New Park Court

Regulatory Briefing

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by Adam Birkby

"Adam Birkby is an exceptional advocate. He is able to deal with a wide range of complex and sophisticated offences."

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Regulatory Briefing: Police Misconduct

I recently completed long running police misconduct proceedings involving an allegation of the misuse of force. The case raised a number of interesting legal and tactical issues which are of wider application for practitioners in police disciplinary proceedings.

The facts of the case are that two police officers, one a constable with several years' experience ("PC X" –whom I represented), the other his tutee ("PC Y"), were tasked with attending a disturbance in a town centre in the early hours. At the scene they came across the complainant ("C"). He was drunk, loud and obstructive. He ignored the instruction of PC Y to walk away and instead encroached upon her personal space and shouted at her. The decision was taken to remove him from the scene to prevent a breach of the peace. He was handcuffed to the rear and placed in the back of the police car. He was asked where he lived and was then driven to that area, albeit not to his home address. C refused to get out of the police car and demanded to be driven home, stating that he had "beef" in that area and that he was at risk of being stabbed. He ignored the officers' commands to get out of the police car and eventually PC X physically removed him. C tried to get back into the police car and was pushed away by PC X. Whilst not being physically or verbally aggressive, C repeatedly approached PC X, entering his personal space and refusing to comply with the officer's commands. PC X pushed C away and then used a leg sweep to take C to the floor. He returned to the police car intending to drive off but C stood in the way. PC X got out of the car and withdrew his taser. He pointed it at C and arced it telling him to go away and that he would use the taser to protect himself. C was pushed away by PC Y and again told to go home, which he again refused to do. As C and PC Y interacted in close proximity to each other, PC X fired a short burst of incapacitant spray to C. The entire incident was captured on BWV footage.

PC X admitted breaching the standards of professional behaviour in relation to the misuse of force. He accepted that the breaches amounted to misconduct but denied gross misconduct. Following a 3-day hearing, the panel found that the allegation of misuse of force did constitute gross misconduct. After hearing submissions as to outcome, the panel imposed a final written warning of 2 years duration.

The following issues arose during the proceedings.

First, the Appropriate Authority ("AA") wished to rely upon opinion evidence as to the use of force and the deployment of the taser. Objection was taken on behalf of PC X on the following grounds. First, the opinion evidence of both witnesses was inadmissible as neither was an expert in the use of force. They demonstrated no understanding of the role of an expert in misconduct proceedings (for example that their duty was to the panel as opposed to the AA) and their statements were incompatible with the requirements under both the criminal and civil procedure rules. Second, even if their opinion evidence were *prima facie* admissible, it was irrelevant in circumstances where the entirety of the incident was captured on BWV footage. Applying *R (Wilby-Newton) -v- PAT & CCSYP* [2021] EWHC 550 (Admin), it was argued that the appropriateness of the use of force could be properly determined by the panel alone: the panel did not require the assistance of expert opinion to reach that determination. At a pre-review hearing, the LQC agreed with my submissions on behalf of PC X and the expert evidence was ruled inadmissible.

It is increasingly common for AAs to seek to deploy the opinion evidence of use of force instructors in an attempt to bolster the case against officers. Practitioners should raise an objection to this at an early stage, identifying deficiencies in the evidence itself (for example inadmissible opinion as to the complainant's presentation or tone of voice, or advancing inadmissible opinion on the law of self-defence) and any failure to comply with the standard rules governing the content of experts' reports. Further, the fundamental objection can be made on the basis of Wilby-Newton, that in most cases the panel would not be assisted by expert opinion to reach their determination either upon the facts or whether the standards of professional behaviour had been breached.

Second, the AA's initial view was that taking C away from the town centre in a police car without having arrested him amounted to false imprisonment and that the application of handcuffs in such circumstances was a misuse of force. However, this approach failed to take account of the law surrounding the use of force by police officers when dealing with a breach of the peace. In Albert Lavin [1982] AC 546, HL, it was stated:

> *"Every citizen (whether Policeman or not) in whose presence a breach of the peace is being, or reasonably appears to be about to be committed, has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those steps in appropriate cases will include detaining him against his will short of arresting him."*

I have encountered this argument by the AA in several recent misuse of force cases. It is particularly relevant to cases which occurred during the pandemic, when officers were regularly instructed at the local and national level not to arrest members of the public unless it was absolutely necessary because of the reduced capacity of custody suites. Given the ongoing issue of prison overcrowding, such an instruction is likely to be maintained. Consequently, officers will continue to defuse confrontational situations by removing members of the public from the scene, pursuant to their common law powers to prevent a breach of the peace. AAs should not seek to include such action within the alleged breaches of the standards of professional behaviour as a matter of course and those defending officers should raise their objection by reference to the relevant caselaw.

Third, this case underlined the need to take a tactical approach towards the alleged breaches of the standards of professional behaviour. Officers often take the view that they should not make any admissions and instead, should fight each and every element of the case presented against them. In this case we took a more realistic approach, conceding where appropriate that the standards had been breached and admitting misconduct in respect of them. Consequently, the officer was able to demonstrate that he had insight into his offending actions and that he was genuinely remorseful. Although the panel ultimately found that his breaches amounted to gross misconduct, his level of insight and remorse were significant factors in mitigating the eventual outcome.

Fourth, there were two significant and unusual mitigating factors in this case:

The first was the state of PC X's mental health. The officer had attended a number of serious incidents in the weeks leading up to the index event. Although he had not appreciated it at the time it became apparent that these incidents had had a profound impact upon his mental health. Consequently, we instructed a consultant forensic psychiatrist to assess the officer's mental state both at the time of the index event and at the time of the misconduct hearing. The conclusion was that the officer had been suffering from an adjustment disorder which had had an impact upon his behaviour at the relevant time. This had subsequently developed into a depressive episode by the final hearing. The psychiatric report was critical to persuading the panel that the officer's culpability was reduced by reason of his mental state. In my experience officers are often unwilling to admit that their mental health may have been a contributory factor to their actions and decision-making for fear of being stigmatised. Practitioners are often left to allude to the existence of such issues without the benefit of supporting evidence. This case demonstrated the need to identify such issues and more importantly, to enlist the assistance of an expert, whether that be a psychiatrist or psychologist, to place supporting evidence before the panel.

The second was delay. The case was delayed by a variety of factors including the recusal of the original legally qualified chair, an adjournment due to illness and the intervention of the Independent Office for Police Conduct ("IOPC"). The latter occurred following the AA's decision to accede to PC X's proposal to accept misconduct only and C's appeal against that decision. The IOPC directed the force to bring gross misconduct proceedings against both officers. Consequently, the final hearing did not take place until some two and a half years after the index event. In mitigation we were able to point not just to the fact of delay but to the adverse impact that the delay had had upon the officer both in terms of his career and his mental health. Where there has been substantial delay in reaching a final hearing, practitioners ought to be prepared to identify the deleterious impact upon the officer by reference to specific evidence, whether that be in the form of references from the officer's superiors and colleagues, or the conclusions of a mental health professional.

This case demonstrates the value of adopting a multifaceted approach towards disciplinary proceedings: identifying and tackling contentious legal issues at an early stage; making appropriate admissions where necessary; and advancing well-reasoned submissions with a sound evidential basis.