

Police Misconduct Hearing

In the matter of :

FPC Harry Benady-Shemilt

Panel: Commander Stephen Clayman (Chair), Yvonne Walsh and Howard Freeman

Legally Qualified Person (“LQP”): Ian Comfort

Introduction

1. The misconduct hearing for FPC Benady-Shemilt was held in public on 25 November 2024. A notice of the hearing was published in accordance with the Police (Conduct) Regulations 2020 (‘the Regulations’).
2. The Metropolitan Police Service (“MPS”), as the Appropriate Authority (“AA”), was represented by David Messling, counsel.
3. FPC Benady-Shemilt did not attend. He was represented by PC Leighton Gurney

Service of Notice

4. The panel was provided with copies of notices relating to this hearing.
5. Mr Messling referred the panel to the Regulation 17 Notice of Alleged Breach of Standards of Professional Behaviour. The notice was given to FPC Benady-Shemilt on 22 June 2022 and signed by him on that day. The notice set out the Allegation that is to be heard by this panel.
6. Mr Messling referred the panel to the Regulation 30 Notice of a Decision to Refer an Allegation to a Misconduct Hearing. The notice was served on FPC Benady-Shemilt on 31 May 2024. FPC Benady-Shemilt did not provide a Regulation 31 response to this notice.
7. The panel was provided with a copy of a letter served on FPC Benady-Shemilt in accordance with Regulation 35, giving notice of the time, date and venue of this hearing and also providing details of the members of the panel.
8. Mr Messling submitted that FPC Benady-Shemilt had received notice of this hearing as required by the Regulations.

9. The panel accepted the advice of the LQP, who confirmed that the panel had been provided with copies of all notices required for this hearing.
10. The panel was satisfied that FPC Benady-Shemilt was aware of the hearing today and that relevant documents had been served on him.

Application to proceed in absence

11. Mr Messling submitted that the hearing should proceed in FPC Benady-Shemilt absence. He submitted that FPC Benady-Shemilt was aware of the hearing and had voluntarily absented himself. He said that FPC Benady-Shemilt had resigned from his role and had indicated that he would not be attending.
12. PC Gurney confirmed that FPC Benady-Shemilt had resigned and would not be attending the hearing.
13. The LQP told the panel that Regulation 37, provides that the officer concerned must attend the misconduct proceedings. Where the officer does not attend the misconduct proceedings, the proceedings may be proceeded with and concluded in the absence of the officer, whether or not the officer is represented.
14. The LQP advised the panel that although Regulation 37 permits it to proceed in an officer's absence the decision to proceed is a discretion which a panel should exercise with the utmost care and caution. The factors which a panel should bear in mind when deciding whether to exercise its discretion to proceed in the absence of the officer are those as set out in the criminal case of *R v Jones (Anthony) [2003] AC 1, HL*. These include:
 - a) the nature and circumstances of the officers behaviour in absenting himself from the hearing;
 - b) Whether an adjournment would resolve the officers absence;
 - c) The likely length of any such adjournment;
 - d) Whether the officer has voluntarily absented himself from the proceedings; and
 - e) The disadvantage to the officer in not being able to present his case.
15. The LQP also advised that in the case of *General Medical Council v Adeogba [2016] EWCA Civ 162; [2016] 1 WLR 3867*, it was said that the principles set out in *Jones* provide a useful starting point for any decision that a panel makes;

however, it is important to bear in mind that there is a difference between continuing a criminal trial in the absence of the defendant and the decision to continue a disciplinary hearing. It highlighted that there is a burden on all professionals subject to a regulatory regime to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession.

16. Taking account of the case law the LQP advised that the starting point must be whether all reasonable efforts have been taken to serve the officer with notice. Assuming that the panel is satisfied about notice, in deciding whether or not to exercise its discretion to proceed, it must do so with regard to all the circumstances of which it is aware bearing in mind fairness to both parties.
17. The panel was satisfied that FPC Benady-Shemilt was aware of the hearing today and was represented in his absence by PC Gurney. FPC Benady-Shemilt had voluntarily absented himself, he had not sought an adjournment and there is no indication that if the hearing were to be adjourned he would attend on a future occasion.
18. The panel determined that it was in the public interest for this matter to proceed today.

Background

19. On Wednesday 20th April 2022, PC Benady-Shemilt and other officers from the Safer Transport Team attended an address in Sutton to conduct an arrest enquiry in relation to a male named P [REDACTED]
20. P [REDACTED] was outstanding as 'wanted' in relation to the theft of a motor vehicle and needed to be arrested and questioned about the allegation.
21. On attendance to the address PC Benady-Shemilt saw a male he believed to be P [REDACTED]. There was a short verbal exchange and officers followed the male along the corridor and stopped outside the address.
22. Whilst outside the address the male knocked on the door and told PC Benady-Shemilt he was K [REDACTED] and P [REDACTED] was his twin and was inside the address.
23. PC Benady-Shemilt disagreed with the male, who reacted by becoming verbally abusive to PC Benady-Shemilt and to the other officer approaching.

24. The male was restrained against the wall and placed in a rear stack with handcuffs. Whilst standing outside the address the male shouted through the door telling P [REDACTED] to run out the back. When he continued to be verbally abusive, PC Benady-Shemilt threatened to use his spray.
25. The male was moved to the communal area where there continued to be a verbal exchange between him and PC Benady-Shemilt. The male was placed up against the wall on his front by PC Benady-Shemilt. After being warned again that if he did not stop being abusive he would be sprayed, PC Benady-Shemilt sprayed the male in the face with PAVA (an inhibitant spray) at close proximity, causing the male to sit on the floor.
26. The male was escorted downstairs and it was soon identified that he was K [REDACTED] not P [REDACTED] as he had said all along. He was subsequently conveyed to custody.
27. At custody PC Benady-Shemilt reported that he had been assaulted by K [REDACTED] [REDACTED] at the scene. He said that K [REDACTED] had kicked him twice.

ALLEGATIONS OF FACT AND MISCONDUCT

28. The allegations of fact made against FPC Benady-Shemilt are set out in the Regulation 30 notice as follows:

Allegation 1:

The force you used against K [REDACTED] whilst detaining him, specifically your use of PAVA spray, was excessive in breach of the Standard relating to Use of Force

Allegation 2

You repeatedly stated that K [REDACTED] had kicked you, when you knew that he had not in fact done so in breach of the Standard relating to Honesty and Integrity.

29. It is further alleged that such conduct, both individual and cumulatively, was a breach of the Standards of Professional Behaviour so serious that your dismissal could be justified, and therefore amounts to gross misconduct.

EVIDENCE

30. In preparation for the hearing the panel was provided with an electronic bundle totalling 236 pages. This evidence included but was not limited to notices, emails, investigating officer's report, witness statements and exhibits.
31. The panel was provided with body worn video ("BWV") taken at the scene at the material time.
32. Mr Messling provided an opening note providing background to the Allegation, his submissions and relevant aspects of the Regulations and law.

THE PANEL'S APPROACH

33. The panel took account of the advice given by the LQP.
34. The panel should adopt a four-stage approach when considering the allegations:
 - i) to consider the facts of the case and to make its findings of fact in relation to each of the allegations;
 - ii) to determine whether those findings of fact found constitute a breach of the relevant standards;
 - iii) to determine whether the conduct found proved amounted to misconduct or gross misconduct; and
 - iv) dependent on the findings under(i)-(iii)above, to decide what the outcome should be.
35. The panel should have regard to a framework of regulations and guidance, in particular the following:
 - a) The Regulations and the Standards of Professional Behaviour as set out in Schedule 3 of the Regulations;
 - b) The Statutory Guidance on Professional Standards, Performance and Integrity in Policing, issued by the Home Office;
 - c) The College of Policing Code of Ethics 2024;
 - d) The NCPC guidelines on the use of PAVA; and

- e) The College of Policing's Guidance on Outcomes in Police Misconduct Proceedings (2023).
36. In reaching its decision the panel should bear in mind that the burden of proof rests on the AA. FPC Benady-Shemilt does not need to prove anything.
37. The standard of proof is that applicable to civil proceedings, namely the balance of probabilities, that is to say whether it is more likely than not that the events occurred. When considering the standard required the panel should have regard to the case of *Byrne v General Medical Council [2021] EWHC 2237 (Admin)*:
- "A serious allegation requires careful analysis of the evidence taking account of inherent probabilities or improbabilities of an event happening. However there is no different standard of proof or especially cogent type of evidence required."*
38. The panel may draw inferences from silence and it is in the public interest that panels have that power. The panel should take account of the guidance provided in the case of *R (Kuzmin) v General Medical Council (GMC) [2019] EWHC 2129 (Admin)*, which concluded that whether to exercise the power to draw an adverse inference from silence in disciplinary proceedings will be highly fact dependent and an inference should not be drawn unless the following relevant criteria are met:
- a) A prima facie case to answer has been established;
 - b) The officer has been given appropriate notice and warning that, if they do not give evidence, then such an inference may be drawn. (This warning is given at paragraph 8 of explanatory notes of the Regulation 17 notice)
 - c) The officer must be given an opportunity to explain why it would not be reasonable for them to give evidence and, if it is found that there is no reasonable explanation, be given an opportunity to give evidence;
 - d) There was no reasonable explanation for the officer not giving evidence; and
 - e) There were no other circumstances which would make it unfair to draw an adverse inference.

39. Dishonesty is a matter of fact and the panel should take account of the guidance set out in the case of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67*. The Court held that the correct test of dishonesty is that which is used in civil cases that:
- a) *the fact finding tribunal must first ascertain (subjectively) the state of the individual's knowledge or belief as to the facts. (The reasonableness of the belief is a matter of evidence going to whether he genuinely held the belief but it is not a requirement that the belief must be reasonable); and*
 - b) *the fact finding tribunal must then consider whether that conduct was dishonest by the (objective) standards of ordinary decent people. (There is no requirement that the individual must appreciate that what they have done was, by those standards, dishonest.)*
40. The definition of misconduct is provided at Regulation 2(1): “a breach of the Standards of Professional Behaviour that is so serious as to justify disciplinary action”.
41. The definition of gross misconduct at Regulation 2(1) : “a breach of the Standards of Professional Behaviour so serious as to justify dismissal”.

FINDINGS OF FACT

42. The Panel considered the allegations of fact and the BWV and documentary evidence provided.

Allegation1

43. The panel viewed the BWV provided. It observed that Mr [REDACTED] although verbally abusive, appears to have been physically compliant at all times.
44. It appeared to the panel that FPC Benady-Shemilt's threats to use force were in response to Mr [REDACTED] verbal abuse and his tone, rather than to physical resistance.
45. There were a number of officers readily available to help with detaining Mr [REDACTED] should FPC Benady-Shemilt have required assistance. The panel considered that FPC Benady-Shemilt could easily have asked them to help him hold Mr [REDACTED]. That said, it was a concern to the panel that the officers did not

assist and appear to have made no attempt to de-escalate the situation as it emerged.

46. PC W [REDACTED], in his statement dated 16 November 2022 says that he does not know why FPC Benady-Shemilt deployed his PAVA spray in Mr [REDACTED] face.
47. The panel found that the BWV footage does not show any incidents where Mr [REDACTED] kicked FPC Benady-Shemilt. From the statements provided, none of the officers at the scene witnessed any kicks.
48. In his Use of Force form submitted on 20 April 2022, FPC Benady-Shemilt says:
“ Male was immediately aggressive both verbally and physically when approached by officers. Male was actively straining against officers and assaulted an officer by kicking ...[reason] Protect self, Protect other officers, effect arrest, prevent harm, prevent escape.”
49. The panel was satisfied that having viewed the BWV and considered the statements of officers at the scene that there was nothing to indicate any assault on FPC Benady-Shemilt, or any threat of harm to other officer, or any suggestion that Mr [REDACTED] would escape.
50. The panel regarded excessive force as that which goes beyond what is reasonably necessary in the circumstances.
51. Taking account of all of the circumstances, the panel decided that it was more likely than not that FPC Benady-Shemilt’s use of force, particularly the use of the PAVA spray at a close distance, which is only advised unless the nature of the risk is such that it cannot be avoided, was excessive.
52. The panel, therefore , found Allegation 1 **proved**.

Allegation 2

53. The panel was provided with evidence that FPC Benady-Shemilt had alleged that he had been kicked by Mr [REDACTED]:
 - a) At the scene to PC W [REDACTED];
 - b) To PS S [REDACTED] on 20 April 2022;
 - c) In his statement made under caution;
 - d) On the Use of Force form; and
 - e) During his interview.

54. The panel has already noted that what FPC Benady-Shemilt recorded on the Use of Force form is not substantiated by the BWV footage. Similarly, it is not substantiated by other officers present at the scene.
55. The panel was satisfied that there was no evidence to support FPC Benady-Shemilt assertion that he had been kicked by Mr [REDACTED] on one or more occasions.
56. The panel was also satisfied, that FPC Benady-Shemilt had repeatedly stated that K [REDACTED] had kicked him as set out above.
57. FPC Benady-Shemilt has not attended this hearing. He was warned that an adverse inference could be drawn from his non-attendance. In the absence of any explanation from FPC Benady-Shemilt, the panel was satisfied that it was more likely than not that he knew that K [REDACTED] had not kicked him.
58. The panel, therefore, found Allegation 2 **proved**.

BREACH OF STANDARDS AND DECISION ON MISCONDUCT

59. The panel has taken into account all the findings of fact and the evidence it considered in reaching those earlier findings and has considered each of the alleged breaches of standards and whether they amount to misconduct.

Use of Force

60. The Standard of Professional Behaviour regarding Use of Force is set out in Schedule 2 of the Regulations and requires that *“police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.”*
61. The panel has determined that FPC Benady-Shemilt, used excessive force towards K [REDACTED] and that the force, including the use of PAVA, was neither necessary, proportionate nor reasonable in all the circumstances.
62. The panel found that FPC Benady-Shemilt had breached the Standard of Professional Behaviour as regards Use of Force.

Honesty and Integrity

63. The Standard of Professional Behaviour regarding Honesty and Integrity is set out in Schedule 2 of the Regulations and requires that *“police officers are honest, act with integrity and do not compromise or abuse their position.”*

64. In order to consider whether FPC Benady-Shemilt's actions, as found proved in allegation 2, amounted to dishonesty the panel took account of the guidance set out in the case of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67*.
65. The panel was satisfied that it was more likely than not that subjectively FPC Benady-Shemilt knew that K [REDACTED] did not kick him on one or more occasions.
66. The panel was satisfied this FPC Benady-Shemilt actions were dishonest by the standards of ordinary people.
67. The panel, therefore, found that FPC Benady-Shemilt had breached the Standard of Professional Behaviour as regards Honesty and Integrity.

Misconduct

68. The panel found that FPC Benady-Shemilt's actions as found proved were a serious departure from the Standards of Professional Behaviour expected of a police officer and were so serious as to amount to gross misconduct.

OUTCOME

69. Having determined the facts and associated misconduct, the Panel heard submissions from the Mr Messling and PC Gurney regarding outcome. The panel had regard to FPC Benady-Shemilt service record.
70. Mr Messling reminded the panel of the approach it should take and referred to the College of Policing's *Guidance on outcomes in police misconduct proceedings (2023)*.
71. He drew the panel's attention to section 5 of the Guidance which addressed the issue of dishonesty in operational policing. In particular he referred to paragraph 5.2 and the case of *R (Chief Constable of Dorset) v Police Appeals Tribunal [2011] EWHC 3366 (Admin)*.
72. He submitted that the panel had found that FPC Benady-Shemilt had been dishonest and that the dishonesty was in relation to a police operation.
73. PC Gurney reminded the panel that when considering outcome it should consider less severe outcomes before more severe outcomes.

THE PANEL'S APPROACH

74. The panel took account of the advice provided by the LQP.

75. In considering the outcome, the panel should bear in mind the purpose of the police misconduct regime:
- i) To maintain public confidence in, and the reputation of, the police service.
 - ii) To uphold high standards in policing and deter misconduct.
 - iii) To protect the public by preventing an offending officer from committing similar misconduct again by excluding them from the police service.
76. In determining the appropriate disciplinary action, the panel should have regard to the College of Policing's *Guidance on outcomes in police misconduct proceedings* (2023) including the need to:
- a) assess the seriousness of the misconduct by reference to:
 - i) the officer's culpability for the misconduct;
 - ii) the harm caused by the misconduct;
 - iii) the existence of any aggravating factors;
 - iv) the existence of any mitigating factors;
 - b) keep in mind the purpose of imposing disciplinary action; and
 - c) choose the disciplinary action which most appropriately fulfils that purpose for the seriousness of the conduct in question (that is, to act proportionately).

Culpability

77. The panel determined that FPC Benady-Shemilt's culpability both for his use of excessive force on Mr [REDACTED] and the subsequent dishonesty in alleging that Mr [REDACTED] had kicked him was high.

Harm

78. Mr [REDACTED] had suffered temporary discomfort from the effects of PAVA; however, no long-term harm had been caused.
79. FPC Benady-Shemilt's actions in relation to his use of excessive force on Mr [REDACTED] and the subsequent dishonesty in alleging that Mr [REDACTED] had kicked him had the potential bring the reputation of the police service into disrepute and undermine public confidence in policing.

Aggravating factors

80. The panel identified the following aggravating factors:
- a) An abuse of trust, position, power and authority;
 - b) Concealing or attempting to conceal wrong doing;
 - c) Significant deviation from the NPCC guidelines on the use of PAVA;
 - d) Operational dishonesty.

Mitigating factors

81. The panel did not identify any mitigating factors.
82. The panel took into account that officers at the scene did not provide support, which was a concern. However, it concluded that this did not mitigate FPC Benady-Shemilt's subsequent actions in accusing Mr [REDACTED] of kicking him, when he knew that this was not the case.

Disciplinary action

Final written warning

83. The panel considered that the conduct was too serious to be dealt with by a final written warning as there were breaches of standards including those relating to honesty and integrity in operational policing. This had the potential to damage public trust in the police service.

Dismissal without notice

84. The panel decided that had FPC Benady-Shemilt not resigned, the appropriate, proportionate and necessary disciplinary action to uphold standards and mark the seriousness of the misconduct was dismissal without notice.

Right of appeal.

85. In accordance with Regulation 43(2), the Appropriate Authority shall provide the officer with a copy of this report and a notice of the right of appeal. The officer is reminded he has a right to appeal to the Police Appeals Tribunal. ("PAT"). The PAT may increase or decrease any penalty or overturn our decision.

Commander Stephen Clayman