Neutral Citation Number: [2022] EWHC 2711 (Admin)

Case No: CO/4357/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 October 2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

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Between :

THE KING (ON THE APPLICATION OF THE COMMISSIONER OF POLICE OF THE METROPOLIS)	**Claimant**
- and -	
THE POLICE APPEALS TRIBUNAL	**Defendant**
(1) PC MAX MICHEL **(2) PC SHAUN CHARNOCK**	**Interested Parties**

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Olivia Checa-Dover (instructed by **Directorate of Legal Services**) for the **Claimant**
Kevin Baumber (instructed by **Reynolds Dawson Solicitors**) for the **First Interested Party**
Ailsa Williamson (instructed by **Reynolds Dawson Solicitors**) for the **Second Interested Party**

Hearing dates: 13 October 2022

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Approved Judgment

Mrs Justice Heather Williams:

1. This is a claim for judicial review brought by the Commissioner of Police of the Metropolis challenging the 30 September 2021 decision of the Police Appeals Tribunal ("PAT") to quash the 24 July 2020 findings of the Misconduct Panel ("the Panel") that the allegations against the first and the second interested parties were proven and amounted to gross misconduct. The PAT substituted the Panel's decision with a finding that the allegations were not proven. The PAT has played no active part in these proceedings, which are contested by the two interested parties. Permission to apply for judicial review was granted on the papers by Cutts J in a decision communicated on 26 April 2022.

2. The allegations arose from a road accident on 4 December 2016 involving a marked police vehicle. PC Michel was the driver of the police car and PC Charnock was the operator. PC Michel proceeded against a red light signal and caused a collision with a vehicle driven by a member of the public who was proceeding in accordance with a green light. In the aftermath of the accident both officers gave accounts that later turned out to be inaccurate. In particular, both officers had indicated that their vehicle moved forwards in accordance with a green light in their favour. Subsequent investigations established this was not the case and the officers accepted as much. The disciplinary charges alleged breaches of the Standards of Professional Behaviour relating to honesty and integrity and to discreditable conduct. The key question for the Panel was whether the officers' inaccurate accounts were the product of deliberate lies or honest mistakes.

3. The Claimant's four grounds of challenge are as follows:

    i) The PAT failed to direct itself correctly as to the test to apply in determining whether the findings of the Panel that the charges were proven and amounted to gross misconduct were "unreasonable" within the meaning of rule 4(4)(a) of the Police Appeals Tribunal Rules 2012 (2012/2630) ("the 2012 Rules") ("Ground 1");

    ii) The PAT conflated the question of whether the Panel's findings were unreasonable with the substantive determination of the disciplinary charges and/or failed to allow the parties to make submissions on the PAT's substantive determination before announcing its conclusion that the charges were not proved ("Ground 2");

    iii) The PAT's conclusion that the charges were not proved was irrational and/or involved procedural irregularity ("Ground 3"); and

    iv) It was irrational for the PAT to decide that the Panel's findings that the charges were proven and amounted to gross misconduct were "unreasonable" ("Ground 4").

The factual background

The accident and the accounts given in the aftermath

4. The road traffic accident was captured on CCTV. Information was also obtained from the police vehicle's Incident Data Recorder. The police vehicle was on the Uxbridge Road travelling south. This becomes the Hampton Road, West after the road crosses the junction with the Hounslow Road ("the junction"). The accident occurred at about midday in the middle of the junction. The police car collided with a VW Polo being driven along the Hounslow Road by Raj Mehra, who had the right of way at the time. The junction is a crossroads controlled by automatic traffic signals ("ATS"), which were functioning correctly on the day.

5. As the police vehicle approached the junction, PC Michel accepted an immediate response call requiring the officers to attend a suspect vehicle in the vicinity. He then came to a stop at a red light at the junction. The police vehicle was the first car stopped at these lights. After waiting for a period of time, PC Michel drove forwards before the traffic light had changed and whilst it was still showing red. Around a second later he activated his front and rear blue lights and headlamp flash, but the siren was not switched on. The vehicle moved off at a slow rate before colliding with the other car. The nearside of the police vehicle hit the offside of Mr Mehra's car. Mr Mehra had to be cut from his vehicle and was taken to hospital with minor injuries.

6. Very shortly after the accident PC Michel reported to the police operator via his radio that he had had a "PolCol", saying he had proceeded through a green light.

7. PS Harvey was the garage sergeant responsible for the area on the day. He attended the scene. He asked PC Michel what had happened. PC Michel said he had been stationary at a red traffic light and had waited for the lights to turn green before activating his warning equipment and proceeding; that there were two vehicles in front of him, which moved to the side, allowing him to proceed; and once through the junction the VW Polo had gone through a red light and collided with his vehicle.

8. PS Harvey then spoke with PC Charnock, asking him whether the version of events relayed to him by PC Michel was correct. PC Charnock indicated that he agreed with PC Michel's account.

9. Mr Mehra was reported for driving without due care and having no insurance.

10. PC Michel made a witness statement setting out his account of the accident dated 9 December 2016. He signed this indicating that the contents were true to the best of his knowledge and belief. His account included: that he was stationary at the lights in the nearside lane with two stationary vehicles in front of him; due to the traffic lights being red he decided to wait for the phasing to turn green before moving off and activating his blue lights; when the light turned from red to green and the two vehicles in front of him began to move off, he moved into the offside lane; and the only apparent factor that caused the collision was the other driving having run a red light.

11. PC Charnock made a witness statement dated 6 December 2016 setting out his account of the incident. He signed it indicating that the contents were true to the best of his knowledge and belief. His account included: the traffic lights governing their

junction were showing red; the police vehicle stopped behind two cars that were in front of them; when the lights turned green, the two vehicles in front filtered left and the police vehicle drove straight ahead; and a grey VW Polo then approached from their left hand side at speed.

12. It is unnecessary for me to detail the subsequent investigations, since neither officer challenged that it was thereby established that the police vehicle had in fact been at the front of the junction when the light was red and not behind any other vehicle; and that it had proceeded through a red light. It also followed that Mr Mehra had driven forwards in accordance with a green light.

The Regulation 21 and 22 Notices

13. Notices serviced pursuant to regulation 21 of the Police Conduct Regulations 2012 (2012/2632) ("the 2012 Regulations") alleged that both officers had breached the Standards of Professional Behaviour set out in regulation 3 and schedule 2, namely (i) honesty and integrity; and (ii) discreditable conduct. The notices also contended that the breaches were so serious that dismissal could be justified.

14. The allegations in respect of PC Michel were:

> "**Charge 1**
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> On 4th December 2016 Police Constable 234520 Max Michel made representations that were false, namely he informed the police operator that he had proceeded through a green ATS, which he knew to be false.
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> **Charge 2**
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> On 4th December 2016 Police Constable 234520 Max Michel made representations that were false, namely he informed PS Harvey that:
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> (i) he was, when in company with PC Charnock, held at a red ATS behind two other vehicles;
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> (ii) the ATS changed to green before the two vehicles in front of his police vehicle moved off;
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> (iii) his vehicle proceeded through a green ATS; and
>
> (iv) Mr Mehra proceeded through a red ATS
>
> which he knew or believed to be false.
>
> **Charge 3**
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> On 9th December 2016 Police Constable 234520 Max Michel made representations that were false, namely within a signed witness statement that he declared as true to the best of his knowledge and belief that:

(i) he was, when in company with PC Charnock, held at a red ATS behind two officer vehicles;

(ii) the ATS changed to green before the two vehicles in front of his police vehicle moved off;

(iii) his police vehicle proceeded through a green ATS; and

(iv) Mr. Mehra proceeded through a red ATS

which he knew or believed to be false."

15. The allegations in respect of PC Charnock were:

"**Charge 1**

On 4th December 2016 Police Constable 237725 Shaun Charnock made representations that were false, namely he confirmed to PS Paul Harvey that the account given by PC Michel was correct whereas he knew or believed the account to be false.

Charge 2

Between 5th and 11th December 2016 Police Constable 237725 Shaun Charnock made representations that were false, namely within a signed witness statement which he declared as true to the best of his knowledge and belief that:

(i) he was, when in company with PC Michel, held at a red ATS behind two other vehicles;

(ii) when the ATS changed to green two vehicles in front filtered left;

(iii) his police vehicle proceeded through a green ATS; and

(iv) Mr. Mehra proceeded through a red ATS

which he knew or believed to be false."

16. PC Michel and PC Charnock denied all of the allegations in their respective Regulation 22 Notices. PC Michel denied saying anything to fellow officers or in his earlier witness statement that he knew or believed to be false. As regards his account of proceedings on a green light, he said that he now realised that he had mistakenly reacted to seeing the secondary lights ahead that controlled a pedestrian crossing and which were green. In so doing he had experienced the recognised phenomenon of "see through" (looking ahead to a different set of lights and mistaking them for the relevant ones) whilst under the pressure of answering an I grade call. The notice pointed out that the secondary green light could be seen in photos taken on the day and that "see through" had been a recognised problem at this junction.

17. As regards his account of there being two cars in front of his vehicle when he was stopped at the red light, PC Michel said that he still had this picture in his head, but human memory and recall "can be fragile, misleading and unreliable yet honest". The Notice said that there were a number of ways in which this mistaken recollection may have been formed. It observed that memories were open to change and distortion, as memory is a fragmentary and reconstructive process, which can be distorted or altered by reference to outside sources. When PC Michel spoke to PS Harvey he gave no details as to what the "two cars in front" meant and he may have been referring at that stage to two vehicles which passed in front of him onto Hampton Road West from the Hounslow Road (as shown on the CCTV footage); or he could have been drawing on one of the many other occasions when he had driven that junction.

18. PC Michel also said that he had no motive for giving an untrue account; that as a police response driver he was trained to look further ahead in the road; and he had stopped at the red light, so there would have been no point in failing to wait for it to change.

19. In his Regulation 22 Notice, PC Charnock said that he accepted that at the scene he had agreed with what was put to him by PS Harvey, but that this was based on his honest belief as to the events. To the extent that his recollection proved wrong, it was the result of honest errors. He also denied giving a knowingly false account in his statement. He emphasised that immediately prior to the accident he was primarily focused on operator tasks rather than the road conditions; and that as they had approached the junction he perceived that there were two vehicles in front of them and when he next looked up they were gone, leading him to believe they had turned left at the junction; and he saw a green light which he now believed was a see through error to the lights at the pedestrian crossing on the other side of the junction.

The report of Professor French

20. Given the central role that his evidence played in the reasoning of the PAT, it is necessary for me to refer in some detail to the report dated 25 May 2020 prepared by Professor Christopher French. Professor French is a Professor of Psychology at Goldsmiths, University of London and a member of the Scientific Advisory Board of the British False Memory Society. He has given expert evidence in several cases involving allegations of sexual abuse and at the Gross Misconduct hearing concerning officers involved in the death of Sean Rigg.

21. In section 3 of his report, Professor French described his instructions in the following terms:

> "I have been asked to address the issue of whether, in light of our current understanding of the scientific memory, it is possible that PC Michel gave an account that he sincerely believed to be true at the time even though objective evidence proves it was inaccurate."

22. In section 4 of his report, Professor French listed the materials he had seen. He set out his opinion in section 6 of the report. It included the following:

"The description of the nature of memory included in the *Regulation 22 response* document is entirely in line with our current understanding of the science of memory based upon many decades of empirical research.

…there currently exists no reliable means to discover if PC Max Michel (henceforth, MM) is basing his account upon sincerely held false or grossly distorted memories as opposed to deliberately lying. Given this situation, the main issue that may be addressed based upon the scientific literature on human memory is: is it possible for a person to have detailed apparent memories for events that never actually happened at all or else happened in a manner that is significantly different from the way in which they are subsequently recalled?

The answer to this question is unequivocally positive. A number of different techniques have been developed by experimental psychologists that can be used to reliably implant false memories in a sizeable proportion of the population… [examples were then given]

…it is important to note that false memories can also arise spontaneously without any such interventions from devious experimental psychologists or dodgy psychotherapists… [supporting literature was then quoted]

…

For a long time it was assumed that memories for particularly dramatic events (so called *flashbulb memories*) were particularly accurate and more or less immune to fading or distortion. This is now known to not always be the case… [examples of studies illustrating this were then given]

…

Although MM accepts that the CCTV footage clearly proves that there were not two cars ahead of him as he waited at the traffic lights, he states that he still has the mental picture in his head as he originally described it. Strictly speaking, we should describe his 'memory' as a *nonbelieved memory* as opposed to a false memory…Nonbelieved memories can feel subjectively just as 'real' as accurate memories…

The Regulation 22 response document includes suggestions as to how MM may have developed a distorted memory of the original event…These suggestions are plausible in the context of our current understanding of human memory.

One intriguing aspect of the current case is the fact that both MM and PC Charnock provided very similar, albeit inaccurate

> descriptions of the events in question despite insisting that they had not discussed the sequence of events with each other. One particular memory phenomenon that may be of particular relevance here is that of *memory conformity*…This refers to the fact that when co-witnesses discuss an event, one person's account may influence the other person's memory. If the first person's account is inaccurate in some ways, those inaccuracies may be unintentionally incorporated into the second person's memory.
>
> Memory conformity is one example of the more general phenomenon of memory distortion due to *post-event misinformation*. Psychologists have for many decades successfully distorted the memories of witnesses by subtly presenting them with misinformation following the viewing of, say, a simulated crime scene….[examples were then given]… Since that early work, there have been innumerable variations of the original technique, leading to one indisputable conclusion: exposure to misleading information about an event after the event has taken place often distorts a witness's memory for that event.
>
> The more recent memory conformity studies are characterised by the presentation of misleading information via a social channel, typically discussion with a co-witness….[examples were then given]…Regardless of the technique used, studies of memory conformity routinely demonstrate that information (or misinformation) only available via a co-witness's report in [sic] incorporated into accounts provided by a significant proportion of witnesses.
>
> …explicit discussion is not actually required for misinformation to potential distort memory. Any kind of exposure to misinformation will suffice, albeit that explicit discussion does seem to be a particularly powerful technique… [an example was then given]…As described in the *Regulation 22 response* document, Charnock had heard MM's account of two cars when being drive back to the police station (despite not having explicitly discussed it) and this may have been sufficient to contaminate his own memory for the sequence of event."

The misconduct hearing

23. The Appropriate Authority's ("AA") case at the hearing was presented by Mr Thacker. PC Michel was represented by Mr Baumber and PC Charnock by Ms Williamson. The Panel heard evidence on 20, 22 and 23 July 2020 and submissions on 24 July 2020.

24. The witnesses called by the AA included Mr Mehra, PS Harvey and PC Francis. PC Francis had taken some photographs whilst standing at the junction. A zoomed in

image from one of these photographs was particularly relied upon by the officers as supporting the "see through" phenomenon. PC Archer, who had analysed the IDR, gave evidence and the Panel adopted the sequence and timings of events set out in his report. The Panel also heard from Mr Scriven who is an expert in traffic signals. He described how louvered hoods had been added at this junction in October 2000 to reduce the acknowledged risk of "see through". He accepted that from the position of the officers in their police car, they may well have been able to see a green light from the secondary traffic light over the junction, although it would have been dimmer than was shown in the photograph.

25. Both PC Michel and PC Charnock gave evidence and were cross examined on the basis that they had given deliberately untrue accounts in the aftermath of the accident. Professor French was called by the officers. He gave evidence in line with his report. He also explained how "memory traces" are laid down and the concept of "inattention blindness". He said that the latter was "a posh way of saying we only actually take in information that we pay attention to at the time the event is taking place". He also indicated that there was "lots of evidence that if you don't take the information in in the first place you're not going to be able to accurately recall it…If you're not looking for things you often don't see them even if your eyes are pointing directly open".

26. The Panel also viewed the CCTV footage of the accident. On 21 July 2022 the Panel members went on a site visit to the junction. As set out at para 20 of the Panel's decision, they took into account the fact that the alleged "see through" light had been subjected to alteration since the incident.

The Panel's decision

27. The Panel found that all of the allegations were proven, that the conduct in question amounted to gross misconduct and that the appropriate sanction in relation to both officers was dismissal without notice.

28. The Panel's written decision was dated 24 July 2020. The Panel correctly directed itself that the burden of proving the charges was on the AA and that the applicable standard of proof was the balance of probabilities (para 4). At para 5 the Panel set out the staged approach that it had adopted. At para 7 the Panel listed what it had taken into account; this included all of the material submitted and the evidence that had been heard. It then said at para 8 that whilst it had taken all this into account, it would "only refer to what it considers to be the essential elements when giving its findings". At para 9 the Panel listed the witnesses it had heard from, noting that it had "been able to assess their evidence" and that this gave it "a unique position".

29. After summarising some of the evidence given by the witnesses called by the AA, the Panel referred to PC Michel's evidence, indicating at para 30:

> "The Panel has taken into account that the collision took place over three and half years ago and that his memory will have faded. However, both listening to him and observing him the Panel did not find him a credible or reliable witnesses."

30. The Panel then said that it found the charges that PC Michel faced were proved (para 31). It is necessary to set out its reasoning in para 32 in full:

"The Panel come to the [sic] these conclusions taking into account the following:

(a) PC Michel told the Panel that he was a very careful, capable and competent police response driver.

(b) The Hounslow Road/Uxbridge Road junction was a place he knew very well passing through to and from his commute to work. It is also in relatively close proximity to Feltham Police Station.

(c) Despite what PC Michel said in evidence, given that he had taken the police response driver test twice, the Panel takes the view that being a police response driver was a role that he obviously enjoyed and would not wish to lose.

(d) PC Michel accepted a call in respect of a lost or stolen car that was very close by.

(e) PC Michel drove to the junction and stopped at the red primary and secondary lights.

(f) There were no vehicles in front of the police car.

(g) Whilst the police vehicle was waiting at the lights three cars turned left from Hounslow Road to Hampton Road West meaning that the see through light was green. Although the police vehicle's view and way ahead may well have been obstructed by a white van turning right from Hounslow Road to Uxbridge Road.

(h) Even if the white van had obstructed the view of the pedestrian traffic signal in the distance, then it was more reason for the officers' attention to be concentrating on the closest traffic signals that were showing red.

(i) Whilst waiting at the junction it is clear from the CCTV that a pedestrian crossed over the road right in front of the police car reenforcing the fact to the police officers that the lights were still red. It is understandable that both officers could not remember this part of the episode over three and half years later on. However, it is reasonable to expect that they would have noticed the pedestrian at the time of the incident.

(j) As soon as the white van turned right the police vehicle drove off and then put its lights on. The Panel finds that there is a possibility that the blue lights were activated in order to proceed across a junction controlled by a red ATS. However, it is also possible that the blue lights were illuminated to proceed onto Hampton Road West.

(k) Nevertheless there would only have been a very short period of time to give either officer a chance to look up at the so called see through light.

(l) In any event the Francis zoomed picture depicts the primary and secondary lights at the junction where the police vehicle was stopped showing red. The Panel finds that PC Michel would have seen those lights when he drove off.

(m) Therefore, the Panel finds on the balance of probabilities that PC Michel knew that he had gone through a red light. PC Michel has immediately decided to lie to the operator in order to protect himself and any consequences of his actions.

(n) PC Michel, although being involved in the collision, was not physically or psychologically affected as to prevent him from lying.

(o) This lie snowballed in that it was repeated to PC Francis, PS Harvey and then put in his witness statement.

(p) The lie about going through a green light when he knew he had gone through a red light was embroidered by the other lies as outlined in the regulation 21 notice.

(q) Both officers said that they did not collude with one another however, they got the same notable features wrong namely:

- Phasing of the light (the turning of the light from red to green)
- the mention of two vehicles
- those two vehicles were in front of them
- the vehicles moved off and then the police vehicle moved into the right hand lane

These are not the hallmarks of coincidence but of collusion and deception."

31. In para 33 the Panel addressed Professor French's evidence. Again it is necessary to set its reasoning in full:

> "The Panel has taken account of what Professor French said in respect of memory. However, his evidence is of little assistance to both officers because:
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> (a) He has not assessed PC Michel or PC Charnock for memory recall.

(b) The Panel agrees with the Appropriate Authority in that "examples of research he gave are broad and where there is significant delay in memory recall, or where questions were asked in a misleading way". The same scenario does not arise in this case.

(c) The Panel also agrees with the Appropriate Authority in that his "opinion is based on a broad concept and he is reliant upon only the information provided which is mainly the self-report of MM himself. He cannot assist on whether MM and SC made representations which they knew or believed to be false. That is the remit of the Panel".

(d) The Panel has heard and observed PC Michel and PC Charnock and is satisfied, on the balance of probabilities that both PC Michel and PC Charnock have lied."

32. The Panel then discussed the account of an eye-witness to the accident, Mr Doyle, who was plainly mistaken in various elements of his recollection, including that Mr Mehra's vehicle was stationary when the police car collided with it. PC Michel and PC Charnock's representatives had highlighted this as an example of an innocently given erroneous recollection. The Panel noted that he was at a different location to the officers and had a different perception and in any event "taking into account all of the evidence against PC Michel the Panel find the allegations against him proven" (para 34). The Panel also indicated that it had taken into account the character references that PC Michel had provided (para 35).

33. The Panel then expressed a similar conclusion in respect of PC Charnock, finding that he was not "a credible or reliable witness" and that the allegations he faced had been proven on the balance of probabilities (paras 37 and 38). The Panel listed its reasons for coming to these conclusions in a series of sub-paragraphs at para 39. The contents largely replicated sub-paragraphs (d) – (n) of para 32 in relation to PC Michel, with the Panel making equivalent findings in respect of PC Charnock. The Panel also found: that the junction was a place PC Charnock knew well from passing through it as a result of his police duties (sub-para (a)); and that "PC Charnock at some point post collision heard PC Michel lie and whether it be through misguided loyalty or some other reason dishonestly and deliberately supported PC Michel's deceit". The Panel repeated its earlier observations in respect of Professor French and Mr Doyle (sub-paras (t) and (u)) and indicated it had taken the character references into account (para 41).

34. Accordingly the Panel found that both officers had breached the Honesty and Integrity standard by "not being truthful, lying and making false, misleading or inaccurate oral or written statements in their role as serving police officers" and that this also amounted to Discreditable Conduct (paras 42 and 43).

The PAT's decision

35. The officers' appeal to the PAT was heard on 30 September 2021. The representation by counsel was the same as before the Panel. After hearing oral submissions, the PAT

deliberated and then its decision was announced by the Chair. Written reasons were provided dated 4 October 2021.

36. After setting out the allegations and making reference to the Panel's conclusions, the PAT set out the terms of rule 4(4) of the 2012 Rules and the relevant Standards of Professional Behaviour (para 8). The Panel then turned to the submissions. Mr Baumber's submissions were described at paras 9 – 20. They were summarised in para 9 as "the findings of the Panel were unreasonable, as it failed to deal with the evidence supporting the view that the first appellant's account had been truthful, and it made findings without adequate reasoning". The PAT then referred to Ms Williamson's submissions at paras 21 – 27, indicating that she said the Panel's decision was unreasonable because there was unreasonable and inadequate consideration of: (a) the evidence of collusion; (b) the expert evidence of Professor French; and (c) the fact that PC Charnock was the operator of the vehicle (rather than the driver). Mr Thacker submitted that the appeal should be dismissed; and his contentions were set out at paras 28 – 40. At para 41 the PAT noted that it had been provided with the documentation and other material available to the Panel, together with the transcripts of the hearing, the Panel's decisions, the grounds of appeal and the AA's response.

37. The PAT made a number of general observations at paras 42 – 45 and then at para 46 summarised some of the conclusions that it would go on to detail. As material, these paragraphs said:

> "42. The appellants consider that the findings were unreasonable, and Mr Baumber and Ms Williamson have set out the ways in which they consider this to be the case. This constitutes a valid basis for an appeal under Rule 4(4)(a).
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> …
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> 44. The Tribunal was mindful that the Panel had heard oral evidence from the appellants, and a number of other witnesses, and to that extent, its assessment of credibility was therefore informed by a more complete picture of the evidence that [sic] was available to the Tribunal.
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> 45. The Tribunal was also mindful of the caution which must necessarily be exercised in an appellate jurisdiction when considering challenges to facts found by the makers of the decision under appeal.
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> 46. It was incumbent upon the Panel to give an adequate explanation for the findings. In the Tribunal's view, it did not do this. In particular, the Tribunal finds that the Panel did not adequately explain why it did not take into account the expert evidence of Professor French. The Tribunal also finds that the Panel did not adequately engage with the evidence before making findings that the appellants had lied, nor did it explain why having considered the alternative explanations, it was more likely that they had lied."

38. At paras 47 – 63 the PAT addressed the Panel's conclusions in respect of the evidence of Professor French. After referring to the contents of Professor French's report, his evidence and the Panel's reasons for finding that it was of "little assistance", the PAT set out its conclusions in respect of this area as follows:

> "53. The Tribunal considered Professor French's evidence to be directly relevant to the decision as to the appellant's credibility. The feature of their evidence which case doubt on their credibility was the inaccuracy of their accounts. The potential explanations for these inaccuracies was of fundamental importance. The expert evidence dealt with the ways in which these inaccurate memories were likely to have been formed.
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> …
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> 57. The Panel found Professor French's evidence to be of little assistance. It did not explicitly reject the evidence, but appears to have rejected its relevance, having determined that it did not apply to the facts of the case, being overly broad, or irrelevant, because questions were asked in a misleading way, there was a delay in memory recall, or the expert's opinion was based on information provided by the first appellant."

39. After citing a passage from paras 66 – 68 the judgment of Leggatt J (as he then was) in *Blue v Ashley (Rev 1)* [2017] EWHC 1928 (Comm) about the potential unreliability of memory, the PAT's analysis continued as follows:

> "59. The Tribunal noted that the expert evidence was wholly consistent with the court's observations in **Blue v Ashley.** Professor French made extensive reference to academic studies relating to the mechanisms by which memories can be inaccurately stored and retrieved, and the ways in which those processes can be influenced and tested. Clearly, as part of a psychological study, participants may be deliberately imposed to 'false' information. As this technique is part of the data-gathering exercise, the Tribunal considered it unreasonable for the Panel to find that the expert evidence was of little assistance because questions in studies were asked in a misleading way
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> 60. The Tribunal noted that the evidence was not confined to studies where memory recall was tested after significant delay. On the contrary, much of the evidence related to research in which recall was tested shortly after the participants were exposed to inaccurate information…The Tribunal found it was unreasonable for the Panel to disregard the expert evidence on the basis that the studies related to accuracy of memory recall after significant delay.

> 61. The Tribunal did not consider that the expert evidence was "*reliant on information provided which is mainly the self-report of the first appellant*". Professor French also had a copy of the investigator's 49 page report and a CCTV recording. However the key parts of his evidence related to the question he was asked to address, which was whether it was possible that the first appellant gave an account which he sincerely believed to be true at the time. The Tribunal did not see how the expert evidence could be undermined by taking into account the information provided by the first appellant, in the context of all the other evidence.
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> 62. The last of the Panel's reasons was unrelated to the evidence itself. It said it was satisfied that the appellants had lied. It appears that this finding forms part of the reasoning for deciding that the expert evidence was of little assistance to the appellants. The Tribunal considers that, if this approach was taken, it was irrational. The decision on the credibility of the appellants ought properly to have been made in the light of all the evidence, including the expert evidence. It was unreasonable to make a finding that the appellants had acted dishonestly, without considering the evidence that there was another plausible explanation for their actions.
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> 63. As the Panel found Professor French's evidence to be of little assistance to the officers, it did not engage with any of the submissions about the mechanism by which the appellants came to give their respective accounts. The Tribunal considers this to have been unreasonable. The expert evidence was unchallenged; Professor French had said there were very plausible reasons for the first appellant recalling that there were two cars in front, and he said it was plausible that both officers sincerely believed the accounts they gave. This evidence should not have been dismissed without consideration."

40. The next section of the PAT's decision appeared under the heading "Credibility" (paras 64 – 75). At para 64 the PAT said:

> "64. The Panel's findings on credibility…were made without reference to the expert evidence, the relevance of which was unreasonably discounted by the Panel. The Tribunal finds that it was unreasonable to embark on the assessment of credibility without reference to the expert evidence, which had direct relevance to the likelihood that the appellants were acting honestly when they gave their accounts of the incident…"

41. The PAT then summarised some of the Panel's reasoning, indicating:

> "71. The Tribunal considers it unreasonable for the Panel to find that the appellants would have seen the red light at the time the first appellant drove away from the lights. This finding appears to be based on the fact that the red light was visible

> from their vehicle. In finding that they would have seen it, the Panel has not taken account of the expert evidence that 'If you're not looking for things you often don't see them even if your eyes are pointing directly'. In respect of the second appellant there was also no consideration of the evidence that he was otherwise engaged, in his role of operator, and in respect of the first appellant, there was no consideration of the additional evidence supporting his assertion that he had pulled away when he saw a green light…"

42. The PAT then listed evidence to which it said the Panel had given "no consideration". These were that: the officer had stopped at the red light although he did not have to; he had pulled away after waiting at the red light for about 26 seconds; he was anticipating that the lights would change to green at any moment; he pulled away smoothly at a modest speed; he used his blue lights but not his siren; and he had said if he was found to have caused the collision he might get points on his licence but would be unlikely to lose his driver status.

43. The PAT cited paras 63 – 64 from Nicklin J's judgment in *R (Dyfed Powys Police) v Police Misconduct Tribunal* [2020] EWHC 2032 ("*Dyfed Powys*") (see para 73 below) before setting out its conclusion as follows:

> "74. … the Tribunal considers that the Panel made an error in its approach to the finding that the appellants would have seen the red light. This was the critical finding from which all its other adverse findings followed. It was made without consideration of the evidence supporting the alternative explanations for the appellant's behaviour and without engaging with the relevant expert evidence. The Tribunal found that there was a 'demonstrable misunderstanding of relevant evidence' and 'a demonstrable failure to consider relevant evidence'. It was therefore satisfied that the Panel's findings, that the appellants had lied, were unreasonable.
>
> 75. The Tribunal therefore allowed the appeal under Rule 4(4)(a), and decided to substitute its own determination. It had reference to all the evidence, including the transcripts of the witness evidence, CCTV, audio files and expert evidence."

44. Between paras 76 and 92, the PAT set out its findings in respect of the evidence. The majority of the findings listed in para 76 related to the circumstances of the accident and thus were in keeping with the Panel's earlier findings. The PAT also included the following points:

i) That the police vehicle had pulled away at a modest speed (sub-para o);

ii) Both officers' car doors were opened within 17 seconds of the collision (sub-para p);

iii) PC Michel's report to the control room about the accident was made within a very short time of the collision (sub-para r);

iv) PC Charnock would have heard PC Michel's account on his radio (sub-para s); and

v) PC Charnock would have heard PC Michel give his account to PS Harvey (sub-para t).

45. The PAT said that they had found the expert evidence of Professor French "to be of assistance…His evidence was particularly helpful, in that it explained how a memory can be constructed of pieces of information, some of which are unwittingly incorporated into the memory by suggestion or assumption, as well as direct observation" (para 82). The PAT noted that PC Charnock had been multi-tasking at the material time (para 83). The PAT went on to say that it found the evidence of the officers to be credible and reliable. It explained this as follows:

> "84. …the inaccuracies in their accounts, regarding the two cars, and the green light, were likely to have resulted from the processes by which they formed their memories. It noted that elements of their account bore relation to what had actually happened…Their explanation of the inaccuracies in their accounts was also supported by the evidence of 'inattentional blindness' and Professor French's evidence that '*we only actually take in information that we pay attention to at the time the event is taking place*'.
>
> 85. The Tribunal considered the conduct of the first appellant. It was consistent with an intention to wait at the red light until it went green. If he had wanted to cross the junction whilst the lights were red, he could have done so as soon as he arrived at the junction…The Tribunal found that waiting for 25 seconds before moving off was not consistent with an intention to cross a red light. It was also inconsistent that he pulled away at a moderate speed, without a siren, rather than treating the junction as a 'give way' situation…
>
> 86. …It is probable that the white van was obstructing his view of the 'see-through' light, and that when it moved, the green light became visible to him. It is likely that he was looking ahead, in accordance with his training. It can be seen from the CCTV that he pulled away immediately after the white van moved. From all the evidence, the Tribunal finds it more likely than not that the trigger for pulling away was seeing the green light."

46. The PAT made further reference to Professor French's evidence about memory conformity in relation to PC Charnock, saying:

> "89. The Tribunal found, from all the evidence that it was likely that he had incorporated aspects of the first appellant's account into his own memory of the incident, namely that the lights were green, and there were two cars in front of them at the junction. The Tribunal accepts that it was unlikely that he was paying attention to the lights, or to their precise position at the junction, and it was therefore likely that he did not notice

> that the junction lights showed red when the vehicle moved away.
>
> 90. The Tribunal considered it inherently unlikely that the first appellant would lie about the lights being green. He said he had no personal relationship with the second appellant, a fairly new member of the team, they had not worked together much, although they [had] been on social occasions as part of the team outside work…the Tribunal considered it inherently unlikely that he would not only take the risk of lying about the lights, at a busy junction where there was likely to be CCTV and independent witnesses who would say otherwise, but would also take the further risk that the second appellant would lie to his colleagues in his support.
>
> 91. …The Tribunal…considered that the inaccuracies in his recollection, and those of the second appellant and the other witnesses, were likely to have been the result of the processes described by Professor French. It did not find that the evidence supported the view that he first appellant had decided to drive through a red light, then lie about it and collude with the second appellant to give false evidence…It found that evidence of the first appellant and the second appellant was credible and reliable and their accounts of the circumstances of the collision had been given in good faith."

The legal framework

47. The Police Appeals Tribunal Rules 2020 came into force on 1 February 2020. However, the 2012 Rules continued to have effect in relation to appeals brought under the 2012 Regulations (made pursuant to the power in section 85(1) of the Police Act 1996).

48. The effect of Rule 4(1) and 4(2)(a) of the 2012 Rules is that a police officer "against whom a finding of misconduct or gross misconduct had been made at a misconduct hearing" may appeal to a tribunal in reliance on one or more of the grounds referred to in para (4). In turn, para (4) states:

> "The grounds of appeal under this rule are-
>
> (a) that the finding or disciplinary action imposed was unreasonable;
>
> (b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action;
>
> (c) there was a breach of the procedure set out in the Conduct Regulations, the Police (Complaints and Misconduct) Regulations 2012 or Schedule 3 to the 2022 Act, or other

> unfairness which could have materially affected the finding or decision on disciplinary action."

Consequences of a successful rule 4(4)(a) appeal

49. As I have indicated, the appeal in this case was solely brought under limb (4)(a). There is only a power for the PAT to hear witness evidence in respect of appeals brought under limb (4)(b). Rule 22(1) provides that the tribunal "shall determine whether the ground or grounds of appeal on which the appellant relies have been made out". Significantly, the PAT only has the power to set aside the relevant decision and remit the matter for it to be decided again where limb (b) or (c) of rule 4(4) has been made out. There is no power to remit a case in relation to a successful limb (4)(a) appeal.

50. In addition to there being no power to remit, at least in the ordinary course of events, the AA has no power to bring further disciplinary proceedings in respect of the same allegations if a rule 4(4)(a) appeal against findings of misconduct / gross misconduct succeeds. In *Chief Constable of Nottinghamshire Police v R (Trevor Gray)* [2018] EWCA Civ 34 ("*Trevor Gray*") Sir Terence Etherton MR said at para 73:

> "The plain inference of Rule 22(2) is that a decision by the PAT not to remit finally determines whether or not there has been gross misconduct…Apart from the general principle of public policy favouring finality in legal disputes, that conclusion follows inexorably from the absence of any power to remit for rehearing where the ground of appeal is that under Rules 4(4)(a), namely that the finding or disciplinary action imposed was unreasonable. It cannot have been the intention of the drafter or of Parliament that, even though the PAT had no power to remit where the appeal succeeded on that ground, the appropriate authority could nevertheless bring new proceedings in relation to the same conduct."

51. By virtue of section 85(2) of the Police Act 1996, a PAT "may on the determination of an appeal under this section, make an order dealing with the appellant in any way in which he could have been dealt with by the person who made the decision appealed against".

The meaning of "unreasonable"

52. Given the finality for the disciplinary proceedings if a PAT concludes that the Panel's finding of misconduct / gross misconduct was "unreasonable" it is important that the correct test is applied and that the test does not become diluted in its application because a PAT disagrees with aspects of a Panel's reasoning or feels that it would have arrived at a different conclusion if it had been sitting as the tribunal of fact.

53. Counsel agreed with my proposition that the rule 4(4)(a) reference to "the finding" being unreasonable must be a reference to the "finding of misconduct or gross misconduct" in relation to which rule 4(2)(a) (or, as the case may be, rule 4(2)(b) or 4(2)(c)) confers a right of appeal.

54. The courts have considered the meaning of "unreasonable" in the context of rule 4(4)(a) (and its predecessor provision) on a number of occasions. In *R (The Chief Constable of Wiltshire) v Police Appeals Tribunal and Woollard* [2012] EWHC 3288 (Admin) ("*Wiltshire*") Wyn Williams J considered the earlier authorities and identified the correct meaning as follows:

> "32. There have been a number of recent decisions in which this court has grappled with what is meant by the word "unreasonable" in Rule 4(4)(a) of the Appeal Rules 2008. I refer to R (Montgomery) v Police Appeals Tribunal [2012] EWHC 936 (Admin) (Collins J); R (Chief Constable of Hampshire) v Police Appeals Tribunal [2012] EWHC 746 (Admin) (Mitting J); R (Chief Constable of the Derbyshire Constabulary v Police Appeals Tribunal [2012] EWHC 280 (Admin) (Beatson J); and R (The Chief Constable of Durham) v Police Appeals Tribunal [2012] EWHC 2733 (Admin) (a Divisional Court consisting of Moses LJ and Hickinbottom J). In his decision in the *Derbyshire* case Beatson J expressed the view that the issue of whether a finding or sanction was unreasonable should be determined by asking the question whether the panel in question had made a finding or imposed a section which was within the range of reasonable findings or sanctions upon the material before it. The learned judge clearly considered that his view was consistent with the views expressed in the earlier decisions in the *Montgomery* and *Hampshire* cases.
>
> 33. The approach of Beatson J is echoed in the approach adopted in the *Durham* case by Moses LJ (with whom Hickinbottom J agreed). During the course of his judgment Moses LJ considered whether or not the use of the word "unreasonable" within Rule 4(4)(a) mandated the tribunal to apply what is familiarly known as the *Wednesbury* test when determining whether or not a finding or sanction is to be categorised as unreasonable. His conclusion was as follows:-
>
> > '7. 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, should I 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.
>
> 34. I propose to follow the same approach to the word 'unreasonable' as that which was adopted by Beatson J in the *Derbyshire* case and Moses LJ and Hickinbottom J in the *Durham* case."

55. In *R (Chief Constable of the Derbyshire Constabulary) v Police Appeals Tribunal* [2012] EWHC 2280 (Admin) ("*Derbyshire*") at para 37, Beatson J (as he then was) had decided that the PAT had erred in expressing in unqualified terms that the test to be applied was the *Wednesbury* test. However, he said that the PAT was "essentially correct" in describing it as "*Wednesbury*-type test" and identifying the question for them as "whether the decision on finding or outcome was within the range of reasonable findings or outcomes to which the Panel could have arrived" (para 37).

56. In Collins J's earlier decision in *R (Montgomery) v Police Appeals Tribunal* [2012] EWHC 936 (Admin) ("*Montgomery*") he said at para 18:

> "It seems to me that unreasonable must in the context in order to achieve at least a semblance of fairness where possible, mean that the PAT will look at all the material before it and decide on all that material whether or not it was specifically referred to or decided by the panel, whether in its view it was a reasonable decision in the particular case and to that extent I think that it is not helpful to apply a strict legal definition in Wednesbury terms of the word 'reasonable'. As I say, it means what it says – a decision which when considered on all the material that can properly be taken into account is one which a reasonable person would not have reached in all the circumstances…"

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.

The test for this court

58. Proceedings in the Administrative Court challenging the decision of a PAT arise by way of a claim for judicial review, rather than as a second appeal. Accordingly, the claimant must establish a public law error before the PAT's decision may be quashed: *R (Chief Constable of Dorset) v Police Appeals Tribunal* [2011] EWHC 3366 (Admin) per Burnett J (as he then was) at para 19.

59. In the same case at para 33, Burnett J observed that the court should be slow to interfere with the decision of an expert tribunal, given that the court does not share that expertise. He described this as "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". However, in *R (Wilby-Newton) v Police Appeals Tribunal* [2021] EWHC 550 (Admin) at para 86 Julian Knowles J explained that these observations applied with particular force where, for example, the court was asked to overturn a particular sanction imposed for misconduct, as the Panel and the PAT are better placed than the court to determine what is required to maintain confidence in policing. But that "[t]hey may apply with lesser force…where the Court is asked to intervene because of an alleged error of law by the PAT…In such a case there is less need for caution or 'deference' because the Court is the ultimate arbiter of what is lawful".

Discussion and conclusions

Ground 1

60. Ms Checa-Dover submits that in deciding that the Panel's findings of gross misconduct were "unreasonable", the PAT failed to direct itself in accordance with or apply the requisite test, namely whether they were outside of the range of reasonable findings that the Panel could have arrived at. Mr Baumber and Ms Williamson dispute this and submit that the PAT's reasoning shows that it applied the correct test.

61. The PAT did refer to the terms of rule 4(4)(a) (para 36 above) and it made frequent references to the Panel's approach, reasoning and/or conclusions being "unreasonable", for example at paras 42, 59, 60, 62, 63, 64, 71 and 74 of its decision (paras 37, 39 – 41 and 43 above). It is common ground that the PAT's decision contained no express self-direction as to the meaning of "unreasonable" in this context. Mr Baumber submits that it was unnecessary for the PAT to do more than this as "unreasonable" is an ordinary word and the meaning is "obvious". I do not accept that submission. As shown by the discussions in the case law (paras 54 - 56 above) it is apparent that the word "unreasonable" may bear a number of different interpretations. By way of example, absent authority to clarify the meaning, an unreasonable decision could mean one that is unreasonable in the *Wednesbury* public

law sense; one that is outside the range of findings that a Panel could reasonably come to; or one that the PAT disagrees with.

62. In the absence of a self-direction on this subject, it is necessary to examine the PAT's reasoning in some detail to see what test it actually applied in practice. If the correct test was applied by the PAT, then failure to identify the test in its decision would not constitute a material public law error (although identifying the test that is being applied is always desirable, both in the interests of clarity and because it helps to focus the decision-maker's mind). On the other hand, application of an incorrect interpretation of "unreasonable" would be a material misdirection and a public law error.

63. Before I come to PAT's reasoning I will consider what was said to the PAT about the test that it should apply, since all counsel sought to derive some support from this in their submissions to me.

64. None of the written submissions from counsel that were filed in advance of the hearing, and which were available to the PAT when it was pre-reading the documents, made reference to the range of reasonable findings test. (I was told by counsel that the usual expectation is that the PAT will have pre-read the materials in advance of the hearing.) It would be desirable for the PAT to be given this kind of assistance, not least because two of the three tribunal members will have a police background; only the Chair is a lawyer.

65. Only Ms Williamson's written submissions addressed the nature of the rule 4(4)(a) test. They did so by setting out an incomplete citation from para 18 of Collins J's judgment in *Montgomery* (para 56 above) with underlining included to add emphasis, as follows:

> "…the PAT will look at all the material before it and decide on all that material, whether or not it was specifically referred to or decided by the panel, <u>whether in its view it was a reasonable decision in the particular case</u>…it is not helpful to apply a strict legal definition in Wednesbury terms of the word 'reasonable."

This citation did not include Collins J's reference to an unreasonable decision being one which a reasonable person would not have reached and no reference was made to the subsequent authorities. Without more, this gave the impression, or at least ran the risk of giving the impression, that in addressing the "unreasonable" test, the PAT's task was to consider whether it disagreed with the Panel's decision.

66. In terms of counsels' oral submissions, Mr Baumber informed the PAT that "the test is not one of *Wednesbury* unreasonableness. It is a much lower hurdle than that". He made no reference to the range of reasonable findings test. Regrettably, this was not an accurate way of characterising the approach that the PAT should take. Ms Williamson did not address the PAT orally on the test that it was to apply. The PAT was then advised of the range of reasonable findings test by Mr Thacker, who said:

> "The test for this panel is whether the finding was unreasonable…this is not about what evidence we prefer and

> what we did not like. The test is very clear under the 2012 rules, the findings was unreasonable.
>
> …
>
> We submit that their findings, therefore, cannot be categorised as being unreasonable. We say that the appellants' issue with the case is that they simply disagree with the tribunal's findings…
>
> Mr Baumber did touch upon the reasonableness of the decision and said, well, it is not Wednesbury unreasonable. Can I, if I may just look at the law, the legal position in relation to unreasonableness? I would submit it is well settled law that they finding is only unreasonable if it is outwith the range of reasonable determinations at which a first instance panel could have arrived at. I rely upon *Queen on the application of Durham against Police Appeal Tribunal* citation being [2012] EWHC 2733 (Admin).
>
> The appellant tribunal is required to review the decision, but not substitute its own assessment of the case to that of the initial decision maker…different and opposing conclusions in the same case may be entirely reasonable."

Thus, belatedly, the PAT did receive an accurate statement as to the test, although it does not appear from the transcript that it was taken to the pertinent passages in *Durham*, nor referred to *Wiltshire*.

67. I return to the crux of Ground 1, namely the reasoning employed by the PAT. Having reviewed the decision, I am clear that the PAT did misdirect itself and failed to apply the range of reasonable findings test. The combined weight of the points I identify in the paragraphs that follow have led me to this conclusion.

68. Firstly, as I have already indicated, the PAT's decision contains no explicit reference to the test that it understood it was applying. Even when setting out quite a detailed summary of Mr Thacker's submissions at paras 28 – 40, the PAT did not mention the range of reasonable findings test.

69. Secondly, at para 42 (para 37 above) the PAT said that counsel had set out "the ways in which they consider" the findings to be unreasonable and this "constitutes a valid basis for an appeal under Rule 4(4)(a)". The PAT summarised the submissions made by Mr Baumber and Ms Williamson at paras 9 – 27. There is no reference in that summary to a submission that the Panel's findings of gross misconduct were outside the range of reasonable findings that the Panel could make. Rather, it contained specific criticisms of the Panel's approach that were characterised as unreasonable.

70. Thirdly, after setting out extracts from Professor French's report at paras 49 – 53, the PAT began its analysis of this evidence by saying: "The Tribunal considered Professor French's evidence to be directly relevant to the decision as to the appellants' credibility." In other words, the very starting point of the PAT's

reasoning was to express disagreement with the Panel as to the weight to be attached to Professor French's opinion. Moreover, it is apparent from the structure and content of what followed that the PAT's different view as to the weight to be attached to Professor French's evidence heavily influenced its conclusion that the rule 4(4)(a) appeal test was established.

71. Fourthly, on several occasions the PAT used the word "unreasonable" in a different sense to the rule 4(4)(a) test that it had to apply (whether the findings of gross misconduct were outwith the range of reasonable findings the Panel could make). Ms Williamson realistically accepted that this was the case in respect of both paras 59 and 60 of the decision (set out at para 39 above). I bear in mind her submission that these were simply steps in the PAT's reasoning and that it did also apply "unreasonable" in the rule 4(4)(a) sense when it came to its conclusion. I will address those later passages shortly, however, I note at this stage that there is no explicit acknowledgement or suggestion by the PAT that it is using the word "unreasonable" in two different senses.

72. Fifthly, in para 71 (para 41 above) the PAT said that it "considers it unreasonable for the Panel to find the appellants would have seen the red light at the time the first appellant drove away from the light". However, it is unlikely that here the PAT was using "unreasonable" in the sense of indicating a conclusion that this finding was one that was outside the range of reasonable findings a Panel could make. In light of the matters I identify in paras 81 - 82 below, I do not see how the PAT could have arrived at that position. Rather, the PAT was critiquing the Panel's reasoning and its alleged failure to take certain matters into account and expressing its own disagreement with the Panel's factual conclusion that the officers had seen the red light at this time.

73. Sixthly, whilst I agree with Mr Baumber and Ms Williamson that for present purposes the crucial passage in terms of the PAT's reasoning is para 74, I consider that its contents reinforce, rather than negate, the proposition that the PAT applied the wrong test. I have set out the PAT's para 74 at my para 43 above. Immediately prior to this, the PAT included an extract from paras 63 – 64 of Nicklin J's judgment in *Dyfed Powys*, addressing when appellate courts can interfere with findings of fact made at trial. *Dyfed Powys* was concerned with the Administrative Court's powers on a judicial review of a Misconduct Panel's decision. Within the passage cited by the PAT, Nicklin J referred to para 67 of Lord Reed JSC's judgment in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 ("*Henderson*") where he said:

> "…in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified"

74. In this passage Lord Reed identified a series of disjunctive reasons that could lead to an appellate court overturning factual findings made by a lower court, including where there was a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence. Lord Reed was not addressing the

circumstances in which a Misconduct Panel's finding that gross misconduct was proven, will be "unreasonable" within the rule 4(4)(a) meaning. The tests are not analogous; the circumstances listed by Lord Reed encompassed circumstances that would not necessarily lead to a conclusion that the lower court's outcome was beyond the range of reasonable findings open to it. Furthermore, an appellate court (and the court hearing a judicial review) has powers to remit the case to the fact finding / decision making body that the PAT does not have in relation to rule 4(4)(a) appeals (para 49 above).

75. However, despite para 67 of *Henderson* not being directly on point, the terms of para 74 of its decision indicate that: (a) the PAT found that two of the disjunctive situations identified by Lord Reed were established, as if this was the test it had to apply and (b) it then concluded that as a result of this, the Panel's findings were unreasonable. The first of these propositions is apparent from the PAT's italicised quotes in para 74, finding that in this case there was a "*demonstrable misunderstanding of relevant evidence*" and "*a demonstrable failure to consider relevant evidence*"; the passages are italicised because they are direct quotes from para 67 of *Henderson*. The second of these propositions is apparent from the fact that immediately afterwards the PAT said: "It was therefore satisfied that the Panel's findings, that the appellants had lied, were unreasonable" (my emphasis added). In turn, immediately after that in para 75, the PAT said: "The Tribunal therefore allowed the appeal under Rule 4(4)(a)" (my emphasis added).

76. Mr Baumber submitted that the PAT had applied the part of para 67 of *Henderson* where Lord Reed indicated that factual findings made by the lower court could be overturned where an appellate court is "satisfied that his decision cannot reasonably be explained or justified". The difficulty with that submission is that this is not what the PAT said in para 74. If the PAT was applying that basis for finding the Panel's decision to be "unreasonable" it would have said so, rather than quoting other bases for overturning factual findings that were identified by Lord Reed. In any event, that is not the same as the rule 4(4)(a) test, given, for example, that it encompasses a decision that lacks reasonable explanation.

77. It is apparent from the PAT's citation of *Dyfed Powys* and then its application of quoted passages from Lord Reed's judgment in *Henderson*, that this was the test the PAT thought it had to apply, rather than the outside the range of reasonable findings test of which it made no mention.

78. Seventhly, if the PAT had understood its conclusion in paras 74 and 75 that rule 4(4)(a) was made out to be a decision that finding the charges proven was not an option that was within the range of findings reasonably open to the Panel, it is surprising that after reaching this point it then turned to a detailed analysis of the evidence in its paras 76 – 92, explaining why it considered that the AA had not proved that the two officers had acted dishonestly (paras 44 – 46 above). The PAT's approach from para 76 onwards is more consistent with an understanding that its conclusion thus far on rule 4(4)(a) unreasonableness was due to identified inadequacies in the Panel's assessment of the evidence and its reasoning, rather than a determination that the finding was not open to the Panel.

79. Eighthly, there are no indications that the correct test was applied, capable of offsetting the concerns that I have identified. Mr Baumber and Ms Williamson submit

that in paras 53 – 74 the PAT focused on the Panel's reasoning, rather than simply expressing disagreement with the Panel's conclusion and substituting its own view. To some extent that is correct (albeit, as I have already indicated, there are expressions of disagreement with the Panel's approach within these paragraphs, which the PAT appeared to treat as a significant part of its reasoning). However, in so far as the PAT's focus was upon the Panel's reasoning, this was, as I have concluded, examined through the prism of determining whether the Panel had misunderstood relevant evidence and/or failed to consider relevant evidence and/or adequately reasoned its decision, the PAT did not address the range of reasonable findings test.

80. As I indicated in para 72 above, I do not consider that the PAT was in a position to decide in its para 71, that the Panel's conclusion that the officers were aware of the red light when PC Michel drove forwards (and thus had lied in giving accounts that the light was green) was one that was outside of the range of reasonable findings that was open to the Panel. It is clear that the PAT would have arrived at a different conclusion if it had been the tribunal of fact, for the reasons that it identified (see in particular paras 44 - 46 above). However, this was a case in which there were factors pointing in both directions. The weight to be given to any particular factor was pre-eminently a matter for the tribunal of fact. It was a classic example of a case where opposing conclusions were reasonably available to the tribunal of fact, depending upon what it made of the evidence and in particular the view it formed of the credibility of PC Michel and PC Charnock.

81. By way of example only, some of the factors that were cumulatively capable of supporting the Panel's finding that, on a balance of probabilities, the officers knew that the primary lights were red when PC Michel drove forwards were as follows:

i) Both officers had a clear and unobstructed view of these primary lights; their police vehicle was the front car stopped at the lights (paras 32(f) and 32(d) of the Panel's decision);

ii) Both officers were very familiar with this junction, which was near to the police station at which they were based and on PC Michel's daily commute (paras 32(b) and 39(a) of the Panel's decision). It would therefore follow that they were familiar with the configuration of the traffic lights;

iii) PC Michel was a trained police response driver (para 32(a) of the Panel's decision);

iv) PC Michel had stopped at the junction in response to the primary red lights (paras 32(e) and 39(c) of the Panel's decision). He was therefore aware of the primary red light at this stage;

v) Whilst the officers were waiting at the junction, the CCTV showed that a pedestrian crossed over the road right in front of their police car, thereby reenforcing to the officers that the light was still red (paras 32(i) and 39(g) of the Panel's decision). As was put to PC Michel in cross examination the CCTV footage showed that he drove forwards very shortly after the pedestrian had finished crossing, meaning that there was now no physical obstruction to him driving against the red light;

vi) The Panel identified a rational basis for rejecting the officers' explanation of having confused the primary red light with the further away "see through" green light which became visible to them after a white van turned. Having acknowledged (in the officers' favour) that their sight line to this further light could have been initially obstructed by the white van, the Panel noted that if this was the case there was all the more reason why the officers' focus would have been on the closer, primary light and that there was only a very short period of time between the van turning and the police car moving forwards for both officers to have looked up and seen the see through light (paras 32(h) and (k) and 39(f) and (i) of the Panel's decision);

vii) Mr Thacker emphasised that no other motorist on this occasion had been confused by the see through light;

viii) The Panel was not persuaded by PC Michel's account (explored in cross examination with him) that he would not have been troubled by being found responsible for the collision and at risk of losing his police response driver status (para 32(c) of the Panel's decision). In other words, the Panel rejected the proposition that PC Michel had no incentive for giving a false account of the circumstances of the accident and did not accept that he had been honest in his evidence in this regard;

ix) The officers were responding to a call to attend a lost or stolen car that was very close by (paras 32(d) and 39(b) of the Panel's decision). Accordingly, PC Michel had a legitimate reason to go through a red light in the circumstances (but no justification for failing to take account of another road user and causing an accident);

x) Whilst PC Charnock emphasised that he was not the driver and his attention was also taken up with his tasks as the operator, his earlier accounts indicated that he had seen a green light, not that he was too preoccupied with other things to tell whether the lights had changed when the police vehicle drove forwards; and

xi) As the Panel emphasised, it had formed its assessment after having had the benefit of seeing both officers give evidence and having their accounts tested in cross examination (paras 28 - 30 above). On the face of it, the Panel was best placed to determine whether the officers' see through light explanations were genuine and honest or not.

82. I address the Panel's conclusion that it derived little assistance from Professor French at paras 108 – 116 below. In any event, Professor French's expert evidence was largely concerned with the officers' respective explanations for why they had both wrongly said in their earlier accounts that there were two cars in front of their police car when it was stopped at the junction. By contrast, both officers' explanation for their earlier incorrect accounts that the police car moved forwards after the lights had turned to green was largely based on the simple, factual proposition that they had seen and reacted to the wrong ATS. This explanation did not rely upon nonbelieved memory, memory conformity or the other phenomena described by Professor French. In so far as the PAT reasoned in para 71 that the PAT had failed to have regard to the Professor's opinion that "if you're not looking for things you often don't see them",

PC Michel, as the driver, would have been expected to be looking at the lights he had stopped at and both officers had described the ATS turning to green in their earlier accounts (and had not suggested at that stage that they were not looking at the lights).

83. Accordingly, for the reasons I have identified, I uphold Ground 1; the PAT misdirected itself in failing to apply the range of reasonable findings approach to the Panel's finding of gross misconduct when it allowed the officers' appeals under rule 4(4)(a). Accordingly, it follows that its decision to allow the appeal under rule 4(4)(a) was flawed by public law error. The PAT's decision therefore falls to be set aside.

Ground 2

84. The claimant alleges that the PAT: (a) erred in conflating the question of whether the Panel's finding was "unreasonable" with its substituted determination that the AA had not shown that it was more likely than not that the interested parties had acted dishonestly, and/or (b) acted unfairly in failing to allow the parties the opportunity to make submissions before it arrived at its substituted determination. Ms Checa-Dover referred to the Panel's finding of unreasonableness as the "gateway" question and the Panel's subsequent findings as the "substantive determination".

85. I reject these propositions for the reasons that I will explain.

86. Given the nature of the rule 4(4)(a) test (as discussed at paras 52 – 57 above), there is a risk of causing confusion by describing a conclusion that a Panel's finding of misconduct / gross misconduct was "unreasonable" as a "gateway"; since, in at least the majority of instances, this conclusion will mean that the end of the line has been reached for the disciplinary proceedings. This is because to permissibly uphold a rule 4(4)(a) appeal against a finding of misconduct / gross misconduct, a PAT must have already considered the evidence and decided that the Panel's finding was outside the range of reasonable findings that a Panel could make. In turn, it would therefore usually follow from such a conclusion that the only option for the PAT would be to find that the charge/s were not proven (since it had already decided that it would be outside the range of reasonable findings to conclude otherwise). I touched on this point when I considered Ground 1 (para 78 above). However, it is also relevant to Ground 2, because, as a matter of logic, it should mean that in relation to a rule 4(4)(a) appeal, in the usual course of events there are no distinct "gateway" and "substantive determination" stages at the hearing and I do not propose to adopt that terminology.

87. I emphasise that I am only addressing rule 4(4)(a) appeals against findings of misconduct or gross misconduct; the position in relation to appeals against sanction does not arise in this case. (And the position in relation to appeals under rule 4(4)(b) and/or (4)(c) is distinct, as different tests apply and the PAT has the power to remit if the appeal succeeds). I have referred to what I would "usually" expect to occur, given the nature of the test. I do not suggest that this would invariably be the case; there may be circumstances that are not before me in this case that would call for a different approach. During the course of submissions I asked counsel to assist me as to when it would or might be appropriate in a rule 4(4)(a) appeal for a PAT to go on to assess the evidence at a second stage for the purposes of its substituted determination after it had already concluded that a finding of misconduct / gross misconduct was outside the range of reasonable findings open to the Panel. Ms Williamson accepted that as a

matter of logic it was "very unlikely" that this second stage would arise, but she suggested two scenarios where it might do so. Firstly, where the PAT sought to arrive at findings on evidence that (although it was before the Panel) had not been addressed at all below. Secondly, where a Panel's decision was so badly flawed that it was very obvious that it was "unreasonable" and the PAT could reach that conclusion quickly and then move on to its own analysis of the evidence. In addition, Mr Baumber noted that a PAT might want to set out its own analysis of the evidence to ensure no further disciplinary proceedings were brought over the same matters (albeit this would usually be ruled out by *Trevor Gray* (para 50 above)). Even if these are examples of instances where a PAT might want to separately set out its own analysis of the evidence, albeit I have my doubts since the PAT would have been expected to consider the evidence in concluding that the "unreasonable" test was met, I do not consider that they give rise to a conceptually distinct second stage of the process, separate to the rule 4(4)(a) question and requiring a separate round of submissions and decision-making at the appeal.

88. Furthermore, I can see no reason in the present case for having two such stages. The rule 4(4)(a) question for the PAT was whether the findings of gross misconduct were within the range of reasonable findings that the Panel could have made. Answering that question in the negative (if the correct test was applied), would in turn supply the only permissible answer to the question of whether the charges were proven. Equally answering the rule 4(4)(a) question in the affirmative would mean that the appeal failed. Pursuant to rule 16 of the 2012 Rules (save where the rules impose specific requirements), it is for the PAT to determine its own procedure. Whilst there may be circumstances where a PAT could consider it desirable to split submissions on the rule 4(4)(a) issue from submissions on its own evaluation of the evidence and the order it should make (if it found the rule 4(4)(a) test to be satisfied), there is plainly no requirement to do so in a case of this nature and there was no error of law on the part of the PAT in not doing so.

89. Nor do I consider that there was any procedural unfairness, as alleged. The PAT did not suggest that it would restrict submissions to the rule 4(4)(a) question in the first instance. If Mr Thacker was in any doubt, he could have checked with the PAT what was envisaged. For the reasons I have explained, I can see no logical reason in this case for splitting the submissions into two parts; the PAT had to consider all of the material that was before the Panel below in determining whether its finding was unreasonable (in the sense I have identified) and therefore the parties would be expected to address this in their submissions. No restriction was placed by the PAT upon the oral submissions that Mr Thacker was able to make. In so far as the transcript suggests that he focused his submissions upon the Panel's reasoning and the criticisms that the officers' counsel made of that reasoning, that was his choice to do so.

90. Accordingly, I do not consider that the contentions in Ground 2 gives rise to a free-standing basis for impugning the PAT's conclusion expressed in para 92 of its decision that the AA had not shown that it was more likely than not that the officers had acted dishonestly.

91. However, for the avoidance of doubt, it appears to me to follow from my conclusion on Ground 1, that the conclusion expressed at para 92 cannot stand in any event. The PAT had no jurisdiction or lawful basis to proceed to substitute its own determination,

as its antecedent conclusion that the rule 4(4)(a) appeal test was met was flawed by misdirection.

Ground 3

92. Ground 3 is also focused upon the PAT's substituted determination in para 92 of its decision that the AA had not shown on a balance of probabilities that the officers had acted dishonestly. This conclusion is said to be irrational because the PAT failed to consider all of the evidence and / or it involved a breach of procedural fairness. I have already rejected the procedural fairness point in respect of Ground 2 and Ground 3 does not materially add to that contention.

93. I do not consider that the specific complaint of irrationality that is made in Ground 3 is made out. The fact that the PAT did not have a chance to read all of the material that was before the Panel between hearing submissions and making its decision is irrelevant, given the expectation that the PAT would have pre-read the documents. There is nothing to suggest that the PAT had failed to read the material in advance; in paras 75 and 77 of its decision it said it had considered all the available evidence.

94. Nonetheless and for the reason I have identified in para 91 above in respect of Ground 2, the PAT's substituted determination cannot stand in any event, given that it did not lawfully arrive at that stage as its antecedent conclusion that the rule 4(4)(a) test was made out was flawed by legal error.

Ground 4

95. The claimant contends that the PAT's conclusion that the rule 4(4)(a) test was made out was irrational. In other words, it is said that no reasonable PAT could have concluded that the Panel's findings of gross misconduct were outside of the range of reasonable findings available to the Panel. In support of this proposition, the claimant makes a number of specific criticisms about the way the PAT addressed the Panel's assessment of Professor French's evidence as well as some more general points.

96. As regards the PAT's approach to the Panel's evaluation of Professor French, the claimant contends that:

    i) The PAT wrongly proceeded on the basis that the Panel had not given consideration to Professor French's evidence;

    ii) The PAT only focused on some of the reasons why the Panel found Professor French's evidence to be of little assistance and it considered these reasons in isolation;

    iii) The PAT misunderstood the reason given at the Panel's para 33(c) for finding that Professor French's evidence was of little assistance; and

    iv) The PAT inaccurately elevated the significance of Professor French's evidence and the weight that could be attached to it.

97. The claimant also contends that the PAT failed to have regard to aspects of the evidence heard by the Panel, identifying alleged instances of this at para 53 of the Statement of Facts and Grounds.

98. However, the over-arching point made is that the Panel had the advantage of hearing and assessing the witnesses across three days of evidence, including the evidence of both PC Michel and PC Charnock. The Panel also had the advantage of undertaking a site visit. In all the circumstances, there was no legitimate basis for concluding that the Panel's finding that the charges were proven was unreasonable.

99. In addressing Ground 1 I have found that the PAT did not apply the correct test when concluding that the rule 4(4)(a) criterion was established and thus its conclusion in that respect was flawed by public law error. In these circumstances I have considered whether it is in fact necessary for me to also address Ground 4. To add anything to Ground 1 and in order for the court to properly assess the alleged irrationality, this contention must be considered on the basis of whether this conclusion was rationally open to the PAT if the correct rule 4(4)(a) test was applied. I consider it is appropriate to address Ground 4 on this basis, as the rationality or otherwise of the PAT's conclusion will likely bear on the form of relief that the court should grant.

100. Accordingly, the question for me is whether a conclusion that the Panel's findings of gross misconduct were outside the range of reasonable findings that the Panel could have made, was a conclusion that no reasonable PAT could have come to.

101. In these disciplinary proceedings the question of whether gross misconduct was established turned on one central issue, namely whether the AA had shown that the officer in question had given a dishonest account in the respects alleged. In turn, this largely rested on the Panel's assessment of PC Michel and PC Charnock. Both officers accepted that their earlier accounts were inaccurate in the respects identified in the disciplinary charges; the question was whether the AA had proved that these inaccuracies stemmed from deliberate lies in circumstances where the officers said they had made honest mistakes. Accordingly, this was a case that was pre-eminently about these officers' credibility. In such circumstances it would usually be expected that there would be two possible options open to the tribunal of fact, both coming within the range of reasonable outcomes, namely that the Panel could find it more likely than not that the officers had been dishonest or it could find that this had not been established. In this case, those acting for the interested parties did not submit after the evidence had been heard that the only lawful outcome for the Panel was to find that the charges were not proven.

102. In these circumstances it would be surprising if an appellate tribunal, who did not have the advantage of assessing the witnesses giving their evidence, were to conclude that the fact-finding body who did have that advantage, did not have the option of disbelieving PC Michel's and PC Charnock's accounts and finding that the charges were proven, as one of the reasonable outcomes available to it. Having listened to these two officers give their evidence and undergo cross-examination, the Panel found that they were not credible or reliable (paras 30 and 37 of its decision). I do not see how the PAT was rationally able to conclude that this was not open to the Panel. As I have already observed at para 80 above, this case appears to be me to be a paradigm example of one which the Panel could lawfully have decided either way, in terms of whether the charges were found proven or not. There were factors that supported each of these outcomes and it was for the Panel to attribute such weight to the competing factors as it saw fit.

103. For present purposes I am particularly concerned with assessing whether there were factors that were capable of supporting the Panel's findings that the alleged gross misconduct was found proven, in order to determine whether the PAT could rationally decide that such a conclusion was beyond the range of reasonable findings available to the Panel.

104. I have already identified evidence that was capable of supporting the finding that the officers had seen the red light before moving forwards and had lied in their earlier accounts to the effect that it was green at paras 81 – 82 above. As regards the question of whether the officers had lied in both saying that there were two cars in front of the police vehicle when it was stopped at the lights, the Panel was plainly entitled to view the officers' credibility as a whole, so that rejecting the honesty of their case on the red light issue bore directly on its assessment of the honesty of their accounts in relation to seeing the two cars, not least since this was part and parcel of the same incident. For reasons I identify at paras 108 – 116 below, I conclude that the way the PAT dealt with Professor French's evidence was seriously flawed and that the Panel were entitled to conclude that it was of "little assistance". Furthermore, it was permissible for the Panel to attach weight to the undisputed fact that the officers got the same notable features wrong in their accounts and to form the view that this was indicative of collusion rather than coincidence (para 32(q) and 39(s) of its decision). Contrary to Ms Williamson's suggestion, I do not understand the Panel's finding at para 39(v) to be inconsistent with a finding of collusion; and nor was it a necessary element of finding the charges proven that the Panel had to be able to pinpoint the precise time when collusion occurred.

105. I therefore conclude that it was <u>open</u> to the Panel to find that the alleged gross misconduct was proven in relation to both of the officers. Mr Baumber suggested during the hearing that such a conclusion on my part would be tantamount to my (wrongly) finding that the Panel <u>had</u> to find that the charges were proven. It is not. For the avoidance of doubt, finding the alleged gross misconduct proven in relation to the officers was an <u>option</u> that was within the range of reasonable findings that were open to the Panel. I accept that if they had formed a different view of the officers' credibility, the Panel could have found that the charges were not proven and that this would also have been a finding that was reasonably open to the Panel in the circumstances.

106. Accordingly, a conclusion that the rule 4(4)(a) test was made out because finding the alleged gross misconduct proven was not an option that the Panel could reasonably arrive at was irrational; there was simply no proper basis for it and the PAT did not identify why this was not a permissible option for the Panel. In arriving at this decision, I have also considered the PAT's specific reasoning, to which I now turn.

107. I have largely dealt with two of the key paragraphs in terms of the PAT's reasoning, namely paras 71 and 74, when I considered Ground 1 (paras 72 - 78 and 80 - 82 above). I also note the following in respect of those paragraphs:

    i) The second sentence of para 71 is inaccurate in suggesting that the <u>basis</u> for the Panel's finding that the officers saw the red light was the fact that it was visible from their vehicle. The implication here is that this was the only supporting reason identified by the Panel. In fact the Panel identified and relied upon the cumulative weight of a number of factors, as I have

summarised within para 81 above. The PAT appears to have misunderstood the Panel's reasoning;

ii) The fourth sentence of para 71 asserts that the Panel gave "no consideration" to the evidence that PC Charnock was engaged in his role as an operator at the time. The foundation for this assertion is unclear. It is trite law that it cannot be assumed from its failure to mention a particular factor, that the fact finding tribunal did not take it into account. The Panel said at its para 8 of its decision that it had taken all of the evidence and submissions into account, but it would only refer to what it considered to be the essential elements. In so far as Ms Williamson suggests that this was a point of such high significance it required explicit discussion, I have addressed it in para 81(x) (and the Panel had in any event rejected the credibility of this officer's account);

iii) In a series of bullet points in the remainder of para 71, the PAT listed matters that it said the Panel had not taken into account in respect of PC Michel. However, some of these aspects were expressly taken into account by the Panel, in particular: that the officer had initially stopped at the red light (para 32(e) of its decision); and that he had pulled away just as the see through green light became visible (paras 32(j) and (k) of its decision). Additionally, as I have already indicated, the Panel considered but rejected PC Michel's explanation that he had no motive to lie (para 81(viii) above);

iv) In so far as it went beyond the reasoning in para 71, the central point being made by the PAT in its para 74 was that the Panel's findings were made without consideration of or engagement with the alternative explanations for the officers' earlier inaccurate accounts, in particular the expert evidence from Professor French. However, the Panel had plainly engaged with the "see through" light alternative explanation (para 81(vi) above). I turn next to the way that the PAT dealt with the Panel's approach to Professor French.

108. Professor French was very clear about the task that he had been asked to undertake and the limitations of that task. As he indicated in his report, he was asked to address whether it was <u>possible</u> that PC Michel gave an account that he sincerely believed to be true at the time even though objective evidence subsequently showed it to be inaccurate (para 21 above). In turn, the conclusions expressed by Professor French were couched in terms of this being a possibility (para 22 above). Professor French did not say that he considered it likely that PC Michel or PC Charnock had told the truth and he did not suggest that he was able to discount the proposition that they had lied. He reaffirmed this in his oral evidence. The following exchange occurred during his cross examination:

> "Q. So would you agree with this proposition then that in order to test one has to look at all the circumstances surrounding the event that we are dealing with?
>
> A. That will always be a very sensible thing to do and I make the point which I think is an obvious one that it is theoretically possible that PC Michel is deliberately lying. We can't know that. But the question I was trying to answer was is it possible that his account was based upon sincerely held false

> memories and the answer to that question would be, yes, it is possible.
>
> Q. So that brings me on to my final topic which is this, as an expert, you cannot tell us, can you, whether this is a case of memory distortion and memory issues as opposed to someone deliberately lying?
>
> A. No, and I've never claimed I could.
>
> …
>
> Q. You also cannot tell us or help us with whether this is a case where these two officers have put their heads together and discussed and agreed an account to come up with, can you?
>
> A. No, all I can say is that it's plausible that both officers have sincerely held but inaccurate memories for the events of the day."

109. Accordingly, even if the Panel accepted Professor French's evidence it did not in and of itself negate the ability of the AA to prove on a balance of probabilities that the officers had given dishonest accounts, since all he could say, as he fairly acknowledged, was that it was possible or plausible that they had provided honestly held recollections. He was quite clear that he was unable to say whether they had lied. Allied to this, Professor French had not assessed the officers personally and he had not heard them give their evidence to the Panel, nor heard the other evidence. This was the central point that the Panel was making at para 33 of its decision in terms of why it found his evidence to be "of little assistance" (para 31 above). In my judgment, this was a conclusion that was open to the Panel.

110. It is apparent from the contents of paras 53 – 71 and 74 of its decision that the PAT's analysis of the Panel's approach to Professor French's evidence was a central plank of its conclusions. In the following paragraphs I address the claimant's specific criticisms of the PAT's analysis.

111. Firstly, the PAT criticised the Panel for "disregarding" the expert evidence, for arriving at its findings "without consideration" of the expert evidence and for not taking it into account. This was not an isolated instance of imprecise language, the PAT said this a number of times, at paras 60, 62, 63, 64 and 71 of its decision (paras 39 - 41 above). However, the PAT was simply incorrect in this regard; as para 33 of its decision showed, the Panel did consider Professor French's evidence, but concluded that it was of little assistance for the reasons it gave. The PAT's real disagreement was with the weight that the Panel gave to his evidence, after it had considered it.

112. The claimant's second criticism is also well founded. At paras 59 – 62 of its decision (para 39 above), the PAT focused individually on some of the Panel's reasons for finding that Professor French's evidence was of little assistance, without reflecting upon the cumulative weight of the Panel's reasons or indeed even referring to what appears to have been the central reason for the Panel's assessment (para 109 above).

113. Furthermore, the PAT plainly misunderstood the point that the Panel was making at its para 33(c), namely that Professor French could not assist with whether or not the officers had lied in the accounts they gave, which was for the Panel to determine. In the course of making this point, the Panel contrasted its remit with the position of the Professor, who was largely reliant upon the written account of MM. This observation was accurate (Professor French gave the opinions expressed in his report by reference to PC Michel's account in his Regulation 22 Notice) and in any event, the precise material that the Professor had regard to was not the central point being made by the Panel in this sub-paragraph. However, the contents of para 61 of the PAT's decision indicate that it mischaracterised – and thus inaccurately criticised - this part of the Panel's reasoning. It points out that Professor French did not only have access to PC Michel's account and it "did not see how the expert evidence could be undermined by taking into account the information provided by the first appellant"; a proposition that the Panel had not suggested.

114. The contents of para 62 of the PAT's decision indicate that it also misunderstood the Panel's para 33(d). In para 33(d) the Panel explained that it had heard the officers give evidence and was in a position (unlike Professor French) to assess that they had lied. It was not saying that it had decided the officers had lied before it had any regard to Professor French's evidence.

115. The claimant's fourth criticism, namely that the PAT wrongly elevated the significance to be attached to the expert evidence, is also well founded. At para 53 the PAT explained why it considered Professor French's evidence to be directly relevant, saying that the "expert evidence dealt with the ways in which these inaccurate memories *were likely to have been formed*" (para 38 above; emphasis now added). In fact Professor French had not advanced this proposition, as I have already noted he was careful to identify the limits of his expert opinion in both his report and his oral evidence (para 108).

116. Given that it had permissibly found that Professor French's evidence was of little assistance, I do not consider that it was incumbent on the Panel to explicitly discuss in its reasons the particular processes, such as memory conformity, which he had identified as providing possible explanations for the officers' accounts.

117. For the reasons I have identified, a conclusion that the rule 4(4)(a) test was made out because finding the alleged gross misconduct proven was not an option that the Panel could reasonably arrive at was irrational.

Conclusion

118. The PAT failed to apply the correct test when it concluded that the Panel's findings that PC Michel and PC Charnock were guilty of gross misconduct were "unreasonable" within the meaning of rule 4(4)(a) of the 2012 Rules. The PAT's decision contained no express self-direction as to the meaning of "unreasonable" in this context and my examination of its reasoning shows that it failed to apply the meaning that has been established by the case law, namely that a finding of gross misconduct was not within the range of reasonable findings open to the Panel. Accordingly, Ground 1 is well founded.

119. Although I do not accept the specific criticisms advanced by the claimant in respect of Grounds 2 and 3, it in any event must follow from my decision that the rule 4(4)(a) conclusion was flawed by public law error, that the PAT never lawfully arrived at a point where it could substitute its own determination.

120. Ground 4 is well founded in the sense that if the correct rule 4(4)(a) meaning of "unreasonable" is applied, the conclusion that the Panel's findings of gross misconduct were outside of the range of reasonable findings available to the Panel was irrational. This was a case where the Panel could lawfully have found that the charges were proved or that they were not proved; the outcome essentially turned upon its assessment of the credibly and reliability of PC Michel and PC Charnock, whom the Panel had heard give evidence. Furthermore, the Panel permissibly concluded that Professor French's evidence was of "little assistance" in the circumstances.

121. Following circulation of a draft of this judgment, the parties have agreed that it follows from my conclusions that the PAT's decision to overturn the Panel's finding and substitute it with a finding that that the allegations were not proven must be quashed and substituted with a decision that the appeals of both the interested parties are dismissed.