Neutral Citation Number: [2024] EWHC 1454 (Admin)

Case No: AC-2022-LON-002712

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2024

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

R (on the application of the CHIEF CONSTABLE OF THAMES VALLEY POLICE)	**Claimant**
- and –	
A LEGALLY QUALIFIED CHAIR	**Defendant**
-and-	
C	**Interested Party**
-and-	
POLICE FEDERATION OF ENGLAND AND WALES	**Intervener**

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John Beggs KC and **Aaron Rathmell** (instructed by **Thames Valley Police)** for the **Claimant**
Kevin Baumber (instructed by **Hempsons LLP** for the **Intervener**
The **Defendant** and **Interested Party** did not appear and were not represented.

Hearing date: 19 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13/06/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Holgate:

Introduction

1. The central issue in the submissions to this court was whether the misconduct provisions in the Police (Conduct) Regulations 2020 (SI 2020 No.4) ("PCR 2020") apply to a person's conduct before he or she becomes a police officer. Although this has been a controversial matter, this claim can be resolved in a more straightforward way, as I explain below.

2. The police officer in this case, referred to as C, joined the Thames Valley Police on 8 February 2010 when he was 24. In misconduct proceedings brought by the claimant as "appropriate authority", it was alleged that in 2008 or 2009 C had engaged in sexual activities with a girl then aged 13 or 14. It was said that he knew, or ought to have known, that she was under 16 at the time. Furthermore, it was alleged that C should have disclosed this conduct on vetting forms he completed, for example, when he applied to join the police force. He did not do so. These matters were said to have involved breaches of the Standards of Professional Behaviour regarding discreditable conduct, honesty and integrity and that, individually or collectively, they amounted to gross misconduct. C denies all the allegations and maintains his innocence.

3. On 8 August 2022 the defendant, the Legally Qualified Chair of a Police Misconduct Panel, ruled that the allegations (which by agreement were assumed to be capable of proof) fell outside the scope of the PCR 2020, because they related to conduct before the officer joined the police force and so the Panel had no jurisdiction to entertain the disciplinary proceedings. He dismissed the case.

4. The claimant, the Chief Constable of Thames Valley Police, applies for judicial review of that decision with the permission of Henshaw J. The judge also made an order that anonymity should be granted to the complainant and to a close friend who had first reported the alleged sexual misconduct to the police. I refer to them as A and B respectively.

5. The defendant filed an acknowledgement of service stating that as a tribunal he did not intend to take any part in the proceedings.

6. C had resigned from the police force on 22 April 2022. He was served with the claim as an interested party but has taken no part in these proceedings.

7. The claimant applied for an order that the identity of the interested party should be anonymised and not published, solely for the purposes of protecting the legitimate interests of A and to preserve the anonymity previously ordered by the court in relation to A and B. On 13 March 2024 I made that order on that basis and so this judgment refers to the interested party as C.

8. It had seemed unlikely that the claim would be opposed. However, on 23 March 2023 the Police Federation of England and Wales ("the PFEW") made an application under CPR 54.17 to intervene in order to contest the grounds upon which the claim had originally been brought. On 10 November 2023 Lang J granted permission for the PFEW to take part in the proceedings as an intervener making both written and oral submissions.

9. The PFEW was first established by the Police Act 1919. It is now constituted under s.59(1) of the Police Act 1996 ("PA 1996"). As a staff association, it represents over 130,000 members of police forces up to the rank of Chief Inspector, and also special constables, in matters affecting their welfare and efficiency. In doing so, it must protect the public interest and maintain high standards of conduct and transparency (s.59(1A)). The Federation may represent a member of a police force at conduct proceedings under s.50 (s.59(2)).

10. On 26 August 2022 Colton J gave judgment in the High Court of Northern Ireland in *Watson's Application for Judicial Review* [2022] NIQB 59. He dismissed the claim for judicial review, holding that under Northern Ireland's legislation, misconduct proceedings may deal with a police officer's conduct before "attestation"[1] (sometimes referred to as "pre-attestation conduct"[2]). The claimant in the current proceedings relied upon the judgment of Colton J (see Statement of Facts and Grounds paras. 53 to 56), submitting that the regime in Northern Ireland was "materially similar to that in England and Wales."

11. Mr. Watson appealed against the dismissal of his claim for judicial review. The hearing took place before Keegan LCJ, Treacy LJ and Scoffield J on 27 and 28 June 2023. The PFEW were allowed to make submissions as interveners, both orally and in writing. They contended that Colton J had been wrong to decide that the misconduct legislation applied to pre-attestation conduct. They said that this point of law was "of wide and significant application" given that the equivalent regulations in England and Wales use nearly identical language.

12. The claimant in the present proceedings applied to stay the hearing of his claim until after the Court of Appeal in Northern Ireland handed down its judgment in *Watson*. Somewhat bizarrely the PFEW opposed that application. But on 24 January 2024 Sir Duncan Ouseley granted the stay, by which time the Court of Appeal had handed down its judgment the day before ([2024] NICA 7).

13. The Court of Appeal reversed the decision of Colton J, holding that the conduct of a person before he or she attests as a police officer does not fall within the ambit of "misconduct" to which the misconduct regime in Northern Ireland applies.

14. Not surprisingly, at the hearing before me the PFEW relied heavily on the decision of the Court of Appeal and the similarity of the legislation in the two jurisdictions. They submitted that the decision in *Watson* cannot be distinguished and should be followed by the High Court in this country. The claimant submitted that *Watson* should not be followed because the regime in Northern Ireland is materially different and/or the Court of Appeal's decision on pre-attestation conduct was wrong.

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[1] Attestation refers to an affirmation (formerly an oath) before a justice by a constable when appointed to discharge his or her functions in accordance with a declaration (see [38]-[39] below).

[2] The claimant says that a fresh attestation is required each time a police officer joins a different police force. The intervener accepts that this is the practice followed by some police forces. The claimant was concerned that if the PCR 2020 do not apply to pre-attestation conduct, disciplinary proceedings could not be brought in relation to the previous conduct of a police officer when they were serving in a different force. This concern does not arise. The PCR 2020 do not apply to conduct before a person becomes a police officer, but may apply to conduct while a policer officer was previously serving as a member of a different force (see [131] below). I therefore use the term "pre-attestation conduct" to refer to conduct before a person became a police officer.

15. But during the hearing the claimant sought to rely upon an alternative ground by which the Police Misconduct Panel would have jurisdiction in this case to deal with the substance of the complaint against C, whilst avoiding the legal controversy over pre-attestation conduct. The claimant contends that C's sexual activity with A, if proven, was conduct which C had been obliged to disclose on his vetting form before joining the Thames Valley Police. It is said that if that conduct had been declared, his application to join the police service would have been rejected. The failure to declare that conduct in the form was dishonest, lacking integrity and disreputable. The defendant made no reference in his decision to this part of the appropriate authority's case against C. Furthermore, C was under a continuing obligation to disclose his conduct in relation to A. He failed to do so. These failures fall within the scope of the misconduct regime under the PCR 2020. The claimant therefore submits that the claim should be allowed on this additional ground and the defendant's decision quashed, even if the original ground of challenge should fail.

16. The PFEW did not oppose the making of an amendment to plead this additional ground of challenge. For reasons I explain below, it was plainly in the interests of justice for this amendment to be allowed for which I granted permission.

17. I note that on 28 May 2024 the Supreme Court refused the application by the PSD for permission to appeal against the decision of the Court of Appeal in Northern Ireland in *Watson* "because the application does not raise an arguable point of law."

18. I am grateful to Mr. John Beggs KC and Mr. Aaron Rathmell, who appeared on behalf of the claimant, and to Mr. Kevin Baumber who appeared on behalf of the PFEW, for their written and oral submissions.

19. The remainder of this judgment is set out under the following headings.

Factual background

20. On 14 April 2008 when he was 22 C began to work for Thames Valley Police as a contractor, not as a police officer or employee. He worked in a custody section.

21. In 2008 C met A through a local group. A was aged 13 or 14 at the time. C told A that he had left university and was working for the police. It is alleged that on one occasion C asked A to masturbate him and to give him oral sex. She did this. It is also alleged that on another occasion they had vaginal sex. This conduct is said to have taken place between 2008 and 2009.

22. Between 26 June 2008 and 23 October 2009 C completed vetting forms in connection with his application to become a police officer with Thames Valley Police.

23. The form signed by C on 26 June 2008 had a section seeking "Personal Information". Two references had to be provided. The form asked detailed questions about *inter alia* criminal convictions and cautions, criminal associates, connections with extremist groups and the C's financial position. The explanatory notes stated that C should make a full and frank disclosure and that withholding relevant information could result in him not being appointed. Section 9 asked C whether he was aware of "any other circumstances or characteristics which may effect your suitability for appointment …" including "conduct which could make you susceptible to pressure or improper influence by anyone?" C answered "no". In section 15 of the form C signed a series of declarations and undertakings. He stated that the information he had provided was true to the best of his knowledge and belief and undertook to notify any material changes or addition to the information provided in the form. He also declared that he understood that if he had knowingly made a false statement or deliberate omission, he could be liable to disciplinary action.

24. Between April and June 2009 C went through a further part of the vetting process to verify his identification. By October 2009 C's vetting was under review. He signed a review form on 23 October 2009. The form reminded C of his obligation to notify the vetting unit of any relevant change of circumstances. C answered "no" to questions asking about personal or domestic problems, conduct rendering him vulnerable to blackmail and whether there had been any significant change in his circumstances. C signed declarations similar to those contained in the form he had signed on 26 June 2008, including confirmation of his understanding that any false statement or deliberate omission in the information he provided could adversely affect security clearance, disqualify him from employment in a particular post, or could render him liable to disciplinary action.

25. On 8 February 2010 C became a police constable in the Thames Valley Police. He would have made an attestation on appointment in accordance with s.29 of the Police Act 1996 (see [38]-[41] below).

26. C's vetting clearance was reviewed by the police force in 2018. He signed a vetting review form on 18 July 2018. The form referred again to his obligation to notify any relevant change of circumstances. In section 7 of the form, C continued to deny that he had experienced any personal problems, or had been involved in conduct making him vulnerable to blackmail, or that there had been any other significant changes to his circumstances. C signed similar declarations to those previously mentioned. He declared that the information he provided was true to the best of his knowledge and belief and that he understood that any false statement or deliberate omission in that information could adversely affect his security clearance, or could disqualify him from employment in a particular post, or render him liable to disciplinary action.

27. On 6 October 2021, B telephoned the police to make allegations about C's sexual activities with A in 2008 to 2009. In the light of a recent, high-profile case, B was concerned about the need to protect women and girls and whether C should be serving as a police officer. She contacted the police without A's knowledge. The following day two detectives met A to obtain her account of what had taken place.

28. On 13 October 2021 C was served with a notice of investigation in relation to the allegations under reg.17 of the PCR 2020: He was also arrested and interviewed under criminal caution. He strongly denied the allegations.

29. On 18 November 2021 the police decided to take no further action under the criminal law. A had stated that she would not support a prosecution in the Crown Court and it was concluded that there was no realistic prospect of securing a conviction.

30. On 17 December 2021 the investigating officer in the PCR 2020 process submitted a report in which he advised that there was a case for C to answer on disciplinary charges.

31. On 25 March 2022 C tendered his notice of resignation, effective from 22 April 2022.

32. On 24 May 2022 A provided a witness statement to the police broadly confirming the account she had given previously. The investigating officer then confirmed his opinion that there was a case for C to answer on the disciplinary charges.

33. On 14 June 2022 the police force served on C a notice under reg.30 of the PCR 2020 that a case against him alleging gross misconduct had been referred to "misconduct proceedings." The case was based on two matters. First, there were allegations of discreditable conduct relating to sexual activity with A when she was aged under 16 and vulnerable and C was aged 22 and in a position of trust. The second matter was set out in para. 5 of the notice:

> "5. The fact that you had sexual relationship with Ms A (if proven) was potentially criminal conduct and a circumstance which you should have declared on your vetting form when you applied to join the police service as a constable, but you failed to do so. Discreditable Conduct; Honesty & Integrity."

Notwithstanding C's resignation, the case against him was to proceed pursuant to reg.4(2) and (3) of PCR 2020 as a case against a former officer.

34. In a regulation 31 response to that notice, a representative for C submitted that the panel had no jurisdiction to deal with the allegations because C had not been a serving officer when the alleged conduct occurred. This was to be dealt with by the Panel as a preliminary issue.

35. In a skeleton argument dated 2 August 2022 counsel for C responded to para. 5 of the reg.30 notice by stating that C had not been a serving police officer when he filled in his application and vetting forms (para.1(iii)). I interpose to note that C was serving as a police officer when he signed the review vetting form on 18 July 2018.

36. In a skeleton dated 5 August 2022 the claimant submitted that the PCR 2020 should be interpreted in the light of the purposes of the disciplinary regime, which include maintaining the reputation of, and public confidence in, police forces and their officers. The need for integrity engages the public interest in the disciplinary regime. Integrity requires not only honesty but also adherence to the ethical standards of the police service, with regard to what an officer both says and does. The claimant submitted that on a proper interpretation of the legislation, a person's conduct before they become a police officer may fall within the scope of the misconduct regime. That regime is not limited to conduct while serving as a police officer. Rather the legislation confers jurisdiction to deal with allegations of misconduct which come to the attention of an appropriate authority at a time when the subject of the allegation was a member of that authority's force. The claimant also submitted in the alternative that the sexual activity with A, if proven, was *prima facie* criminal conduct and therefore something which C should have declared on the vetting forms when he applied to join the police force. The failure to disclose that conduct amounted to dishonest concealment, and was lacking in integrity and discreditable (paras. 18 and 19 of skeleton).

37. At the hearing on 8 August 2022 the defendant determined the preliminary issue in favour of C, by deciding that the statutory misconduct regime does not apply to pre-attestation conduct. He did not deal with the claimant's allegation against C based on the vetting forms signed by the claimant.

Statutory framework

Attestation of constables

38. Section 29 of the PA 1996 provides:

> "Every member of a police force maintained for a police area and every special constable appointed for a police area shall, on appointment, be attested as a constable by making a declaration in the form set out in Schedule 4—
>
> (a) …
>
> (b) before a justice of the peace having jurisdiction within the police area."

39. The current form of declaration is to be found in sched. 4 to the PA 1996 (as substituted by s.83 of the Police Reform Act 2002 ("PRA 2002")):

> "I … of … do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people: and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property, and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to the law."

40. Attestation is the moment when a person assumes the powers and obligations of a police constable (*Sheikh v Chief Constable of Greater Manchester Police* [1990] 1 QB 637, 647B). Section 30(1) of the 1996 Act provides that a member of a police force shall have all the powers and privileges of a constable throughout England and Wales.

41. The terms of the declaration in the 1996 Act reflect the common law obligations of the police (*Michael v Chief Constable of South Wales Police* [2015] AC 1732 at [29]-[35]). Appointment as a constable is based upon certain basic requirements which are relevant to the allegations against C. They include integrity, equal respect for all people, upholding fundamental rights and preventing offences against people and property.

42. Regulation 10 of The Police Regulations 2003 (SI 2003 No. 527) sets out qualifications which a candidate for appointment to a police force must satisfy. A candidate for appointment "must give such information as may be required as to his previous history or employment or any other matter relating to his appointment to the police force" (reg.10(1)(h)).

The regime for dealing with the conduct of a police officer

43. The current regime was introduced by the Police and Magistrates' Courts Act 1994. The previous regime was laid down by the Police Act 1964. Section 33(1) of the1964 Act provided for the making of regulations for "the government, administration and conditions of service of police forces". Section 33(2) listed particular subjects which could be addressed by regulations, including at sub-para (e), "the maintenance of discipline in police forces." That provision was amended by s.18(2) of the 1994 Act to read:

> "*the conduct, efficiency and effectiveness of members of police forces* and the maintenance of discipline" (emphasis added)

This amendment was carried through to the consolidating statute, the PA 1996.

44. Counsel were asked to consider whether there is any admissible *Pepper v Hart* or other material which would assist in understanding the reasons for this amendment, or in resolving the issues in these proceedings. It appears that the 1994 Act followed on from the White Paper: Police Reform (Cm. 2281) published in June 1993. Para. 3.29 records that the consultation process had examined the difference between what can be handled as a matter of internal personnel management and what should be dealt with more formally as a matter of public concern (i.e. in conduct proceedings). One

objective was to change existing procedures to bring them more into line with wider management practice.

45. When the Bill was introduced at Second Reading in the House of Lords on 18 January 1994, the Lord Chancellor stated that it paved the way for procedures to be introduced by regulations to deal with police officers whose *performance* is unsatisfactory and for simplified procedures to deal with *misconduct*. Accordingly, the 1994 Act widened the power to make regulations to cover "conduct, efficiency and effectiveness" of police officers, as well as "the maintenance of discipline". However, the extra-statutory material does not cast any light on the use of the word "conduct" in this context.

46. Section 50 of the PA 1996 provides for regulations relating to police forces:

> "(1) Subject to the provisions of this section, the Secretary of State may make regulations as to the government, administration and conditions of service of police forces.
>
> (2) Without prejudice to the generality of subsection (1), regulations under this section may make provision with respect to—
>
> …
>
> (e) the conduct, efficiency and effectiveness of members of police forces and the maintenance of discipline;
>
> (f) the suspension of members of a police force from membership of that force and from their office as constable;
>
> …
>
> (3) Without prejudice to the powers conferred by this section, regulations under this section shall—
>
> (a) establish, or
>
> (b) make provision for the establishment of,
>
> procedures for the taking of disciplinary proceedings in respect of the conduct, efficiency and effectiveness of members of police forces, including procedures for cases in which such persons may be dealt with by dismissal."

Section 50(3A) authorises regulations to deal with the alleged conduct, efficiency or effectiveness of any person who at that time was a member of the police force but has since ceased to be such a member.

47. The College of Policing is an operationally independent, arm's length body of the Home Office. Under s.39A of the PA 1996 it is responsible for issuing codes of practice on the discharge of the functions of chief officers of police *inter alia* to promote the efficiency and effectiveness of police forces generally. A chief officer of

police must have regard to a code of practice when discharging any function to which that code relates (s.39A(7)).

48. Under s.87(1) of the PA 1996 the Home Secretary, and under s.87(1B) the College of Policing, may issue guidance on the discharge of "disciplinary functions" by *inter alia* chief officers and other members of police forces. Those functions mean functions (including disciplinary proceedings) in relation to the conduct, efficiency and effectiveness and the maintenance of discipline of, *inter alia* members of police forces (s.87(4A)). It is the duty of every person to whom any s.87 guidance is issued, including police officers, to have regard to that guidance in discharging any function to which it relates (s.87(3)). A failure to do so is admissible evidence in any disciplinary proceedings.

49. Under s.87A(1) of the PA 1996 the Home Secretary, and under s.87A(2) the College of Policing, may issue guidance on matters of conduct, efficiency and effectiveness to *inter alia* members of police forces. It is the duty of every person to whom any s.87A guidance is issued, including police officers, to have regard to that guidance (s.87A(3)). A person's failure to do so is admissible evidence in any disciplinary proceedings brought against that person (s.87A(4)).

50. The PCR 2020 sit alongside the Police Performance Regulations 2020 (SI 2020 No.3) ("the PPR 2020") and the Police (Complaints and Misconduct) Regulations 2020 (SI 2020 No.2), which passed into law at the same time.

51. By reg.4(1) of the PCR 2020:

> "(1) Subject to paragraph (6), these Regulations apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct, gross misconduct or practice requiring improvement."

52. Regulation 2(1) of the PCR 2020 includes the following definitions:

> " "conduct" includes acts, omissions … "
>
> " 'misconduct', other than in regulation 23(2)(a) and the first reference to "misconduct" in regulation 23(2)(b), means a breach of the Standards of Professional Behaviour that is so serious as to justify disciplinary action;"
>
> ""gross misconduct" means a breach of the Standards of Professional Behaviour that is so serious as to justify dismissal;"
>
> ""Standards of Professional Behaviour" has the meaning given in regulation 5 and references in these Regulations to the Standards of Professional Behaviour are to be construed accordingly"
>
> "disciplinary action" means, in order of seriousness starting with the least serious action—

(a) a written warning;

(b) a final written warning;

(c) reduction in rank, or

(d) dismissal without notice"

> ""practice requiring improvement" means underperformance or conduct not amounting to misconduct or gross misconduct, which falls short of the expectations of the public and the police service as set out in the "Code of Ethics" issued by the College of Policing under section 39A of the Police Act 1996 (codes of practice for chief officers)"

53. Regulation 5 of the PCR 2020 provides that the Standards of Professional Behaviour ("SPB")are the standards described in sched 2:

> "**Honesty and Integrity**
>
> *Police officers are honest, act with integrity and do not compromise or abuse their position.*
>
> **Authority, Respect and Courtesy**
>
> Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.
>
> Police officers do not abuse their powers or authority and respect the rights of all individuals.
>
> **Equality and Diversity**
>
> Police officers act with fairness and impartiality. They do not discriminate unlawfully or unfairly.
>
> **Use of Force**
>
> Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.
>
> **Orders and Instructions**
>
> Police officers only give and carry out lawful orders and instructions.
>
> *Police officers abide by police regulations, force policies and lawful orders.*
>
> **Duties and Responsibilities**

> Police officers are diligent in the exercise of their duties and responsibilities.
>
> Police officers have a responsibility to give appropriate cooperation during investigations, inquiries and formal proceedings, participating openly and professionally in line with the expectations of a police officer when identified as a witness.
>
> **Confidentiality**
>
> Police officers treat information with respect and access or disclose it only in the proper course of police duties.
>
> **Fitness for Duty**
>
> Police officers when on duty or presenting themselves for duty are fit to carry out their responsibilities.
>
> **Discreditable Conduct**
>
> *Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty.*
>
> Police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice.
>
> **Challenging and Reporting Improper Conduct**
>
> Police officers report, challenge or take action against the conduct of colleagues which has fallen below the Standards of Professional Behaviour.*"* (emphasis added)

54. In July 2014 the College of Policing issued the "Code of Ethics" as a code of practice under s.39A of the PA 1996. Paragraph 1.4.2 of the Code states that police officers are expected to use the Code to guide their behaviour at all times, whether at work or away from work. Paragraph 3.1.1 explains that the Code is rooted in the SPB now contained in the PCR 2020. Page 5 of the Code deals with "honesty and integrity". By way of example a police officer must "not knowingly make false, misleading or inaccurate oral or written statements in any professional context." Under "conduct" para. 9.2 states: "You should ask yourself whether a particular decision, action or omission might result in members of the public losing trust and confidence in the policing profession."

55. On 5 February 2020 the Home Office issued guidance under ss.87 and 87A of the PA 1996: "Conduct, Efficiency and Effectiveness: Statutory Guidance on Professional Standards, Performance and Integrity in Policing". The Guidance is issued to *inter alia* all members of police forces (para.1.16). "The guidance should be understood and followed by every police officer in England and Wales as it sets out the standards

and expectations for police officers, alongside the Code of Ethics and the associated Regulations" (para. 1.18).

56. Paragraph 2.3 of the Guidance states:

> "The Standards of Professional Behaviour [in sched.2 to the PCR 2020] are a statement of the expectations that the police and the public have of how police officers should behave. They are not intended to describe every situation but rather to set a framework which everyone can easily understand. They enable everybody to know what type of conduct by a police officer is acceptable and what is unacceptable. The standards should be read and applied having regard to the Code of Ethics."

The Code of Ethics sets "the principles and expected behaviours that underpin the Standards of Professional Behaviour for everyone working in the policing profession in England and Wales", although not an exhaustive guide (paras. 2.4, 2.6). Police Officers have a duty to keep themselves up to date with the Code of Ethics (para.2.8)

57. In July 2023 the College of Policing issued a Vetting Code of Practice under s.39A of the PA 1996, in part to uphold the SPB (para 3.3). Paragraph 3.4 of the Code states that it is supported by the College's Authorised Professional Practice ("APP") on Vetting issued in 2021 under s.87A(2). Paragraph 4.8.1 of the APP states that because members of the police have to "act with the highest levels of integrity," they "*must disclose all relevant information* during the vetting process and *throughout the lifetime of the vetting clearance*" (emphasis added). Similarly, a police officer must report relevant changes of circumstance (para. 4.8.2). The APP warns of the potentially serious consequences should an officer fail to make a material disclosure.

58. Regulation 14 of the PCR 2020 requires the "appropriate authority" (generally the chief officer of the police force) to assess the severity of an allegation, were it to be proved. If it would amount to misconduct or gross misconduct, the matter must be investigated and, in the event of it being referred to misconduct proceedings, a misconduct meeting or hearing would be likely to be held. However, if the appropriate authority considers that the allegation, if proved, would not amount to misconduct, he must decide whether (a) it would amount to "practice requiring improvement" to be dealt with under Part 6 of the PCR 2020, or (b) should be referred to be dealt with under the PPR 2020, or (c) that no further action be taken.

59. Where an allegation is to be "investigated", the investigator must give the police officer a notice under reg.17 stating *inter alia* the alleged conduct, breaches of the SPB and the results of the reg.14 assessment. The police officer or his "police friend" may respond to the reg.17 notice (see reg.18).

60. When the investigation is concluded, the investigating officer must submit a report to the appropriate authority. As soon as practicable thereafter, the appropriate authority must decide whether or not the police officer has a case to answer and, if he does, whether misconduct proceedings should be brought and the form those proceedings will take. If the authority decides that there is no case to answer or that no misconduct proceedings will be brought, he must go on to select one of the three options (a), (b) or (c) referred to in [58] above (reg.23). But if the case is referred to "misconduct

proceedings" the authority must give the officer a notice under reg.30 setting out the alleged misconduct and other specified information.

61. Under reg.41 the disciplinary panel must decide whether the allegations should be upheld and, if so, which, if any, disciplinary action (defined in reg.2(1)) should be imposed in accordance with reg.42.

The regime for dealing with the performance of a police officer

62. As explained above, some misconduct issues raised under the PCR 2020 may turn out to be "performance" issues, which may end up being dealt with under the PPR 2020. It has been suggested that PPR 2020 may provide a route by which conduct before a person becomes a police officer may be addressed, even if that does not fall within the scope of PCR 2020.

63. The PPR 2020 are concerned with the performance, or attendance, or gross incompetence of police officers. Generally matters are handled in three stages. Where the line manager of a police officer considers that the performance or attendance of a police officer is unsatisfactory he may be required to attend a first stage meeting (reg.15). If, following a prescribed procedure, the allegation is made out, the officer may be given a written improvement notice specifying a period of up to 12 months within which specified matters must improve sufficiently (reg.18). If at the end of that period the line manager considers that a matter specified in the written notice has not improved sufficiently, the officer must attend a second stage meeting (reg.22). If, following a prescribed procedure, a second line manager considers that the performance or attendance has been unsatisfactory during that period, he must give the officer a final written improvement notice which lasts for 12 months. If the line manager considers that by the end of that period there has not been a sufficient improvement in the matters of concern, the officer must attend a third stage meeting (reg.30). Where a panel convened under reg.34 finds the allegation to be made out they may order *inter alia* dismissal on notice or a reduction in rank (reg.46).

64. Where the "appropriate authority" (i.e. the chief constable of the force) decides that the performance of a police officer constitutes "gross incompetence" the matter passes directly to a third stage meeting, without going through the first stage and second stage procedures (reg.32). Where a panel finds that gross incompetence is made out, the possible outcomes include immediate dismissal (reg.46). Regulation 4(1) defines "gross incompetence":

> "'gross incompetence' means a *serious inability* or serious failure of a police officer *to perform the duties of the officer's rank* or the role the officer is currently undertaking to a satisfactory standard or level, without taking into account the officer's attendance*, to the extent that dismissal would be justified* and "grossly incompetent" is to be construed accordingly" (emphasis added)

65. The vetting regime has been helpfully examined by Eyre J in *R (Victor) v Chief Constable of West Mercia* [2023] EWHC 2119 (Admin). In July 2023 the College of

Policing issued a Vetting Code of Practice under s.39A of the PA 1996 (see [57] above). Vetting is an integral part of the framework of ethics and professional standards for a police force. It assists with identifying people who are unsuitable to work within a force or to have access to police assets, such as data bases. This includes people who are unsuitable because of previous criminal activity, or who have a demonstrable lack of honesty or whose previous behaviour is inconsistent with the Code of Ethics (para.1.4).

66. The APP on Vetting (see [57] above) states that in assessing information obtained through the vetting process a two stage test should be applied: (1) are there reasonable grounds for suspecting that the applicant or officer is or has been involved in criminal activity or, in an applicant's case, has financial vulnerabilities, and (2) if so, is it appropriate, in all the circumstances, to refuse vetting clearance (para. 8.37.4). This approach is based on the principle laid down by Coulson J (as he then was) in *R (A) v Chief Constable of C Constabulary* [2014] 1 WLR 2776.

67. Paragraph 8.47.1 of the APP states that if vetting clearance is refused in the process of recruitment vetting, unsupervised access to police assets (including premises, information and systems) cannot be granted. It is inconceivable that such a person would be appointed to be a police officer. Where such clearance is subsequently withdrawn for a member of the staff of a police force, dismissal would follow under the Employment Rights Act 1996, for example where alternative employment cannot be found and the risks cannot be managed (para. 8.47.2). But the 1996 Act does not apply to police officers. In their case, where vetting clearance is withdrawn and suitable alternative employment cannot be found and/or the risks cannot be managed, the police force should consider proceedings under the PPR 2020 (para.8.47.3). Paragraph 8.47.4 states:

> "When a police officer's or special constable's RV clearance is withdrawn, they will be unable to access police information and systems. Unsupervised access to police premises will also not be permitted. As a result, the police officer will be unable to perform their role to a satisfactory level. This could, therefore, amount to gross incompetence and a third-stage meeting should be considered."

Legal principles

Statutory interpretation

68. When interpreting a statute, the court's task is to ascertain and give effect to the true meaning of the language used by Parliament and, within the permissible bounds of interpretation, to give effect to Parliament's purpose. This means reading the relevant text in the context of the statute as a whole, including the historical context of the circumstances which led to its enactment (Lord Bingham in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8]; *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594 at [41]). But a purposive interpretation of a statute must relate to the language used by Parliament, rather than alter the legislative scheme (see Bennion, Bailey and Norbury on Statutory Interpretation (8th Edition) at section 12.2 and *R v Bentham* [2005] 1 WLR 1057).

Disciplinary regimes

69. There is a long line of authority in which the courts have held that the purpose of a statutory disciplinary regime for a profession is not to impose punishment for misconduct but to maintain public confidence in the reputation of the profession and the integrity of its members and to declare and uphold proper standards of conduct (e.g. *Bolton v Law Society* [1994] 1 WLR 512; *Gupta v General Medical Council* [2002] 1WLR 1691; *R (Coke-Wallis) v Institute of Chartered Accountants* [2011] 2 AC 146).

70. This principle has been applied by Burnett J (as he then was) to the disciplinary regime governing the conduct of officers (*R (Chief Constable of Dorset) v Police Appeals Tribunal and Salter* [2011] EWHC 3366 (Admin) at [22]:

> "The reasons which underpin the strict approach applied to solicitors and barristers apply with equal force to police officers. Honesty and integrity in the conduct of police officers in any investigation are fundamental to the proper workings of the criminal justice system. They are no less important for the purposes of other investigations carried out by police forces, including those on behalf of coroners. The public should be able unquestioningly to accept the honesty and integrity of a police officer. The damage done by a lack of integrity in connection with the investigation of an alleged offence may be enormous. The guilty may go free. The innocent may be convicted. Large sums of public money may be wasted. Public confidence in the integrity of the criminal justice system may be undermined. The conduct of a few may have a corrosive effect upon the reputation of the police service in general."

71. The Court of Appeal rejected Mr. Salter's criticism of this passage and of the analogy drawn by the judge with the disciplinary regimes for the legal profession ([2012] EWCA Civ 1047 at [21]).

72. In *R (Green) v Police Complaints Authority* [2004] 1 WLR 725 Lord Carswell said at [78]:

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

73. Similarly, the Court of Appeal of Northern Ireland emphasised in *Watson* at [56] "the importance of maintaining public confidence in the police service which is an important aspect of the rule of law."

74. In *Solicitors Regulation Authority v Wingate* [2018] 1 WLR 3969 the Court of Appeal elucidated the concepts of "honesty" and "integrity" in a disciplinary regime for a profession. As to honesty Jackson LJ stated at [93]:

> "Honesty is a basic moral quality which is expected of all members of society. It involves being truthful about important matters and respecting the property rights of others. Telling lies about things that matter or committing fraud or stealing are generally regarded as dishonest conduct. These observations are self-evident and they fit with the authorities cited above. The legal concept of dishonesty is grounded upon shared values of our multicultural society. Because dishonesty is grounded upon basic shared values, there is no undue difficulty in identifying what is or is not dishonest."

The test for dishonesty is objective [94].

75. "Integrity" is a broader concept than honesty. It is used to express the higher standards which society expects from professional persons and which the professions expect from their own members. Integrity connotes adherence to the ethical standards of a profession to which a person belongs. The rationale for this requirement is that professions have a trusted, and sometimes privileged, role to play in society. So, for example, a solicitor or barrister is expected not to mislead in their professional dealings (*Wingate* [95]-[100]).

Precedent

76. In *Deane v Secretary of State for Work and Pensions* [2011] 1 WLR 743 the Court of Appeal stated at [26] that it was not bound by decisions of the Court of Appeal of Northern Ireland but it should accord them the greatest respect. Where such a decision relates to a statutory provision which applies, or is the same as that which applies, in England and Wales, then the Court of Appeal should follow that decision. This is to prevent the undesirable situation arising of identically worded legislation in different parts of the Kingdom being interpreted in inconsistent ways. The same approach applies to decisions of the Court of Session in Scotland.

77. This "rule of practice" was revisited by the Court of Appeal in *R (Jwanczuk) v Secretary of State for Work and Pensions* [2004] 2 WLR 795 at [39] – [49]. The Court reiterated that where the Court of Appeal of Northern Ireland had decided an issue about the meaning or effect of UK legislation, or identical legislation, the Court of Appeal in this country should follow that decision, unless there is a "compelling reason" not to do so. The minimum requirement for such a compelling reason is that the court considers the earlier decision to be "clearly wrong." It is insufficient that the court would have decided the issue in a different way, or disagrees with that decision. Where it is thought that a previous decision of the Court of Appeal of Northern Ireland, or of the Court of Session, is wrong, the Supreme Court can act as the final arbiter. A judge of the High Court should be even slower than the Court of Appeal to reach a different decision from an appellate court in Scotland or Northern Ireland on an identical issue about the meaning or effect of UK legislation, or identical legislation. The rule of practice has greater force as between tribunals of different status in the judicial hierarchy ([49]).

78. The Supreme Court has refused permission to appeal against the decision in *Watson* ([17] above). The claimant points to para. 3.3.3 of the Supreme Court's Practice Direction which states: "The reasons given for refusing permission to appeal should

not be regarded as having any value as a precedent." That reflects longstanding practice going back to the procedures of the Judicial Committee of the House of Lords. Permission may be refused because an application does not raise a point of general public importance or because the facts of the case are not suitable for the resolution of such a point in the final appellate court. Here the Supreme Court has straightforwardly said that the application in *Watson* did not raise an arguable point of law. Given that the main issue on which the parties in *Watson* and in the present case disagree is concerned with statutory interpretation on very similar legislation, I do not see how the decision of the Supreme Court could simply be disregarded by this court. At the very least, this court needs to tread most carefully before disagreeing with the decision of the Court of Appeal in Northern Ireland.

The legislation in Northern Ireland

79. Section 38(1) of the Police (Northern Ireland) Act 2000 provides for the attestation of constables in terms which, for present purposes, are not materially different from the English provision in s.29 of the PA 1996.

80. Section 52 of the 2000 Act provides that the Northern Ireland Policing Board shall issue, and may from time to time revise, a "code of ethics" for the purpose of *inter alia* "laying down standards of conduct and practice for police officers." In preparing the code the Chief Constable and the Board shall have regard to the terms of the attestation declaration (s.52(2)). The Chief Constable is under a duty to take such steps as he considers necessary to ensure that "all police officers have read and understood the code as currently in force" (s.52(8)(a)). The Department of Justice is to ensure that the provisions of that code are reflected in the regulations relating to conduct or discipline made under *inter alia* s.25 of the Police (Northern Ireland) Act 1998 (s.52(10)).

81. Section 25(1) of the 1998 Act empowers the Department of Justice to make regulations as to "the government, administration and conditions of service of members of the Police Service of Northern Ireland." Section 25(2) provides that those regulations may make provisions as to:

> "(e) the conduct, efficiency and effectiveness of the Police Service of Northern Ireland and the maintenance of discipline."

There is no material difference between this provision and s.50(2)(e) of the PA 1996. Section 25(3) provides for regulations in relation to disciplinary procedures against police officers in terms which do not differ materially from s.50(3) of the PA 1996 (see [46] above).

82. The relevant regulations dealing with conduct are the Police (Conduct) Regulations (Northern Ireland) 2016 (SI 2016 No. 41) ("the 2016 NI Regulations"). Regulation 3(2) provides that the "Code of Ethics" means the Code contained in the schedule thereto. The Code issued under s.52 of the 2000 Act is not merely reflected in the 2016 NI Regulations, it is set out in those regulations. In summary, "misconduct" means a breach of the Code of Ethics which, in an investigation under Part 3, the Police Ombudsman for Northern Ireland, or the "appropriate authority" (for lower ranks than the Chief Constable), has decided is not more properly dealt with as a

"performance matter" (reg.3(2)). "Gross misconduct" means "a breach of the Code of Ethics where the misconduct is so serious that dismissal would be justified."

83. Regulation 5(1) of the 2016 NI Regulations provides that:

> "These Regulations apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a member may amount to misconduct or gross misconduct."

There is no material difference between that regulation and Reg.4(1) of the PCR 2020 (see [51] above).

84. Part 4 of the 2016 NI Regulations contains the rules governing misconduct proceedings. The regime is similar to that contained in the PCR 2020. Certainly, the claimant did not suggest that there is any difference between the two sets of regulations which is material for the purposes of the issues in this case.

85. In Northern Ireland the "unsatisfactory performance" procedures are laid down by the Police (Performance and Attendance) Regulations (Northern Ireland) 2016 (SI 2016 No.42) ("the NI Performance Regulations"). Regulation 4(1) defines "gross incompetence" in terms virtually identical to the definition of that expression in the PPR 2020 (see [64] above). The NI Performance Regulations are very similar in structure and content to their English equivalent. They provide for "meetings" in three stages. The definition of "gross incompetence" in both sets of regulations is essentially identical. Where an allegation of "gross incompetence" is made, the matter proceeds directly to a third stage meeting (reg.29). If the allegation is upheld by the panel, the police officer may be summarily dismissed (reg 39(3)).

The decision in *Watson*

86. This decision needs to be considered in some detail. In April 2016 Mr. Watson, the appellant, completed a security vetting questionnaire as part of the process for dealing with his application to join the Police Service of Northern Ireland. He began training in January 2017 and was attested as a constable in June 2017. He had to complete a form in which he was asked to disclose details of any full-time or part-time employment in the previous 5 years. He failed to disclose his part-time work for Matalan as a sales assistant between October 2011 and July 2014 and his work for another retailer, Statement, between January 2015 and October 2016. It subsequently transpired that the appellant had been subject to disciplinary procedures at Matalan, culminating in a warning for gross misconduct. It was also alleged that he had made 10 unauthorised payments from Statement to himself totalling £1,675. Plainly this employment record ought to have been disclosed [5].

87. When the Police Service became aware of these matters a misconduct charge was brought in March 2021, alleging that the appellant had made a false declaration in the vetting questionnaire in April 2016 and had "failed at any time thereafter to correct the falsity." The appellant had signed a declaration that the information he had provided was true and complete to the best of his knowledge and belief. This conduct was said to have been in breach of the Code of Ethics in terms of discreditable conduct (article 1.10), integrity (article 7.1) and dishonesty (article 7.5) [6].

88. The relevant provisions of the Code read as follows:

> "1.10 Whether on or off duty, police officers shall not behave in a way that is likely to bring discredit upon the Police Service."
>
> "7.1 Police officers shall act with integrity towards members of the public and their colleagues so that confidence in the Police Service is secured and maintained. They shall avoid all forms of behaviour that may reasonably be perceived to be abuse, harassment, bullying or victimisation."
>
> "7.5 Police officers shall not commit any act of corruption or dishonesty. They shall oppose and report any such acts coming to their attention and shall be supported by their colleagues and senior officers in doing so."

89. The misconduct notice issued to the appellant stated that although he had not been a constable when he signed the vetting questionnaire, the misconduct panel would nevertheless have jurisdiction to consider the allegations. The appellant contended that the misconduct code did not apply to pre-attestation conduct [7].

90. On 5 May 2021 the panel refused to stay the proceedings. They decided that from the moment of attestation a police officer in the appellant's position was "under an immediate and ongoing duty to ensure that his superiors are in receipt of full disclosure of any and all information previously sought", including that which had been sought in the vetting questionnaire. The obligation to correct the record was an "on-going, career-long obligation". In the Court of Appeal this was referred to as "the on-going duty" [8].

91. The prosecuting body, the Professional Standards Department ("PSD") of the Police Service of Northern Ireland, argued before the Panel that it also had jurisdiction to deal with the allegations on the additional basis that the misconduct code applied to pre-attestation conduct ("the interpretation point"). The Panel rejected that contention [10].

92. In the judicial review proceedings in the High Court Mr. Watson challenged the Panel's conclusion on "the on-going duty point." The PSD intervened (a) to support that conclusion and (b) to argue that the Panel had erred in rejecting "the interpretation point" and so had jurisdiction on that additional basis [11]. Colton J decided that the Panel had jurisdiction to deal with the alleged misconduct on both bases, namely the on-going duty point and the interpretation point (i.e. that the misconduct regime in the 2016 NI Regulations applies to pre-attestation conduct).

93. Mr. Watson appealed to the Court of Appeal challenging the judge's decision on both points. After initiating the appeal he resigned from the Police Service [12]. Although the appeal therefore became academic as between the appellant and the Police Service, the Court of Appeal decided that the issues raised were of wider importance and should be dealt with in the public interest [13].

94. The appellant continued to be represented. He contended that the judge was wrong on both jurisdictional points [24]. The PSD argued the contrary [26].

95. The PFEW and other English Staff Associations, together with the Scottish Police Federation, appeared in the Court of Appeal as interveners. They confined their submissions to the interpretation point and submitted that the 2016 NI Regulations do not apply to pre-attestation conduct [27] – [28].

96. The Court of Appeal noted that in the High Court the PSD had intervened at a late stage and had only raised the interpretation point in its skeleton. As a result the parties did not focus on another alternative remedy for dealing with pre-attestation conduct, namely the use of vetting procedures and the NI Performance Regulations [38] and [62]-[63].

97. The English Federations submitted to the Court of Appeal that the 2016 NI Regulations and the English equivalent, the PCR 2020, "use nearly identical language." They said that Colton J had erred on the interpretation point, largely because he had been concerned about the lack of a mechanism to deal with pre-attestation conduct rendering a police officer unsuitable for service. He had not been assisted sufficiently by the PSD on alternative remedies:

> "In this regard they [the English Federations] relied heavily upon police forces' ongoing duty to vet a member for suitability, with reference to the Vetting Code of Practice issued by the College of Policing, and the ability to deal with proven pre-attestation conduct giving rise to unsuitability through the mechanisms contained in the Police (Performance) Regulations 2020, at least for the majority of officers."

The English Federations then went on to explain how more senior officers could be removed [27].

98. The Court of Appeal dealt with the interpretation point at [40] to [45]. At [40] to [43] the Court explained why on a proper construction the 2016 NI Regulations do not apply to conduct before a person becomes a police officer. The process of construing the regulations was said to be conclusive of that issue [44]. But the court went on to identify six "ancillary matters" which "fortified" their decision [44].

99. At [46] to [54] the Court addressed the case law cited by the parties. They distinguished those cases relating to other disciplinary codes where conduct before a person joins a particular profession has been held to fall within the scope of that code.

100. At [55] to [63] the Court of Appeal explained why they considered that material non-disclosure in answering a vetting questionnaire which results in the subsequent withdrawal of vetting, may amount to "gross incompetence capable of being dealt with under the Performance Regulations" (i.e. by dismissal) [63]. Alternatively, a police officer may be required post-attestation to confirm the information he had provided during the vetting process pre-attestation, rendering him liable to misconduct charges if, in confirming that information, the officer acts in a way which contravenes any provision of the Ethics Code [63].

101. At [64] to [68] the Court of Appeal rejected the appellant's ground of appeal in relation to the ongoing duty point. That plainly formed part of the *ratio* of the case. Having upheld the Panel's conclusions on the interpretation point, and decided that it had no jurisdiction to deal with pre-attestation conduct as "misconduct", the Court of Appeal found it necessary to deal with the challenge to the Panel's decision that it had jurisdiction to deal with the allegations under the ongoing duty point, on which they had been upheld by the High Court.

102. I asked Mr. John Beggs KC, who appeared for the claimant, whether the reasoning of the Court of Appeal on the ongoing duty point was applicable to the English regime and to the circumstances of the present case and, if so, whether the consequences would be that the defendant's decision would have to be quashed in any event, irrespective of whether PCR 2020 covers conduct before a person becomes a police officer. He answered "yes" to those questions. Mr. Kevin Baumber said that the PFEW took a neutral stance on the ongoing duty point and would not oppose the quashing of the defendant's decision to decline jurisdiction on this ground.

103. In these circumstances I will deal with the legal issues which have been raised in the following order:

- The ongoing duty point;
- Whether the misconduct regime applies to conduct before a person becomes a police officer;
- Removal of vetting clearance and gross incompetence.

The ongoing duty to disclose information previously sought by a police force

104. The Misconduct Panel in *Watson* stated that a police officer's ongoing duty to correct errors or non-disclosure in the information he or she has previously supplied to a police force when applying to join that force is engaged from the moment of attestation, but not before. Even if there had been good reasons for any initial non-disclosure, an attested officer is not absolved from correcting or completing disclosure immediately, or certainly as soon as practically possible upon attestation. This is an on-going, career-long obligation [8].

105. The Court of Appeal held that whether a failure to correct or supplement information provided at the vetting stage amounts to a breach of the "ongoing duty" would need to be examined on a case-by-case basis. But in principle such a failure may well constitute misconduct committed at a time when a person is subject to the Code of Ethics, i.e. post-attestation [64].

106. The Court held that this issue turned more upon the Code of Ethics than the 1998 Act or the 2016 NI Regulations. It decided that the Code already provided a sufficient basis for an ongoing duty of disclosure in relation to pre-attestation conduct, without needing to be amended. They referred to the requirements that police officers should act with integrity, and not commit any act of dishonesty (articles 7.1 and 7.5 – see [88] above). The Explanatory Notes to the Code state that an act of dishonesty would include "knowingly omitting to make oral or written statements or entries in any record or document required for police purposes." The Court stated at [65]:

> "This is plainly capable, in appropriate circumstances, of covering a situation where an individual knowingly keeps quiet about misleading or incomplete information which they are aware they previously provided for vetting purposes."

107. At [66] the Court of Appeal referred to the importance of the terms of the questionnaire and the declaration signed by Mr. Watson (see [75] and [91] of the judgment of Colton J) and continued:

> "These emphasised to [Mr. Watson], in clear terms, both the importance of providing full and honest disclosure and the continuing reliance which would be placed by the Police on that obligation having been discharged."

108. The Court of Appeal then concluded at [67] to [68] as follows:

> "67. We further reject the appellant's submission that the basis of the asserted duty can only be that the past conduct which should be disclosed was itself a breach of the Code, as otherwise there can be no duty to report it. In our view, the obligations that, once attested, a police officer shall act with integrity and/or shall not commit any act of dishonesty and must oppose any such act are capable of capturing a situation where that officer made a false declaration and, after attestation, keeps that matter to himself or herself. Whether or not that amounts to the commission of misconduct whilst a police officer will depend upon all of the circumstances. However, the mere fact that it might – and, in our view, on the evidence in the present case reasonably could – be found to represent misconduct is enough to see off any argument posing a knock-out blow to the Panel's jurisdiction.
>
> 68. The respondent's submission on this issue – and, no doubt the Panel's decision on it – takes the case against the appellant at its height, namely that he knowingly secured the position of constable by deceit and knowingly maintained that deceit in an active and continuing way. Especially in circumstances where the appellant had signed the voluntary declarations contained at the end of the vetting form – including an acknowledgement that the information provided may be subject to ongoing checks and that any false statement or deliberate omission may result in disqualification, discipline or dismissal – it was plainly open to the Panel to take the view that it could enquire into whether the appellant had been guilty of misconduct in failing to volunteer the matters which had previously not been disclosed. We agree with both the Panel's and the judge's conclusions on this issue."

109. I see no material difference between the terms of the questionnaires and the declarations signed by C in this case (see [23]-[24] and [26] above) and those upon which the decision of the Court of Appeal in *Watson* was based.

110. In England and Wales misconduct under the PCR 2020 is based upon breaches of the SPB set out in Sched. 2. They include the requirements for police officers to act with honesty and integrity. Those standards are to be read together with the Code of Ethics, the Guidance issued in February 2020, the Vetting Code of Practice and the APP (see [54] to [57] above). Although the Code of Ethics embedded in the 2016 NI Regulations is more detailed than the SPB in sched. 2 to the PCR 2020, it is plain that the latter are not to be read or applied in isolation. When the SPB are read together with the statutory guidance which I have summarised, there is no material difference for the purposes of this case between the conduct regimes in England and Wales and Northern Ireland in relation to the standards of honesty and integrity expected of police officers. The essential features of these concepts are the same. The fact that they have been arranged differently in the two systems is of no legal significance.

111. In particular, the requirements in England and Wales for honesty and integrity in relation to the disclosure of relevant information by an applicant seeking to join a police force during the application and vetting processes, and the declarations made by an applicant, are not materially different from those materials upon which the Court of Appeal in *Watson* based its analysis of a police officer's ongoing duty of disclosure.

112. Accordingly, in England and Wales a failure by an applicant seeking to become a member of a police force to disclose pre-attestation conduct relevant to the application or vetting process is capable of engaging an ongoing duty, once that person has been attested as a police constable, to disclose that information to an appropriate officer in that force. That duty is engaged, and may be breached, irrespective of whether the officer is asked post-attestation to confirm the accuracy and completeness of the information he has given pre-attestation, and irrespective of whether the officer does so confirm. The onus lies on the officer to correct his earlier failure to disclose relevant information. A breach of that ongoing duty is capable of amounting to misconduct by a police officer under the PCR 2020 and may be the subject of investigation and disciplinary proceedings under those regulations. A disciplinary panel convened under the PCR 2020 would have jurisdiction to entertain such an allegation and, if accepted, to decide that it amounted to misconduct or gross misconduct, according to the circumstances.

113. The allegations made against C under reg.30 of PCR 2020 included misconduct of this type. Accordingly, the defendant erred in law in deciding that the disciplinary panel had no jurisdiction to entertain the proceedings in so far as they relate to that alleged misconduct. To that extent the application for judicial review must be allowed.

Whether the misconduct regime applies to conduct before a person becomes a police officer

114. In *Watson* the Court of Appeal in Northern Ireland decided that the Code of Ethics applies only to police officers. By s.52(1) of the 2000 Act the Code lays down standards of conduct and practice for police officers and "for making police officers aware" of rights and obligations arising under the ECHR. The Code in Sched. 2 to the 2016 NI Regulations is headed "Ethical Standards Required of Police Officers." The fact that the Code applies to police officers while off-duty does not indicate that it applies to pre-attestation conduct. An off-duty police officer is still a police officer

and is therefore subject to the standards of conduct expected of those entrusted with that important office. The wording of the 2000 Act, and of the Code, indicate that the Code only applies to the conduct and practice of police officers while they are police officers. For example, Article 1.3 requires police officers to carry out their duties in accordance with their attestation, which would make no sense if the Code was also intended to apply to those who have yet to become police officers [40].

115. The Court of Appeal held in *Watson* that the Police (Northern Ireland) Act 1998 and the 2016 NI Regulations lay down disciplinary procedures in relation to members of the Police Service. Regulation 5(1) provides that those Regulations "apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a member may amount to misconduct or gross misconduct." There "the reference to 'conduct of a member' refers to a police officer's conduct *as a member,* that is to say, at a time when they were a member of the police service and could therefore be in breach of the Code of Ethics." Misconduct is defined as being a breach of the Code, which is a Code applicable only to attested police officers. A person cannot breach that Code at a time when they are not subject to it because they were not then a police officer [41].

116. Likewise the "complaints" regime deals with complaints made by or on behalf of a member of the public about "the conduct of a member of the police force" (see Art.3(2) of the 2016 NI Regulations). That can only relate to conduct of a police officer occurring after they had become a police officer [42].

117. The use of the word "allegation" in reg.5(1) of the 2016 NI Regulations is not an indication that misconduct includes conduct before a person becomes a police officer. That simply reflects the point that not all matters giving rise to disciplinary proceedings will be complaints made by members of the public. Misconduct proceedings can be triggered in a variety of ways where a concern about conduct possibly amounting to misconduct comes to the attention of an appropriate authority [43].

118. I do not consider that the legislation applicable in England and Wales is materially different from that applicable in Northern Ireland as regards the key parts of the reasoning in *Watson* that pre-attestation conduct falls outside the concept of "misconduct". The relevant legal principles are essentially the same although the provisions by which they are given effect have been arranged differently.

119. The Court of Appeal held that s.25(2)(e) of the 1998 Act authorises the making of conduct regulations which relate to the conduct (and efficiency and effectiveness) of police officers as *police officers,* that is after they have attested to perform that function [44(i)]. There is no material difference between that provision and s.50(2)(e) of the PA 1996.

120. As to the scope of the matters to which the conduct regulations apply, there is no material difference between Art.4(1) of the PCR 2020 and Art.5(1) of the 2016 NI Regulations.

121. In both regimes "misconduct" and "gross misconduct" are defined in similar terms by reference to breaches of either the SPB or the Code of Ethics (reg.2(1) of the PCR 2020 and reg.3(2) of the 2016 NI Regulations).

122. Although the SPB do not contain an express provision such as article 1.3 of the Code of Ethics, requiring police officers to carry out their duties in accordance with their attestation, the effect of the SPB read as a whole is substantially the same and so the absence of any such express provision in the PCR 2020 is of no significance.

123. All the requirements set out in the SPB are directed at police officers. Likewise, sched. 2 to the PCR 2020 lays down standards of conduct for members of a police force.

124. If this Court is to follow *Watson* at [44(i)], the PCR 2020, including the SPB, must be construed so as to fall within the ambit of the primary legislation which authorises that secondary legislation, section 50 of the PA 1996. In other words, the PCR 2020 including the SPB, can only apply to the conduct of police officers *as police officers*. They cannot apply before a person becomes a police officer.

125. The SPB are shorter and less detailed than the Code of Ethics in Northern Ireland. But the SPB are not to be read in isolation. Police officers are obliged to have regard to guidance issued under ss.87 and 87A of the PA 1996 and failures to do so may be relied upon to support disciplinary proceedings against them ([48]-[49] above). Accordingly, the SPB must be read together with the Code of Ethics appliable in England and Wales and the Guidance and relevant APPs issued by the Home Office and the College of Policing (see [54] to [57] above). When that is done, it is plain that the standards required by the SPB are very similar to those imposed by the Code of Ethics in Northern Ireland.

126. More importantly, the Court was not shown any text in the overall package of standards applicable in England and Wales that treats a person's conduct before he or she becomes a police officer as being capable of amounting to misconduct within the scope of the disciplinary regime. The fact that some parts of these standards apply to police staff, rather than police officers, is nothing to the point.

127. Having concluded that there are no material differences between the statutory regimes applicable in Northern Ireland and this country which could justify distinguishing the decision in *Watson*, the remaining question is whether the High Court should not follow the Court of Appeal in Northern Ireland, applying *Deane* and *Jwanczuk*.

128. The relevant issues were fully argued in *Watson* and the decision of the Court of Appeal should be accorded great respect. Ultimately the decision of that Court depended upon the true construction of the relevant legislation. In my judgment that construction was certainly open to the Court. It is impossible for me to say that the decision was "plainly wrong." I should therefore follow it.

129. In *Watson* the Court also analysed a number of English decisions on other disciplinary regimes in which it had been held that they applied to conduct prior to a person joining a profession [47] to [50]. Counsel made helpful submissions on those decisions. I agree with Mr. Baumber that firstly, they are decisions on materially different statutory schemes and secondly, they do not demonstrate that the construction adopted in *Watson* of the scheme there under consideration was untenable or plainly wrong.

130. The Code of Ethics in England and Wales and relevant Guidance make it plain that an applicant seeking to become a police officer must answer questions in the application and vetting forms honestly and completely, that is without omitting any relevant information. However, that obligation does not alter the analysis of how the misconduct regime is to be interpreted or applied. A failure to make a material disclosure before a person becomes a police officer cannot in itself amount to misconduct *as a police officer.* Such conduct took place before the applicant became a police officer. But as *Watson* makes clear, once a person becomes a police officer, their ongoing duty to correct an earlier material non-disclosure, or an incorrect statement or declaration in the information they provided as part of the application, is plainly capable of amounting to misconduct *as a police officer* (see above). In addition, any such omission or misinformation may result in the removal of vetting clearance and a finding of gross incompetence (see below).

131. One point should be cleared up. The claimant appeared to be concerned that, on the submissions advanced by the PFEW, a police officer may only be disciplined for conduct which has occurred during the period when he has belonged to the force of which he is currently a member. In other words conduct which took place when that person was previously serving as a member of a different force could not be the subject of disciplinary proceedings. There is no basis for that concern. True enough, the appropriate authority who can investigate or bring misconduct proceedings in respect of an allegation of misconduct is generally the chief constable of the police force of which the person concerned is currently a member (see reg.2(1)). But the definitions of "conduct" or "misconduct" are not restricted to conduct which occurred during a person's membership of that particular force. They are based upon breaches of the SPB. The SPB sets standards for police officers (meaning "a member of *a* police force"). What is relevant is whether the alleged conduct occurred while the person was a police officer, or member of some police force.

132. I conclude that the misconduct provisions in the PCR 2020 do not apply to conduct which only occurred at a time when the person concerned was not a police officer. In so far as the defendant reached that conclusion, he committed no error of law.

Removal of vetting clearance and gross incompetence

133. In *Watson* the Court of Appeal stated at [58] to [59]:

> "58. The appropriate means of addressing pre-attestation conduct which renders a candidate unsuitable for service as a police constable is in a robust vetting regime. Where, as here, the vetting regime fails because of a lack of candour in a candidate's responses which only later comes to light, it is right that some mechanism exists (where appropriate) for this to have consequences for that individual qua police officer. In many cases, this may be able to be dealt with through the Police (Performance and Attendance) Regulations (Northern Ireland) 2016 ("the Performance Regulations") where vetting or security clearance is withdrawn upon discovery of the non-disclosure or false declaration. The 2016 Regulations and the Performance Regulations were made and came into force at the same time and are complementary instruments representing an

> overall package of measures to deal with matters which may render a constable liable for dismissal or other sanction. A range of potential outcomes are set out in regulation 39 of the Performance Regulations, including dismissal, reduction in rank or redeployment to alternative duties. A performance panel may make a finding of gross incompetence, which is defined as including "a serious inability … to perform the duties of his rank or the role he is currently undertaking to a satisfactory standard or level, to the extent that dismissal would be justified". That may encompass a range of circumstances where vetting is removed and the individual is therefore subject to an inability to perform police functions to a satisfactory standard.
>
> 59. The College of Policing publication, 'APP [Authorised Professional Practice] on Vetting' (2021), on which the PSNI vetting procedures are based, discusses the withdrawal of vetting clearance for civilian police staff and police officers at section 8.47. It includes the following guidance:
>
> > "The [Employment Rights Act 1996] does not apply to police officers or special constables. Therefore, when clearance is withdrawn and suitable alternative employment cannot be identified, and/or the risk cannot be reasonably managed, the force should consider proceedings under the Police (Performance) Regulations 2020.
> >
> > When a police officer's or special constable's RV [recruitment vetting] clearance is withdrawn, they will be unable to access police information and systems. Unsupervised access to police premises will also not be permitted. As a result, the police officer will be unable to perform their role to a satisfactory level. This could, therefore, amount to gross incompetence and a third-stage meeting should be considered."'

134. I see no material difference between the NI Performance Regulations and the PPR 2020 for the purposes of deciding whether *Watson* should be followed in England and Wales on the possibility of dismissal for gross incompetence as a result of the removal of vetting clearance. Neither party identified any such difference.

135. The Court of Appeal in Northern Ireland recognised that the removal of vetting clearance might provide a remedy to deal with some, but not all, cases where the original clearance pre-attestation should not have been given because of the provision of incorrect information or a material non-disclosure. This procedure may be highly fact sensitive. It may not always result in the removal of clearance. Alternatively, an alteration of clearance may leave an officer able to perform some level of duties and thus not be treated as grossly incompetent. So the Court suggested that a procedure be followed whereby soon after attestation an officer is asked to confirm the accuracy and completeness of all the information he previously gave when he applied to join the police force. If an officer were to give an untruthful answer at that stage, that

would clearly found a misconduct charge based upon conduct when the officer was plainly subject to the Code of Ethics or SPB [60] to [61]. I respectfully agree.

136. In [97] above I noted that in the Court of Appeal of Northern Ireland the PFEW criticised the interpretation of the 2016 NI Regulations adopted by Colton J because he had assumed that no other procedure was available to deal with a person's misconduct before he becomes a police officer. The PFEW relied heavily upon a police force's ongoing duty to vet a member for suitability, the Vetting Code of Practice issued by the College of Policing under s.39A of the PA 1996, the APP on Vetting and the power under the PPR 2020 to deal with such misconduct giving rise to "unsuitability". The Federation's analysis was unequivocal and was accepted by the Court of Appeal. It formed an important part of the Court's reasons for accepting the submissions of Mr. Watson and the English Federation on the interpretation of the 2016 NI Regulations and the PCR 2020 ([11], [38], [57]-[60] and [62] to [63]).

137. When on 23 March 2023 the PFEW made a written application to intervene in the present proceedings, it relied upon essentially the same submissions as it had advanced in *Watson* about using the removal of vetting clearance and the PPR 2020 as an appropriate remedy for dealing with misconduct before a person becomes a police officer, given that such behaviour falls outside the PCR 2020. Indeed, the PFEW noted that a proposal at that stage to revise the Vetting Code of Practice would strengthen this mechanism (paras. 16 to 20 of application).

138. In their written representations filed on 29 November 2023 resisting the claim the PFEW maintained the same stance (paras. 4 to 25).

139. In a note dated 15 March 2024 the claimant's counsel submitted that the PFEW's skeleton for the hearing involved a significant departure from its submissions before the Court of Appeal in Northern Ireland and the submissions referred to in [136] to [138] above. It was suggested that the Federation no longer wishes to be associated with those earlier submissions. However, I do not read the PFEW's skeleton in that way. In para.19 the Intervener continues to accept that the removal of vetting remains a route for dealing with a person's conduct before becoming a police officer. But the Federation endorses the additional analysis of the Court of Appeal in *Watson*. It recognises that removal of vetting clearance may not provide a solution in all such cases. That issue can be addressed (a) by the simple expedient of requiring a new police officer to confirm the accuracy and completeness of the information he or she has previously given and/or (b) by relying upon a police officer's on-going duty to correct inaccuracies or omissions in that information. Either route could give rise to misconduct charges under the PCR 2020. In other words, the PFEW accepts the Court's view in *Watson* that those routes may apply in addition to removal of vetting clearance and use of the PPR 2020 (paras. 24 to 26 of the skeleton).

140. The important point is that there was nothing in the written or oral submissions of the PFEW to suggest that I should not follow the Court of Appeal in Northern Ireland in relation to these issues. On the contrary.

141. For these reasons, I respectfully adopt the analysis of the Court of Appeal in *Watson* and conclude that in appropriate cases in England and Wales the removal of vetting clearance combined with the PPR 2020 may address a person's misconduct before he or she became a police officer.

142. In paras. 11 and 12 of the claimant's note it is suggested that more recently the PFEW has made submissions in other proceedings that it is unlawful for a police officer to be dismissed under the PPR 2020 as the result of the removal of their vetting clearance on the grounds that the process does not comply with Art.6 of the ECHR. However, the court was not provided with any evidence that that has happened before performance panels. More importantly, the PFEW did not advance this point, either before the Court of Appeal in Northern Ireland handed down its judgment on 23 January 2024 or in the proceedings before this court.

143. The PFEW is a staff association representing its members in matters affecting their welfare and efficiency. But it will be recalled that in doing so the PFEW is obliged to protect the public interest, maintain high standards of conduct and maintain high standards of transparency (s.59(1A) of PA 1996). It would hardly be compatible with these statutory obligations if the PFEW were to advance submissions before performance panels materially inconsistent with the case it persuaded the Court of Appeal in Northern Ireland to accept and which it has repeated in the present proceedings. If that were to happen, it would be no answer to say that the removal of vetting clearance argument is not essential to the proper construction of the PCR 2020 ("the interpretation point").

Conclusion

144. I allow the claim for judicial review and quash the defendant's decision to decline jurisdiction to entertain disciplinary proceedings in relation to C. This is solely on the basis that these proceedings are concerned with "the ongoing duty point" (see [104] to [113] above). The proceedings must be determined by a differently constituted panel.