Neutral Citation Number: [2012] EWHC 808 (Admin)

Case No: CO/475/2011

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

Sitting at:
Leeds Combined Court
1 Oxford Row
Leeds
West Yorkshire
LS1 3BG

21 February 2012

B e f o r e :

THE HONOURABLE MR JUSTICE SUPPERSTONE

Between:

THE QUEEN on the application of SIMPSON — **Claimant**

- and -

(1) POLICE MEDICAL APPEAL BOARD

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendants**

(3) NORTHUMBRIAN POLICE AUTHORITY

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr D Lock QC (instructed by Lake Jackson Solicitors) appeared on behalf of the Claimant.
Mr O Sanders (instructed by Treasury Solicitors) appeared on behalf of the Second Defendant.

HTML VERSION OF JUDGMENT

Mr Justice Supperstone:

1. The central question to be determined on this application for judicial review is whether that part of Home Office Guidance 46/2004 (which I shall refer to as "the Guidance") concerning "Review of Injury Pensions once Officers reach 65" and paragraph 20 of section 5 of the Guidance on Medical Appeals under the Police Pensions Regulations 1987 and the Police (Injury Benefit) Regulations 2006 (which I shall refer to as "Guidance on Medical Appeals") are inconsistent with the Police (Injury Benefits) Regulations 2006 (which I shall refer to as "the Regulations") and therefore unlawful.

2. The background to the application is that the claimant was born on 30 January 1935. He is now 76 years old. In November 1959 he joined the Northumbria Police Force. He served as a police constable for 29 years until he was required to retire on grounds of ill health in November 1988. He suffered from cervical spondylosis, which was caused by his services as a police officer. As such, he came within the definition of being permanently disabled under the Regulations operative at that date and he was required by his police authority (which body is now the third defendant) to retire. If a police officer suffers from an injury which is caused by his duties as an officer he is entitled to apply for an enhanced pension, known as a Police Injury Pension. The claimant applied for and was granted a police injury pension. Such pensions are now governed by the Regulations, although the award to the claimant was governed by a previous set of regulations when it was made. Under regulation 9(1) of the Regulations the claimant is treated as if his injury pension was awarded under the Regulations even though it was made in 1987. The claimant's pension, once awarded, was calculated in accordance with the table at Schedule 3 to the Regulations. His degree of disability was assessed at 30 per cent. That placed the claimant in Band 2 in the table in Schedule 3. As he had more than 25 years' service his Band 2 pension was set at 70 per cent of the average pensionable pay for his rank at the date of his retirement.

3. The claimant reached the age of 55 on 30 January 1990. Pursuant to regulation A18(1)(a) of the Police Pension Regulations 1987 which were in force at that date, if he had still been serving as a police officer he would have been required to retire from the force on that date. His injury pension was reviewed in 1995 and was maintained at 30 per cent. The claimant reached the age of 65 on 30 January 2000. In February 2009 the third defendant appointed Dr Broome, a Selected Medical Practitioner ("SMP") to conduct a review of the claimant's injury pension, together with that of 78 others, in accordance with the Guidance. In their letter of appointment the third defendant said:

> "Northumbria Police can identify no cogent reason why we should not advise you (in your role as SMP) to place former Constable Simpson in the lowest band of Degree of Disablement. As a result we would like to draw your attention to the question and recommendation below.
>
> **Question**
>
> In line with Police Injury Benefit Regulations [30]2(d), could you please confirm the degree of the former officer's disablement.
>
> **Recommendation**
>
> That in your assigned role as Selected Medical Practitioner you should place former Constable 1516 Simpson in the 0-25% Degree of Disablement banding on the grounds that he has reached State Pension Age and no longer has an earnings capacity for the purposes of the Police Injury Benefit Regulations."

4. In a letter dated 20 February 2009 Dr Broome sets out his decision which led to the third defendant's decision that the claimant did not have a cogent reason not to be placed into Band 1. Dr Broome wrote:

> "Further to Northumbria Police's referral letter, I reviewed the degree of disablement of the above named ex-officer in my capacity as Selected Medical Practitioner. I note that I am only asked to consider the non-medical question of 'Degree of Disablement' and am therefore precluded by the Police Pension Regulations from reviewing the questions of permanent disability, medical cause(s) and the relationship of these to an injury on duty.
>
> I am advised that the Pensioner has reached State Retirement Age and therefore, in accordance with the Regulations, the Pensioner *'no longer has an earnings capacity for the purposes of the Police Injury Benefit Regulations'*. Northumbria Police has also determined that there is no '*cogent reason*' why the Pensioner should not therefore be considered to have 0% loss of earnings capacity as a consequence of their injury, and should be placed in the 0-25% Degree of Disablement banding.
>
> I confirm that the above recommendations are consistent with Regulations. I attach a revised Statement of Injury."

All 79 reviews were conducted by Dr Broome as a paper exercise.

5. The claimant appealed that decision to the Police Medical Appeal Board ("PMAB"), the first defendant. The first defendant eschewed reliance upon the Guidance and adopted a different approach to that taken by the third defendant, but nevertheless approved a reduction in the claimant's injury pension from Band 2 to Band 1 and thus dismissed the appeal.

6. Following the decision of the first defendant, the claimant's injury pension was reduced to Band 1. This claim was commenced on 19 January 2011. On 1 December 2011 the Court of Appeal granted permission to apply for judicial review in reliance on grounds 1A, 1B, 2 and 3 as set out in the claimant's Statement of Facts and Grounds dated 6 January 2011. Grounds 2 and 3 challenge the decisions of the third and first defendants respectively. The claim as against those defendants has now been settled by way of a consent order agreed between the relevant parties. The decisions of the third and first defendants have been quashed and the claimant's injury pension has been restored to its former level.

7. By section 1(1)(a) of the Police Pension Act 1976 (the "Act"), regulations to be made by the Secretary of State shall make provision "as to the pensions which are to be paid to and in respect of members of police forces, whether as of right or otherwise". By section 1(2)(c) any such regulations shall provide for the payment subject to the Regulations of pensions "to and in respect of persons who cease to be members of a police force by reason of injury received in the execution of their duty". Section 1(3) also confers power on the second defendant to include in Regulations "such consequential or incidental provisions as appear to the Secretary of State to be necessary or expedient, including, in particular, provision as to the cases in which pensions are to be --- (a) varied, suspended, terminated or forfeited". The Regulations were made by the second defendant pursuant to sections 1 and 6 to 8 of the Act. Regulation 11 of the Regulations provides:

> "(1) This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty (in Schedule 3 referred to as the "relevant injury").
>
> (2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that Schedule and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled.

8. Schedule 3, so far as is material, provides

> "**1.** A gratuity under regulation 11 shall be calculated by reference to the person's degree of disablement and his average pensionable pay and shall be—
>
> (a) in the case of a police officer all of whose service by virtue of which his pensionable service is reckonable was full-time, the amount specified as appropriate to his degree of disablement in column (2) of the Table in paragraph 3;
>
> ...
>
> **3.** An injury pension shall be calculated by reference to the person's degree of disablement, his average pensionable pay and the period in years of his pensionable service, and, subject to the following paragraphs, shall be—
>
> (a)in the case of a police officer all of whose service by virtue of which his pensionable service is reckonable was full-time, of the amount of his minimum income guarantee specified as appropriate to his degree of disablement in column (3), (4), (5) or (6) of the following Table

Degree of disablement	Gratuity expressed as % of average pensionable pay	Minimum income guarantee expressed as % of average pensionable pay	Minimum income guarantee expressed as % of average pensionable pay	Minimum income guarantee expressed as % of average pensionable pay	Minimum income guarantee expressed as % of average pensionable pay
		Less than 5 years' service	5 or more but less than 15 years' service	15 or more but less than 25 years' service.	25 or more years' service.
(1)	(2)	(3)	(4)	(5)	(6)
25% or less (slight disablement)	12.5%	15%	30%	45%	60%
More than 25% but not more than 50% (minor disablement)	25%	40%	50%	60%	70%
More than 50% but not more than 75% (major disablement)	37.5%	65%	70%	75%	80%
More than 75% (very severe disablement)	50%	85%	85%	85%	85%

9. An injury is defined in schedule 1 of the Regulations as including any "injury or disease, whether of body or of mind". Regulation 7 defines the meaning of degree of disablement for the purposes of the Regulations. It provides, so far as is material,

"(1) Subject to paragraph (2), a reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent.

...

(4) Subject to paragraph (5), disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force except that, in relation to the child or to the widower or surviving civil partner of a woman member of a police force, it means inability, occasioned as aforesaid, to earn a living.

(5) Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force:

Provided that a person shall be deemed to be totally disabled if, as a result of such an injury, he is receiving treatment as an in-patient at a hospital.

10. Regulation 30 provides:

"1) Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards under these Regulations shall be determined in the first instance by the police authority.

(2) Subject to paragraph (3), where the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions—

(a)whether the person concerned is disabled;

(b)whether the disablement is likely to be permanent,

except that, in a case where the said questions have been referred for decision to a duly qualified medical practitioner under regulation H1(2) of the 1987 Regulations, a final decision of a medical authority on the said questions under Part H of the 1987 Regulations shall be binding for the purposes of these Regulations;

and, if they are further considering whether to grant an injury pension, shall so refer the following questions—

(c)

whether the disablement is the result of an injury received in the execution of duty, and

(d)

the degree of the person's disablement;

and, if they are considering whether to revise an injury pension, shall so refer question (d) above.

...

(6) The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations 31 and 32, be final."

11. Regulation 31 provides for an appeal to a board of medical referees, in this case the first defendant. Regulation 32 provides for a further reference to the medical authority. Regulation 37 provides for the review of injury pensions. Regulation 37(1) states:

> (1) Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the police authority shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered; and if after such consideration the police authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly."

Regulation 43(1) provides,

> **"**(1) Subject to the provisions of these Regulations, in particular of regulation 11(2) (limitation on payment of an injury pension to a person who ceased to serve before becoming disabled) and Part 5 (revision and withdrawal or forfeiture of awards), the pension of a member of a police force under these Regulations shall be payable in respect of each year as from the date of his retirement."

The Guidance on Medical Appeals (section 5, paragraph 6) states:

> "For the purposes of police injury awards 'degree of disablement' means the extent to which a medical authority (ie the selected medical practitioner (SMP) or, on appeal, a medical referee) assesses a person's earning capacity has been affected by the relevant injury. The link with earnings is necessary because injury pensions are based on a system of 'minimum income guarantee' designed to bring total income in retirement up to a certain level."

Annex C to the Guidance bears the heading "Home Office Guidance for Forces on Reviews of Injury Awards". By way of introduction it states:

> "This Guidance is being issued to help ensure a fairer, more cohesive approach to the payment of injury benefits to ill-health retired officers who have reached the compulsory retirement age with their Force."

Under the heading "Review of Injury Pensions once Officers reach Age 65" it states:

> "Once a former officer receiving an injury pension reaches the age of 65 they will have reached their State Pension Age irrespective of whether they are male or female. The force then has the discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest band of Degree of Disablement. At such a point the former officer would normally no longer be expected to be earning a salary in the employment market.
>
> A review at age 65 will normally be the last unless there are exceptional circumstances which require there to be a further review."
>
> "

The Medical Appeal Guidance is in substantially the same form as the Guidance. Paragraph 20 of section 5 of the Guidance on Medical Appeals provides:

> "Once a former officer receiving an injury pension reaches the age of 65 they will have reached their State Pension Age irrespective of whether they are male or female. The force then has the discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest band of Degree of Disablement."

12. The two grounds in respect of which the Court of Appeal granted permission to the claimant to challenge the Guidance are: first, that the Guidance is inconsistent with the Regulations (ground 1A; and, second, that the Guidance is wrong in that it mistakes earnings for earning capacity (ground 1B). In respect of ground 1A, Mr David Lock QC, for the claimant, submits that the recommendation in the Guidance that once a police officer will have reached the age of 65 there needs to be a "cogent reason" for not placing the former officer in the lowest band for injury pensions is inconsistent with Regulation 7(5) which requires the assessment of the former officer's "degree of disablement" by reference to the loss of earning capacity of the former officer regardless of his or her age. There is no presumption provided for within the Regulations that a person who reaches the age of 65 is unable to work or has either no or a reduced earning capacity by reason of reaching that age. There is, therefore, no basis for failing to consider the individual circumstances of the former officer on such a review.

13. As for ground 1B, Mr Lock submits that the test under Regulation 7(5) is based on the loss of a former officer's earning capacity, not his actual loss of earnings. In this regard he relies on the judgment of Ouseley J in R (South Wales Police Authority) v The Medical Referee (Dr David Anton) and Crocker [2003] EWHC 3115 Admin where the judge said at paragraph 42:

> "The task, in my judgment, in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not a labour market assessment, or an assessment of whether somebody would actually pay him to do what he is capable of doing, whether or not in competition with other workers.

14. On a review, whether at age 65 or any other age, Mr Lock submits that the SMP is required to consider whether there has been an alteration in the jobs – and hence earnings – the pensioner would have had the skills to perform if he had not been injured, and to compare this with the jobs and earnings that the disabled pensioner was in fact able to do as compared to the date of the last review. In his skeleton argument and his oral submissions Mr Lock puts forward what he describes as his "wider submission" and his "narrower submission". The wider submission, which is made by reference to the judgment of Burton J in R (Turner) v Police Medical Appeal Board [2009] EWHC 1867 Admin and the Court of Appeal in Metropolitan Police Authority v Laws 2010 EWCA Civ 1099, is that the task that the first and third defendants are required to undertake as part of a Regulation 37(1) review is not to commence with an assessment of the present uninjured earnings capacity and compare this to the actual earnings capacity of a former police officer. The only duty on a medical authority when conducting a Regulation 37(1) review is to decide whether, since the award or last review – whichever is the latest – there has been a change in the degree of disablement; whether, in the language of the regulation, there has been a substantial alteration.

15. Mr Lock's narrower submission is based on an analysis of the Guidance and includes asking whether it complies with three tests. First, the Inconsistency Test: the approach set out in the Guidance does not recommend an approach which is in any way inconsistent with the statutory test that the decision maker must apply as part of the decision making process. Second, the *Padfield* test: the Guidance must make recommendations about the exercise of the statutory discretion which promote the policy and objects of the act. Third, the Presumption Test: the Guidance is entitled to suggest factors that a discretionary decision maker may wish to take into account in making a decision. However, it must not suggest that, in exercising the area of discretionary judgment open to the decision maker, the decision

maker is either required to take any discretionary factor into account or to apply any presumption unless the requirement or the presumption is set out in the statutory scheme.

16. Applying these tests, Mr Lock submits that the Guidance is flawed for four reasons. First, the discretion to advise the SMP to reduce a former officer to the lowest band of degree of disablement could only arise if it were provided for in the Regulations. There is no provision in the Regulations which gives rise to such a discretion. Accordingly the Guidance is inconsistent with Regulation 37 and also fails the presumption test. Second, the reference to a former officer "no longer being expected to be earning a salary in the employment market" is, in reality, a suggestion either that a person who is not working has no earning capacity which is flawed as a matter of logic or that a person over the age of 65 can be assumed to have no earning capacity which is equally flawed logic. Accordingly, it fails the *Padfield* test because it does not promote the purpose of the Regulations. Third, it also fails the Presumption test because the "cogent reason" test is not part of the statutory scheme and deviates the decision maker from the statutory scheme in an unlawful way. Fourth, the way in which the "cogent reason" test is put forward fails all three tests. It places a heavy onus on the former officer to demonstrate that he or she still has an earning capacity. This is a reversal of the burden of proof under the Regulations because the default position in the Regulations is that the pension is unaltered unless a substantial alteration is proved.

17. Mr Oliver Sanders, for the second defendant, in response to ground 1A, emphasises that Regulation 7(5) requires an assessment of the degree of a person's disablement by reference to the degree to which their earning capacity has been affected. He submits that, given that the Regulations are silent as to the means of assessing the effect on an individual's earning capacity, it is entirely proper for the Home Office to issue guidance suggesting appropriate assumptions in order to give the decision-making authorities a framework and some structure for their deliberations and to help promote consistency of approach. It is common sense and consistent with the purpose and practical focus of the Injury Pension Scheme, he submits, that an injury pension review should be considered compulsory at occupational retirement age since it is no longer appropriate to use the former officer's police pay scale as the basis for his or her pre-injury earning capacity. Mr Sanders contends that the guidance simply suggests that reference is made to national average earning figures as a guide in the absence of a cogent reason for a higher or lower outside earnings level.

18. In response to ground 1B Mr Sanders submits that it is the claimant who falls into error by seeking to divorce earnings capacity from practical reality in the purpose of injury pensions. Any assessment of the degree to which an individual's earning capacity has been affected as a result of an injury inevitably requires a counterfactual assessment of their earning capacity "but for" the injury. The assessment must be directed to what the individual would have been earning in reality and not what they would have been earning in theory. The fact that someone has reached an age at which they would no longer be working as a member of a police force or probably in any other capacity cannot be disregarded.

19. Mr Sanders, in his skeleton argument, suggested that by contrast with grounds 1A and 1B, for which permission was given, the claimant's skeleton argument concentrates on a new argument. Mr Lock contends that a reviewing SMP or PMAB may not conduct a fresh review of the former officer's degree of disablement and use that result to work back to find that there has been an alteration in the former officer's degree of disablement. However, in Mr Sander's submission the authorities relied upon by the claimant in this regard all related to the assessment of actual earning capacity post-injury. None of them supports the proposition put forward in the context of ascertaining assumed earning capacity but for the injury.

20. It is accepted by Mr Sanders that SMPs and PMABs cannot re-visit previous answers to questions (a) to (c) in regulation 30(2) when conducting a review under Regulation 37. However, they must consider question (d), namely whether the degree of the pensioner's disablement has altered. He submits it is impossible to do this without reviewing their degree of disablement more generally. The Guidance is concerned with assumed earning capacity but for the duty injury and Mr Sanders submits the only way to identify an alteration in this is to compare what it was at the last review with what it is now. If this in turn points to a change

in the degree to which the individual's earning capacity has been affected as a result of the injury within Regulation 7(5) and consequently an alteration in the degree of the pensioner's disablement within Regulation 37(1), this cannot be said to have entailed any revisiting of any component of the previous review (which could not have taken a view on future assumed earning capacity "but for" the injury) or any negation of its finality.

21. In support of this submission Mr Sanders relies upon the witness statement of Mr Spreadbury, sworn on 21 December 2011. Mr Spreadbury currently works as Head of the Police Pensions and Retirement Policy Section within the Home Office. At paragraph 6 of his statement Mr Spreadbury, commenting on regulation 37, says:

> "6.1 Regulation 37 of the PIBR 2006 requires police authorities to consider whether the degree of the pensioner's disablement has altered at such intervals as may be suitable and, if after such consideration the police authority finds that the degree of the former officer's disablement is substantially altered, to revise the award accordingly. ...
>
> 6.2 The question for determination upon such a review is whether there has been a change since the original decision (or last review) which has had the effect of altering the degree of disablement. It is not open to the SMP/PMAB to reach a different decision in relation to the fact of disablement, whether the disablement is likely to be permanent or whether the disablement resulted from a duty injury. In assessing degree of disablement by reference to the effect of an injury on earning capacity, as a prelude to assessing whether there has been an alteration, it is standard practice to compare assumed earning capacity 'but for' the injury, on the one hand, with actual earning capacity post-injury, on the other. This brings in the relevant guidance which is concerned with the choice of a comparative figure for assumed or 'but for' earnings capacity.
>
> 6.3 This is inevitably a hypothetical exercise but the Home Office considers it fundamental that what matters most is how much the individual could have been expected to earn 'but for' the injury and that this should be taken to indicate earning capacity. This rests on an assessment of what the individual *would* have been earning in reality and not what they *could* have been earning in theory. It would be artificial and unreal in the extreme to disregard the fact that someone has reached an age (in this case the Claimant is now 76 years old) at which he or she would have retired regardless of the duty injury."

22. Mr Lock observes that, in the third sentence of paragraph 6.2, Mr Spreadbury appears to be saying that the standard practice on a review is to conduct a fresh assessment. Paragraph 6.3 is, he submits, illogical. He does not suggest that the fact that a person has reached the age of 65 should be ignored, but it does not follow that such a person has no earning capacity.

23. It is common ground that departmental guidance of the kind at issue in this case is prima facie amenable to judicial review on error of law grounds notwithstanding its non-statutory, non-binding status (see Gillick v West Norfolk AHA [1986] 1 AC 112, per Lord Bridge at 193G). Mr Lock suggests that the test should be whether the Guidance "permits or encourages unlawful conduct". Mr Sanders accepts that, if the Guidance suggests or encourages an unlawful approach, the Guidance would be unlawful. I agree it would not be sufficient for the Guidance merely to permit it. In my view the key question is whether the Guidance contains an error of law.

24. The second defendant's case and Mr Sander's submissions are based on the justification for the Guidance given at paragraphs 7.6 and 7.7 of Mr Spreadbury's witness statement. His evidence is that:

"7.6 The relevant guidance suggests no more than that the following working assumptions can reasonably be made when the SMP or PMAB is assessing degree of disablement by reference to the degree to which the relevant person's earning capacity has been affected:

(1) until the age when the individual would have been compulsory retired from the police service ("CRA") it can be assumed that he or she would have remained in the service 'but for' the duty injury, and his or her earning capacity can therefore be assessed by reference to his or her police pay;

(2) from CRA onwards it can be assumed that the individual would no longer have been in the police service 'but for' the duty injury, and his or her earning capacity can therefore be assessed by reference to the average earnings of a person in his or her age group;

(3) From state pension age ("SPA") it can be assumed that the individual would no longer be in gainful employment 'but for' the duty injury, and his or her earning capacity can therefore be assessed as nil.

7.7 Each of these assumptions is expressly amenable to rebuttal by way of a cogent reason. In relation to assumption (1), for example, it would be open to the individual to show that he or she had intended to leave the police service well before compulsory retirement age and take up more highly paid employment elsewhere. The relevant guidance therefore seeks simply to offer a framework and structure for the assessment of these matters and thereby to help promote consistency of approach, while making it clear that the PIBR 2006 take primacy and must be followed, the proposed assumptions may not apply and each case must be considered on its own individual merits."

25. Mr Sanders submits that the Regulations must be read as a whole and given a purposive construction. The real concern for the Home Office, he says, is the issue of principle as to what happens when police officers reach the point at which they retire. By reference to the statutory language, section 1(2) of the Act, Mr Sanders submits that the scheme is designed to address the financial consequences of an individual ceasing to be a member of the police force. The Regulations, he contends, adopt a practical focus on the effect of a duty injury on an individual's ability to operate as a police officer. Invoking the language of Laws LJ in Laws, Mr Sanders says that "the regime is designed to meet objective need" [27]. The purpose and focus of the Regulations is to provide a minimum income guarantee. Paragraph 3 of Schedule 3 to the Regulations, he submits, supports this analysis. The amount a former officer should receive should broadly correspond to the shortfall in income by reference to his inability to continue to serve as a police officer. The reality is that at the age of 65 the vast majority of persons are retired, so in terms of a rational starting point it is acceptable to assume this is so and then to consider whether the facts of an individual case are different. Mr Sanders suggests that the reference to "cogent reason" should not be viewed in terms of a burden or a standard of proof. It simply means that if there are cogent reasons, the starting point should be disregarded.

26. Addressing the Guidance on Medical Appeals, Mr Sanders submits that paragraph 20 should not be considered in isolation. It should be read together with paragraph 21, which makes clear that "each case needs to be considered in compliance with the Police Pensions Regulations and in the light of the individual circumstances". Paragraphs 20 and 21, dealing with the degree of disablement after the age of 65, should be read together with paragraphs 17 to 19 which consider degree of disablement after compulsory retirement age. Paragraph 17 states that, once a former officer reaches what would have been his or her compulsory retirement age under the Regulations, it is no longer appropriate to use a police pay scale on the basis of his or her pre-injury earning capacity. Paragraph 19 states that, in the absence of a cogent reason for a higher or lower outside earnings level, it is suggested that the basis of the person's earning capacity, had there been no injury, should be the national mean

earnings (from the Annual Survey of Hours and Earnings (ASHE)) and it would be for the SMP, after seeking material information from the police authority about the background to the individual case, to decide whether the ASHE figure can be used.

27. Mr Sanders distinguishes the authorities on which Mr Lock relies – Turner, Laws, and Crocker – on the basis that they are dealing with actual post-injury earning capacity and not with but for earning capacity. He submits that the vice of those cases, starting again from scratch, has no relevance to the Guidance that invites a medical practitioner to start from scratch. Mr Sanders submits that it is not possible when considering the "but for" issue to do anything other than compare the situation that presently exists with what it was at the last review.

28. In my view the problem with Mr Spreadbury's "working assumptions", (in particular (3)), and the "cogent reason" test in the Guidance, is that they find no basis in Regulation 37. Indeed, in my view the authorities on which Mr Lock relies make clear that Regulation 37 requires a very different approach. I accept Mr Lock's submission that the SMP and the PMAB cannot conduct a fresh review of the uninjured earning capacity and the actual earning capacity of the former officer and then, comparing the outcome of that assessment with the previously determined degree of disablement, conclude that there has been an alteration in the former officer's degree of disablement. That approach is contrary to the analysis approved in Turner and confirmed in Laws and reverses the approach required to be taken by Regulation 37(1). The statutory scheme requires an assessment as to whether there has been an alteration in the degree of disablement first. A further quantum decision on the present degree of disablement is only permissible if the police authority, acting by the SMP, have first decided that there is a substantial alteration in the former officer's degree of disablement.

29. In Turner Burton J said,

> "21 ... It is important from the point of view of disputes such as pension entitlement that a decision once made should be final if at all possible, and that is what is provided by these Regulations. But causation questions having been put aside, it is clearly fair both for the police force and for the community that someone who starts out on a pension on the basis of a certain medical condition should not continue to draw a pension, or any kind of benefit, which is no longer justified by reason of some improvement in his condition, or, of course, the reverse.
>
> ....
>
> 23. It is apparent, therefore, that in considering questions of disablement earning capacity is important, but, of course, Crocker would not apply straightforwardly to the present case. It would not justify starting from scratch in relation to earning capacity, because in the present case what is posed under Regulation 37 is the degree if any to which the pensioner's disablement has altered. By virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving. To that extent, therefore, the approach by the SMP, had it been justifiable, which it was not because it had been overturned on appeal by the PMAB, would have been relevant. Mr Lock accepts that if there is now some job available which the defendant would be able to take by virtue either of some improvement in his condition or in the sudden onset of availability of such a job then that would be a relevant factor. But it would all hang on the issue of alteration or change after 'such intervals as may be suitable'. There is no question of relitigation and, of course, suitable intervals suggests that this is not a matter which should be revisited every year, nor is it."

30. In Laws the Court of Appeal approved the construction of the Regulations adopted by Cox J at first instance. As the judge put it at [2009] EWHC 3135 at 35, the Board erroneously conducted "...an entirely fresh assessment of the claimant's degree of disablement and its

causes, rather than directing their minds, as required by the regulations, to whether her degree of disablement had substantially altered since the last review in 2005."

31. The Court of Appeal in Laws expressly approved the decision in Turner. Rejecting the submission made by Mr Pitt-Payne for the police authority to the effect that the starting point for the Board or the SMP is to consider the pensioner's current degree of disablement and compare it with the previous assessment. Laws LJ said:

> "18. So much is surely confirmed by the terms of Regulation 37(1), under which the police authority (*via* the SMP/Board are to "consider whether the degree of the pensioner's disablement has altered". The premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty – the *only* duty – is to decide whether, since then, there has been a change: "substantially altered", in the words of the Regulation. The focus is not merely on the outturn figure, but on the *substance* of the degree of disablement.
>
> 19. In my judgment, then, the learned judge below was right to construe the Regulations as she did. Burton J's reasoning in paragraph 21 of *Turner*, which encapsulates the same approach, is also correct. The result is to provide a high level of certainty in the assessment of police injury pensions. It is not open to the SMP/Board to reduce a pension on a Regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong. Equally, of course, they may not *increase* a pension by reference to such a conclusion; and it is right to note that Mr Butler, appearing for the Board, voiced his client's concern that so confined an approach to earlier clinical findings might in some cases work to the disadvantage of police pensioners. Strictly that is so. But the clear legislative purpose is to achieve a degree of certainty from one review to the next such that the pension awarded does not fall to be reduced or increased by a change of mind as to an earlier clinical finding where the finding was a driver of the pension then awarded.

32. There is in my view no statutory basis in the Regulations to support a different approach to a regulation 37 review at different ages. I reject Mr Sanders' submissions distinguishing Turner, Laws, and Crocker in this respect. I also reject Mr Sanders' submission that the purpose of an injury pension is to make up for the financial consequences of an enforced inability to continue operating as a member of a police force. Regulation 7(4) is the gateway into the benefit, defining disablement. Regulation 7(5) is concerned with the assessment of loss of earning capacity. The degree of a person's disablement should be determined by reference to the degree to which *his* (emphasis added) earning capacity has been affected as a result of the injury. The focus is on the individual's earning capacity which, in the case of a former officer, may or may not involve the police officer's salary. As Ouseley J noted in Crocker, the task in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not an assessment of whether somebody would actually pay him to do what he is capable of doing. There is nothing in the language of section 1(2)(c) or regulation 7(5) to suggest that the life entitlement provided by regulation 43 is affected by reference to the age when the individual would have been compulsorily retired from the police service or from state pension age on the basis of an assumption that the individual would no longer be in gainful employment "but for" the duty injury and his earning capacity can therefore be assessed as nil.

33. The advice contained in the Guidance that the SMP may place the former officer in the lowest band of degree of disablement in the absence of a cogent reason otherwise is not supported by the wording of regulation 37(1). The advice is based on the premise that, having reached the age of 65, a former officer would normally no longer be expected to be earning a salary in the employment market. The third of Mr Spreadbury's working assumptions is that the individual would no longer be in gainful employment "but for the duty injury and his or her earning capacity can therefore be assessed as nil". This is not in my view an approach

permitted by regulation 37(1). It is no answer to say that the working assumptions can be rebutted by way of a cogent reason. Regulation 37(1) contains no such presumption or "cogent reason" test. The Guidance fails to address the question as to whether there has been an alteration. Instead of advising that the question as to whether there has been an alteration should be approached neutrally by the decision maker on the facts of the individual case, it wrongly advises that certain working assumptions can be made. It then wrongly advises that there must be a cogent reason to displace those assumptions. In so doing, it detracts from the neutral decision making process that should take place and sets a high bar which is not justified by the Regulations.

34. In the recent decision of R (Crudace) v Northumbria Police Authority [2012] EWHC 112 Admin involving one of the other 78 individuals reviewed by Dr Broome, HHJ Behrens accepted the argument that the Guidance was unlawful, subject to the caveat that he did so without considering any evidence or submissions from the Secretary of State for the Home Department (see paragraphs 28 to 34). On the present application I have considered the evidence put forward on behalf of the second defendant and heard submissions from counsel for the Secretary of State. In my judgment, for the reasons I have given, the parts of the Guidance and the Guidance on Medical Appeals under challenge are inconsistent with the Regulations and unlawful.

35. I turn now to consider whether the discretionary relief sought by the claimant should be granted. Mr Sanders submits that I should decline to grant relief on four grounds. First, he submits that any claim for relief is entirely academic, particularly as the Guidance has been suspended. Second, because of the needs of good administration. Third, to the extent that the SMP relied on the guidance, the claimant's appeal to the PMAB operated as an alternative remedy and cured any defect in his approach. Fourth, the claimant does not have a sufficient interest in the claim for the purposes of the Senior Courts Act 1981, section 31(3). Mr Sanders submits that the PMAB expressly disavowed any application of the impugned cogent reasons test and the claimant cannot claim that this had any effect on his interest or caused him any prejudice or injustice.

36. In considering this issue I have had regard to the evidence of Mr Spreadbury. At paragraph 9.7 of his witness statement he says that,

> "...following the decision of the Administrative Court dated 12 November 2009 in R(Laws) v PMAB [2009] EWHC 3135 Admin, (which did not bear directly on the issues raised in this case) all further use of the relevant guidance was in effect suspended by way of interim guidance issued in early 2010. This interim guidance was promulgated by way of a letter from Mr Gilbert dated 10 March 2010. ... In short, it was announced that the review of the relevant guidance had been suspended pending the outcome of the appeal to the Court of Appeal in the *Laws* case and that police authorities should defer any further injury benefit reviews under the PIBR 2006, except in cases involving the deterioration of a condition."

37. At paragraph 9.10 Mr Spreadbury continues,

> "Our review of the relevant guidance was revived following the Court of Appeal decision in *Laws* dated 13 October 2010 ([2010] EWCA Civ 1099) and revised draft guidance was circulated by the PMAB and other stakeholders under cover of a letter from me dated 7 January 2011 which included the following. ...
>
> 'The guidance issued under HO Circular 46/2004 has attracted significant comment, including criticism by former officers and those representing them, who felt that the guidance was the catalyst for some Police Authorities reducing a number of injury pensions when individuals had reached or beyond age 65. Our aim in this draft revised guidance, as it was with the original guidance, is to encourage greater transparency in this process and

consistency, providing the framework within which Police Authorities and Forces might carry out injury award reviews. Clearly, notwithstanding guidance from the Home Office, the duty and power to conduct such reviews under the 2006 Regulations remains very clearly the discretion of the relevant Police Authority. The draft revised guidance provides a firmer framework for forces to conduct reviews, with an emphasis on:

- each case being treated individually and on its merits;
- the rights of the former officer at review;
- transparency over the process by which a medical practitioner reviews the degree of disability and any change in earnings capacity;
- a review not being completed solely on papers if there has been any significant change in circumstances which is likely to lead to a change in banding of the degree of disablement, ie any change in the level of the award;
- the police authority considering whether there are particular exceptional reasons not to review a former officer, particularly where a modest income level is involved (ie to avoid hard cases);
- clarity of process, particularly where the police authority intends to carry out any further review after age 65."

38. At paragraph 9.11 Mr Spreadbury states,

> "9.11 I have not exhibited a copy of the proposed draft guidance attached to my letter because we have since received various comments on it, our thinking has moved on and the text is no longer current. (I understand the claimant's advisors already have a copy in any event). As things stand, our review of the relevant guidance has been suspended again pending the outcome of these proceedings. I do not think it relevant to outline where our thinking had got to on the relevant guidance prior to the suspension of the review following the grant of permission on 1 December 2011. At that point, it was still our intention to address the subject matter of the relevant guidance in some way but we had not yet re-consulted on any advised draft guidance and we will now have to revisit the topic in the light of the Court's ruling in this case in any event. Should it appear that repeated legal challenges and uncertainty are likely to continue in this area, one possible option is the withdrawal of the relevant guidance and the abandonment of any attempt to give central guidance on the topic."

39. In my view none of the matters relied upon by Mr Sanders, individually or cumulatively, warrant the denial of relief in the circumstances of this case. It is clear from the evidence of Mr Spreadbury that the decision of the Home Office as to what to do with the Guidance is awaiting the outcome of these proceedings. As Carnwath LJ observed when the Court of Appeal granted permission, other individuals are affected by this case. This is general guidance which raises an issue of general importance. I do not consider the claim to be academic. Mr Spreadbury acknowledges that the guidance has caused considerable problems. There is a "live, practical question" to be resolved (see R (Rusbridger) v Attorney-General [2004] 1 AC 357 per Lord Hutton at 35).

40. The "good administration needs" argument of Mr Sanders is not supported by evidence. There is no evidence that quashing the Guidance would have considerable administrative consequences or adverse effect on third parties (see generally R v Monopolies and Mergers Commission ex parte Argyll Group [1986] 1 WLR 763). If a declaration were to be granted rather than the Guidance quashed, then any effect on good administration is likely to be more limited (see R v Secretary of State for Social Services ex parte AMA [1986] 1 WLR 1). In my view the evidence of Mr Spreadbury rather suggests that good administration requires clarification of this issue of general importance. The alternative remedy argument also carries

no weight. The statutory appeal to PMAB did not resolve the issue of law with which this claim is now solely concerned. There is no alternative remedy for the purposes of testing the issue of the legality of the Guidance.

41. Finally, I am satisfied that it would be wrong to deny relief on the basis that the claimant's personal position would not be affected by the outcome of his claim against the second defendant. Mr Sanders submits that the claimant is not adversely affected by the guidance. However, as a person over the age of 65, he has an interest in the terms of any guidance that may be applied to him on any future review. The lawfulness of the Guidance raises a serious issue of importance to police officers in a similar position to the claimant.

42. In my judgment, the appropriate relief to grant in the circumstances of this case is a declaration that the section in the Guidance headed "Review of Injury Pensions Once Officers Reach Age 65" and paragraph 20 of the Guidance on Medical Appeals are inconsistent with the Regulations and unlawful. There is no justification for adopting a different approach to regulation 37(1) in respect of a former officer who reaches the age of 65 than in the case of a review for former officers of a younger age.

MR LOCK: I am grateful for your Lordship's judgment; I am particularly grateful – I know my learned friend is as well – that your Lordship was able to produce it so quickly.

My Lord, the only other matter is the questions of costs and costs clearly follow the event and, following that, the only question is whether your Lordship would be comfortable in ordering an interim payment on those costs. Your Lordship will appreciate this matter has been somewhat protracted, including going up to the Court of Appeal, where we have an order for costs. Our costs are in the region of £50,000 because we are on a conditional fee agreement. My Lord, I am afraid it is a high success fee, but this was not a case where, when we started it, it was not the equivalent of a road traffic accident for a passenger; it was a matter of considerable complexity and considerable uncertainty. Therefore I would ask for our costs.

MR JUSTICE SUPPERSTONE: Do you ask for them to be assessed if not agreed with an interim payment?

MR LOCK: Yes. There are two issues. One is the basis - I do ask for my costs on an indemnity basis. The reason I ask for indemnity basis is that, as my learned friend raised yesterday before you, we have repeatedly attempted to persuade the Home Office to accept the logic of the position and they have dragged us to a hearing on the basis that the Guidance was defensible on either the narrow or the wider basis, neither of which, as I understand your Lordship's judgment, has been accepted today. Therefore repeated attempts to try to resolve this matter have failed. I ask for an interim payment of about 50 per cent of the amount. There is a schedule if your Lordship is minded, but given the complexity of the issues I trust your Lordship will not think that, particularly on a CFA case, the sums are out of kilter and I ask for an interim payment of £30,000.

MR JUSTICE SUPPERSTONE: Mr Sanders, first of all costs.

MR SANDERS: I accept that we have to pay costs, my Lord. First of all, I should echo Mr Lock's gratitude to you for producing the judgment so quickly, which will assist the Home Office in moving forward from here.

MR JUSTICE SUPPERSTONE: Thank you. I understand there is no shorthand writer in court so I think my clerk has informed you that I am content for what I have read out to be sent to you on the basis that that is not the approved judgment.

MR SANDERS: I fully understand the caveat but we are grateful for that. In terms of costs, there are really two issues. One is whether the costs should be on an indemnity basis which does not nowadays make as much difference as it once did. My response to that would be that if were to have to pay indemnity costs because we lost the judicial review, it would follow

in every judicial review. The fact that we defended the Guidance is neither here nor there. The difficulty that we always face with agreeing a consent order to quash or accept unlawfulness of certain parts of the Guidance, it would leave open the question as to the depth at which unlawfulness had been established.

MR JUSTICE SUPPERSTONE: I think it became clear during the course of submissions yesterday that the fundamental issue to be determined is not so much the wording of this Guidance. I am not suggesting that any concessions were made there. The fundamental issue is as to whether any different approach should be adopted for those 65 and over.

MR SANDERS: My Lord, yes, and simply settling a consent order would not resolve that. Obviously I accept that we have been unsuccessful in defending the Guidance but that should not lead me to indemnity costs in my submission.

In terms of interim payment on account, of course we would not oppose that in principle. I would oppose the amount. I think that when it comes to detailed assessment there will be an issue about the success fee that has been claimed in this case. What I would propose is 50 per cent of the base costs that are claimed in the schedule.

MR JUSTICE SUPPERSTONE: What is that figure?

MR SANDERS: It is around £50,000.

MR LOCK: I have various pages here that I have not considered in detail. £52,000 is the bottom line on page four.

MR SANDERS: I think the un-uplifted amount would be about £30,000 on that basis so I would accept an interim payment of £15,000.

MR JUSTICE SUPPERSTONE: As a matter of interest, how long should it take to get costs assessed in a case such as this, if it goes to assessment?

MR SANDERS: I have no idea, my Lord.

MR LOCK: I think in practical terms what tends to happen is this, that if a realistic interim payment is set there is then a negotiation and somewhere between the sum claimed and the interim payment matters are generally agreed. Therefore the answer is that assessments are quite rare. Having said that, my understanding is that you have three months in which to issue your bill for assessment and then it can take up to nine months to actually go through the detailed assessment. Sometimes in cases bills are issued and then there is a settlement. That is the way it works.

On the indemnity point, my Lord, all I say is this, that if the Home Office wanted to come here to test what was a sub-issue, that they accepted that the Guidance was essentially in its rigidity unlawful but they really wanted to test the sub-issue as to how deep it goes, that is fine, but my client should not have to pay any part of that, bearing in mind the difference between full costs and recovered costs is a cost that my client will have to pay and in effect, therefore, concessions should have been made to narrow the issues and they were not. My client should not be left with, in effect, the public policy argument between the court and the Home Office determining precisely as to how wide they deviated from what was acceptable.

MR JUSTICE SUPPERSTONE: Your client chose to continue with this claim - I am not criticising your client for one moment – against the second defendant in circumstances where he had been restored to his original band. So it was always a public issue claim after that.

MR LOCK: Yes, but it would have been perfectly proper for the Home Office to say that we accept the original Guidance was improperly worded. It could not be defended; we will go

away and produce fresh guidance which we think sets the right approach. They may well have made a mistake even then judging by Mr Spreadbury, but they would have made less of a mistake than they did under the original Guidance they were trying to defend. That is the first point.

The second point as far as quantum is concerned, logically I do not think the amount of work undertaken at the base cost of £30,000 is going to be substantially reduced and I cannot see that it could be said at any point that this was a claim run only on a CFA – could only be run on a CFA – where a substantial uplift was not entirely appropriate. Therefore in terms of making an assessment of setting a point which, on any view will be less, will not be greater than the amount covered on assessment which is in principle why interim costs are there, to help narrow the gap and assist. The approach that my learned friend takes, which I think would produce an interim payment of about £15,000 to £20,000, sets the bar far too low and I have asked for £30,000 against a £50,000 bill and submit that, roughly speaking, that is the approach I would like your Lordship to take. Otherwise it assumes that effectively this was a case with no risk and it was not. It was not, apart from anything else, because judicial review is always a discretional remedy and your Lordship was urged at the end yesterday not to exercise the discretion and if your Lordship had acceded to that no doubt there would have been an argument, that in the absence of a proper remedy costs should not flow. That is how I invite your Lordship to approach it.

MR SANDERS: Your Lordship, on the question of costs and in terms of assessment, there is a live issue about the amount of costs because this is a case where – I am not casting any aspersions on Mr Simpson's advisers – the same argument has been run several times in several sets of proceedings, most notably in Crudace and so therefore there is an issue as to whether or not costs claimed for skeleton arguments and preparation and so on claimed in this case are justifiably claimed in terms of the amount because they have been claimed in other cases along the way.

MR JUSTICE SUPPERSTONE: Mr Lock would say that he has done all this work answering your submissions in this case.

MR SANDERS: I am sure that component of the work absolutely, but in terms of the skeleton argument itself it is an argument which has been run several times and there were several cases where it failed at the permission stage.

MR JUSTICE SUPPERSTONE: I understand.

MR SANDERS: So there are live issues about taxation.

MR JUSTICE SUPPERSTONE: Thank you both very much. Costs to be paid by the second defendant to claimant, to be assessed if not agreed; no indemnity costs; interim payment of £20,000.

MR LOCK: Would your Lordship wish me to draft an order?

MR JUSTICE SUPPERSTONE: Would you do that, Mr Lock?

MR LOCK: Of course.

MR JUSTICE SUPPERSTONE: Thank you very much. Thank you both again for very interesting submissions.

MR SANDERS: I have one other matter. I should ask you for permission to appeal. I am not saying necessarily that the Secretary of State would wish to do that, but it is an issue of general importance that does have a potential policy impact and therefore, in order to get this out of the way, I ask you for permission to appeal.

MR JUSTICE SUPPERSTONE: I quite understand but no, you will have to go elsewhere, Mr Sanders.

MR SANDERS: Thank you.

MR JUSTICE SUPPERSTONE: Thank you both very much.