Appeal No 1/2009/2621
Claim No CO/6062/2009

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE METROPOLITAN POLICE AUTHORITY *Appellant*

- and -

THE QUEEN (On the application of BELINDA LAWS) *Respondent*

- and -

THE POLICE MEDICAL APPEAL BOARD *Interested Party*

RESPONDENT'S SKELETON ARGUMENT

The Respondent will refer to the Appellant's Bundle as bundle "A" and the original trial bundle as Bundle "B". Page references will be **[Bundle No/Tab/Page]**. This Skeleton Argument responds to the issues raised in the Appellant's Grounds of Appeal for which permission has been given. The Interested Party has also served a document entitled "Grounds of Appeal" which (a) is out of time, and (b) for which no permission has been given. The Respondent will respond to that document if permission is given.

Suggested pre-reading:

1. Judgment of Cox J **[A/4/21-35]** (**"Jmt"**)
2. Report of original Medical Referee, Dr Meanley **[B/25/131]**
3. Report of Consultant Neurologist, Dr Howard **[B/27/137]**
4. Decision of PMAB **[A/8/98-108]**
5. *R (ota Turner) v PMAB* [2009] EWHC Admin 1867.
6. Appellant's Skeleton Argument.
7. Respondent's Skeleton Argument.

1 Introduction

1.1 We agree that this case has significant implications for Police Authorities generally (para 3 of Appellant's Skeleton). Police Authorities are responsible for funding injury pensions and naturally have an interest in trying to reduce the cost of doing so.

1.2 The other side of the coin is that it equally has very significant implications for all former police officers who are in receipt of an injury pension (and all serving officers who may become entitled to one).[1] To take the Respondent's own case as an example, the effect of the revision of her pension sought by the Appellant, the Metropolitan Police Authority (**"MPA"**), would be to reduce her pension from about £1850 per month to about £220 per month.[2]

1.3 Cox J in this case rightly noted (at Jmt [21] **[A/4/26]**) that the Police (Injury Benefit) Regulations 2006[3] (**"the 2006 Regulations"**) exist because police officers are exposed to the risks of physical or psychological injuries in the course of the duties they perform for the benefit of society generally. When an officer receives such injuries they are not necessarily (or even commonly) the fault of the Chief Constable.[4] However the injuries may (as in this case) prevent the officer continuing as a police officer and thus lead to them having to give up their chosen profession, and retire from the service. The Injury Benefit scheme recognises the financial losses suffered by injured former officers which arise from taking on these risks and that, in practice, such former police officers will rarely be able to recover compensation from any other party for these duty injuries.

1.4 The scheme has 2 distinct stages:

(i) An assessment stage; and

(ii) A review stage.

1.5 The assessment stage is the stage at which the Police Authority decides whether an officer is

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1 The Respondent was supported in this action by the Police Federation who continue to support this appeal on the basis of its widespread implications for both the Respondent and other former officers.

2 These are approximate figures. We will provide precise amounts if required at the appeal.

3 The scheme for providing injury pensions to injured police officers dates back to at least 1955 in substantially this form under a series of statutory instruments.

4 Police officers on front-line duty are of course exposed to a variety of risks. The injuries which attract awards are very often inflicted directly or indirectly by those that the officers are seeking to arrest or lawfully restrain, or when protecting members of the public.

entitled to an injury award. This involves the Police Authority, acting through the Selected Medical Practitioner (**"SMP"**), determining the 4 questions in reg 30 namely:

(i) whether the officer is disabled,

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

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

(iv) the degree of the officer's disablement (reg 30).

Once awarded, the injury pension is prima facie payable for life (reg 43(3)).

In practice the first 2 questions tend to be decided under the Police Pensions Regulations 1987 when a decision is made whether to require the officer to retire. Once a decision is made for those questions under the Police Pensions Regulations 1987 those decisions are binding on the SMP who considers the injury pension.

1.6 By contrast the review stage is of much more limited scope. The only questions on review for the Police Authority (again acting through the SMP) are whether (a) there has been an alteration in the officer's degree of disablement, and (b) if so whether that alteration is substantial. The power to revise the injury pension arises if, and only if, the SMP answers both these questions "Yes" (reg 37(1)). This case is about the procedure to be adopted by the Police Authority at the review stage. We suggest that the facts of this case provide a good illustration why the statutory role of the SMP, and on appeal, the Police Medical Appeal Board (**"PMAB"**), has been defined in the 2006 Regulations in a precise and limited way. The Respondent respectfully adopts the observations of Burton J in *R (ota Turner) v PMAB* [2009] EWHC Admin 1867 concerning the purpose of the review stage. He said at [21]:

> "It does appear to me to be fundamental in this case that Regulation 30 and Regulation 37 have an entirely different role... *the learned judge then described the purpose of regulation 30 ...* But causation questions having been put aside, it is clearly fair for both the police force and 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"

1.7 Our primary submission is that if the MPA is right in their appeal, the review stage, far from

being limited to an inquiry whether the officer's degree of disablement has *altered*, in practice would become a *reassessment* of the degree to which the officer is disabled as a result of his or her injury. That would mean, as happened here, that a former police officer's injury pension could be reduced because the SMP or PMAB came to a different judgment on reassessment. Thus a former police officer could find his injury pension being reduced because of a difference of medical opinion on his capability for work rather than there being any real alteration in the officer's degree of disablement. So where, as again happened here, the SMP took a more "*robust*" approach, former officers would find their injury pensions being reduced because of the robustness of the SMP's approach to the assessment process rather than because of any real change in the former officer's medical condition or a change in the jobs a person with those injuries could undertake. There is no warrant in the 2006 Regulations for Police Authorities to have second or repeated bites at the "assessment" cherry; to allow them to seek to reopen the assessment of the degree of the former officer's degree of disablement is not the proper purpose of the review process.

1.8 The right question for the SMP is not (as the MPA suggests) "what jobs can this person do today" but the comparative exercise of "has the impact of the index injury on the jobs s/he can do today substantially changed from the position at the last review date". In this case neither the SMP nor the PMAB ever asked themselves, or sought to answer, this question; they therefore failed to make the findings of fact which gave rise to the power under reg 37 to revise the Respondent's pension.

1.9 In short, Cox J was right for the right reasons and the appeal should be dismissed.

2 The facts

2.1 The facts (up to the hearing before the PMAB) are well set out by Cox J in Jmt [4]-[19] **[A/4/22-26]**. The Respondent suffered a duty injury which produced significant pain and psychological sequelae.

2.2 We invite the Court to note that as a result of regulation H2(3) of the Police Pension Regulations 1987,[5] the findings of the original SMP were, in effect, replaced by the report of the original Medical Referee, Dr Meanley **[B/25/131]**. The substance of Dr Meanley's

[5] These were the regulations in force at the relevant time. Reg H2(3) of the 1987 Regulations has now effectively been replaced by reg 31(3) of the 2006 Regulations. Note that reg 9(1) and (3)(g) of the 2006 Regulations provide that the 2006 Regulations should have effect as if anything done under Part H of the 1987 Regulations had been done under the corresponding provision of the 2006 Regulations.

findings are at Jmt [10] and [11] **[A/4/23f]**, and by regulation H2(3) his decision was final. However the SMP, Dr Porritt, failed to adopt this approach. She explained her approach to the PMAB as follows:

> "Dr Porritt had only looked at her neck and shoulder, in relationship to her incapacity for work, in accordance with the original certificate"

See **[A/8/103]** at lines 16 and 17. This was the first error in Dr Porritt's analysis of the Respondent's case. Dr Porritt also referred the PMAB to the possibility of "degenerative neck problems" (**[A/8/101]** at line 10), for which there was no supporting medical evidence.

2.3 In contrast both Dr Meanley **[B/25/131]** and the fresh report of the consultant orthopaedic surgeon, Dr Howard **[B/27/137]** (whose report was included in the Appellant's material before the PMAB) reported that the Respondent had widespread and persistent pain which was directly linked to the duty injury and that she had a real psychological condition which was derived from the injury (see the parts of the Meanley Report quoted at Jmt [10] and [11] **[A/4/23f]**).

2.4 There is no appeal from the following findings of Cox J:

(1) Jmt [19] **[A/4/26]**: Dr Howard essentially confirmed the findings of the Medical Referee, Dr Meanley, that the Respondent had persistent and genuine pain over 9 years, that it was causing her considerable disability, was limiting her ability to work, and was closely related to the duty injury. Cox J said "In essence the expert medical evidence before the PMAB was that her medical situation was unchanged".

(2) Jmt [44] **[A/4/31]**: the Respondent had a genuine psychological injury which was related to the duty injury (or may have been related to the pain that the duty injury caused).

2.5 In contrast to the findings of Dr Meanley, which were supposed to have been treated as "final" under the statutory scheme, the PMAB appear to have taken their steer from the incorrect approach of Dr Porritt and made a finding that the Respondent's pain had "*no organic pathology"* (see **[A/8/106]** at 12 lines from bottom). They also concluded, contra the findings of Dr Meanley, that the Respondent had "*unrelated psycho-physical symptoms*" (see **[A/8/106]** at 11 lines from bottom). Thus the PMAB appeared to conclude that Ms Laws' physical symptoms had no pathological origin (ie were not a medical condition caused by the duty injury despite the finding of Dr Meanley that this was the case) and they rejected

any relationship between her psychological symptoms and the duty injury (despite the finding of Dr Meanley that this was the case). Given the finality of the decisions of Dr Meanley that was not an option that was open to them.

2.6 The approach of the PMAB was thus focused on a failure to accept that they were bound by the decisions reached by Dr Meanley (and confirmed by Dr Porritt in her 2005 assessment) and a misunderstanding of the present medical evidence. It was thus clearly flawed and Cox J was right to find so. However the above problems flowed from the PMAB asking themselves the wrong question and thus approaching the matter on a basis which was not permitted by the Regulations.

3 The law

3.1 The 2006 Regulations (and their predecessor, the Police Pensions Regulations 1987) have been considered in a number of decisions of the Administrative Court.

3.2 In *R (ota South Wales Police Authority) v Anton* [2003] EWHC 3115 (also referred to as *"Crocker"*) the Medical Referee (who fulfilled the same function under the 1987 Regulations as the PMAB under the 2006 Regulations) had assessed the officer (Mr Crocker) to have lost 100% of earning capacity. The Police Authority challenged this decision. This was not a review case but a case arising out of the original assessment, but in his judgment Ouseley J considers the nature of earning capacity: see at [33] and [42]-[43].

3.3 In *R (ota Pollard) v PMAB* [2009] EWHC 403 (Admin), the officer (Ms Pollard) had been assessed in 1987 and 1988 as suffering over 50% disablement from a duty injury. On a review under reg 37 in 2007 the SMP and PMAB reduced this to 0% on the basis that they did not consider her medical condition to be attributable to the index injury. Silber J held that it was not open to them to reopen that question: see at [35]-[41].

3.4 In *R (ota Turner) v PMAB* [2009] EWHC 1867 (Admin) the officer (Mr Turner) had lost all hearing in his left ear. In 2001 the Medical Referee concluded that this was due to injury sustained on duty. On a review under reg 37 in 2007, the PMAB found that the hearing loss was only 50% attributable to the index injury. Burton J held that it was not open them to reopen that question: see at [16]-[28]. Note in particular at [23]:

> "[The decision in *Crocker*] 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."

3.5 In our submission the decisions in *Pollard* and *Turner* are clearly right in finding that on a review under reg 37 it is not open to the SMP or PMAB to reopen the original assessment as to the cause of the officer's disability; and Cox J's decision in the present case that what reg 37 requires is not a reassessment from scratch of the officer's degree of disablement, but a consideration of whether there has been a substantial alteration from the position at the last review (see at [30] **[A/4/28]**), follows naturally from them.

4 Ground 1: did the PMAB ask itself the right question ?

4.1 The core argument at Ground 1 of the MPA's Grounds of Appeal is that an SMP (or on appeal the PMAB) is entitled to approach a review under reg 37 as follows:

(1) To conduct a fresh assessment of the pensioner's degree of disability, including conducting a fresh job comparison study on each occasion;

(2) To compare the outcome of that process with the last assessment; and

(3) If there is a difference between (a) and (b), to find that there has been an alteration in the pensioner's degree of disablement

4.2 This is a seductively simple argument. But it is fundamentally flawed:

(1) It does not perform the comparative exercise required by reg 37;

(2) It does not treat the previous assessment of the degree of disablement as being "final"; and

(3) It allows the SMP/PMAB to find an alteration as a result of different professional judgments in the assessment process alone, which is not the statutory purpose.

4.3 These problems are shown in the following example. Consider a case where an SMP judges that a disabled former officer could perform job X for 40 hours a week. The officer appeals to the PMAB on the basis that, because of his disablement from his injuries, he can only perform the job for 20 hours per week. The PMAB upholds the appeal and an injury pension is awarded on the basis of the officer having the capacity to work 20 hours per week. Assume that there is no change in the officer's level of disablement. The MPA's approach would mean, at the next review (after say 3 years) the SMP, would be entitled (or indeed required – see the MPA's skeleton at para 26 "the right starting-point") to conduct an entirely fresh assessment. The SMP may still consider that the officer could undertake

greater duties and could work at job X for 40 hours per week. If he is permitted to undertake a fresh assessment, he would have to write a report to that effect. He may:

(1) Still believe that the officer can perform job X for 40 hours a week, and so will so find such and thus in effect overturn the previous PMAB decision; or

(2) Discard job X (on the basis of the prior finding of the PMAB) but on the same factual basis assesses the officer as able to perform job Y for say 30 or 40 hours per week. Job Y is a position which would have been open to the officer on the last occasion but no one suggested it as a possible job for the officer.

Hence, on either basis, the SMP will seek to reduce the injury pension even though there is no change in the officer's medical condition or in the job market for a person of his skills.[6]

4.4 In either case, on the construction advanced by the MPA in this case the SMP is not required to treat the PMAB assessment of the officer's degree of disablement on the last occasion as being a final assessment which is binding on the SMP. On the contrary he is able to ignore the last assessment on the first option set out above and to propose something inconsistent with the previous finding on the second option (all assuming of course that there is no change in the officer's medical condition). The approach advocated by the MPA thus creates "alterations" between reviews which are caused by the assessment process itself and differing professional judgments of the SMP, and not by any underlying change in the medical condition of the former police officer. This is not the statutory purpose of the review.

4.5 Or the SMP at one review may be replaced by another SMP at the next review who takes a different view of the officer's degree of disablement (without any change in the officer's medical condition or the job market). Or the same SMP may have changed his mind in the intervening period and adopted a more "*robust*" approach – this is in fact what happened here.

4.6 In all such cases the approach advocated by the MPA would lead to a reassessment of the officer's degree of disablement without there necessarily being any alteration, let alone any substantial alteration, in the officer's underlying medical condition or suitability for available jobs.

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[6] We understand that the vast majority of reviews conducted by the MPA under their "more robust" system have led to substantial reductions in the injury award to former police officers.

4.7 Another way of putting the same point is that the MPA's approach effectively enables the SMP and PMAB to ask themselves "do we agree with the assessment made in 2005 as to Ms Laws' degree of disablement, or do we take a substantially different view ?" whereas the question they should have been asking is "do we find that there has been a substantial change in Ms Laws' degree of disablement since 2005 ?".

4.8 The point can be neatly illustrated by considering the facts of *Turner*. In that case it was common ground that there was no change in the pensioner's medical condition.[7] The change in the injury pension determined by the SMP (who was also Dr Porritt) arose solely from the assessment process. Part of the Judge's reasoning is that if there was no change in the medical condition of the former officer, there could be no alteration in the degree of disablement. If the MPA is right that, on a review, a fresh assessment is required to be undertaken, then that part of *Turner* must be wrongly decided because, on the MPA's case, Mr Turner's pension could have been reduced even though there was no material change in his medical condition. The alleged "alteration" in his degree of disablement was solely the result of a different SMP considering that the pensioner could have performed a wider range of jobs which had always been available.

4.9 We suggest it is nonsensical to assert that Mr Turner's degree of disablement had substantially altered in the above circumstances. The flaw in the MPA's argument is that the duty of the SMP on a review is to ask himself (or herself) whether there has been an alteration in the pensioner's degree of disablement. The SMP is thus required to conduct a comparative exercise not an absolute one. The question for the SMP is not "what jobs can this man do today" but "is the effect of the index injury on the jobs he can do today substantially altered from the position at the last review date ?"

4.10 There can only be an "alteration" within the meaning of regulation 37 if the SMP concludes that there is a difference between the jobs that the pensioner could do today as compared with those he could do at the last review. Logically this can only arise for 1 or 2 reasons:

(1) There has been a change in the pensioner's medical condition; or

(2) There has been a change in economic or other circumstances so that a person with

[7] The officer had impaired hearing because he was deaf in one ear. His deafness had not changed between when he was awarded the pension and his review by Dr Porritt.

the same disabilities can do a job which he could not perform before.[8]

This approach thus fits with the purpose of the review and avoids the illogicalities set out above.

4.11 Thus Cox J was right to say (at Jmt [39] **[A/4/30]**) that the Board "failed to carry out the essential comparative exercise that is required of them under the legislation".

4.12 In para 32 of its Skeleton the MPA argues that Cox J was wrong because the Board did carry out a comparative exercise. However, apart from noting that the last review was in 2005, the Board did not address the issue of a comparison between 2008 and 2005 at any stage. Cox J was therefore fully entitled to conclude that the Board asked itself the wrong question.

4.13 If the challenge in Ground 1 fails, the appeal must be dismissed.

5 Ground 2: job comparison studies

5.1 This Ground really stands or falls with Ground 1. The SMP and PMAB should respectively have been asking whether there had been a substantial alteration in the Respondent's earning capacity, not starting from scratch with a completely fresh reassessment.

6 Ground 3: failure to be bound by previous findings

6.1 This Ground is unsustainable for the following reasons:

(1) The PMAB made no reference to Dr Meanley's clinical findings and appear to have limited themselves to the findings on the "certificate" as reported to them by Dr Porritt. This was an error of law.

(2) Dr Meanley recorded that the Respondent had a "very severe injury". The PMAB wrongly investigated the original cause of the injury (as to whether the Respondent's right or left thumb was involved") and said at line 18/19 on **[A/8/106]**

> "The inconsistency between the recorded event and the Appellant's current account raises doubt as to the severity of that injury. The Board notes that the contemporaneous records merely indicate a slight soft tissue injury."

[8] An example of the latter may be that the increased terrorism threat means that there is now a market for former police officers with anti-terrorist experience to provide advice to companies which did not exist at such a level for such officers 3 years ago.

(3) Dr Meanley noted the psychological condition from which the Respondent suffered and directly linked it to the pain caused by the injury. The PMAB noted that the Respondent had "*unrelated* psycho-physical symptoms" **[A/8/106]** and said:

> "There is evidence of marked illness behaviour, with wide spread body pain and symptoms *unrelated* to the incident and not supported by clinical findings."

(4) The PMAB referred to the report of Dr Howard as supporting a finding of "no organic pathology" when (a) this is not what the report said since it reported genuine pain which he said had a "soft tissue basis", and (b) the genuineness of the Respondent's pain ought not to have been an issue (unless they diagnosed a remarkable improvement in the level of pain which was not the case).

7 Ground 4 – Respondent's law degree

7.1 This Ground raises the question whether the officer or the Police Authority is to have the benefit of a voluntary decision by the officer to improve their skills. Unlike the case with a damages award, there is no duty on the officer to "mitigate his loss" by seeking to take courses or carry out other endeavours to improve his or her skills. Hence the analogy at para 38 of the MPA's Skeleton Argument is not sound.

7.2 As a matter of policy, it seems wrong that a disabled former officer who improves his or her own skill set should be penalised for doing so by having their injury pension reduced. It would mean that there is no benefit to a former police officer in, for example, incurring all the costs and debt of doing a university degree if the resulting increase in the former officer's earning capability led to a corresponding reduction in pension.

7.3 This would be a disincentive to acquiring new skills even if the officer were assured of a job. But the position is actually worse than this. The injury pension is calculated on <u>earning capacity</u> and not actual earnings (see *Anton* at [42] per Ouseley J) so that an officer who improved his or her own skills would find himself penalised for an increase in earning capacity even without any increase in actual earnings.

7.4 Thus a former officer who completes a law degree might be considered "capable" of being taken on as a trainee solicitor at, for example, a London law firm. The fact that there is strong competition for such jobs and that the former officer (like the vast majority of mature graduates) might be unlikely to gain one of the few coveted places is irrelevant. Hence, in

the approach advocated by the MPA, the former officer cannot gain anything by securing additional skills and will almost certainly lose out financially because (a) he will have incurred the cost of acquiring the skills, and (b) he will be deemed to have achieved his earning capacity with the new skills even if he has been unable to secure a job at that level (notwithstanding the well documented and continuing substantial difficulties in disabled people securing well paid jobs).

7.5 The Court should be slow to adopt a construction of the regulations which leads to such an unjust result.

7.6 There are two possible answers to this suggestion by the MPA. The first, which is that adopted by Cox J (see Jmt [49]-[50] **[A/4/32f]**) is to concentrate on reg 7(5) which provides that a person's "degree of disablement" shall be determined by reference to the degree to which his earning capacity has been affected as a result of a duty injury. Since reg 37 only permits an award to be revised where there has been a substantial alteration in the degree of a person's disablement, this means that reg 37 is only applicable where there has been a change in the effect of the injury. If the officer's earning capacity has improved as a result of a factor which is wholly unrelated to the duty injury (such as electing to study to gain a law degree) or has diminished as a result of another factor which is wholly unrelated to the duty injury (such as the onset of another medical condition such as Alzheimers Disease) the pension does not fall to be increased or decreased because of those unrelated factors.

7.7 Alternatively, if this is wrong, it is still necessary to assess the impact on earning capacity of the disability caused by the index injury. This is expressed as a percentage. Suppose an officer who would, but for the injury, have been capable of earning £30,000 as a police officer. If the effect of the duty injury is that he can only work at a desk job paying £24,000 pa and then only half-time (so that his earning capacity is £12,000 pa), the loss of earning capacity is 60% (£18,000 out of £30,000). Now suppose, after leaving the force, the officer obtains a law degree and passes his Law Society Finals. If uninjured he would have been capable of earning £40,000 as a trainee solicitor; but due to his injury he can only work half-time. His earning capacity has now increased to £20,000 but the effect of the duty injury on his earning capacity is 50% (£20,000 out of £40,000). Whichever route is chosen however, the value of his pension is always linked to his pensionable pay as a police officer and not to his loss of earnings as a solicitor.

7.8 What however would be quite wrong would be to regard the officer in such a case as only

having a 33% loss of capacity (£10,000 out of £30,000). That would be to enable the police authority to appropriate the entire benefit of his acquisition of new skills where, for many such individuals they do not in fact acquire a training contract and the earnings to go with it.

8 Ground 5 – hours per week

8.1 This issue depends on whether there is a challenge to Cox J's finding that the Respondent's medical condition as found by Dr Howard was broadly the same as that found by Dr Meanley and that the SMP and the PMAB erred in not accepting this medical evidence or expressly rejecting it on a reasoned basis. There is no such challenge.

8.2 The evidence of the SMP (**[A/8/101]** lines 8/9 from bottom) was that:

> "Despite the issue of the pain syndrome there was no evidence which would indicate that it would stop her working 30 hours per week"

There was, of course, evidence that the Respondent could not work 30 hours per week – see Dr Meanley and Dr Howard and Dr Porritt's own findings in 2005. Dr Porritt appears to have approached this by limiting her inquiry to the diagnosis on the retirement certificate (neck and shoulder injury: see **[A/8/103]** lines 16-17) and not the much wider pain syndrome and associated mental health injuries found by Dr Meanley. This was an error of law: the starting point for considering whether there has been any substantial alteration in Ms Laws' degree of disablement should have been the findings of Dr Meanley (which were made under H2(3) of the 1987 Regulations and were final).

8.3 The fact that the Respondent had worked for 14-15 hours per week with a considerable package of support as a disabled student cannot be evidence that she could work twice as long (either with or without such a support package). For example, the jobs proposed by the SMP all involved a considerable commute for the Respondent and so her real level of working hours would have been far higher than the 30 hours.

8.4 Thus Cox J was justified in concluding that there was no proper evidence to discard the assessments of Drs Meanley and Howard that the Respondent could not work 30 hours per week.

9 Ground 6 – remedy

9.1 The effect of the decision of the SMP was that the Respondent's degree of disablement was

reduced from 85% to 25%, thereby reducing her injury pension from Band 4 to Band 1: see the table in sch 3 of the 2006 Regulations. That decision took effect unless and until it was overturned by way of an appeal to the PMAB. Thus the Respondent's monthly pension was reduced because of the decision of the SMP, not the decision of the PMAB. See reg 31(3) which means that the PMAB decision only comes into effect if the Board disagrees with the decision of the SMP.

9.2 As Cox J recognised, however, if the decision of the PMAB fell to be quashed because they asked themselves the wrong question, exactly the same was true of the decision of the SMP. The "common sense" of this was accepted by counsel then appearing for the MPA: see Jmt at [63] **[A/4/34]**.

9.3 That then leaves two points. First, is there any technical objection to quashing the decision of the SMP ? The answer is No: although Nicol J had refused permission for the Respondent to proceed for Judicial Review against the SMP in this case (perhaps it not having been made clear enough to him that where an appeal is turned down by the PMAB, the effective decision in law remains that of the SMP), Cox J herself acceded to a renewed application for permission to proceed with a Judicial Review of the decision of the SMP. It should be noted that counsel then appearing for the MPA did not oppose this: see Jmt at [73]-[85] **[A/4/34f]**.

9.4 The second question is whether Cox J's substantive decision to quash the SMP's decision is wrong in principle. In our submission it is not. Indeed, having found the SMP's decision to be infected by the same flaw as that of the PMAB, it would have been wrong to leave it in place; this would mean that Ms Laws would suffer a continuing reduction in her award as a result of a flawed decision. Cox J's decision was in any event a matter for her discretion and cannot be set aside on appeal unless it could be shown that it was outside the generous ambit of reasonable decisions.

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