Neutral Citation Number: [2012] EWHC 1225 (Admin)

Case No: CO/1986/2011

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

Date: 16/05/2012

Before:

MR JUSTICE KING

- -

Between :

THE QUEEN (ON THE APPLICATION OF SUSAN HAWORTH)	**Claimant**
- and -	
NORTHUMBRIA POLICE AUTHORITY	**Defendant**

- -
- -

Mr David Lock QC and **Satnam Choongh** (instructed by **Lake Jackson Solicitors**) for the **Claimant**
Mr Sam Green (instructed by **Northumbria Police Authority**) for the **Defendant**

Hearing dates: 11th October 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE KING

Mr Justice King:

1. This case concerns the statutory regulatory scheme providing for the award of an injury pension to police officers permanently disabled in the execution of their duties. The material Regulations for present purposes are those contained in the Police (Injury Benefit) Regulations 2006 (the 'Regulations'). The claimant is a retired police officer in receipt of such a police IOD ("Injury on Duty") pension. That pension was first awarded to her in 1996 under like predecessor regulations (the Police Pension Regulations 1987) but it is common ground that this case is to be determined by reference to those currently applicable.

2. By these proceedings the claimant seeks by way of judicial review to challenge the refusal of the defendant Police Authority acting through the Chief Constable (to whom it had lawfully delegated its duties and powers under the material Regulations) by a decision dated the 6th of December 2010 to agree under regulation 32(2) to refer her case back to the material medical authority, in this case the Police Medical Appeal Board (the PMAB), for a reconsideration of a decision made by the Board in 2006 on a review of her police injury pension. That decision purportedly made under the review provisions contained in regulation 37, had had the effect of substantially reducing her pension.

3. Section 3 of the Form N461 states that the claimant seeks to challenge :

> "the decision of the (defendant) made on the 6th of December 2010 to refuse to refer the claimant's case back to the PMAB under regulation 32(2) of the 2006 Regulations in breach of her rights under Article1 Protocol 1 of the European convention on Human rights and/or because such decision was irrational and/or because the decision was so unreasonable that no reasonable public body directing itself properly could lawfully have reached such a decision."

Overview of the Issues

4. This is a challenge to what is conceded to be an exercise of discretion on the part of the defendant. It is also conceded that to be lawful that discretion had to be exercised in accordance with the statutory purpose for which the discretion was given which it is to be presumed must be as a mechanism to promote the overall policy and object of the statutory scheme. For authority for such proposition one need look no further than the majority judgments in the House of Lords in Padfield v Minister of Agriculture Fisheries and Food [1968] AC 997. '*The discretion must be exercised by the Minister in accordance with the intention of the Act*' (per Lord Hodson at 1045 G). If it be the case that the defendant has, by reason of its misconstruing the Regulations or for any other reason, exercised the discretion contrary to the intention of the statutory scheme (as to the purpose of the power to agree to a reconsideration) in a way which 'thwarts or runs counter to the policy and objects' of the scheme, then this court will be entitled to intervene. See Lord Reid in Padfield at page 1030 B- D;

5. In Padfield the minister had refused to exercise his discretion under section 19 of the material Act to refer a genuine complaint by milk producers over the price they received for their milk to an independent committee of investigation under the

statutory milk marketing scheme. It was held that the parliamentary intention, on proper construction of the Act, was that the appellants had no avenue for their complaint except through section 19 (Lord Pearce at 1052 D), any genuine complaint of this sort which was worthy of investigation by the committee should be referred to that committee (Lord Denning dissenting in the Court of Appeal at 1006 D-E); that although access to the committee was by the statute dependent on a direction of the minister, his discretion was not unfettered and the minister could not refuse to have such a complaint investigated without good reason. Those reasons might include that the complaint was frivolous or vexatious or had already been determined by an earlier investigation (Lord Reid 1030A) but what he was not entitled to do was '*throw it unread into the waste paper basket. He cannot say (albeit honestly) "I think in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth*". (per Lord Pearce at 1053)." To allow him to do so '*would be to give him power to set aside …the obvious intention of Parliament, namely that an independent committee should investigate grievances*'.

6. Given the particular construction put on the Act in that case, Lord Hodson for example held that the reasons disclosed for not making the referral were not *'good reasons for refusing to refer the complaint seeing they leave out of account altogether the merits of the complaint itself"* (at 1049C) and "*where as here the circumstances indicate a genuine complaint for which the appropriate remedy is provided if the Minister so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation*'. He observed in a passage relied on by the claimant in the present case '*as the guardian of the public interest he has a duty to protect the interests of those who claim to have been treated contrary to the public interest'*.

7. But of course to apply these principles to the current case it is necessary for the court to determine what is the intention of the statutory scheme, what are its policy and objects, and thereby what is the statutory purpose of the particular regulation conferring the material discretion. These questions are to be determined 'by construing the Act as a whole and construction is always a matter of law for the court' (per Lord Reid in Padfield a 1030 C). "The intention of parliament ...must be implied from its provisions and its structure" (Lord Pearce at 1053E).

8. At the heart of this case – although other issues are before me including whether the decision under challenge is in breach of the Claimant's property rights under Article 1 of the 1st Protocol of the European Convention of Human Rights (ECHR) – is accordingly this issue as to the underlying purpose of the Scheme, and in particular a dispute between the parties whether within the Scheme - as contended by the defendant - there is to be found an overriding intention that there should as far as possible be finality and certainty in decisions both as to pension entitlement and current degree of disablement, such that there is to be inferred a presumption of finality in respect of the decisions of the material medical authority determinative of those questions subject only to an express time limited right of appeal from one level of medical authority to another and the provision for a consensual reference back for reconsideration which in principle should be expected to be utilised swiftly and without delay and not substantially out of kilter with the time limits applicable to any alternative mode of challenge, such as judicial review. The longer the delay in seeking reconsideration, the more – on this construction of the Scheme - it will

require something truly exceptional for this court on a judicial review of a decision not to agree, to strike down that decision as unlawful or irrational.

9. The Claimant in contrast contends that the provision enabling consensual reconsideration should be construed as a free standing provision free of any implied time constraints, intended by Parliament to be a mechanism to enable mistakes, whether of law or fact, which have deprived a police officer of the pension to which he is entitled under the Regulations, and *which otherwise cannot be put right*, to be put right, and thereby to be a mechanism to promote the overall policy and object of the Statutory Scheme that former police officers get the pensions to which they are entitled under the Regulations. Its purpose it is said is to provide a mechanism to allow reconsideration of a pension payable to a former police officer in the event there is a reasonable case that the pension paid is incorrect and to be part of the system of a series of checks and balances to be found in the Regulations to ensure that both the entitlement and level of pension payable to a former officer is in accordance with the regulations. According to the claimant, delay in seeking such a reconsideration is relevant only to the extent that such delay has prejudiced a fair resolution of the issues sought to be raised on a reconsideration – such as the loss of material medical records.

10. As will be seen, the decision in relation to which the defendant has exercised its discretion not to agree to a referral back for reconsideration, was a decision on the degree of disablement of the claimant made on a review under regulation 37 carried out several years ago to the effect that only part of the Claimant's disablement (that relating to her ankle and not that attributable to her back) was attributable to the index incident at work. This decision resulted in a severe reduction in the claimant's pension from that originally awarded on the basis that the entirety of her disablement was work related. The reduction was of some 90%. At current values, it represented a reduction from some £1100 per month to that of £85 per month.

11. The defendant has done so not on the basis that there is no merit in the matters which the Claimant seeks to raise on such a reconsideration which go to the legality of the approach adopted by the medical authority as to the questions it was entitled to address on such a review as well as the lawfulness of the way it answered those questions.

12. The reasons given by the defendant for its decision do not involve any express consideration of those underlying merits. Indeed before this court the defendant has conceded that there may well be merit in the claim that the material decision was mistaken as a matter of law being contrary to the scheme of the regulations as interpreted and construed in recent case law. This is a reference to the decision of Burton J in R (Turner) v Police Medical Appeals Board [2009] EWHC 2867 subsequently approved by the Court of Appeal in R (on the application of Laws) v. The Police Medical Appeal Board [2010] EWCA Civ 1099, the now leading case dealing on the approach to reviews under the Regulations, decisions handed down respectively on the 8th of July 2009 and 14th October 2010. The Board on the review in 2006 under regulation 37 revisited the question of causation of disablement ,and the question whether the entirety of the claimed duty injuries were duty injuries which questions had originally been determined in the claimant's favour when her entitlement to pension was first determined some years earlier. This on the basis of the decision in Laws it was not entitled to do.

13. To quote the defendant's skeleton argument at paragraph 41:

> "The Police authority accepts that the Board's decision may well have been different had it been reached after the cases of Turner and Laws were determined. The Police Authority also accepts that the 2006 decision may have been susceptible to successful challenge had the Claimant sought permission to apply for judicial review of it at the time, although this would have depended on the approach taken to the statutory regime in the pre-Turner and Laws era".

14. Rather the defendant has refused to agree to any reconsideration on the basis that it is entitled in exercising its discretion to take the stance that no matter how meritorious the underlying case which the claimant wishes to raise on the reconsideration she seeks, it is now far too late for the claimant to seek to challenge the decision of the material medical authority by way of such a reconsideration when she could have mounted such a challenge much earlier at or about the time of the decision either by way of seeking a judicial review or by way of seeking at that time a consensual reconsideration.

15. This stance is justified as being in pursuit of the need to maintain the finality and certainty of pension decisions under the Scheme which it is said is in the interests of both police authority and pensioners alike. Given the absence of such timely challenge it is said that the defendant was and is entitled to assume that the 2006 decision was and is final subject only to a review under regulation 37 if there is any substantial alteration in the degree of disability since the decision was made.

16. A line it is said has to be drawn somewhere. Mr Green on behalf of the defendant has prayed in aid in support of this stance by way of *mutatis mutandis* the principle said to be applicable in both criminal and civil law that time should ordinarily not be extended only on the ground that an authoritative judgment has rendered the previous understanding of the law to be arguably incorrect, citing R v Hawkins [1997] 1 Cr App R 234 ; Re J.Wignall &Sons' Trade Marks [1919] 1 Ch 52 ; Greg Middleton & Co. Ltd v Denderowicz [1988] 1 WLR 1164. It is said it would be repugnant to principle for a police authority to be effectively compelled to agree to a reconsideration of an old decision on the basis of recent case law.

17. This of course begs the question whether any kind of time limit should be impliedly read into the regulation providing for reconsideration.

18. In taking this stance the defendant further asserts it is entitled to have regard to its own need for fiscal stability and the ability properly to budget for anticipated calls on its resources and not have to accommodate the sudden need to find monies to pay arrears of pension going back several years. A witness statement of Nicholas Wirz, Principal Solicitor employed by the Defendant, suggests that if delay is not a permissible consideration to decide not to agree to a reconsideration, the potential costs to the authority could be one approaching some £5m. Although he refers to the costs of reconsideration itself, the principal anticipated costs identified are those attributable to the consequences of an anticipated successful reconsideration of old awards. This is of course a concession that it may well be the case that these officers

are being currently underpaid if their pensions were assessed by reference to the Scheme as now interpreted.

19. The material parts of Mr Wirz' statement are as follows :

> "3) Northumbria Police authority manages 592 awards. these are broken down as follows. There are 197 awards in band 1 (0 -25%), 226 awards within band 2 (26-50%). 120 awards within band 3 (51-75%) and 49 awards within band 4 (76-100%);
>
> 4) Since 1988, 439 appeals have been notified to the Police Authority. Currently an SMP referral consumes about two days of SMP time, which costs the Authority approximately £2,000. The current cost of a medical appeal to the Medical Appeals board ("the Board") is £7,440 (more if more than one medical speciality is involved). The SMP will also attend a medical appeal (about £1,000). The costs of administering the appeal and attending are very variable; however, they will average out at about £1,000. Each SMP referral and appeal therefore costs the administering Authority approximately £11,500.
>
> 5) Those former officers in receipt of bands 3 and 4 awards seem, for understandable reasons of self–interest, unlikely to challenge or to re-open these conclusions. It is the officers in receipt of bands 1 and 2 awards who would be most likely to seek to re-open matters.
>
> 6) The authority accepts that when a pensioner seeks a reconsideration either of the SMP's decision or the Board's decision, it has a discretion under Regulation 32(2) Police (Injury Benefit) Regulations 2006 to consent to the same. In determining how to exercise that discretion in the case of Susan Haworth, it has taken into account the fact that the decision she wishes to re-open hails back to 2006. The authority contends that it ought, in the exercise of its discretion, be permitted to take account of the need for fiscal stability, and, in doing so, to rely upon the statutory presumption that a Board's decision is *final.* The Authority further considers that it ought to be awarded a wide margin of appreciation in determining where the line should be drawn. Otherwise, how far back is it obliged to go in facilitating a pensioner's wish to reopen an old case?
>
> 7) However, if delay by a pensioner in seeking the Authority's consent to a reconsideration under Regulation 32(2) is not a permissible consideration, there is potential for up to 423 former officers to re-open their awards, with a potential cost to the Authority of up to £4,864,500.If only 10% of such officers seek to do so, that is still nearly £1/2 million."

20. Part of the defendant's defence to this claim is moreover that the these proceedings are an abuse and a misuse of the judicial review process, amounting to an improper collateral attack on the Board's decision of June 2006, designed to circumvent the rule governing applications for judicial review that any claim be brought promptly and in any event within 3 months (see CPR Part 54.5). It is said that the failure of the claimant to seek now to challenge the 2006 decision of the Board by way of judicial review, is a recognition that she would almost certainly be refused permission on grounds which would include inordinate delay. It is submitted that she only "alighted" upon a request in October 2010 for a consensual reconsideration of the 2006 decision under regulation 32(2) and then the decision of the defendant in December 2010 to refuse that request, to be the subject of the present judicial review proceedings, as a device to circumvent the delay rule applicable to such proceedings.

21. In this context the defendant relies upon the expression of principle in the judgment of Laws J. (as he then was) in R v Secretary of State for Trade and Industry ex parte Greenpeace (No 1) [1998] Env.L.R.415 which Laws J described as a 'common principle which is not dependent upon an appeal to the rules relating to delay'. The principle was expressed thus:

> 'It is that a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If after the act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late."

22. The claimant roundly attacks the stances taken by the defendant in these various regards as wholly misunderstanding and misapplying the statutory intent and purpose both of the scheme as a whole and the particular provision providing for consensual reconsiderations.

23. I have already set out the rival contentions as to what is the proper construction of the Scheme and the particular provision. The claimant's case is that the stance taken by the defendant frustrates the purpose of both, and in focussing in its decision only upon its own financial position and the passage of time, without paying any consideration to the merits of the claim and whether the wrong pension was being paid to the claimant, the defendant has used its discretionary power for a purpose inconsistent with the purpose of the regulations namely to ensure that someone in her position is paid the pension to which she is lawfully entitled under the Regulations. In accordance with fundamental principles of jurisprudence the legal position under the scheme as explained in recent judgments of the courts, is no more than declaratory of what the true position in law has always been.

24. The claimant emphasises that the effect of the defendant's decision not to agree to a reconsideration if it is not struck down, will be that the claimant will be deprived for the rest of her life of the shortfall to which in law as now established she would in all likelihood be otherwise entitled. The only other avenue open to her to redress this deficiency would be by way of a further review under regulation 37 but it is now established that such a review can be concerned only with the question as to whether there has been any substantial alteration in the degree of disablement since the last review. Upon any such review the starting point on disablement has to be taken as that

reached by any previous review as a matter of substance and a new review cannot lawfully seek to re-open questions on disablement, and in particular on causation, already determined by earlier decisions of the material medical authority. Indeed this is the ratio of the very case law relied on by the claimant to undermine the lawfulness of the review decision of 2006 in respect of which reconsideration is sought .

25. In other words – and this again is conceded by the defendant – no review of her case under regulation 37 applying the law as it has now been established, can correct the mistakes said to have been made by the PMAB in 2006. Any review will have to take as its starting point that determined by the Board in 2006, namely that any disablement attributable to the claimant's back condition does not arise from a duty injury. Accordingly any loss of earning capacity and hence any pension based on such loss, will have to be heavily discounted to reflect this finding, notwithstanding a contrary finding was made when the initial award of pension was made. The claimant points to the paradox that if the PMAB had today the same freedom to make fresh decisions as the PMAB (wrongly following Laws) thought it had in 2006 she would be able to continue to assert that her back injury was a duty injury. To quote paragraph 13 of the claimant's recent witness statement "*I have therefore lost out both ways'*.

26. Hence the claimant attacks the decision made both as an unreasonable exercise of discretion and as amounting to a case of unjust enrichment in so far as the defendant is seeking to be entitled to withhold monies (such as the £4.5 m identified by Mr Wirz) to which on any proper application the Regulations retired police officers are entitled .

27. Within the rival contentions presented to me is a further fundamental dispute as to what is meant by the claimant's "pension entitlement under the Regulations". The defendant does not dispute that the claimant has an entitlement to be paid an IOD pension in accordance with the Regulations or that such a entitlement is a property right entitled to protection under the 1st Protocol of the ECHR but consistent with its submissions on finality and certainty, asserts that this means only that the claimant is entitled to that which has been set by the Appeal Board in an unchallenged final decision under regulation 37. To quote the defendant's skeleton argument: "*Her entitlement has been established by the 2006 decision of the Board which she did not promptly challenge either by way of judicial review or inviting a reconsideration under Regulation 32(2)*". In other words the defendant does not accept the claimant's underlying premise that her pension *entitlement* is different from that which she is actually getting.

28. Before considering further these rival contentions I turn to set out the material facts of this case and the material provisions of the statutory scheme under the 2006 Regulations. I start with the Scheme.

The Scheme under the 2006 Regulations

29. Under regulation 11 a person who ceases or who has ceased to be a member of a police force and is permanently disabled as a result of an injury received without default in the execution of his duty (a 'relevant injury') is (under regulation 11(2) entitled ("shall be entitled") to an injury pension calculated in accordance with Schedule 3. Under regulation 7(1) a reference in the regulations to a person being

permanently disabled is a 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". Under regulation 7 (4) (subject to paragraph (5)) 'disablement' means, material to this case, the inability to perform the ordinary duties of a member of the police force.

30. Regulation 7(5) deals with "degree of disablement" and in effect provides that 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 a relevant injury. Schedule 3 established four degrees or bands of disablement: band 1 which is 25% disablement or less (referred to as slight disablement); band two – more than 25% but not more than 50% (minor disablement); band 3 – more than 50% but not more than 75% (major); band 4 – more than 75% (very severe). Calculation of the degree of disablement in the requisite percentage terms is achieved by comparing the earning capacity it is assumed the person would be earning but for the relevant injury (usually taken to be the income the person would be earning if still a police officer of the rank at which he sustained the relevant injury) with what the person is now actually capable of earning.

31. There are thus two questions to be determined. The first is as to entitlement. The second is as to calculation of the pension, the question of quantum.

32. The scheme of the Regulations is that although the question whether a person is entitled to any and if so to what awards under the Regulations is determined by the police authority, the underlying medical questions relevant to both entitlement and quantum, namely (a) whether the person concerned is disabled (b) whether the disablement is likely to be permanent (c) whether the disablement is the result of a relevant injury (d) the degree of the person's disablement, are questions which the police authority must refer to a medical authority and it is that body who is to be the decision maker on these matters.

33. They are decisions in the first instance for a selected medical practitioner (SMP) acting under regulation 30 subject to an appeal under regulation 31 to a higher medical authority, referred to in the regulations as a board of medical referees and currently known as the Police Medical Appeal board (PMAB).

34. Thus Regulation 30 provides as far as is material:

> 'Reference of medical questions
>
> 30 – (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), (*irrelevant for present purposes*) 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 :

> whether the person concerned is disabled;
>
> whether the disablement is likely to be permanent;
>
> except *(irrelevant*) ……..
>
> 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."

35. Similarly under regulation 31 which provides for the appeal to the PMAB, the obligation of the appeal board is to decide whether it disagrees with the decision made by the SMP concerning any of the questions referred to the SMP and to give a report of any such decision. See regulation 31(3).

36. The right of appeal under regulation 31 is however time limited. Under paragraph (1) a person dissatisfied with the decision of the SMP has 28 days from receipt of the report of the SMP ('or such longer period as the police authority may allow') in which to give notice of appeal to the police authority and under paragraph (2) has a further 28 days (or again such longer period as the authority may allow) to submit grounds of appeal to the police authority. Upon receipt of such grounds within such time, the police authority has two obligations, namely 'to notify the Secretary of State accordingly' and to refer the appeal to the board.

37. The scheme of the Regulations is further that these medical decisions of the material medical authority are to be binding upon the police authority and pensioner alike and are to be taken as (i) final subject only to the right of appeal from the SMP to the PMAB under regulation 31 and (ii) the provisions in regulation 32 for *further reference* to medical authority with which these proceedings are concerned.

38. Thus 30(6) provides

> "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 31and 32, be final"

while Regulation 31(3), referable to an appeal to board of medical referees, provides:

> "The decision of the board of medical referees shall, if it disagrees with any part of the report of the selected medical practitioner, be expressed in the form of a report of its decision on any of the questions referred to the selected medical practitioner on which it disagrees with the latter's decision, and

> the decision of the board of medical referees shall, subject to the provisions of regulation 32, be final."

39. There is no further right of appeal against any of these medical decisions within the regulations. The board's determination on a regulation 31 appeal can only be revisited by judicial review, subject always to the reconsideration provisions in regulation 32.

40. Although regulation 34 provides for a right of appeal to the Crown Court (where a person claiming an award is aggrieved by the refusal of the police authority to admit a claim to receive as of right an award, or a larger award than actually granted) that appeal cannot embrace any discretionary matters (see regulation 36 (1)) and under 36(2), the court "*shall be bound*" by "*any final decision of a medical authority within the meaning of regulation 32*" (see regulation 36(2)). However this too is subject to the power of the Crown Court under regulation 32(1) to refer the so called final decision back to the medical authority for reconsideration 'in the light of such facts as the court ….may direct' if the court 'considers that the evidence before the medical authority who has given the final decision was inaccurate or inadequate'. Again however, any fresh report issued by the medical authority following upon reconsideration is to be final subject only to any further reconsideration under the same paragraph (1) of regulation 32, (see again regulation 32 (1)).

Review: Regulation 37

41. The pension awarded as a result of such medical decisions is however open to re-assessment on a periodic review under regulation 37. It is contained in Part 5 of the regulations which has the general heading 'Revision and Withdrawal or Forfeiture of Awards'. This provides as follows, again as far as is material:

> "Reassessment of injury pension
>
> 37(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."

42. Such a review is by the very wording of regulation 37(1) concerned only with whether the degree of the pensioner's disablement has substantially altered since the previous decision of a material medical authority. Hence under regulation 30(2) on the occasion of such a review it is only question (d) which is to be referred under regulation 30. Given that that degree is defined as the degree to which earning capacity has been affected by the qualifying injury, that alteration may come about as a result of an improvement in the underlying medical condition for example or as a result of external factors such as the sudden availability of a job but the critical principle is that the review is concerning itself with changes in circumstances that have occurred since the last relevant decision and is looking to see if as a result there has been any alteration in degree of disablement which is substantial.

43. It might be thought self evident in these circumstances that on any review, the medical authority can not go outside the narrow question referred to it and cannot revisit prior questions, for example the question relating to causation under (c) ('whether the disablement is the result of an injury received in the execution of duty') arrived at on the initial assessment or revisit the degree of disablement arrived at on a previous occasion, be it the initial assessment or the last review, by revisiting the clinical judgments taken on that previous occasion. However – critically for present purposes – that was only made crystal clear by the Court of Appeal decision in Laws, in which the court endorsed the approach to Regulation 37 adopted by Burton J in Turner, to which I have already referred.

44. In Laws the police authority was contending that the requirement of finality under regulation 30(6) and 31(3) meant only that the Board had to accept whatever pension had been previously fixed as the starting point for the review in considering the pensioner's current degree of disablement compared with the previous assessment – which it equally contended was the exercise to be undertaken on any review. It contended that it was not however obliged to accept all the clinical judgments made in or for the purpose of any previous assessment. This approach was firmly rejected by the Court of Appeal as contrary to the both the language and purpose of the Regulations. The effect of the Court of Appeal decision is that on any review, the reviewing body does not start from scratch but rather it must take the earlier decision as to degree of disablement as a given as a matter of substance and not merely as the percentage figure arrived at to represent the pensioner's disability. The exercise to be undertaken, and the reviewing body's duty and only duty on such a review, is to decide whether since then there has been a substantial change. See Laws LJ at paragraphs 16 and 18.

45. What is forbidden is summarised in paragraph 19 of the judgment:

> "In my judgment the learned judge below was right to construe the regulations as she did. Burton J's reasoning at 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 a previous conclusion ….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 the driver of the pension that was then awarded."

Reconsideration: Regulation 32

46. I turn to regulation 32. It is headed: '**Further reference to medical authority**'.

47. Regulation 32(1) concerns the reference back of a medical decision to the medical authority which made it, by the Crown Court on hearing an appeal under section 34,

(or a tribunal hearing an appeal under regulation 35) where the court is concerned as to the evidential and factual basis of the decision. It provides as follows:

> "(1) A court hearing an appeal under regulation 34 or a tribunal hearing an appeal under regulation 35 may, if they consider that the evidence before the medical authority was inaccurate or inadequate, refer the decision of that authority to him, or as the case may be it, for reconsideration in the light of such facts as the court or tribunal may direct and the medical authority shall accordingly reconsider his, or as the case may be its decision and, if necessary issue a fresh report which, subject to any further reconsideration under this paragraph, shall be final."

48. I have already referred to this power to order a reconsideration when considering the provision for an appeal to the Crown Court in the regulations and its limitations. See paragraph 40 above. I would accept the claimant's contention that the purpose of this particular provision must be to ensure as far as possible that decisions of a medical authority are made on a proper evidential basis.

49. I turn then to Regulation 32(2) with which this claim is directly concerned. It provides as follows:

> "(2) the police authority and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him or as the case may be it, for reconsideration ,and he, or as the case may be it, shall accordingly reconsider his, or as the case may be its, decision, and, if necessary, issue a fresh report which, subject to any further reconsideration under this paragraph or paragraph (1) or an appeal, where the claimant requests that an appeal of which he has given notice (before referral of the decision under this paragraph) be notified to the Secretary of State, under regulation 31, shall be final."

50. It is to be noted at once that (i) what is provided for is a consensual reference back, that is to say one to which both the police authority and the claimant officer must agree, (ii) there is no express time limit within which such a reference back must be made and (iii) again any fresh decision made following such reconsideration is to be treated as final subject only to any further reconsideration pursuant to regulation 32(2) or any appeal under 31(1) which had already been instigated by way of notice before the reference back was made.

51. On the first of these noted aspects, I would accept the defendant's submission that it does not necessarily follow that the only circumstances contemplated by parliament in which this joint power would come to be exercised would be, as submitted by Mr Lock QC before me, where an aggrieved claimant seeks the agreement of the police authority. It is of course correct that no public law duties lie upon a claimant so that unlike in the case of a refusal to agree by a police authority, such a refusal by a claimant would not be open to challenge by public law proceedings, but if the medical decision in question is itself open to judicial review with good prospects of success, a properly advised claimant might well be prepared to agree to a reference back in an

appropriate case rather than run the risk of an adverse order for costs in the event of a successful challenge which he has opposed.

Home Office Guidance

52. This said however, it equally by no means follows that this analysis must mean that parliament contemplated that this power should be exercised only if judicial review proceedings, or an appeal under the regulations themselves, were still a viable alternative by which to challenge the medical decision in question. As indicated there is no expressly prescribed time limit for seeking a re-referral under this regulation. My attention was drawn to the guidance given in paragraph 23 of the Home Office Guidance on Police Medical Appeals ('HOG') which states as follows:

> "*Internal review of a medical decision*
>
> 23. Both the decision of the SMP, if no appeal has been heard, and the decision of the appeal board may be referred back to the medical authority which took it by agreement between the officer and the police authority. Such a procedure will normally be followed where there is a reasonable prospect that further consideration of the issues will resolve the matter without the need for an appeal hearing in the case of an SMP's decision or need for Judicial Review in the case of an appeal board's decision."

53. The defendant relies upon this guidance as 'the most obvious and accessible source of information as to the purpose of the provision contained within regulation 32 (2)' but I would agree with the claimant that such guidance cannot be decisive of this question of purpose which must be determined by reference to the statutory scheme as a whole. As a matter of principle such extra statutory guidance cannot be effective to cut down the scope of a statutory power or to impose limits on the circumstances in which the power to agree to a reference back can be exercised unless the limitations can be inferred from the statutory language or the statutory scheme as a whole.

54. It is to be further noted that it is only a 'final decision' of a medical authority which can be sent back for reconsideration and that the meaning of 'final decision' for these purposes is defined in paragraph (4) in these terms:

> "(4) in this regulation a medical authority who has given a final decision means the selected medical practitioner, if the time for appeal from his decision has expired without an appeal to a board of medical referees being made, or if, following a notice of appeal to the police authority, the police authority have not yet notified the Secretary of State of the appeal, and the board of medical referees, if there has been such an appeal."

55. It can be seen from this definition that at least in the case of a medical decision of a SMP, the scheme under regulation 32 (2) contemplates the possibility of an agreed reference back after the time limit for an appeal has expired and hence outside the

time limits imposed for such an appeal, as well as where notice of appeal has been given but as yet not further progressed.

56. For the sake of completeness I record that paragraph (3) of regulation 32 provides for the reference back of the decision to a different medical authority agreed upon by the parties (in the case of a reference under 32(2)) where the original medical authority is unwilling or unable to review it.

The facts

57. The Claimant was born on the 29th of January 1966. She joined the police force in January 1991. She had a previous history of injuries to her back but had suffered no back problems prior to her joining the force. In July 1991 whilst on duty she sustained injury when she fell into an open manhole. She injured her back and her ankle. In May 1995 she was retired from the police on medical grounds with a permanently disabling condition of ligament strain of the right ankle and lumbro sacral strain.

58. In May 1996 she was awarded an IOD pension under the equivalent of regulation 11 of the current regulations, calculated in accordance with the equivalent of Schedule 3. Her pension was fixed at band 3, in other words on the basis of a major permanent disablement within the meaning of the regulations which was the result of a duty injury to both her back and her ankle. This was the outcome of a determination by a SMP to which the relevant questions under the equivalent of regulation 30 (a) to (d), had been referred. The police authority did not seek to challenge the decision of the SMP which accordingly became final under the equivalent of regulation 30(6). Although the police authority had no right of appeal within the regulations, it is not in dispute that it had been open to the authority to seek a judicial review of the decision.

59. In 2005 the police authority carried out a review of the claimant's pension under the equivalent of regulation 37(1) pursuant to which the authority referred the claimant's case to a SMP, a Dr Broome, consultant occupational physician, or more precisely referred the question set out in the equivalent of regulation 30(2)(d) ('the degree of the person's disablement'). If the authority – and indeed the SMP – was to be faithful to the terms of the material regulation 37(1), this was for the purpose of finding whether or not the claimant's degree of disablement had substantially altered. Dr Broome produced a report dated the 19 of August 2005 in which he reduced the claimant's pension from band 3 to band 2. The basis upon which he did so is not entirely clear although his report (according to the subsequent PMAB report) purportedly considered that the current back injury was not in fact an injury on duty and the loss of earning capacity could be assessed only on the basis of the ankle injury. In other words Dr Broome appears to have applied his mind to a question which was not referred to him namely the equivalent of question (c) in the now regulation 30(2) (whether 'the disablement is the result of an injury received in the execution of duty').

60. The claimant exercised her right of appeal to a PMAB against this SMP decision pursuant to the equivalent of regulation 31(1). A hearing was held on the 21st of June 2006 which resulted in a report of the 5th of July 2006 which further reduced the claimant's award to band 1. The claimant has duly been paid a pension at band 1 level from July 2006 and continues so to be paid. As already indicated in present day

values, her monthly pension was reduced from some £1100 when it was paid on band 3 to some £84.

61. The report of the PMAB reveals that the PMAB itself revisited, amongst other questions, the question of causation reflected in the equivalent of question (c) under regulation 30(2). As regards the back injury, it found, following a review of the claimant's medical records and medical evidence from 1995, that the claimant was likely to have been suffering from degenerative changes in her back before joining the police force, that the index incident had merely brought forward the symptoms in the claimant's back by some 10 to 20 years and *'cannot be seen to be the causative event of the disability from her back'* and was rather a case of '*acceleration*'. It then purported to apply the case of *'Jennin*gs' (a reference to Jennings v Humberside Police [2002] EWHC 3064) in determining that '*as such'* (that is say as a case of acceleration) '*applying Jennings this would not be considered as being an injury on duty*' and hence was a 'non qualifying injury' for the purposes of any calculation of pension (see the report at internal page 13). As regards the ankle injury, the Board found that whilst it accepted that this was an on duty injury (absent any *'reliable evidence to suggest the ankle had been compromised prior to the index incident'*) (report page 11) which would prevent the clamant from carrying out the duties of a police officer, it played no role in her current inability to earn. It found a total loss of earning capacity of some 35.5% of which however it found that the *non qualifying* back symptoms represented '*the major component'* (report page 13) and applying '*apportionment*' in order to determine the degree to which that loss was the result of a qualifying injury, calculated a loss of earnings capacity attributable to the injury on duty (i.e. the ankle injury) of 8.9% and hence placed the claimant in band 1.

62. Mr Lock has sought to identify any number of reasons why this decision of the PMAB was wrong in law.

63. I would accept that in relation to both the back injury and the ankle injury, the Board appears not to have focused on their statutory obligation under Regulation 37(1) of determining whether there had been an alteration in the claimant's degree of disablement since the award, and if so whether it was substantial, but were seeking to replicate the process, in particular in relation to causation of disablement, which led to the original SMP decision and the initial award of pension back in 1996 (when answering questions equivalent to (a), (b) & (c) within regulation 30(2)), in order to see whether they would have made the same findings. They agreed with those findings relating to the ankle but disagreed with those relating to the back. For the reasons already outlined this was not permissible and was outside the task which they had to undertake under regulation 37 which was confined to question (d) ('the degree of the person's disablement') and whether there had been any substantial alteration since the initial award or the last review. Its task was to undertake a comparative exercise to assess the extent to which the loss of earning capacity of the former police officer due to the already determined on duty injury, had changed since the injury pension was initially awarded, or since the last review whichever be the later. It was not entitled to revisit the earlier clinical findings underlying the earlier assessment of degree of disablement and award of pension. See again Laws at paragraph 19. It was not entitled to re-determine as it appears to have, questions under (a), (b) & (c),

already answered on the occasion of the initial award, as to the original causes of the claimant's injuries.

64. In these circumstances the approach of reducing the IOD by reason of an 'apportionment' referable to its findings on causation revisiting those previously made, would not appear to have been one open to the Board on a review (as distinct from the position on any initial assessment).

65. I further accept that even if these questions of causation were questions open to the Board on a review, the Board's interpretation of the principles to be derived from Jennings was arguably wrong and a medical authority is required to award an injury pension if the duty injury aggravates a previously asymptomatic underlying medical condition . See the subsequent authority of Walther v Metropolitan Police Authority 2010 EWHC 3009 (Admin). However as Mr Lock rightly submitted the important point for present purposes is that in the context of this case and the claimant's back symptoms, this was a decision for the material medical authority on the initial award and once decided at that stage was final. See again Laws.

66. In the round therefore I accept that there must be a good arguable case that the decision of the PMAB in 2006 offended against the finality of decisions already made by the material medical authority on the initial grant in 1996, and the narrow confines of the statutory question to which the Board was limited on a review under regulation 37. In other words I accept that there is and was always a good arguable case that this decision of the PMAB was wrong in law. Mr Green would say that this is so at least since the decision of the Court of Appeal in Laws, if not the High Court decision in Turner, as to the correct interpretation of regulation 37 and as I have already set out he has conceded that the Board's decision '*may well have been different had it been reached after the cases of Turner and Laws were determined'*. But of course the quality of such good arguable case does and did not at the time flow from those decisions themselves which merely reflected the acceptance of arguments derived from the very wording of the regulations which could have been made at any time. In other words the decision of the PMAB in 2006 was always susceptible to a challenge by way of judicial review with a more than reasonable prospect of success notwithstanding the decision in Laws had yet to be handed down.

History since the PMAB decision of 2006

67. The claimant did not however thereafter seek to judicially review the decision of the PMAB on any of these bases, or at all. In her witness statement of the 19th of September 2011 she says (paragraph 5) that she had been devastated by the decision but "was not aware that I was able to challenge it". She refutes the suggestion of the defendant in their letter of 6 December 2010 that she had accepted the findings of the PMAB. Her failure actively to mount any challenge was simply because she had not known how to do so.

68. The Claimant says she did approach the Police Authority in early 2010 and sought a further regulation 37 review of her pension because she considered that her medical situation was becoming more serious but that that this was refused because the Authority were awaiting clarification on the law relating to such reviews and further the Authority informed her of a Home Office letter of 10 March 2010 advising police authorities to cease conducting reviews pending the decision of the Court of Appeal

in Laws in which the material police authority were seeking to appeal the successful challenge at first instance to the approach of the PMAB.

The request for the reference back under regulation 32(2): the letter of the 29th October 2010

69. The Court of Appeal decision in Laws was handed down on the 13 October 2010. The claimant says that the Police Federation then put her in touch with her present solicitor who shortly after wrote the letter of 29th of October 2010 seeking the agreement of the Police Authority to a reference back of her case under regulation 32 (2) to the PMAB for a reconsideration . It is unnecessary to set out the entirety of the letter. Having set out the history of the claimant's initial award of pension, the review carried out by Dr Broome and the appeal to the PMAB in 2006, it continued as follows:

> 'It is against the background of the decisions of the SMP and the PMAB that Mrs Haworth is seeking a reconsideration under Regulation 32(2) of the Police (Injury Benefit) Regulations 2006.
>
> The detailed reasons for seeking this review (sic) are set out below, however in essence the decisions of both the SMP and the PMAB were not made in accordance with the relevant regulations , as it is clear that the SMP…..revisited causation as to the original final decision made at the time of Mrs Haworth's ill heath retirement in May 1995, and the, PMAB ….then proceeded to apply an apportionment, again to a final decision made in May 1995.
>
> Both of these decisions are therefore unlawful, and not made in accordance with the Injury Benefit Regulations.

Having referred to the material Home Office Guidance on the application of regulation 32(2), the letter continued (any emphasis in italics is the emphasis of this court):

> "Close reading of the decision of the PMAB does not offer any support to the proposition that the PMAB asked themselves whether there was a substantial alteration to the Claimant's degree of disablement. On the contrary the PMAB appear to have focused on the issue of causation and the introduction of apportionment. The words 'substantial alteration' do not appear in any part of the decision.
>
> It is the Appellant's case that the PMAB wrongly revisited causation as to the original injury and then applied a degree of apportionment, irrespective of the fact that apportionment had never been considered prior to the PMAB of 21 June 2006.
>
> We would suggest that it is now common ground that the PMAB were wrong to revisit causation in what has already been determined by the Force's SMP in this case, when he

> determined the Appellant should be retired due to, permanent disablement and when he assessed the degree of disablement at band 3 in May 1995.
>
> It therefore appears that the NPA determined the case on a basis that was plainly flawed in that it is clear that the PMAB did not address the issue as to whether the claimant's degree of disablement had substantially altered.
>
> The Appellant's request for the PMAB to reconsider the final decision contained in their report is primarily, but not exclusively, founded on the *clarification* given in the judgment of TURNER …..[2009] and the Pension Ombudsman's determination in the case of AYRE and Humberside, in that the PMAB had failed to determine there had been a substantial medical change in the disablement caused by the injury sustained in the execution of duty since the last assessment, wrongly revisited causation and wrongly applied apportionment.
>
> Clearly the recent Court of appeal case of Laws v MPC *confirms the position further, in that those cases of Turner and Pollard are confirmed* as the correct method in carrying out an IOD review.
>
> It is not right that the Northumbria Police Authority rely upon a final unlawful decision of the SMP and or PMAB to refuse this request that the earlier unlawful decisions may subject to this reasonable 32(2) request.'

The defendant's refusal to agree to a reconsideration: the letter of 6th December 2010

70. This agreement was refused by the Police Authority by and for the reasons given in the letter of the 6 of December 2010. It is this refusal which is the subject of the present claim. Its material terms were as follows:

> "It is not uncommon for case law to clarify matters relating to the Police (Injury Benefit) regulations 2006 and therefore how Forces apply these Regulations. It would be fair to say that the outcome of a determination by a…(SMP) or a ..(PMAB) would often be different depending upon whether it is before or after a particular case rules on a particular point. This process has also been the case and is likely to continue.
>
> Northumbria Police Authority has delegated its powers in relation to granting and reviewing injury awards to the Chief Constable in line with law and guidance at the time of the review.
>
> The determination from such a review is "final". Regulation 32(2) does provide the Chief Constable with discretion to re-

> refer a matter to a medical authority which has issued a final decision – the PMAB in this case.

Unfortunately, the Chief Constable is not minded to agree to a re-referral. The principal reasons for this are as follows:

> "1. The decision Mrs Haworth now takes issue with was taken in June 2006. If Mrs Haworth had not wanted the consequences of a decision to apply, she had open to her avenues properly to challenge the decision. Mrs Haworth was also represented by her staff association, which also had access to legal advice to support this decision. By not challenging the decision at that time, Mrs Haworth accepted the findings of the PMAB.
>
> 2. It is important that final decisions, once taken, remain just that. The review (and appeal) process takes time and costs considerable sums of public money to administer.
>
> The Chief Constable, as a reasonable public authority, is entitled to rely on the outcomes of these processes which were pursued in good faith and which, in your client's case, involved the intervention of two independent third parties.
>
> For the avoidance of doubt, the only circumstances when the Chief Constable will consider a referral to a "medical authority" in the case of your client is if new evidence, post dating the final decision of 2006, exists, which indicates that the degree of disablement found by the PMAB in relation to Mrs Haworth should be altered. Evidence in relation to issues of causation would be inadmissible on any such review."

71. I should observe at once that in my judgment it is quite clear that in refusing to give the requested agreement to a reconsideration under regulation 32(2) the defendant through its delegate, the Chief Constable, was relying on interlinked considerations which all flow from a single fact dominating both the decision under challenge and the defence to this claim, namely the considerable passage of time since the decision sought to be reconsidered, was made.

72. In other words, although Mr Lock sought to persuade me that this was not apparent from the terms of the letter itself (as distinct from that which is contained within the Summary Grounds of Defence) it is the question of delay in seeking the reconsideration and the perceived prejudice and detriment to the defendant police authority if it were to agree to the 're-opening' of a case after such a long period (over four years) which has been decisive in the mind of the decision maker.

73. Thus:
- there is reliance upon the failure of the claimant to challenge the decision at the time by way of either judicial review or possibly a timely request for a reconsideration. It seems to being suggested that this failure in itself has given rise to some kind of implied acceptance of the PMAB decision upon which the Chief Constable was

entitled to rely and which acts as a kind of estoppel upon the claimant to prevent her from seeking to invoke the 32(2) process.

- there is an overall reliance upon the characteristic of the decision in question as being a 'final ' decision which ought to remain so.

74. In so far as costs have been taken into consideration, they have, on the face of the letter, been limited to the costs of the process whereby that 'final' decision has been reached (or possibly also the costs of any reconsideration process itself) in support of the contention that it is important that 'final' decisions remain final. However, as already indicated, in the evidence placed before the Court from Mr Wirz, reliance is now placed upon the need within the defendant to maintain budgetary control and for fiscal stability in terms of the anticipated costs of the pension provision itself which it is said the authority was and is entitled to take into account when deciding whether to agree to a reconsideration of an "old" case. For this consideration to be relevant however, it must be on the basis that there are grounds for believing that any such reconsideration might lead to the pension being readjusted upwards. Mr Wirz it will be recalled speaks of the defendant's contention that '*it ought in the exercise of its discretion, be permitted to take account of the need for fiscal stability and in doing so to rely upon the statutory presumption that a Board's decision is final'*.

The final paragraph: a fetter on the exercise of discretion under regulation 32(2)?

75. I also interpret the final paragraph of the letter of the 6th of December as meaning only that the defendant, again through the Chief Constable, was making clear that it would never agree to a reconsideration of the 2006 decision under regulation 32(2) in the particular circumstances of the claimant's case for the reasons it had already given and that it would only be if there were evidence justifying a review under regulation 37 that her case would be referred again to a medical authority as part of the Regulation 37 process. Hence the reference for the need for evidence post dating the 2006 review decision, indicating an alteration in the degree of disablement since that last review, which, as already explained, is of the essence of the revision process under regulation 37. If that paragraph were to be interpreted as meaning that the defendant considered that regulation 32(2) could be invoked only if there were evidence of an alteration to the degree of disablement since the very decision sought to be the subject of a reconsideration, then I would agree that would amount to a fundamental misinterpretation of regulation 32(2), rendering (in the light of regulation 37) regulation 32(2) wholly otiose, and would amount to an unlawful fetter on the defendant's discretion under 32(2). However I do not consider that this paragraph can be sensibly interpreted in this way given those which precede it.

76. What is highlighted by this final paragraph however is that the defendant has firmly taken on board the implications of the decisions in Turner and Laws for any future reviews of the claimant's case, namely that 'evidence in relation to issues of causation would be inadmissible on any such review'. This kind of inadmissible evidence was of course admitted in the 2006 Review in relation to which the claimant sought the defendant's agreement to a reconsideration under regulation 32(2). This again highlights the claimant's *cri de couer* in this case that it could only be on such a reconsideration that the 'wrong' done to her, represented by the PMAB revisiting the question of causation already determined in her favour back in 1995, can have any

prospect of being 'righted' and the avenue of a regulation 37 review can be of no assistance to her.

77. What finally is clear from the letter is that the defendant did not purport to assess the underlying merits of the claimant's case for a reconsideration although, again as already highlighted, such indications as there are, suggest that the defendant was aware that the approach of the PMAB in 2006 was inconsistent with the proper interpretation of the regulations as declared in subsequent case law and was alive to the very real prospect that upon any such reconsideration the decision of the PMAB would be altered to restore the original findings of 1995/6 that the claimant's back injury was a qualifying injury with a resultant significant upwards readjustment of the claimant's pension.

The grounds of challenge

78. As already indicated, it is not in dispute that the decision of the defendant through the chief constable not to agree to a reconsideration under regulation 32(2) was an exercise of a discretion by a public authority which is susceptible to judicial review on public law grounds of unlawfulness and/or *Wednesbury* unreasonableness which for present purposes encapsulates contentions that the decision took into account irrelevant considerations, ignored the relevant or was otherwise irrational in the sense that it was decision which no reasonable authority properly directing itself could have reached. In this case as is already apparent from the overview of issues set out at the beginning of this judgment the claimant seeks to rely upon both aspects of challenge, but with particular reliance upon the failure to give effect to the purpose of the discretionary power. See again the overview of issues.

79. Mr Lock in his skeleton argument put forward his grounds under six heads, namely:

> 1. Failing to give effect to the purpose of the discretionary power.
>
> 2. Breach of the claimant's A1P1 rights because of the lack of a fair or balanced approach;
>
> 3. The financial arguments advanced by the Police Authority are disingenuous and/or manifestly illogical;
>
> 4. The final reason for refusal was illogical and misunderstands the statutory scheme;
>
> 5. The Police Authority failed to follow the statutory guidance about how to exercise its discretion under Regulation 32(2)
>
> 6. Breach of the duty under the Disability Discrimination Act 1995.

80. Grounds 1, 3, 4 and 5, are in effect part and parcel of the overall contention that the defendant failed properly in public law terms to exercise its discretion whether or not to agree to a reconsideration. The ground under the1995 Act (ground 6) is not part of the pleaded claim. This is a matter to which I shall return.

The Claim under the Convention

81. The pleaded grounds do however include ground 2, namely reliance upon unlawfulness arising out of an alleged breach of the claimant's human rights under Article 1 of Protocol 1 to the European Convention on Human Rights (A1P1).This provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
>
> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or otherwise."

82. The argument under this head is that the claimant has a right to a police injury pension under the material statutory scheme contained within the Regulations which is a right to be paid her full entitlement in accordance with those regulations, that such a right arsing as it does under a statutory scheme, is a property right protected under A1P1, that any decision which deprived the claimant of that full entitlement is an interference with that right, that the defendant being a public authority was obliged by section 6(1) of the Human Rights Act 1998 to act in accordance with such right, that a refusal to exercise a statutory power to allow a reconsideration of a decision which potentially deprived the claimant of that full entitlement should be construed as a refusal to correct a potentially unlawful interference with a ECHR right (and amounts to a decision that she should continue to be deprived of that full entitlement) which if it was to be lawful would have to be justified by the defendant demonstrating, which it has not done, that it had approached the matter in a way which was (a) not arbitrary and (b) had applied a fair balance between the general interest of the community and the interest of the individual meaning it must not impose an excessive burden on the individual.

83. The point is made that in making its decision the defendant appears only to have considered the public interest in the importance of finality in administrative decision–making and a fair balance has not been struck between achieving that purpose and protecting the property rights of the claimant. No compelling competing public interest has been demonstrated sufficient to justify what amounts to deprivation of property without compensation. Sub paragraph (h) of paragraph 26 of the Grounds reads as follows:

> "the legislative scheme expressly allows for decisions to be reconsidered, and the failure of the NPA to allow this to happen imposes an excessive burden on Mrs Haworth because it deprives her of her lawful entitlement for the remainder of her life."

84. Mr Lock conceded in this context that as part of the balancing exercise which needed to be undertaken once the claimant's Convention rights were engaged, the claimant's delay in asking for the reconsideration was one factor that could legitimately have been weighed in the balance (although he contends a careful reading of the 6th of December letter indicates that delay per se was not a factor) but in order to properly apply that factor the defendant would have to have sought and assessed the full facts around the delay. Even then it is said that a balanced approach would have been required which was never undertaken in this case. In particular the strength of the claimant's case that the 2006 PMAB decision reduced her police injury pension in a way that was incompatible with the regulations, and hence that her pension had been wrongly reduced, was never considered. The police authority may have taken into account the costs to them of setting up a reconsideration hearing but they failed to take any or any proper account of the financial loss to the claimant of not referring her case back or the long term effect the claimant of her pension having been improperly reduced.

85. In the round it is argued that the failure to consider, properly or at all, any factors in the claimant's favour demonstrates that the decision maker failed to apply a proper balance 'or in ECHR terms, failed to justify the interference with her A1P1 rights'. Sub paragraph I of paragraph 26 of the Grounds reads in part:

> "In the present case the NPA had regard to finality and the wish of the Chief Constable to rely on the outcome of the review process, but gave no credence to Mrs Haworth's Article 1, Protocol 1 rights."

86. Various authorities (for example the decision of the ECHR in Oneryildiz v Turkey 2004 39 EHRR 12) were cited to me in support of these propositions of law set out in paragraph 82 above. The defendant's response – as highlighted in the overview of issues – is that there is no basis for the argument that the claimant has been deprived of her full pension entitlement since her only entitlement under the scheme was that which has been established and determined in the final decision of the Board in 2006 which she has never sought directly to challenge. By refusing consent the defendant was only refusing to interfere with the claimant's current established property rights and hence far from thereby interfering with the claimant's property rights it was doing the opposite, namely refusing so to interfere.

87. In any event the defendant submits that even if the refusal to consent to reconsideration did engage the claimant's rights under A1P1, any interference was justified and proportionate.

88. Moreover, it is submitted the engagement of a convention right cannot itself overcome otherwise inordinate delay since otherwise applicable time limits would be frustrated, citing from the criminal law context, R v. Ballinger [2005] EWCA 1060 (the fact that the appellant was able to show that his article 6 fair trial had been breached was insufficient to displace the usual presumption against an extension of time to appeal on the ground that an authoritative judgment had displaced the previous understanding of the law).

89. Again however this argument begs the question of whether any time limits can properly be implied into the provision for a reconsideration made in regulation 32(2).

The Court's conclusions

90. Notwithstanding the attractive way in which Mr Green has put his argument. I cannot accept that it is lawfully open to a police authority to refuse a retired officer its consent to refer a final decision back to a medical authority for reconsideration under regulation 32(2) simply on the grounds of delay, even inordinate delay, in other words passage of time since the decision was made, without any consideration of the underlying merits of the matters which the former officer seeks to pursue on such a consideration.

91. Such an approach imposes upon what on its face is a wide power and unfettered discretion granted to it under regulation 32(2), a time limitation which in my judgment cannot properly be implied. If it had been the intention of parliament to limit the power in the way suggested by Mr Green – that is to say that any consensual reconsideration should be made "*quickly and without delay and usually within a period that is not substantially out of kilter with the time limits applicable to the alternative modes of challenge"* (i.e. those applicable to an appeal under regulation 31 or judicial review), it could have made express provision to this effect but has not done so. This is in stark contrast to the time limits – albeit ones capable of being extended – which are imposed within the regulations for a regulatory appeal. Moreover, in the case of a SMP reconsideration, it just cannot be argued that a viable appeal route under the regulations must always still be available before consent to a reconsideration can be contemplated – in other words that a reconsideration must *always* be an alternative to an *otherwise available* alternative mode of challenge – since that runs counter to the very definition of a final decision for the purposes of such a reconsideration. See again the terms of regulation 32(4) which expressly demonstrates that the statutory scheme contemplates an agreed reference back of a SMP decision after the time limit for a regulatory appeal has expired and not simply where one is pending.

92. In other words – and notwithstanding the HOG guidance – I can see nothing in the wording of regulation 32(2) or in the structure of the statutory scheme as a whole – which can justify limiting the scope of regulation 32(2) to it being a mechanism simply for avoiding judicial review of the decision, which must therefore *always* be otherwise available as a viable option. I agree with the submission of the claimant that it is irrelevant to the decision that has to be made under regulation 32(2) that the claimant could have judicially reviewed the 2006 decision but did not, or in all likelihood on the grounds of time would now fail to obtain permission to judicially review the decision – save in so far the such matters might in appropriate circumstances go to inform the police authority on any assessment of the underlying merits of the proposed reconsideration .

93. It must follow that I can see no basis for the submission that these proceedings themselves should be viewed as an illegitimate attempt to circumvent the procedural time rules governing judicial review or an illegitimate collateral challenge to that which can no longer be directly challenged or are otherwise an abuse of process.

94. It must also follow that the extensive citation of authority concerning the reluctance of the courts to extend time limits applicable to civil and criminal appeals solely on the basis that an authoritative judgment has rendered a previous understanding of the law

to be arguably incorrect, is of little assistance in this case given the absence of any time limit in my judgment to be implied into the exercise of the power under regulation 32(2).

95. It is true of course that throughout the regulations there are references to finality and the case law relied on by both parties in this case contains citations to support the proposition that the regulations should be construed to ensure as far as possible a high level of certainty in the assessment of police injury pensions – hence the approach to a review under regulation 37 endorsed by the Court of Appeal in Laws. But this in my judgment is of little assistance to the proper construction of regulation 32(2) and any consideration of the circumstances in which parliament must have contemplated the power to consent to a reconsideration could be exercised, since each of the references in the regulations to finality is expressly made subject to the regulation 32(2) power and that power itself expressly requires the decision in question to be a final one before it can be exercised. As Mr Lock submitted, the existence of such finality is a condition precedent to the exercise of the power. A refusal to consent to a reconsideration under 32(2) on the ground that the decision in question is a final one cannot lawfully stand with the very provisions of the regulation itself. Moreover, regulation 32(2) expressly contemplates that there can be more than one reconsideration by the medical authority.

96. I am persuaded that Mr Lock must be correct in his submission that regulation 32(2) should be construed as a free standing mechanism as part of the system of checks and balances in the regulations to ensure that the pension award, either by way of an initial award or on a review to the former police officer by either the SMP or PMAB, has been determined in accordance with the regulations and that the retired officer is being paid the sum to which he is entitled under the regulations. It must be the overall policy of the scheme that the award of pension reflects such entitlement and I see no reason why regulation 32(2) should be construed simply as a mechanism to correct mistakes which might nonetheless be able to be corrected by some other means.

97. In other words I am persuaded that in the light of the statutory scheme as a whole, there is no reason not to construe regulation 32(2) as in part a mechanism (and indeed an important mechanism) to correct mistakes either as to fact or as to law which have or may have resulted in an officer being paid less than his full entitlement under the regulations, *which cannot otherwise be put right*, which is this case. As I have already explained, the review process under regulation 37 cannot assist the claimant to correct the mistakes of law she has identified in the approach made by the PMAB in 2006 in revisiting and altering the findings on causation made in her favour on the initial award.

98. It should in my judgment have been the starting point of any decision making process by the defendant in deciding whether to give the requested consent in this case to have this purpose in mind and hence the staring point should have been to assess the strengths of the merits of the underlying case sought to be pursued on the reconsideration by the former officer and the long term likely effect upon her if she were denied the opportunity to have those mistakes corrected.

99. Further, in assessing those merits it must in my judgment be irrelevant that the correct approach in law to the construction of a review under regulation 37 had not been judicially identified at the time of the decision sought to be reconsidered, was made.

In this context my attention has been drawn to a judgment of HHJ Behrens sitting as a Judge of the High Court in The Queen (on the application of Thomas Crudace) v, Northumbria Police Authority 2012 EWHC 112 (Admin), delivered since the hearing before myself, in which he too rejected similar submissions made on behalf of the police authority as have been made in this case as to the construction to be put upon regulation 32(2). In a passage in paragraph 91 he said the following with I entirely concur:

> "Whilst it is true that the regulations do contain references to finality, each of those references is expressly made subject to the power in regulation 32(2). It has to be borne in mind that the Regulations are concerned with the provision of pension for former officers who were disabled in the course of duty through no fault of their own. In such a case it may well be thought that the need for accuracy is at least as important as the need for finality. Suppose case law establishes that an interpretation of the Regulation by either the SMP or the PMAB has been wrong, I do not see why regulation 32(2) cannot be used to enable the SMP or (as the case may be) the PMAB to reconsider the decision in the light of the correct interpretation of the law."

The Relevance of Delay

100. This is not to say that the fact of delay since the decision sought be reconsidered was made, is entirely irrelevant to the exercise of the police authority's discretion whether to consent to a reconsideration under regulation 32(2). But in my judgment delay can be relevant only to the police authority's assessment of the underlying merits of the application. In an appropriate case the delay may be such that the authority can legitimately conclude that no fair reconsideration is possible, in other words no fair resolution of the issues sought to be raised on the reconsideration is possible – for example where material medical records are no longer available. And the longer the delay, I would see nothing improper in the police authority considering more anxiously than might otherwise be the case, whether the underlying merits have sufficient strength to justify re-opening an old case, although in principle I would agree that that in the absence of good reason to the contrary, consent should be given if the officer can demonstrate a reasonable case capable of being resolved on a reconsideration, that the pension he is being paid is significantly incorrect by virtue of a decision not in accordance with the regulations.

Considerations of Costs

Costs of the Process

101. Similarly with regard to the costs already incurred on the any review/appeal process and the anticipated costs of any reconsideration, these can be relevant in my judgment only to the extent that they would justify the police authority refusing to consent to what in their reasonable assessment was a vexatious frivolous or otherwise unmeritorious application. In other words they go only to the legitimacy of the police

authority in deciding whether to consent, being entitled to make and act upon their own reasonable assessment of the merits of the underlying case.

Costs of any anticipated revision of pension

102. What however must in my judgment be wholly irrelevant to the question of consent – and notwithstanding the matters raised by Mr Wirz as to the likely effect on the authority's budget of the re-opening of old cases – is any anticipated costs to the authority of meeting any revised pension in the event the reconsideration results in a significant upward lift in the claimant's pension. There is something fundamentally unattractive in the proposition that the authority should be entitled to thwart the claimant or any retired officer being paid what *ex-hypothesi* is the pension she is entitled to under the regulations, and should be able to insist that she paid for the remainder of her life a pension which – on this hypothesis has to be accepted – has been reduced in a way inconsistent with the regulations, on the grounds of the cost of meeting that entitlement. This not only runs counter to the object and policy of the statutory scheme that an officer disabled in the course of duty without fault, should be paid the full pension to which he is entitled under the regulations but I see force in Mr Lock's submission that if such an approach were upheld as lawful, this would be tantamount to the court condoning an unjust enrichment of the defendant.

The Decision of 6th December 2010 made in this case

103. Applying the above principles to this case, the decision under challenge not to consent to a reconsideration of the PMAB must in my judgment be fundamentally flawed on conventional public law grounds for the following reasons:

104. First and foremost in failing to have any regard to the underlying merits of the claimant's application, and in refusing consent regardless of the strength of these merits, this was a decision not in accordance with the statutory purpose for which in my judgment the discretionary power under regulation 32(2) was given, namely as a mechanism whereby mistakes in the determination and assessment of pension entitlement under the regulations can be corrected in particular where they cannot otherwise be put right, and one which thwarted or ran counter to the policy and objects of the statutory scheme, namely that a former police officer permanently disabled in the execution of his duty through no fault of his own should be paid the full pension to which he is entitled under the regulations.

105. It was in my judgment not lawfully open to the defendant to refuse consent regardless of those merits, simply by reference to the delay in the claimant seeking that consent or the passage of time since the decision was made or to the fact that the unlawfulness of the approach to its regulatory task adopted by the PMAB when making its decision, has been judicially established or confirmed only since the decision was made. None of this could justify the defendant not asking itself whether in the light of the case law the revision of 2006 was made in accordance with regulation 37. Had it asked itself that question for the reasons already given, the only reasonable answer it could have reached was and is that at the very least there is a strong case that it was not and that absent a reconsideration, the claimant will be condemned to suffer a severe reduction in the full pension to which she would otherwise be entitled for the remainder of her life.

106. Secondly the considerations expressly relied upon by the defendant in its letter of the 6th of December 2010 to justify a refusal of consent were not in themselves relevant considerations. In particular:

> 1) for reasons I have already identified, the fact the claimant had not sought to challenge the decision by way of judicial review is in itself irrelevant to the exercise of the power under regulation 32(2) which does not depend upon such a challenge having been made. There was moreover no evidential basis for any contention that by reason of the absence of any challenge by judicial review the claimant had to be taken in some way to have accepted the decision and thereby estopped herself from seeking a reconsideration;
>
> 2) reliance upon the 'finality' of the 2006 decision could not justify not exercising the power under regulation 32(2) whose very exercise depends upon the decision being a final one. Such reliance deprives regulation 32(2) of its proper effect (see again Judge Behrens in Crudace at paragraph 95(2))
>
> 3) the reference to the costs of the review and any appeal process could not, absent any consideration of the merits of the claimant's underlying case, justify a refusal of consent to a reconsideration – ex hypothesi any reconsideration will be in respect of a decision already made through such a process and itself will always incur process costs.

107. Thirdly, in so far as the defendant did rely (although this is not explicit in the letter of the 6th of December) upon the anticipated costs to it of having to meet any increase in pension arising from the proposed reconsideration or the anticipated costs to it of meeting any increased pension of other retired officers in a similar position to the claimant (as however is suggested by Mr Wirz was the case) then again for the reasons I have already given ,this could not have been a lawful basis upon which to refuse consent.

108. These are sufficient reasons why in my judgment the defendant's decision of the 6th of December is fatally flawed and cannot be allowed to stand. I should make clear that for the reasons I have already given, the terms of the final paragraph of the letter do not take the matter any further. See paragraph 75 above. Nor do I consider it necessary to become embroiled in the dispute between Mr Lock and Mr Green as to whether the decision was in accordance with the HOG guidance. Whether it was or not, cannot for the reasons I have already given be determinative of whether the decision was a lawful exercise of the regulation 32(2) power. I repeat my judgment that such extra statutory Guidance cannot lawfully cut down the scope of the statutory power which otherwise exists, having regard to the terms of the particular regulation and the statutory scheme as a whole.

The claim under the Convention

109. These conclusions render it strictly unnecessary for me to decide whether the decision is unlawful on the basis of it being an unlawful interference with the

claimant's convention rights under Article 1 Protocol 1 the ECHR. I however I do accept Mr Lock's basic submissions that the property right which fell to be protected under the article is the claimant's right to a full pension entitlement determined in accordance with the regulations rather than that awarded to her on a purported application of the regulations whether in accordance with the regulations or not (which is the logical effect of Mr Green's submission that her right for these purposes is only to that determined by the Board in what he describes its unchallenged final decision of 2006 under regulation 31(3)); that a decision to pay the claimant a sum less than her full entitlement is an interference with that right that has to be justified in convention terms; further that regulation 32(2) is a mechanism provided by parliament to give effect to and to provide protection for that right by providing a mechanism to correct any such interference ;and again any refusal to exercise that power to be lawful in terms of the defendant's obligations under the Human Rights Act would have to be justified by the application of a fair balance between the general interests of the community and the individual interests of the claimant.

110. In these circumstances where as here, there must be a strong case that the 2006 decision was not in accordance with the regulations, it must follow in my judgment that the court under this head of claim does have to consider whether the defendant did in refusing its consent to the reconsideration, strike the fair balance to which I have referred.

111. My considered view is that it did not since self evidently in not considering the underlying merits of the claimant's case and the strength of her case that her pension had been wrongly reduced by the PMAB decision of 2006, it did fail to have proper regard to her interests, and in particular the likely long term impact upon her if steps were not taken to correct such wrongful reduction.

112. In other words although strictly unnecessary for my determination of this claim, I am prepared to rule that the December 2010 decision under challenge was also unlawful as being in breach of the claimant's convention rights under A1P1. Again in my judgment Mr Green's reliance upon domestic jurisprudence relating to inordinate delay cannot assist him given my conclusion as to the absence of any time limit to be implied into the regulatory power under 32(2).

The Claim under the Discrimination Act 1995

113. However I am not prepared in the light of my conclusions so far, to determine the additional ground of claim now raised (but unpleaded) under the Discrimination Act.1995. It is wholly unnecessary to do so. Like Judge Behrens in Crudace (at paragraph 97), I have my doubts as to the applicability of the section 49A general 'due regard' duties (under the legislation then in force) to the exercise of the power to order a reconsideration under regulation 32(2) but I too prefer to leave any determination of this issue to a case where it is potentially decisive of the claim.

Overall Conclusion

114. For all these reasons this claim must succeed to the extent that I will order that the decision of the defendant of 6th of December 2010 not to agree to refer the final

decision of July 2006 back to the PMAB for reconsideration under regulation 32(2) of the Regulations be quashed.

115. I will order also that the defendant do reconsider whether to agree to such a reference back in accordance with the said regulation and in the light of this judgment.

116. I did consider whether I should go further and order that the defendant do agree to that reference. I am mindful of my considered conclusion that had the defendant approached the exercise of its discretion under regulation 32(2) in the way it ought to have done and considered at the outset the underlying merits of the claimant's case, the only reasonable answer it could have reached is that the claimant has a strong case that the 2006 review decision was not in accordance with the regulations ,in particular regulation 37, that absent a reconsideration there is no way in which any mistake so identified can be corrected , and absent such correction the Claimant will continue to be severely under paid compared to her full entitlement for the remainder of her life. These considerations must all be powerful indicators as to how any discretion ought to be exercised. However I am equally mindful that the discretion is that of the defendant and not of the court and this equally so in the case of any balancing exercise of competing interests which the defendant may choose to undertake in the context of the claimant's rights under Article 1 Protocol 1 of the ECHR. Ultimately the defendant must be free to make such decision as it considers appropriate when considering whether to give the requested consent in the light of this judgment. It will of course always be open to the claimant to seek to challenge any fresh decision if she considers she has any public law grounds to do so.

117. I will consider the precise form of the order to be made, including any order as to costs, on the handing down of this judgment.