonable” within the meaning of rule 4(4)(a):*

 *i) The PAT must ask itself whether this finding was one that was within or outside of the range of reasonable findings that the Panel could have made;*

 *ii) The PAT should keep in mind that the rule 4(4)(a) test is not met simply by showing a deficiency in the Panel’s reasoning or a failure to consider a particular piece of evidence or similar error, if the finding of misconduct / gross misconduct was nonetheless one that the Panel could reasonably have arrived at. The question is whether that finding is unreasonable;*

 *iii) The PAT will be careful not to substitute its own view as to what should have been the outcome of the charges. Whether the PAT agrees or disagrees with the Panel and whether it thinks it would have found the allegations proven if it had been hearing the disciplinary proceedings is not in point, as this in itself does not indicate that the Panel’s finding was “unreasonable”. In many circumstances, different and opposing views can both be reasonable; and*

 *iv) The PAT should consider all of the material that was before the Panel, whether or not the Panel made express reference to it in the decision.*

1. The tribunal had to decide if it was unreasonable for the Panel to find that the appellant and JM spoke to each other before 9.59am on 22 September 2021, and that he became aware of her wrongdoing at this time, which motivated him to delete her texts to destroy evidence of it. The appellant disagrees with the conclusions drawn by the Panel, but the tribunal bore in mind that the Panel’s findings might still have been within the range of reasonable findings.
2. The appellant said the finding of fact was wrong as the Panel failed to deal with the 10.10am email, in which JM asked him to call her, indicating that they had not yet spoken.
3. The Tribunal considered all the material that was before the Panel. There did not appear to be a copy of the 10.10am email in the hearing bundle, but it was not disputed that it had been sent. The Panel was fully aware of this issue, as the chair asked about it:

*J SALT “… Inspector we do have a few questions for you. I think we’ve got a question or two each. So I’ll start with my question then, which relates to your contact with Miss MORRIS on the 22nd of September. It might be simply that I’ve sort of become confused when writing it down but I had some doubt about whether there had been one contact or two contacts and whether it was before or after the service of papers or both and I just wondered if you could clarify that for us please.”*

*J OLIVER “Of course. So she’s text me at 9:41 and then she’s rang me at 10 minutes past 10 and she’s had papers served at 2:30 in the afternoon and I’ve spoken to her late morning or lunchtime-ish that day.”*

 *J SALT “Ok, she texted at 9:41 and you didn’t text back directly to that.”*

 *J OLIVER “No, no.”*

 *J SALT “So there was sort of no direct response to that.”*

 *J OLIVER “No.”*

 *J SALT “She rang you at 10:10 but you.”*

 *J OLIVER “No she emailed me rather.”*

 *H DAVIES “But you said rang you meant emailed.”*

 *J OLIVER “Oh I do apologise. So she’s text me at 9:41, then she’s emailed me at 10 minutes past 10.”*

 *J SALT “And you didn’t reply to the email.”*

 *J OLIVER “No.”*

1. The Panel was addressed on the matter in the closing submissions:

*And we come to page 267, this sequence between 9:41 and 10:10, it’s so familiar now I needn’t labour it. I would ask you to correct the language of the timeline though, it’s call me please not call me back please. It may be a small detail but you’ve got that. 9:41 in comes that message, call me please. It absolutely genuinely, is it really to be said call me please question mark as a level of urgency that suggests something extremely serious is happening? Call me please, question mark. No evidence of any phone calls at all before 9:59, one message, certainly that one, was deleted as he routinely did, you’ve got the data, we’ve been through it three, four times, I won’t do it again, wholly consistent with his normal practice deleting data, and whether it’s that message or all of the thread is not to the point really*, *too much can be made from it. A) forensic recovery to his knowledge would have got it but look at what the messages actually say, they’re unremarkable in isolation. But the email at 10:10, ring me please, the, in the absence of any phone data whatsoever in between is, an actual interpretation of that is there has been no phone call or discussion before 10:10, that is the most natural interpretation of that sequence.*

1. At para 4.1 of its decision, the Panel set out its reasons for its finding that there was a call before 9.59am in which the appellant discovered JM’s wrongdoing. As it had with earlier findings, it set out all the key factors which it had taken into account. It said:

*The panel took into account the following:*

* *The timing of the deletion of the message containing the questions as evidenced by the phone analysis.*
* *The timing of contact from former PC Morris as evidenced by text and email*

*messages and the evidence in interview of former PC Morris.*

* *The implausibility of a conversation in which former PC Morris said: “I’m in the shit” without some further enquiry from Inspector Oliver, however brief, to elicit further detail.*
* *The implausibility of Inspector Oliver not making a connection between former PC Morris telling him she was “in the shit” and the interview process, when this had been his only reason for contact with her during that period of time.*
* *The evidence from the interview of former PC Morris that, although brief, there was a conversation, prior to the one in the afternoon of 22/9/21 after she had been served with papers, that included former PC Morris telling Inspector Oliver that the reason for her being in trouble with former Inspector Ball was connected to the interview questions. The panel considered in detail the account in interview of former PC Morris. At page 385 of the bundle she initially said she had spoken to Inspector Oliver in the afternoon after she had been served papers. However, when asked if there was contact in the morning she said “No. Oh yeah, yes, because of Georgie.” She went on to describe the conversation which appears to be the same one acknowledged by Inspector Oliver as the one where she said she was “in the shit” and he told he to speak to her Fed rep. Where the accounts diverge is that Inspector Oliver denies being told any details of what the problem was, whereas former PC Morris says when asked about the conversation …” it was along the lines of the questions again. So Georgie’s not very happy with me ..that I’ve had some questions that I shouldn’t have had and that..she’s given me 24 hours to confess…he then said the best thing you could do is speak to the Fed rep.”*
* *The plausibility of former PC Morris telling this to Inspector Oliver immediately after her conversation with former Inspector Ball where this had been the focus of the conversation.*

*Set against that, the panel took into account:*

* *The nature of the evidence said to support the deletion of contact with former PC Morris as deleting her contact details- the evidence in the statement of PC Hussain was that this was done in the course of interrogating the phone. Despite the AA’s submission that he corrected this at the hearing, he appeared to the panel to repeat what he said in his statement, no matter what he may have meant.*
* *The wording of the allegation as “in order to destroy evidence of PC Morris wrongdoing, as well as that of Inspector Ball and you as set out above”. The panel was satisfied that at this stage Inspector Oliver had reason to believe that former PC Morris had been accused of wrongdoing, but not that he believed he had done wrong or that former Inspector Ball had done wrong, and the panel noted that the wrongdoing is not put in the alternative.*
* *The plausibility of the submission that Inspector Oliver would know from his policing and general knowledge that deletion would not prevent retrieval of the relevant details.*
* *The lack of evidence of a close relationship between Inspector Oliver and former PC Morris.*
* *The panel did not attach any weight to the suggestion that the contact details of former Inspector Ball had been hidden under another name and accepted the explanation that they had been stored under someone else’s contact details in error*

*The evidence at the hearing did not support the suggestion of the computer analysis in the bundle which appeared to suggest the deletion of past meetings in the calendar. The evidence of DS Bennett and PC Hussain was not inconsistent with that of Inspector Oliver who said that he only removed meetings from the electronic calendar if they were cancelled, ie future meetings, not past meetings.*

1. It was clear to the tribunal that the Panel was fully aware of the 10.10am email, and the argument that had been made that it showed there had been no prior contact that morning. JM’s written evidence showed that, in her first interview she made no mention of the appellant, but in her second interview, on 22 October 2021, she accepted that she had spoken to him. She said it was after she spoke to Inspector Ball, but before she went into work. The relevant part of the interview is as follows:

*3316 So in relation to the conversation with Georgie, erm, on the 22nd, erm, you’ve had some communication in the morning with James OLIVER and because you were given 24 hours notice…*

 *21:00:00 3130 By Georgie*

 *3316 So when did that conversation take place?*

 *3130 Oh, in the morning some time

3316 So that was in the morning with Georgie BALL?*

 *3130 No not with Georgie. Georgie rang me – and then I spoke with Jim later on. I think I was out walking the dog at the time. I think Daniel was with me. Daniels not a cop. But I spoke to Jim and asked for how it was best to go about it and he says go and speak to your Fed Rep*

 *3316 And but that was on the same morning*

 *3130 Yeah*

 *3316 Georgie spoke to you about all this, ’24 hours’ to……*

 *3130 Yeah*

 *3316 Confess?*

 *3130 Yeah*

 *3316 About what happened? And then straight away you, erm, have spoken to James OLIVER*

 *3130 Yeah. I spoke, I spoke to Jim. Erm, it was only ever so briefly that he basically, I basically says look I’m in the shit, erm, whats the best thing to do and he just says go and speak to your Fed Rep*

 *3316 Okay. Did you tell him the ins and outs of the…..*

 *3130 I didn’t get into so m…too much detail*

 *3316 What conversation did you have with him?*

 *3130 Oh God, that was ages ago. Erm………..it was along the lines of the questions again. So Georgies not very happy with me, urm, that I’ve had some questions that I shouldn’t have had and that, what, I need to, she’s given me 24 hours to confess or that’s it. Or she’s going forward and then he didn’t really say anything about it. He then just said the best thing you could is speak to the Fed Rep. I cant remember the full ins and outs of the conversation as coz it was ages ago.*

1. The Panel did not mention the time that the 10.10am email was sent, and it did not explicitly deal with this in its decision. However, after the first bullet point about the timing of the deletion of the messages, its second bullet point dealt with the timing of contact from JM, *“as evidenced by text and email messages”* and her evidence in interview. It is reasonably clear that this included the 10.10am email.
2. The Panel was aware of the difference in the accounts of the appellant and JM, and referred to this in the fifth bullet point of its decision. The appellant had denied being told any content during this call, although he had inferred that she had been served with misconduct papers.
3. As to the accounts of appellant and JM on the timing of the call; JM said it was *“later”* after she spoke to Inspector Ball, and the appellant said it was late morning or early afternoon.
4. As to the content of the call, the appellant gave oral evidence on this, as follows:

*D BASU “Because it’s right isn’t it that you spoke to her at some point in the day where she hadn’t yet been served papers, or well sorry had not been served papers, but to use her phrase she was in the shit.”*

 *J OLIVER “Hm.”*

 *D BASU “Yeah? You had that conversation?”*

 *J OLIVER “Yeah I weren’t, I didn’t know if she’d been served papers or not. I just took it for granted that she had been, hence she said the words I’m in the shit.”*

1. The Panel took a number of factors into account in forming its conclusion. It considered the plausibility of the appellant’s evidence in the context in which the phone call took place. Whilst it had not heard from JM, it had heard from the appellant, and did not find his account of the timing and the content of the call to be credible. It knew there had been a call, that JM had spoken to Inspector Ball at 9.40am and within seconds she was urgently seeking to speak to the appellant, and it knew that, at 9.59am, he had deleted exchanges between them which evidenced her wrongdoing.
2. The tribunal found that the Panel’s findings were open to it on the material before it, and were not outside the range of reasonable findings. Whilst it did not deal with every point made on the appellant’s behalf, its decision was sufficiently detailed to show that it had taken account of all the evidence, and had been entitled to reject the appellant’s account.

**Rule 4(4)(c)**

1. The appellant said it was unfair of the Panel to rely on JM’s evidence of the content of the call, as her evidence was disputed, and she was not called. It was argued that, if the Panel had indicated that it was going to rely on JM’s evidence, he would have sought to call her, or, if she had been characterised as an unreliable witness, he would have applied to have her evidence excluded.
2. The Chair had explained the process by which the Panel would make its findings of fact:

*“So the panel will be considering the allegations against you, which I will read out in a moment. We have to follow a four stage process first of all. We have to decide what our conclusion is on the facts of the case. Obviously there are significant areas of factual dispute in this case so we will make findings on the balance of probabilities and that will be the first stage of the proceedings.”*

1. Evidence is placed before a misconduct hearing in accordance with the Regulations. They provide for an officer to give notice of any allegations they dispute, and their account of the relevant events. They also provide for parties to supply a list of witnesses, which must be considered by the chair. No witness may give evidence unless the chair reasonably believes that it is necessary in the interests of justice.
2. In the appellant’s case, there were two additional witnesses. The Chair explained this to the appellant at the start of the hearing:

*“Just to let you know the process that we, will be followed, I’ve told you about the potential for stages so in that first stage, the fact finding stage, we will be considering evidence from witnesses. Obviously we have had the bundles as you have and we won’t be hearing from all of these witnesses because the Police conduct regulations specify that witnesses need only give evidence where it is necessary in the interests of justice to do so. I decided before the hearing after taking representations that we should hear from two witnesses and it’s about the evidence around the deletion of messages because it seemed to me that there was an issue there that was potentially important regarding the timing of deletion or otherwise dealing with those*

*messages.”*

1. The appellant had ample opportunity to seek the attendance of JM to deal with the disputed evidence, if he thought it necessary in the interests of justice. He knew he was facing a serious allegation that he had breached the standard of honesty and integrity, and was alleged to have deleted messages as a consequence of what JM told him in a phone call. On his behalf, representations had been made to the Chair regarding the need to hear from witnesses, and JM was not required.
2. Mr Davies says that only JM and the appellant were party to that telephone call, and it was essential that her evidence should be tested, if it were to be relied upon. However, the appellant knew that her interview evidence was before the tribunal, and would have been aware of the extent to which it was disputed. The tribunal did not accept that the Panel should have explicitly indicated an intention to rely on JM’s evidence, and that its failure to do so unfairly deprived the appellant of the opportunity to ask for her to be called as a witness. It was also open to him to make submissions on the weight to be placed on her evidence, if she were not called as a witness.
3. The tribunal did not accept the proposition that the appellant should have been put on notice that JM’s disputed evidence might be taken into account by the Panel. It had been evident from the start that the allegations concerned the timing and content of the conversation between them, and that was the reason for calling PC Hussain and DS Bennett to give evidence. JM’s evidence contained her account of what she had said to the appellant, and he would know from the outset that this would be relevant to the Panel’s decision.
4. Irrespective of the approach taken by the respondent, and any submissions it might make regarding JM’s evidence, it was open to the appellant either to seek to call her, or to make representations as to the weight that should be placed on her evidence. The weight given to written evidence may be reduced if the witness is not available for cross-examination, or for other reasons, if, for example, they had given contradictory accounts. It was also open to the appellant, if JM were not being called, to apply to have her written evidence excluded, if he took the view that it could not be fairly considered as part of the material before the Panel unless she attended to give oral evidence.
5. The tribunal accepted the submission that the Panel had taken a reasonable approach to the evidence before it, and had made inferences that were open to it, for the reasons it explained. It had heard the appellant’s account of his contact with JM on 22 September, and his motivation to delete messages, it considered the evidence in the round, and concluded that this evidence lacked credibility.
6. The tribunal did not find that it was unfair of the Panel to have taken JM’s interview evidence into consideration as part of its fact-finding exercise, in circumstances where it had not been suggested by either party that she should attend to have her account tested. The tribunal also accepted the submission that the interview evidence of JM was part of a broader set of facts and inferences, which together led to a conclusion that was within a range of reasonable findings which the Panel could have reached.

**Conclusion**

1. In determining whether the appellant’s grounds of appeal were made out under Rule 4(4)(a), the tribunal was not engaged in an exercise to substitute its own view for that of the Panel. The decision before it was whether the Panel’s findings or decision on disciplinary action were unreasonable. The tribunal determined that the grounds of appeal were not made out for the reasons set out above. It considered all the elements of the appeal, and found that the Panel did not take an unreasonable approach, nor were its conclusions outside the range of reasonable findings which it could have made.
2. The Tribunal found that there was no breach of regulation or procedure or other unfairness which could have materially affected the findings or decision on disciplinary action. The appellant’s grounds of appeal under Rule 4(4)(c) are not made out.
3. The appeal is therefore dismissed.

**Costs**

1. No application for costs was made, so the Tribunal therefore made no order for costs.

Sara Fenoughty

Chair of the Police Appeals Tribunal

23 November 2022