Neutral Citation Number: 2012 EWHC 112 (Admin)

Case No: CO/2417/2011

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT in LEEDS

The Court House
Oxford Row
Leeds LS1 3BG

Date: 02/02/2012

Before:

His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

- -

Between:

THE QUEEN (on the application of THOMAS EDWARD CRUDACE)	**Claimant**
- and -	
NORTHUMBRIA POLICE AUTHORITY	**Defendant**

- -
- -

David Lock QC (instructed by **Lake Jackson**) for the **Claimant**
Jonathan Holl-Allen (instructed by **Nicholas Wirz, Northumbria Police Authority**) for the **Defendant**

Hearing dates: 19 and 20 January 2012

- -

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.

.....

Judge Behrens:

1 Introduction

1. This is an application for judicial review by Mr Crudace in respect of two decisions made on 20th February 2009 and 21st December 2010. Each of the decisions was made under of the Police (Injury Benefit) Regulations 2006 ("the Regulations").

2. Mr Crudace is a former police inspector who retired on ill health grounds in 1991. He was awarded a Band 3 injury pension. On 20th February 2009 a decision was made by the Selected Medical Practitioner (SMP), supposedly under regulation 37 of the Regulations, which had the effect of reducing his pension to Band 1. . In practice that meant his pension reduced from 75% to 45% of relevant earnings. The decision purported to follow Home Office Guidance on the interpretation of the regulations in relation to former police officers who have attained the age of 65.

3. Mr Crudace initiated an appeal against the decision but following a letter from the Police Authority solicitor, Mr Nicholas Wirz, he withdrew the appeal.

4. Following a decision in the Court of Appeal on regulation 37 Mr Crudace consulted solicitors who invited the Police Authority to agree under regulation 32 to refer the matter back to the SMP to reconsider his decision of 20th February 2009.

5. By letter dated 21st December 2010 a Human Resources Manager, purportedly acting on behalf of the Chief Constable, refused to agree to refer the matter back.

6. After a pre-action protocol letter dated 2nd February 2011 and a reply dated 14th March 2011 the application for judicial review was lodged on 16th March 2011. In summary Mr Crudace seeks an extension of time to review the decision 20th February 2009 and challenges the 21st December 2010 decision.

7. He seeks to argue that the decision was wrong in law in that the SMP failed to carry out the review in accordance with regulation 37 and that in the circumstances it is appropriate to extend time. In so far as the decision was taken in accordance with Home Office Guidelines the Guidelines are unlawful. In response the Police Authority denies that the decision of the SMP was, in law, their decision. Accordingly the Police Authority is not the appropriate Defendant. The review, which was carried out following Mr Crudace's 65th birthday, was carried out in good faith in accordance with Home Office Guidelines. The application is 22 months out of time and it is not appropriate to extend time.

8. The challenge to the 21st December 2010 decision is made on a number of grounds. In summary it is not accepted that the Human Resources Manager, Mrs Taylor was properly authorised to make the decision; in any event she erred in law by failing to have regard to the purpose of regulation 32. The reasons that she gave were bad in law. She failed to have regard to the merits of Mr Crudace's claim and the provisions of the Disability Discrimination Act 1995. The Police Authority meets these criticisms head on. It contends that Mrs Taylor had sufficient authority to make the decision. It also contends that she did have regard to the purpose of the regulation 32 and that the reasons she gave disclosed no error of law.

9. On 11th May 2011 I granted permission on the papers. In so doing I observed that the challenge to the 21st December 2010 decision seemed well arguable but I could not, at that time, see how the challenge to the challenge to the 20th February 2009 decision could succeed. However, as I was granting permission I was not going to restrict the argument.

10. The application was argued over 2 days on 19th and 20th January 2012. I was greatly assisted by the very detailed and clear submissions on both sides. I am extremely grateful to Counsel for the assistance I have received.

2 The Regulations

11. Before turning to the facts in more detail it is convenient to look at the Regulations. The scheme of police pensions dates back many years and, at the date that the police injury pension was awarded to Mr Crudace, the award was made under provisions of the Police Pension Regulations 1987. In 2006 the police pension scheme was removed (by amendment) from Police Pension Regulations 1987 and a separate set of Regulations was passed to govern such pensions, namely the Police (Injury Benefit) Regulations 2006. For the purposes of this case the wording of the Regulations is identical to the wording of the previous statutory scheme.

12. There are 3 conditions which a person has to satisfy in order to be initially eligible for a police injury pension under regulation 11(1), namely:

1. The applicant is ceasing or has ceased to be a member of a police force (i.e. this is a pension only paid to former officers);
2. The applicant is permanently disabled from being able to discharge all of the duties of a police officer; and
3. That disablement was a result of (i.e. has been caused by) an injury received without his own default in the execution of his duty as a police officer

13. The procedure for determining whether that person qualifies is determined by regulation 30 which provides:

> ***30 Reference of medical questions***
> *(1) Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards under these Regulations shall be determined in the first instance by the police authority.*
> *(2) Subject to paragraph (3), where the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them ["the SMP"] the following questions--*
> *(a) whether the person concerned is disabled;*
> *(b) whether the disablement is likely to be permanent,*
> *...*
> *(c) whether the disablement is the result of an injury received in the execution of duty, and*
> *(d) the degree of the person's disablement;*
>
> *and, if they are considering whether to revise an injury pension, shall so refer question (d) above.*
>
> *(6) The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations 31 and 32, be final.*

14. Thus, it will be seen that the Police Authority are required to refer questions (a) – (d) to the SMP and it is the SMP who makes the decisions in relation to them. It will also be seen that question (d) must also be referred to the SMP when they are considering revision to the injury pension.

15. The meaning of the expression "degree of disablement" is set out in regulation 7(5):

> *(5) Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a*

result of an injury received without his own default in the execution of his duty as a member of a police force:

16. In establishing the degree to which earning capacity has been affected by the relevant injury, the SMP is required to compare the former officer's actual earning capacity with the earning capacity he would have had if uninjured (the uninjured earning capacity). The result is expressed as a percentage from which the former officer is placed into one of four bands. Band 1 is the lowest and Band 4 the highest. The Band translates into a pension based on the table in Schedule 3 to the Regulations

17. The SMP is obliged to produce a report with reasons to explain the basis for his decision on both entitlement and on quantum. Under regulation 30(6) the decision is final subject to any appeal under regulation 31 or a reconsideration under regulation 32(2).

18. Under regulation 31 there is a right of appeal from a decision of the SMP to the Police Medical Appeal Board ("PMAB"). Under regulation 31(1) Notice of Appeal must be given to the Police Authority within 28 days or such longer period as the Police Authority may allow. Under regulation 31(3) the decision of the PMAB (again in the form of a report) is final subject to regulation 32.

19. Under regulation 32(2) the Police Authority and the former officer may agree to a final decision being referred back to the medical authority that made the decision:

(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.

20. . As can be seen from the above provisions, the decision of a medical authority is final but is subject to further reconsideration under Regulation 32(2)"

21. Under regulation 37 there is a duty on the Police Authority to consider at suitable intervals whether the degree of disablement has altered and to revise the pension accordingly. It provides:

(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.

22. It will be recalled that the actual decision under regulation 37 is by regulation 30(1) referred to the SMP and his decision is, subject to an appeal to the PMAB, or reconsideration under regulation 32(2) final.

23. Regulation 37 has been considered in decisions of the High Court and the Court of Appeal. In *R (on the application of Pollard) v The Police Medical Appeal Board and West Yorkshire Police Authority* [2009] EWHC 403 Silber J explained that :

Regulation 37 does not enable an authority to reach a different conclusion on the issues specified in regulation 30(2)(a), (b) and (c) but only on the matters set out in regulation 30(2)(d) which relate to the degree of the person's disablement. Indeed, this is made clear in the closing words of regulation 30(2).

Therefore the question of whether a person is entitled to an injury award cannot be considered on a regulation 37 review and so the board has no authority to cancel an injury

award on the basis that the disablement was not the result of an injury received in the execution of duty.

24. Silber J's decision was followed by Burton J in *R (on the application of Turner) v The Police Medical Appeal Board and Metropolitan Police Authority* [2009] EWHC 1867 (Admin). In the course of his judgment Burton J said at paragraphs 21 and 23:

> *21… It is important from the point of view of disputes such as pension entitlement that a decision once made should be final if at all possible, and that is what is provided for by these Regulations... [I]t is clearly fair both for the police force and for the community that someone who starts out on a pension on the basis of a certain medical condition should not continue to draw a pension, or any kind of benefit, which is no longer justified by reason of some improvement in his condition, or, of course, the reverse.*
>
> *23. [Having referred to the decision of Ouseley J in Crocker [2003] EWHC Admin 3115 and Regulation 7(5)] It is apparent, therefore, that in considering questions of disablement earning capacity is important, but... Crocker... would not justify starting from scratch in relation to earning capacity, because in the present case what is posed under Regulation 37 is the degree if any to which the pensioner's disablement has altered. By virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving... Mr Lock accepts that if there is now some job available which the defendant would be able to take by virtue either of some improvement in his condition or in the sudden onset of availability of such a job then that would be a relevant factor. But it would all hang on the issue of alteration or change after 'such intervals as may be suitable'. There is no question of relitigation and, of course, 'suitable intervals' suggests that this is not a matter which should be revisited every year, nor is it.*

25. The matter was considered by the Court of Appeal in *Metropolitan Police Authority v Laws* [2010] EWCA Civ 1099 where the leading judgment was given by Laws LJ. In the course of his judgment Laws LJ approved the decision in *Turner.* The heart of his judgment is contained in paragraphs 18 and 19:

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

3 Home Office Guidance

26. In 2004 the Home Office published a Circular which included Guidance to Police Authorities HOC 46/2004 in relation to a number of aspects of police injury pensions. The

updated Guidance is now included in a series of Guidance Notes published by the Home Office. Annex C to the 2004 Guidance recommended the following approach for the conduct of reviews when former officers reached the age of 65.

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

27. The Home Office also published parallel Guidance to Medical Officers undertaking police injury cases. The relevant Guidance is in somewhat different terms and was revised and republished in November 2008. The relevant part of Guidance is in paragraph 20 of Section 5:

> ***"Degree of disablement after age 65***
>
> *20. Once a former officer reaches the age of 65 he or she will have reached State Pension Age irrespective of gender. In the absence of a cogent reason otherwise, the SMP may place the former officer in the lowest band of Degree of Disablement. At such a point the former officer would normally no longer be expected to be in employment.*
>
> *21. It should be noted that while the default retirement age of 65 set in the Employment Equality (Age) Regulations does not apply to police officers as office holders, it does apply to employees and that age remains one at which a former officer can be taken to be no longer economically active. However, each case needs to be considered in compliance with the Police Pensions Regulations and in the light of the individual circumstances. We consider that the Age Regulations add extra weight to the requirement in the Police Injury Benefit Regulations that each case which is reviewed should be considered on its merits and in the light of any points made on behalf of the former officer.*
>
> *Note - It is important that the correct procedures are followed in such cases in accordance with regulations 37 and 30 and that the issue is referred to the SMP for decision"*

28. Mr Lock QC has a number of criticisms of the Home Office Guidance which are set out in detail in paragraphs 18 – 21 of his skeleton argument. He reminds me that under regulation 7 the degree of disablement is the difference between the pensioner's uninjured and actual earning capacity. There is no justification for assuming (or assuming in the absence of cogent reasons) that his uninjured earning capacity is reduced to nothing at the age of 65. He points out that, in fact, there are a substantial number of people over the age of 65 in the labour market. The fact that a pensioner might choose to retire at the age of 65 does not mean that he has no earning capacity at that age. Thus he submits that the equation between "normal retiring age" and a diminution to zero of a pensioner's uninjured earning capacity involves flawed logic.

29. He also submits that the "cogent reason" test proposed in both sets of Guidance is wrong in law. It is not in regulation 37 and inappropriately seeks to change both the burden and standard of proof as part of the review. Thus he submits that the Guidance seeks to divert the SMP from the test in regulation 37. It does not advise the SMP to ask whether there has been an alteration in the degree of disablement of the pensioner since the pension was awarded and/or the last review and fails to advise the SMP to ask himself whether any alteration he finds is substantial.

30. I am conscious that I have received no submissions from the Secretary of State in support of the Guidance. The Secretary of State was, however, given an opportunity to make submissions and declined to do so in this case. I am equally conscious that in another case *R (ota Simpson) v Police Medical Appeal Board and others* which is due to be heard in Leeds at the end of next month she has filed evidence and is currently defending the lawfulness of the Guidance.

31. However the lawfulness of the Guidance is an integral part of Mr Lock QC's case both on the lawfulness of the decision of the SMP and on the questions of discretion that arise on the challenges to each of the decisions. Furthermore Judge Gosnell has determined that the court is entitled to rule on the lawfulness of the Guidance notwithstanding that the Secretary of State elects not to be joined as a party to these proceedings. In those circumstances it is necessary for me to express my view on the Guidance.

32. I have come to the conclusion that Mr Lock QC's submissions on this point are correct. In my view the test proposed in the Guidance is not in accordance with regulation 37. The SMP is not entitled to conclude that "in the absence of cogent reason" the pensioner's uninjured earning capacity is reduced to zero when he attains the age of 65. Rather, if the Police Authority refers the matter to him for review when the pensioner attains the age of 65 he must carry out a proper review in accordance with regulation 37. Thus he must consider whether the degree of the pensioner's disablement has altered and if so whether the alteration is substantial.

33. I am fortified in this view by decisions of the Pensions Ombudsman to which I was referred during argument. In paragraph 20 of *Sharp v Northamptonshire Police Authority* he said:

> *There are no special provisions in the Regulations relating to the degree of disablement at age 65. I do not find it appropriate that a review should start from the assumption that at state retirement age Mr Sharp's earning capacity reduced to nothing or that it was for him to prove otherwise; particularly in view of the coming into force of the Employment Equality (Age) Regulations 2006.*

34. I agree with those observations.

4 The Facts

4.1 The review dated 20th February 2009

35. As already noted Mr Crudace is a former police inspector of the Northumbria force. He was required to retire from the police force as a result of ill health on 26th March 1991 when he was aged 47.

36. When he retired Mr Crudace applied for and was awarded a Band 3 injury pension under the Police Pension Regulations 1987 on the grounds that he had been permanently disabled as a result of an injury received, without his own default, in the execution of his duty and had a degree of disablement of between 51% and 75%. In a letter dated 25th March 2009 Mr Crudace pointed out that his injuries started in March 1979 when a car landed on top of a police car in which he was a passenger. He then suffered further severe injuries during the arrest of a drunken man in November 1989.

37. The Claimant's pension was reviewed by the Police Authority in 1998 and maintained at a Band 3 pension.

38. On 21st April 2008 the Police Authority wrote to the Claimant stating that they intended to conduct a review of the Claimant's injury pension when the Claimant reached the age of 65 in April 2009. The letter referred to the Guidance and made the point that the Police Authority intended to review all former officers' injury awards once they reach the age of 65. It stated that the likely outcome was that Mr Crudace would be reduced to the 0– 25% band of disablement.

39. The Police Authority initiated the review by an undated letter to the SMP inviting him to conduct a review. The letter referred expressly to the Guidance and made the point that the Police Authority could identify

> *"no cogent reasons why we should not advise you (in your role as SMP) to place former Inspector Cruddace in the lowest band of Degree of Disablement".*

40. The letter went on to recommend that

> *"in your assigned role as Selected Medical Practitioner you should place former Inspector 7608 Cruddace in the 0-25% Degree of Disablement banding on the grounds that he has reached State Pension Age and no longer has an earnings capacity for the purpose of the Police Injury Benefit Regulations."*

41. A total of 70 cases were referred to the SMP for review on the ground that the former officer had reached the age of 65.

42. Dr Broome, the SMP, dealt with all 70 cases on the same day – 20th February 2009. In each case he reduced the degree of disablement to Band 1. In Mr Crudace's case his reasons were expressed in a letter of that date which reads:

> *"I am advised that the Pensioner has reached State Retirement Age and therefore, in accordance with the Regulations, the Pensioner "no longer has an earning capacity for the purposes of the Police Injury Benefit Regulations". Northumbria Police has also determined that there is no "cogent reason" why the Pensioner should not, therefore, be considered to have 0% loss of earnings capacity and as a consequence of their injury, and should be placed in the 0-25% Degree of Disablement banding*
>
> *I confirm that the above recommendations are consistent with the Regulations and I attach a revised Statement of Injury"*

43. Attached to the letter was a report. The report (which refers to the 1987 rather the 2006 Regulations) appears to be more suitable for a regulation 30 determination rather than a regulation 37 review. In any event it assessed the degree of disablement at 0% and recommended no further review.

Criticism of the review.

44. As Mr Lock QC points out there was no medical examination of Mr Crudace; the only information taken into account by the SMP was that he had attained the age of 65. [In fact, on February 20th 2009 Mr Crudace was in fact 64. He did not reach the age of 65 until April 2009]. The SMP has accepted the determination of the Police Authority that there was no cogent reason why Mr Crudace should not be considered to have a 0% loss of earnings. He thus took the view that the "cogent reason" test was in accordance with the Regulations. He also appears to have taken the view that the determination as to whether there was a cogent reason was a matter for the Police Authority and not for himself.

45. Mr Lock QC therefore submits that the decision of the SMP was fatally flawed as a matter of law and that Mr Crudace did not have the benefit of a review conducted in

accordance with regulation 37. It follows from my analysis of the Guidance and of the authorities in the previous section that I agree with those submissions.

4.2 The Appeal

46. It is not clear how the decision of 20th February 2009 was communicated to Mr Crudace but it is common ground that it was.

47. On 25th March 2009 Mr Crudace gave notice by letter to the Police Authority of an appeal under regulation 31 to the PMAB. In the letter he set out in considerable detail the nature of his injuries and the progress he had made. In summary he made the point that his condition was deteriorating. He summarises his condition on the final page of the letter:

> *I am unable to walk more than 25 yards unless I stop for a period of time …If I walk after 25 yards I get severe pains down my arms and into my hands and fingers, they feel like they have been crushed …*
>
> *I am unable to travel in buses, trains metro and cruise ships because of the vibration, the swaying and the jolting.*

48. On 16th May 2009 Mr Crudace gave further details of his grounds of appeal in Form A. Among the points he made was:

> *I find it incredible that any doctor can reduce my award without an examination, having no knowledge of my present health nor any information from my specialists or my GP. This is a complete farce.*

49. On 2nd July 2009 the Police Authority solicitor, Mr Nicholas Wirz, sent Mr Crudace a letter which in effect threatened the Claimant with a £6,200 adverse costs award if he persisted with his appeal. It included:

> *"Guidance empowers the Medical Appeal Tribunal to order unsuccessful Appellants to pay the fees of the Appeal Hearing which currently stand at £6,200 plus VAT if they consider your appeal to be "frivolous". Frivolous for these purposes means having no real prospect of success. To the best of my knowledge, no medical appeal against the implementation of Home Office Circular 46/2009 has ever succeeded. Neither has there been an application to the High Court for leave to apply for judicial review of any decision based on Home Office Circular 46/2004 in the five years of its existence. Your appeal is, therefore, bound to fail in my view.*
>
> *I will be making submissions to the Medical Appeal Tribunal that you should be ordered to pay the fees and expenses of the Tribunal*
>
> *I strongly recommend you obtain your own independent legal advice …"*

50. 45 of the 70 former officers who were the subject of decisions on 20th February 2009 lodged notices of appeal. Mr Wirz sent a letter in similar terms to each of them. The letter has been the subject of criticism by Mr Lock QC and was also the subject of a complaint to Mr Wirz's professional body. That complaint was dismissed and I agree with Mr Holl-Allen that it would not be right for me to go behind that dismissal. It is, however right to bear in mind that the letter was sent by the solicitor of a public body to a disabled unrepresented former officer. As well as threatening to apply for costs it expressed an opinion that the appeal was hopeless. It did, however, recommend that Mr Crudace obtain his own legal advice.

51. Mr Crudace did not obtain his own legal advice. On 3rd July 2009 he spoke to Mr Wirz on the phone. Mr Wirz's file note is uncontroversial save on the question whether Mr Crudace said he would seek legal advice. It is clear that Mr Wirz stated that the reasons given by Mr Crudace which no doubt related to his medical condition were irrelevant to the

decision of the PMAB and would not be taken into account. He also advised him that if he withdrew his appeal there would be no costs implication.

52. On 9th July 2009 Mr Crudace wrote to Mr Wirz withdrawing the appeal. In his letter he pointed out that the basis of the appeal was that his medical condition was far worse than it was in 1991. He went on to refer to the phone conversation and stated that:

> *I now realise that it is not medical evidence that is needed. I therefore withdraw my appeal.*

53. Of the 45 appellants 21 withdrew their appeals after receiving Mr Wirz's letter. 14 of the appeals which were pursued to the PMAB succeeded, 8 failed. Some of the 8 (including Mr Simpson) are pursuing claims against the Police Authority. It is the Police Authority's policy to apply for costs in all cases that fail. In each of the 8 cases the application for costs was not successful.

4.3 The request to refer for reconsideration

54. There is no witness statement from Mr Crudace dealing with the events between 9th July 2009 and 19th October 2010. However there are a number of documents that throw light on what was happening.

55. On 12th November 2009 Cox J decided *Laws* in favour of Ms Laws. Her decision which was largely upheld on appeal dealt with the construction of regulation 37. Notice of Appeal was given by the Police Authority on 3rd December 2009. Permission to appeal was granted on 13th January 2010.

56. On 10th March 2010 the Home Office sent a letter to the Police Authority in which they referred to the ongoing appeal and gave interim guidance pending the outcome of the appeal:

> *The decision whether and when to review the injury pension of a former officer lies with the police authority. With one exception we therefore advise police authorities to defer any planned reviews until the Court of Appeal has made its decision …*
>
> *Where an individual seeks a review not on the basis of a change in his or her condition but on the basis of a change in the case law it is suggested that the police authority should decline the request but undertake to consider it once the legal position has been clarified …*

57. On 13th October 2010 the judgments of the Court of Appeal in *Laws* were handed down.

58. Following the decision Mr Crudace was referred to his present solicitors by the National Association of Retired Police Officers. It can be inferred that Mr Crudace took no action before that because of, what, in effect, was a moratorium pending the decision of the Court of Appeal.

59. On 19th October 2010 Mr Crudace's solicitors wrote a long letter to Ms Taylor the Manager of HR Department at Northumbria Police Headquarters inviting the Police Authority to permit Mr Crudace to appeal to the PMAB or to agree to the matter being reconsidered by the SMP under regulation 32(2).

60. Ms Taylor replied on 21st December 2010. The letter included:

> *"You rightly identify recent changes in the law concerning the review of injury awards has changed the way Police Authorities and Police Medical Appeal Boards (PMAB) currently approach reviews. The Force does not agree that the Police Authority and the Selected Medical Practitioner (SMP) acted inappropriately when reviewing Mr Cruddace's injury award. Both parties acted in good faith and in compliance with the Home Office Guidance that existed at the time.*

I confirm that the SMP adopted a process he considered appropriate to determine the questions asked of him by the Police (Injury Benefit) Regulations 2006. The Force believes a change in the relevant case law or Home Office Guidance does not amount to maladministration. ...

Please be advised that the Chief Constable is not willing to consent to a re-referral to a SMP for the following reasons:

1. *The decision you now seek to take issue with was made in February 2009. Mr Cruddace had not wanted the consequences of that "final" decision to apply, he had avenues open to him to challenge it. Having taken legal advice, he chose not to do so.*
   It can be reasonably inferred that your client accepted the decision of the SMP at that time.
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.*
   The Chief Constable, as a reasonable public authority, is entitled to rely on the outcomes of the processes briefly outlined above, which were pursued in good faith and, in your client's case, involved the intervention of an independent third party.

For the avoidance of doubt, the only circumstances when the Chief Constable will consider referral to a "medical authority", in your client's case, is if new admissible evidence, post dating the final decision of February 2009, exists which indicates the degree of disablement found by the SMP, in relation to Mr Cruddace, should be altered"

61. It is accepted by the Police Authority that the letter was sent by Ms Taylor without consulting either the Chief Constable or any member of the Police Authority. The decision to refuse to refer the case back for reconsideration was accordingly made by Ms Taylor. It is also accepted that there is no document or other evidence authorising Ms Taylor to make a decision under regulation 32(2) on behalf of either the Police Authority or the Chief Constable.

62. Following the refusal Mr Crudace's solicitors sent a pre-action protocol letter on 2nd February 2011. On 14th March 2011 Mr Wirz replied on behalf of the Police Authority. These proceedings were commenced two days later.

5 The review dated 20th February 2009

5.1 The correct Defendant.

63. There is a dispute between the parties as to whether the correct Defendant is the Police Authority or the SMP. Mr Lock QC points out that in all of the decided cases the Police Authority has been the effective Defendant. It is the Police Authority who is the paying party.

64. Reference to the decided case shows that in *Pollard* neither the Police Authority nor the PMAB appeared before Silber J; in *Turner* only the PMAB were named as the Defendant but the Police Authority appeared by Counsel to defend its decision; in *Laws* both the PMAB and the Police Authority were represented and appeared by Counsel. Mr Lock QC who was junior Counsel for Mr Laws told me that the PMAB took a neutral stance and left the main argument to leading counsel for the other two parties.

65. Mr Lock QC primarily submits that the Police Authority are the correct Defendant. He refers me to both regulation 30 and 37. He points out that under each of the regulations the decision is expressly said to be that of the Police Authority. In particular (under regulation 37) the pension is to be revised if *the Police Authority* find that the degree of disablement has substantially altered.

66. He accepts, of course, that the actual decision is made, in the first instance, by the SMP or on appeal by the PMAB. He also accepts that both the SMP and the PMAB are

independent. However he submits that the decision is still a decision of the Police Authority albeit a decision that has been delegated to the SMP/ PMAB by regulation 30(2) or 30(3). He referred me to paragraph 18 of the judgment of Laws LJ in *Laws* where he referred to the decision as being of the Police Authority (via the SMP/board).

67. Mr Holl-Allen does not accept this analysis. In his submission the decisions of the SMP are not to be treated as decisions of the Police Authority. The SMP is not a true delegate of the Authority because the Authority is required to accept his decisions on the questions referred to him. The independence of the SMP from the Authority is confirmed by the terms of regulation 31(1), which confer on the officer a right of appeal against the decisions of the SMP, not the Authority. The decisions of the SMP are no more decisions of the Police Authority than are the decisions on appeal of the PMAB, which similarly the Police Authority are required to treat as final under regulation 31(3). He makes the point that at paragraph 18 of *Laws* Laws LJ draws no distinction between the position of the SMP and the Board.

68. My mind has wavered on this point during the course of the submissions. In the end, however I prefer the submissions of Mr Lock QC. It seems to me that the wording of regulation 37 makes it clear that the decision to revise the pension is the decision of the police authority. It follows, in my view that the decision of the SMP and/or the PMAB on appeal can only be as the delegate of the Police Authority. This is so even though they are independent and the Police Authority is bound to accept their decision as final (subject to reconsideration under regulation 32(2) and/or judicial review).

69. There is also to my mind force in Mr Lock QC's subsidiary submission that the decision was in fact a joint decision of the SMP and the Police Authority. The wording of the letter of 20th February 2009 is consistent with that view. It will be recalled that as part of the decision the SMP stated:

> *Northumbria Police has also determined that there is no "cogent reason" why the Pensioner should not, therefore, be considered to have 0% loss of earnings capacity and as a consequence of their injury, and should be placed in the 0-25% Degree of Disablement banding.*

Thus the determination of no cogent reason was that of the Police Authority and the overall decision a joint one.

70. If I had thought otherwise I would have probably acceded to Mr Lock QC's suggestion that the proceedings be adjourned to enable the SMP to be served. If, as seems likely, the SMP was content to take a neutral stance there would then have been no reason why the remainder of the issues could not be determined. They have, after all been fully argued between the two parties with a financial interest in the outcome.

5.2 Delay

71. Mr Lock QC inevitably accepts that the application was not made within 3 months of the decision of 20th February 2009 and that the question of delay was relevant as to whether any relief should be granted.

72. He accepts that the exercise of the Court's discretion is governed by section 31(6)(b) of the Senior Courts Act 1981. Section 31(6) and (7) provides:

> *(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—*
> *(a) leave for the making of the application; or*
> *(b) any relief sought on the application,*

> *if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration*
> *(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.*

Both parties referred me to a passage in the speech of Lord Goff n *R v Dairy Produce Quota Tribunal for England and Wales ex parte Carswell* [1990] AC 738, 747 B – C:

> *"It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6)) or would be detrimental to good administration"*

73. He accepts that the discretion is not limited to the matters set out in the section but where as here Parliament has laid down criteria they are plainly matters of prime importance.

74. He justifies the reasons for the delay in part by the appeal that was initiated and then withdrawn as a result of Mr Wirz's letter and the subsequent conversation with Mr Wirz and in part as to the moratorium resulting from the appeal in *Laws* as evidenced by the interim guidance provided by the Home Office in March 2010.

75. This is not a case where there has been any prejudice to the Police Authority and he submits that this is not a case where the granting of relief would be detrimental to good administration.

76. On a more general level he points out Mr Crudace's pension rights are rights protected by Article 1 of the First Protocol ("A1P1") of the ECHR. He thus submits that A1P1 is engaged. He makes the point that Mr Crudace's pension has not been removed according to law in that he has not had the benefit of a lawful review under regulation 37. He drew my attention to the decision of the European Court of Human Rights in *Öneryildiz v Turkey* (2004) 39 E.H.R.R. 12 and submitted that in exercising its discretion

> *regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention.*

77. He accordingly submits that the court has power in this action to exercise its discretion by quashing the unlawful decision which interfered with Mr Crudace's A1P1 rights, and so should be guided in the exercise of that discretion by the fact that A1P1 rights are engaged and that the court has a duty to make these real and effective rights.

78. He makes the point that the decision affects only Mr Crudace and no other person, that the decision was plainly unlawful, that if this is not corrected Mr Crudace will be paid an unlawfully reduced pension for the rest of his life whereas if the decision is quashed that the Police Authority will have the opportunity to carry out a lawful review in accordance with regulation 37.

79. In answer to these submissions Mr Holl-Allen submitted that the delay amounting to 22 months was substantial. He did not suggest that the Police Authority were prejudiced by the delay but he did submit that the grant of relief would be detrimental to good administration. He drew attention to Mr Crudace's right of appeal under regulation 31 which he withdrew. He pointed out that Mr Wirz advised Mr Crudace to take legal advice. Mr Wirz's advice was given in good faith and there is no evidence to show that the facts in the letter were untrue.

Whilst he accepted that Mr Crudace's A1P1 rights were engaged he did not accept that that factor made any significant difference to the discretion.

80. To my mind the merits of the application are a very important factor in the exercise of the discretion. For reasons I have given I am quite satisfied that the decision by the SMP was legally flawed and Mr Crudace has not had a valid revision to his pension. I cannot accept that it is in the interests of good administration that that situation should continue. Whilst I accept that Mr Wirz's letter and subsequent conversation were made in good faith, the fact remains that very material assertions in the letter were incorrect. The appeal was not hopeless and there was no realistic prospect of an order for costs against Mr Crudace. There was material in the public domain (such as the decision in *Pollard*) which could have alerted Mr Wirz to the importance of the words in regulation 37. Mr Wirz was the solicitor acting for a public authority. Whilst it may be said that Mr Crudace should have incurred the expense of his own legal advice I do not think it unreasonable of him to rely on what Mr Wirz told him. Whether or not the precise terms of the moratorium covered Mr Crudace's case it was in my view not unreasonable to await the decision of the Court of Appeal before taking matters further.

81. In all the circumstances I have come to the conclusion that there is a good reason for the delay in this case. I am equally satisfied that it is not in the interests of good administration to deny Mr Crudace relief.

82. It follows that I do propose (so far as may be necessary) to extend time and to grant relief to Mr Crudace. I propose to quash the decision of the SMP on 20th February 2009.

6 The decision of 21 February 2010

6.1 Authority of Ms Taylor

83. Mr Lock QC accepts that there is power for the Police Authority to delegate to the Chief Constable the power to agree to a reconsideration under regulation 32(2). He also accepts that under section 107(3A) Local Government Act 1972 the Chief Constable may arrange for the functions of the Police Authority to be discharged by a person employed by the authority but is not under the authority's direction and control.

84. The Police Authority rely on their standing orders in relation to delegation to the Chief Constable. The relevant standing order provides:

> *In accordance with the relevant sections of the Police Pension Regulations 1987 to cancel ill health and injury pensions, reassess injury pensions and reduce withdraw and forfeit pensions.*

85. Mr Lock QC submits that this is not wide enough to delegate the Police Authority's discretion under regulation 32(2) to the Chief Constable. I agree that there is no specific reference to regulation 32(2) or indeed to the Regulations. However there is specific reference to the reassessment of injury pensions. To my mind the discretion to consent to a reconsideration is ancillary to the reassessment of an injury pension. In those circumstances I consider that the Standing Order is wide enough to delegate the Police Authority's discretion to the Chief Constable.

86. However, as Mr Lock QC points out, there is absolutely no evidence at all of any sub-delegation by the Chief Constable to Ms Taylor authorising Ms Taylor to take decisions in the name of the Chief Constable. The fact that Ms Taylor assumed the right to make the decision on 21st December 2010 cannot of itself amount to "arrangements made by the Chief Constable" within section 107(3A).

87. I agree with Mr Lock QC that in the absence of any evidence of arrangements made by the Chief Constable Ms Taylor did not have the necessary authority to make the decision on 21st December 2010. It follows that no valid decision has been made.

6.2 The Reasons given by Ms Taylor

88. It is common ground between the parties that as the discretion to agree to reference under regulation 32(2) is a discretionary decision made by a public body the decision must be exercised so as to promote the policy and objects of the Regulations. [See *Padfield and Others Appellants v Minister of Agriculture, Fisheries and Food and Others* [1968] A.C. 997].

89. There is, however, a dispute between Mr Lock QC and Mr Holl-Allen as to the policy and object of the Regulations.

90. Mr Holl-Allen submitted that the power to agree to a reference had to be seen in the context of the overall system under Part IV and V of the Regulations. He stressed the numerous references to finality in the regulations and submitted that the emphasis was on finality. He pointed to the time limits inherent in the Regulations. Thus there is a time limit of 28 days for the appeal to the PMAB; there are time limits for applications for judicial review and for an appeal to the Crown Court. Accordingly he submitted that the clear purpose and intent of regulation 32(2) is not to provide a mechanism of appeal but to provide a simple method of reconsideration where the parties agree to a reference in cases where an appeal is made to the PMAB or where there are judicial review proceedings. In support of that submission he relies on guidance from the Home Office which includes:

> *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 the SMP's decision or need for judicial review in the case of an appeal board's decision.*

91. Despite the cogency of Mr Holl-Allen's argument I cannot accept it. There is nothing in the wording of regulation 32(2) that limits the power to refer the matter back to the medical authority. The power is expressed in general terms. If it had been the intention to limit the power in the way suggested by Mr Holl-Allen it would have been perfectly possible for it to be so expressed. 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 pensions 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 Regulations 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.

92. Whilst it is true that regulation 31 provides for an appeal within 28 days and there is a time limit for applications for judicial review none of the time limits are absolute. The Court has power to extend the time limit for judicial review and the Police Authority have power to extend the 28 day time limit for appeals to the PMAB. Furthermore it is to be noted that regulation 32(2) expressly contemplates that there can be more than one reconsideration by the medical authority.

93. In my view there is force in Mr Lock QC's submission (in paragraph 100 of his skeleton argument):

> *… the general power under Regulation 32(2) exists as part of the system of checks and balances in the Regulations to ensure that the pension awarded (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. The Claimant thus submits that the purpose of power is to provide is a mechanism to allow reconsideration of a pension payable to a former officer in the event a former officer is being paid the wrong sum. In practice this must mean that the former officer raises a reasonable case that the pension paid is incorrect. It is also a mechanism to give effect to A1P1 rights without the need for the intervention of the court.*

94. There is no reason to limit this purpose in time in the way suggested by Mr Holl-Allen.

95. Once the statutory purpose of regulation 32(2) has been appreciated it can readily be seen that the reasons given by Ms Taylor in the letter of 21st December 2010 are flawed:

1. Ms Taylor does not consider the merits of the application. She makes the point that both parties (i.e. the Police Authority and the SMP) acted in good faith and in accordance with the Guidance and that a change in the relevant case law does not amount to maladministration. She may well be right about these points. It is no part of Mr Crudace's case that either party acted in bad faith. She did not however ask or attempt to answer the question of whether in the light of the case law the revision of 20th February 2009 was made in accordance with regulation 37. Equally she did not attempt to answer the question whether there is a reasonable prospect that further consideration of the issues will resolve the matter without the need for judicial review.
2. Ms Taylor's references to "finality" are for the reasons given above flawed. Decisions under regulation 37 are not absolutely final. They are final subject to reconsideration under regulation 32(2). It is not, in my view, a proper reason to refuse to agree to a reconsideration on the basis that the regulation 37 decision is final. Such a reason would deprive regulation 32(2) of its proper effect.
3. Whilst it is true that Mr Crudace withdrew his appeal against the decision of the SMP, he did so as a result of the wrong opinion of Mr Wirz that his appeal was hopeless, that medical evidence of the deterioration of his condition was irrelevant, and the threat of a claim for £6,200 plus VAT if he pursued his appeal. In those circumstances it is not reasonable to infer that Mr Crudace accepted the decision at the time. It is, to my mind, not without significance that Mr Wirz's letter persuaded 21 out of 45 appellants to withdraw their appeals.

96. In all the circumstances if I had not quashed the decision of 20th February 2009 I would have quashed the decision of 21st December 2010 both on the ground that Ms Taylor has not been shown to have the necessary authority to make the decision and on the ground that the decision was flawed.

97. In those circumstances it is not necessary for me to consider the additional arguments raised by Mr Lock QC under the Disability Discrimination Act 1995. I have to confess that I have some doubts as to the relevance of such arguments in relation to the decision as to whether to agree to a reconsideration under regulation 32(2) but it is unnecessary for me to express a concluded view and I would prefer to leave such arguments to a case where they are decisive.

7 Conclusion

98. I would quash the decision of the Police Authority dated 20th February 2009.